



COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL
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2023 - 2024 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST

Cases from the Courts of Appeals

Summary of Cases by Topic

June 2023 – May 2024

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CRIMINAL PROCEDURE

Bail

Virginia Court of Appeals - Unpublished

Valerio v. Commonwealth: May 28, 2024

Norfolk: Defendant appeals his convictions for Malicious Wounding and Use and Possession of a Firearm on Denial of an Appeal Bond.

Facts: The defendant shot the victim after the victim pounded on his storm door, cracking the glass. The defendant claimed self-defense at trial, but the trial court rejected that defense. The jury convicted the defendant of Malicious Wounding, Use of a Firearm, and Possession of a Firearm by Felon, and the trial court imposed an active eight-year sentence of incarceration.

After conviction, the defendant sought an appeal bond. The trial court noted that the defendant was previously twice convicted of contempt—first in 2008 and again in 2021—along with a failure to appear conviction in 2008. The defendant also had a previous robbery conviction from 2009.

Held: Affirmed. The Court held that, weighing the nature and circumstance of this offense, the defendant's conviction, the "quantum of punishment," his propensity for violence, and record of non-compliance, the trial court did not abuse its discretion in denying the defendant post-conviction bond.

The Court repeated that post-conviction bail is generally less liberally accorded than in the pretrial stage and that the primary test for determining whether a defendant should be released following conviction for a felony requires the trial court to consider questions essential to all bail decisions — whether the defendant will appear for hearing or at such other time as may be directed and whether the defendant's liberty will constitute an unreasonable danger to himself and the public.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1660221.pdf>

Martin v. Commonwealth: September 26, 2023

Grayson: Defendant appeals the denial of Bond regarding his Probation Revocations

Facts: The defendant violated probation on the offenses of two counts of statutory burglary, petit larceny as a third offense, and grand larceny, by absconding from probation and failing to pay any restitution for 8 years.

Upon his arrest, the defendant asked for bond. He claimed that he would reside in Chesterfield, where he had lived for 14 years, and had a full-time job. He admitted that he was recently charged with DWI and had three felony charges involving possessing controlled substances. The Commonwealth noted that the defendant had a lengthy criminal history beginning in 1990 involving numerous larcenies, defrauding an innkeeper, trespassing, assault and battery, possessing drugs, breaking and entering, and violating the conditions of his probation. He also had convictions from jurisdictions in North Carolina and Georgia.

The trial court denied the defendant's bond, rejected the defendant's argument that it was giving too much weight to his criminal history, "most of which preceded the bond hearing by over ten years."

Held: Affirmed. The Court agreed that the record supported a finding of probable cause that the defendant's release on bail would constitute an unreasonable risk of harm to the public. While acknowledging that the defendant had longstanding employment and had resided in Chesterfield County for a significant period, the Court also looked to the defendant's lengthy history of criminal convictions in Virginia and two other states.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0681233.pdf>

Competency

Virginia Court of Appeals - Published

Stewart v. Commonwealth: November 8, 2023

Rockbridge: Defendant appeals his convictions for Possession with Intent and Possession of a Weapon by Felon on Competency grounds.

Facts: In 2020, the trial court dismissed numerous drug distribution charges against the defendant pursuant to § 19.2-169.3.1 after finding that he was unrestorably incompetent to stand trial. Before the trial court entered the order, however, the defendant committed new offenses involving drug distribution and a concealed weapon.

The trial court ordered another competency evaluation. This time, the same doctors who had evaluated the defendant before observed that the defendant now appeared more engaged in discussing his legal situation and that he was capable of understanding the role of legal personnel, the purpose of legal proceedings, and the legal charges against him on a broad, basic level. The doctors further observed that the defendant had a rational appreciation of the legal process, that he was able to discuss

the alleged offenses against him in a detailed manner, and that he appeared to be capable of collaborating with his attorney to assist in his defense.

The defendant argued that he was incompetent to stand trial because he had previously been found unrestorably incompetent to stand trial for prior charges due to a traumatic brain injury, substandard IQ, learning disabilities, and renal disease. The defendant emphasized his long history of mental incompetence and asserts that he was unable to comprehend the nature of the current legal proceedings or give adequate assistance to his attorney in his defense. The defendant also noted that he had received no rehabilitative services prior to the trial court's determination that he was competent to stand trial for his current charges.

The trial court found the defendant competent to stand trial. The trial court conducted a colloquy with the defendant immediately prior to trial, during which the defendant answered all the court's questions, indicated that he understood the court's questions, and stated that he was ready for trial.

Held: Affirmed. The Court held that the trial court's finding that the defendant was competent to stand trial was not plainly wrong or without evidence to support it.

The Court found that, relying on the December 2020 competency evaluation, the trial court had a sufficient evidentiary basis to conclude that the defendant was competent to stand trial. Although the trial court found the defendant to be unrestorably incompetent to stand trial for prior charges less than two years before the trial court's determination that the defendant was competent to stand trial for his current charges, the Court emphasized that the trial court was not bound by that prior finding of unrestorable incompetence.

The Court also rejected the defendant's complaint that he received no services to restore his competency after having been declared unrestorably incompetent. The Court explained that under § 19.2-169.3(A), a trial court is not required to order services to restore competency but may simply release the defendant and dismiss his charges. In this case, the Court noted that the fact that the defendant received no services after having been found unrestorably incompetent was a relevant factor for the trial court to consider in determining whether the defendant was now competent to stand trial, but this factor was not dispositive to the trial court's decision as a matter of law. Moreover, the Court explained that any argument from the defendant that the trial court failed to comply with the statute in his immediate prior case needed to be raised in that case, and not in this one.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1363223.pdf>

Continuances

**Virginia Court of Appeals -
Unpublished**

Hanover: Defendant appeals his conviction for Rape on Denial of a Continuance and Trial in Absentia.

Facts: The defendant raped a woman in 2017 while he was visiting her college. The defendant was arrested and indicted for rape. In 2019, the defendant and his initial counsel signed an “Agreement Setting Case for Trial” that established an initial trial date and stated that “[t]he defendant is hereby warned that failing to appear . . . may result in further charges and/or trial and conviction in absentia.”

At the beginning of the COVID pandemic, the trial court continued the defendant’s trial and released him on bond. Upon his release, the defendant signed a recognizance form that cautioned, “If I fail to appear, the court may try and convict me in my absence.” After another continuance, the Commonwealth moved to revoke the defendant’s bond, arguing that he had violated bond conditions restricting his use of computers and social media. The defendant did not appear at the revocation hearing and the trial court revoked his bond and issued a capias for his arrest.

Two weeks later, the defendant’s attorney moved to withdraw, revealing that the defendant had orchestrated a three-way phone call between her, the defendant, and a third party who threatened her and her firm. The defendant then posted portions of the call on social media, disparaging the attorney. The defendant also hosted live social media events in which he shared information such as the victim’s identifying information, the victim’s previous testimony, and other witnesses’ identities. The Court declared that the defendant was a fugitive and did not rule on the motion.

The defendant then failed to appear at trial. The defendant’s attorney stated that she did not know of his whereabouts and revealed that she had no contact with him for two months. In addition, the defendant had posted on social media that he was “on the run” and commented that revocation of his bond before Christmas was unfair. The defendant’s attorney requested a continuance and again moved to withdraw. The trial court denied both motions.

The Commonwealth then moved to try the defendant in his absence. The trial court determined that the defendant had voluntarily waived his right to be present for trial. The trial continued in the defendant’s absence, and the jury convicted him of rape through incapacitation. Two weeks after his conviction, officers located and arrested the defendant.

[Great job to Alison Linas, who tried this case – EJC].

Held: Affirmed. The Court held that the trial court did not abuse its discretion in denying the motion for a continuance made on the morning of trial and in proceeding with the trial in the defendant’s absence.

The Court first repeated its rule from *Cruz* that a knowing and voluntary waiver of the right to be present by a defendant who is voluntarily absent from the entire trial cannot be shown unless the defendant (1) has been given notice of his trial date; and (2) has been warned that his failure to appear could result in a trial in his absence. In this case, the Court pointed out that the record contained a document he signed advising that should he fail to appear, he could be tried in his absence, and that he signed bond paperwork with similar language. Thus, the Court found that the trial court could reasonably conclude that the defendant knew of the trial date and that he could be tried in his absence

if he did not appear. The Court concluded that the record supported a conclusion that the defendant was voluntarily absent from trial.

The Court rejected the defendant's argument that the Commonwealth would not have been prejudiced if the trial court had continued the trial. The Court explained that, in analyzing whether the Commonwealth would have been prejudiced had the case been continued, it would consider the likelihood that the accused would appear, and the trial could take place at a later date. However, when the record is devoid of any assurance, or even hint, that the defendant would be available in the future, the Court repeated that a trial court does not abuse its discretion in proceeding with trial in the defendant's absence.

In this case, the Court agreed that, at the time the trial court considered the motion to continue, there was no assurance that the defendant would be available at any time in the future. The Court noted that the defendant did not appear at his bond revocation hearing, at counsel's hearing to withdraw as counsel of record, or at the start of his trial. The defendant was wanted at the time of trial and had been for months. Thus, the trial court had no information concerning the defendant's whereabouts or a definitive reason for his absence. The Court found that the defendant's unexcused absence, his statements on social media, and his failure to contact his attorney reasonably raised the specter that the defendant never intended to appear for trial voluntarily and would abscond until apprehended.

Regarding prejudice to the Commonwealth, the Court pointed out that the Commonwealth noted the exceptional delay in trying this matter, the threats defendant and his associate made on social media against the victim, and the anticipated expense and inconvenience to the witnesses. The Court found it irrelevant that the defendant was found just two weeks after the conclusion of his trial.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1325222.pdf>

Wilson v. Commonwealth: October 10, 2023

Spotsylvania: Defendant appeals his convictions for Murder, Abduction, Child Cruelty, and related charges on Denial of a Continuance, Refusal to Strike Jurors for Cause, and Denial of a Mistrial based on Juror Misconduct.

Facts: The defendant and his confederates conspired to rob a man for drugs and money. The defendants then attacked the man and a woman, tying them up in their residence before slitting their throats and also murdering a fourteen-year-old child. They then abandoned a seventeen-month-old toddler and one-month-old infant alone with the three dead victims for multiple days without anyone to care for them in the residence. The two surviving children suffered significant injuries and suffered dehydration until they were finally discovered three days later.

On the first day of trial, only 51 of the 114 prospective jurors summoned for jury duty appeared for jury selection due to inclement weather. The defendant objected to going forward because "essentially half of the jurors ha[d] chosen not to appear." The defendant argued that the 51

prospective jurors did not represent a fair cross-section of the community because they comprised only people who “want[ed] to be [t]here.” The defendant asserted that when he objected to the composition of the venire, the trial court failed to assess the prospective jurors’ “gender or racial makeup” and conduct an inquiry to determine whether they “lived, primarily or exclusively, close to the courthouse (thereby only representing a small geographic portion of the county) or had access to transportation (indicative of a possible class disparity).” The trial court denied the motion.

During voir dire, the trial court then asked whether anyone had read a newspaper article about this case that was published the previous week. Several jurors raised their hands, including two particular jurors. The prosecutor asked those jurors whether they had “any preconceived notions” regarding the defendant’s and his co-defendants’ guilt or innocence. The two jurors replied, “Not really,” and, “No, sir.” Neither the defendant nor his co-defendants questioned either juror regarding the article or their understanding of it.

The defendant then moved to strike the two jurors for cause. He proffered that the article disclosed that two other defendants had accepted “plea deal[s]” and had pleaded guilty to their charges. Acknowledging that he did not question either juror regarding “the content” of the article, the defendant nevertheless maintained that they may have learned that the co-defendants had pleaded guilty and, thus, acquired “information” that the trial court had ruled was inadmissible. The defendant asserted that the “information” was “so prejudicial” that the jurors could not be impartial. The trial court refused to strike the jurors for cause.

On the third day of trial, defense counsel proffered that the defendant was “feverish,” had a headache, and was “unable to focus.” Additionally, he stated that the defendant had not been “feeling well” the previous day, counsel reported, and seemed “distracted and uncomfortable.” The defendant had vomited before court the previous morning and had requested medical attention at the jail but had not “received any actual attention or treatment.” Therefore, the defendant requested a one-day continuance. Alternatively, the defendant asked the trial court to “pause the proceedings briefly to allow him to recuperate” and to instruct the jury that he might need to “close his eyes or put his head in his hand” during trial.

The trial court found that the defendant did not appear ill and had “seemed very engaged” during trial. There was also no “medical report” or other evidence demonstrating that the defendant was sick. Accordingly, the trial court denied the continuance but stated, “[w]e’re going to proceed this morning, unless it becomes apparent that we can’t.” During trial, the defendant raised no further objection and did not renew his continuance request.

On the fourth day of trial, during a lunch recess, the trial court notified the parties that it had received a letter from a juror. The letter stated, “it has come to my attention that the victim in this case has some family ties to my family which [I] did not know at the start of this trial.” Additionally, the letter stated that serving as a juror was causing the juror financial hardship.

Outside the presence of the other jurors, the trial court placed the juror under oath and permitted the parties to question him regarding his letter. The juror stated that he was not related to any of the victims, but his family had “ties” to them. The juror confirmed that he had not communicated those family ties to anybody else on the jury. The juror also acknowledged that he had “a number of financial concerns,” but did not specify what those concerns were. The trial court then excused the juror without objection.

After trial but before sentencing, the defendant moved for a mistrial, arguing that the juror's purported dishonesty during voir dire denied him an impartial jury. The defendant argued that he was entitled to a mistrial because the juror failed to answer honestly a material question on voir dire by deliberately failing to disclose his "family ties" when a truthful answer would have provided a valid basis for a challenge for cause. In addition, the defendant argued that the juror "must have" discovered his "family ties" through independent investigation or speaking with someone about his jury service, thus ignoring the trial court's directive not to do so. The defendant contended that the juror was biased against him, and the trial court was required to order a new trial. The trial court denied the motion.

[Note: The defendant was tried alongside the defendants in the Bailey and Green cases, decided today as well – EJC]

Held: Affirmed.

Regarding the defendant's "fair cross section" argument, the Court pointed out that the defendant bore the burden to establish a prima facie fair cross-section claim; it was not the trial court's responsibility to sua sponte investigate the matter. In this case, the Court complained that the defendant did not demonstrate that the trial court's jury selection process systemically excluded members of that group from jury venires or that there was a policy or other effort to exclude them. Therefore, the Court ruled that the defendant failed to establish a prima facie fair cross-section claim.

Regarding the two jurors who had seen the article before trial, the Court found that the record demonstrated that the jurors acknowledged that they understood that the defendant was presumed innocent and maintained that they did not have any "preconceived notions" regarding his guilt or innocence after reading the article. The Court noted that the jurors had confirmed that they could "give a fair and impartial trial" to the defendant "based solely on the evidence" presented. The Court concluded that the defendant did not establish that the jurors were subject to strikes for cause.

Regarding the defendant's request for a continuance due to illness, the Court repeated that prejudice may not be presumed; it must appear from the record. In this case, the Court examined the record and found that it demonstrated that despite the defendant's purported illness, he ably testified and presented his version of events. Therefore, the Court found no evidence of prejudice from the denied continuance.

Regarding the defendant's claim of the juror's bias, the Court ruled that the defendant failed to demonstrate that the juror intentionally failed to disclose his "family ties" to the victims during voir dire or that the juror had actual bias against the defendant. The Court first repeated that to succeed on an implied bias claim, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. On the other hand, the Court noted, to succeed on an actual bias claim, a party must demonstrate at a hearing that the juror had "actual bias" against him.

In this case, the Court found that the defendant had not demonstrated that the juror's failure to disclose his "family ties" to the victims during voir dire was intentional. The Court noted that the evidence demonstrated that he was unaware that his family was related to any of the victims until the final day of trial, whereupon he promptly notified the trial court. In addition, the Court found that the defendant had failed to demonstrate that the juror had actual bias against him.

The Court concluded that the defendant's assertion that the juror must have learned about his relatives' association with the victims "through independent investigation" or discussing the case with his family was speculative. The Court also pointed out that the juror had previously testified during voir dire that he did not have any "preconceived notions" regarding the defendant's guilt or innocence and would "give a fair and impartial trial" to the parties "based solely on the evidence."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0780222.pdf>

Moore v. Commonwealth: June 6, 2023

Rockbridge: Defendant appeals her conviction for PWID on denial of a continuance.

Facts: Defendant possessed Methamphetamine with the intent to distribute. Her jury trial was scheduled for Monday, December 6, 2021. On December 2, the defendant advised her two public defenders that she wished to retain counsel of her choice. On December 3, the defendant contacted a private attorney, but attempts to tender payment failed. Meanwhile, the public defenders notified the trial court that the defendant would request a continuance when she appeared for trial on Monday.

On Monday, the defendant appeared and told the trial court she was working on retaining counsel and would "likely" successfully retain one "within hours or days." The defendant explained that her financial position had changed when she received two payments of \$1,000 following the COVID-19 outbreak. She said she had \$2,448 on a pre-paid card that could be used to retain counsel.

The trial court contacted the lawyer that the defendant was seeking to retain. That lawyer confirmed that the defendant wanted to hire him but stated the defendant's credit card numbers had been declined and that he had not yet been retained. The trial court denied the defendant's request for a continuance and proceeded to trial. After the jury retired for deliberation, the defendant informed the court that earlier in the day, around lunchtime, her family had successfully retained counsel on her behalf. The trial court declined to alter its ruling.

Held: Affirmed. The Court concluded that the trial court did not err when it denied the continuance request. The Court rejected the defendant's Sixth Amendment claim and rejected the defendant's argument that § 19.2-159.1(B) required the trial court to grant a continuance.

The Court looked to *Reyes v. Commonwealth*, where the Virginia Supreme Court wrote: "§ 19.2-159.1 confers no rights on defendants, so they are entitled to no remedy under the statute if a court declines to substitute counsel and grant a continuance for him or her to prepare." Instead, the Court explained, the statute was intended "to minimize taxpayers' responsibility for paying the costs of court-appointed counsel for criminal defendants who can afford to pay for counsel themselves." The Court repeated that a "defendant is harmed only if his or her constitutional rights are violated, and that determination is evaluated according to familiar Sixth Amendment precedents."

Full Case At:

Discovery & Brady

Fourth Circuit Court of Appeals

U.S. v. Briscoe: April 30, 2024

Baltimore: Defendant appeals his convictions for Murder, Drug Trafficking, and related offenses on Fourth Amendment and *Brady* discovery grounds.

Facts: The defendant robbed a woman of a large quantity of heroin, then shot and killed her. The defendant then shot and killed her seven-year-old son so that the child could not testify against him.

Police identified the defendant as the perpetrator. The investigators in this case obtained a tracking order which authorized them to use a cell site simulator to locate the defendant. Maryland law provides a procedural mechanism for executing a search by means of cell site simulator. Police used this statutory procedure to obtain a tracking order in this case and “pinged” the defendant’s phone using a cell site simulator, which led them to an apartment building. Investigators then obtained a warrant to search an apartment because the cell site data was directing them to that unit.

After unsuccessfully searching the first apartment, the officers continued to receive cell site data indicating that the phone was nearby. Thus, the officers went to the second floor where they attempted, but failed, to enter a second apartment. They then knocked on the door of the second apartment, the unit where the defendant was ultimately located.

The occupant who opened the door of that apartment allowed them to enter. Officers saw several individuals running towards the back room. At that point, officers conducted a protective sweep of the apartment to locate all individuals and ensure that there was no threat to law enforcement. During their protective sweep, officers located the defendant on a couch in a common room and confirmed his identity. The officers secured the defendant and his cell phone and conducted a protective sweep of the apartment. They discovered narcotics and drug paraphernalia in a bedroom and brought everyone in the apartment, including the defendant, to the police department for questioning.

Prior to trial, the defendant moved to suppress the evidence. He contended his Fourth Amendment rights were violated in several ways during the investigation following the murders. First, the defendant contended his rights were violated when investigators used a cell site simulator to obtain his location. Second, the defendant contended that police lacked authority to search his person when they entered the apartment, and that he had standing to challenge their search as an overnight guest. The trial court denied his motion.

After trial, the defendant complained that the government failed to investigate whether a broken security camera found in the kitchen of the murder victims had recorded any footage from the time of the murder. A crime scene technician determined that the camera was not operational and a

detective assigned to the case corroborated the technician's report. Nonetheless, the defendant argued that the Government should have determined whether Comcast, the service provider associated with the security camera, retained any video footage.

Held: Affirmed.

Regarding the cellsite simulator order, the Court reviewed the tracking order and found that, like a search warrant, it set forth the requirement of probable cause and provided facts supporting probable cause. The Court pointed out that the application for a tracking order required the affiant officer to swear that there was "probable cause to believe that a misdemeanor or felony has been, is being, or will be committed by the owner of the [cell phone.]" It required the affiant to swear that "there is probable cause to believe that the location information being sought is evidence of, or will lead to evidence of, the misdemeanor or felony being investigated." It then set forth the phone number that was the subject of the search, the defendant's identity, and the facts supporting probable cause. Therefore, the Court rejected the defendant's argument that the Government lacked probable cause to use a cell site simulator to obtain his location information.

Regarding the protective sweep, the Court concluded that the officers lawfully detained the defendant during a lawful protective sweep of the apartment.

Lastly, regarding the defendant's *Brady* claim, the Court complained that the defendant could not demonstrate that the footage on the camera would have been favorable to his case; instead, he could only speculate as to what the footage would have shown, and "rank speculation as to the nature of the allegedly suppressed materials cannot establish a *Brady* violation." The Court then noted that the government never had the recording, and so the defendant also failed to satisfy the test of *Brady*, not to mention the higher "bad faith" showing required to demonstrate a violation under *Youngblood*. Thus, the Court rejected the defendant's argument that the Government committed a *Brady* violation by failing to follow up on whether any footage was contained on the broken camera.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/234013.P.pdf>

U.S. v. George: March 11, 2024

N.C.: Defendant appeals his conviction for Possession of a Firearm and Ammunition on *Brady* Discovery grounds.

Facts: The defendant, a convicted felon, possessed a firearm and ammunition while a passenger in a vehicle. Police stopped the vehicle during a theft investigation. An officer found a handgun between the defendant's seat and the driver's seat and found a loaded handgun magazine in the seat cover for the seat in which the defendant had been sitting. No physical evidence connected the defendant to the firearm or magazine except their location in the vehicle.

The driver agreed to cooperate and testify against the defendant. A few months prior to trial, the government produced, in discovery, an interview report in which the driver claimed that two other

people, a man and a woman, had been riding in the back seat prior to the stop, but he had dropped them off after leaving the convenience store.

Two weeks prior to trial, the driver stated to the government that the back seat passengers were different people than he had named before. This time, the defendant stated that there were two men in the back seat, and they were the defendant's cousins. The Government did not disclose to the defendant that the driver had changed his story regarding the identities of the rear passengers.

At trial, the driver testified that the back seat passengers were men who were the defendant's cousins. The defendant cross examined the driver and confronted him with his inconsistent statement regarding the back seat passengers. The driver admitted to making the previously inconsistent statement. The defendant then called the case agent as a witness and asked him about the driver's inconsistent statement. The case agent revealed that the driver had recently identified the defendant's cousins as the back seat passengers.

After trial, the defendant moved for a mistrial or dismissal, based on the newly disclosed information. He argued that, had the government disclosed the driver's identification of the other passengers in the car, the defendant would have conducted further investigation and prepared additional defense arguments. The trial court denied the motion.

Held: Affirmed. The Court held that the fact of the inconsistent statement was not material to the defendant's defense.

The Court first agreed that the Government improperly withheld impeachment evidence. As a result, the Court complained that the defendant was ambushed when his own counsel questioned the driver on cross examination and then the case agent on direct examination. In the Court's view, the Government was not relieved of its duty to have disclosed its pre-trial knowledge of the inconsistent statement just because the defendant later happened to "stumble upon it" during trial.

The Court then examined whether the fact of the inconsistent statement was material to the defense. The Court noted that the defendant impeached the driver's credibility in several other ways during the trial. The Court also observed that the jury was aware that the driver had told the story about the back seat passengers up until the final interview two weeks before trial. The Court pointed out that the defendant was able to cast doubt upon the law enforcement investigation more than he would have been able to otherwise because he was able to argue that there was "no pursuit to investigate those people" who were in the back seat.

Because the jury knew about the inconsistent statement and the driver was impeached by it, the Court found it "difficult to imagine how an earlier disclosure would have materially altered the course of the trial." The Court also concluded that the fact of the inconsistent statement was not material to the defense because the conviction would stand independently of any question about the driver's credibility.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224617.P.pdf>

E.D.Va: Defendant appeals his conviction for Possession of a Firearm and related offenses in Fourth Amendment and Evidence Spoliation grounds.

Facts: The defendant, a convicted felon, possessed two firearms while riding as a passenger in his girlfriend's vehicle. Officers observed the vehicle in an area of Norfolk well-known for gang activity and violent crimes, noting that the vehicle had no front license plate and a temporary paper license plate on the rear. When the officers made a U-turn to investigate, the vehicle accelerated away from the patrol car in an evasive manner and ran two stop signs. The officers pursued, losing sight of the SUV for about ten seconds.

When they caught up, the vehicle had pulled over in a parking lot and the passenger door was open. The officers activated their emergency equipment. The defendant's girlfriend exited the vehicle from the driver's side door. The defendant, however, leaned towards the floorboard before "jump[ing] over the center console" of the car to exit the driver's side door as well.

Officers handcuffed both the defendant and his girlfriend and questioned them separately. Officers placed the defendant in their patrol car and ran a background check on him. The girlfriend consented to a search of the vehicle which revealed two handguns. Officers arrested the defendant for felon in possession. They allowed his girlfriend to depart; she took the defendant's cellphone with her.

The lead officer preserved the bodycam video from this encounter but failed to preserve the dashcam video, which was automatically deleted thirty days after the stop. He concluded, after watching his bodycam video, that the bodycam and dashcam videos would have shown largely the same things and that the bodycam would have shown a better recording of that night's events. The officer never reviewed the dashcam footage, however.

Over the course of the next seven months the girlfriend was the only person to use the defendant's cell phone. She regularly used the phone for purely personal purposes. During that time, she had access to the contents of the entire phone.

The Government then subpoenaed the girlfriend to appear and testify at Grand Jury. When the girlfriend returned to Virginia for the grand jury proceedings, she brought the defendant's phone, and gave both it and the passcode to federal agents, along with her consent to search the phone. Agents discovered incriminating evidence on the phone.

The defendant moved to suppress the search of his vehicle and the search of the phone. The trial court denied those motions. The defendant also objected to the destruction of the dashboard camera video, claiming a Due Process violation due to evidence spoliation, but the trial court rejected that argument as well.

Held: Affirmed.

The Court first concluded that the officers had reasonable suspicion sufficient to justify detaining the defendant. In this case, the Court applied *Rodriguez* and found that the mission for the seizure was not, at any point, limited to the observed traffic violation of running two stop signs. The Court contended that the officers reasonably suspected that criminal activity was afoot based on the reaction to the officers' U-turn. The Court explained that investigating that activity was therefore part of

the traffic stop's mission from the beginning. The Court also pointed out that the initial detention revealed information that heightened their suspicions, such as the defendant's furtive movements toward the floorboard and the fact that both he and the driver exited out of the driver's-side door, even with the passenger's-side door wide open.

The Court rejected the argument that the officers' request for consent to search unlawfully prolonged the traffic stop. Instead, the Court repeated that one purpose of a *Terry* stop is to allow the officer to attempt to obtain a person's consent to a search when reasonable suspicion exists. In this case, the Court pointed out that the search advanced the traffic stop's mission of investigating suspected criminal activity.

The Court also repeated that the precautions that officers take to preserve their safety stem from the mission of the stop itself. Thus, just as the officers acted within the mission of the traffic stop by asking for consent and searching the car, they also acted within the mission of the stop by detaining the defendant throughout the search.

Regarding the search of the phone, the Court agreed that the girlfriend had the requisite authority to consent to the search. The Court restated that as long as the person who consents has "joint access or control for most purposes" over something, others with an interest in that effect will be seen to "have assumed the risk" that the consenter might submit the object to the police to be searched. In this case, the Court agreed that the girlfriend had at least joint, if not sole, access and control over the cell phone at the time of the search. The Court concluded that the girlfriend had actual authority to consent to the phone's search, and the government's failure to get the defendant's consent or a warrant was irrelevant.

Lastly, regarding spoliation, the Court repeated that spoliation will only violate due process where the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant yet still failed to preserve it. In this case, the Court agreed that the defendant failed to show that the officer did not preserve potentially exculpatory evidence in bad faith. Therefore, his due-process argument failed.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214684.P.pdf>

**Virginia Court of Appeals -
Published**

Shaw v. Commonwealth: January 23, 2024

Arlington: Defendant appeals his conviction for Concealing a Dead Body on Bill of Particulars, Jury Instruction Issues, Vagueness, and Denial of Diminished Capacity Evidence.

Facts: The defendant, after working with an accomplice for three days to clean up the apartment and get rid of the deceased body of his romantic partner, lied to police when questioned about his partner's whereabouts, telling a police officer that his partner was at the hospital recovering

from a seizure. In fact, his partner had suffered multiple blunt-force traumas and had been dead for three days; the battered, bloody, and bruised corpse of the defendant's romantic partner was concealed in the apartment they shared, wrapped up in a shower curtain and secured with duct tape that contained the defendant's DNA. Although he did not tell the police, the defendant believed that his partner had been murdered.

The grand jury returned an indictment under § 18.2-323.02, for concealing a dead body "with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death." The defendant filed a motion for a bill of particulars, seeking "what the unlawful act is or what the manner . . . and cause of death were [that] the Commonwealth believes that Mr. Shaw wanted to conceal or prevent the detection of." The trial court denied the defendant's motion. The trial court also denied the defendant's motion to dismiss the indictment on the ground that the statute was unconstitutionally vague.

Prior to trial, the trial court granted the Commonwealth's motion to exclude the testimony of the defendant's expert, Dr. Sara Boyd, Ph.D., a licensed clinical psychologist, under § 19.2-271.6. The defendant proffered that Dr. Boyd would supply evidence tending to negate the mens rea for the offense. Dr. Boyd wrote:

"[The defendant's] overall pattern of behavior around the time of the alleged offense . . . is more consistent with a disorganized and highly stressed person with Complex-PTSD, whose limited mental resources were overwhelmed by the shock and pain of finding his partner dead, than it is with planful, intentional, and instrumental concealment to avoid detection of the dead body."

She said that the defendant's "symptoms impaired his ability to process the information about death in a reality-based way, to reason about his circumstances, and to independently formulate and execute organized planning." His "behaviors and responses during the roughly three-day period . . . are best characterized as reactive, impulsive, and instinctive, rather than planful." That is, he "engaged in unconsidered, impulsive behavior that was focused on the immediate moment rather than days or weeks ahead." The court asked: "So can you say that there were times during the three-day period where he had the ability to plan and act intentionally?" She answered, "I would say it's possible given the flux in his symptoms more than . . . I can say that it's affirmatively true."

The trial court excluded Dr. Boyd's testimony after determining that she failed to apply her description of the defendant's "mental illness to the distinct, separate statutory intent elements." The trial court found it "unclear whether Dr. Boyd's opinion [went] to the malicious intent requirement or the body concealment mens rea requirements of" § 18.2-323.02, or the time period.

At trial, the defendant argued that under § 18.2-323.02, the Model Jury Instruction for malice, was inappropriate because homicide and malicious wounding are malum in se—crimes that are "inherently immoral"—while maliciously concealing a dead body is only malum prohibitum—"a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." The trial court overruled his objection and used the Model Jury Instruction to define malice under § 18.2-323.02.

Held: Affirmed.

The Court first examined the meaning of "malicious intent" in § 18.2-323.02. The Court concluded that the trial court did not err in using the Model Jury Instruction to define malice under §

18.2-323.02. The Court also agreed that the evidence more than sufficed for a reasonable jury to conclude that the defendant intentionally concealed the body and that he did so “with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death.”

The Court rejected the defendant’s facial challenge to the statute at the start because he did not claim that § 18.2-323.02 is unconstitutionally vague as applied to him. The Court noted that the defendant had not claimed, for instance, that ordinary people would not understand that the statute criminalizes what the defendant did here: conceal a battered corpse in his apartment for three days and lie to police when asked about it for fear of having his probation revoked.

Regarding the defendant’s request for a Bill of Particulars, the Court ruled that the Commonwealth’s indictment here satisfied the law. The Court ruled that the defendant was not entitled to a bill of particulars requiring the Commonwealth to identify the evidence it planned to adduce in support of each element of that offense.

Regarding the defendant’s diminished capacity evidence, the Court agreed that § 19.2-271.6 allows evidence of a mental disorder to explain why a defendant did not have a requisite mental state in a specific instance, whether or not the disorder prevented the defendant from forming culpable mental states altogether. However, the Court cautioned that the statute does not permit mental-condition evidence to support a diminished- capacity theory if such evidence does not show that the defendant lacked the state of mind to commit the offense.

The Court then conducted an extensive review of other jurisdictions’ rulings regarding similar evidentiary rules. After the review, the Court concluded that to be “helpful” to the fact finder, it is not enough that a defendant may be diagnosed as suffering from a particular mental condition. Instead, the Court emphasized that the diagnosis “must be capable of forensic application” to help the trier of fact assess the defendant’s mental state at the time of the crime.” The Court quoted a 3rd Circuit ruling that cautioned:

“Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea.” ... “Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires.”

In this case, the Court complained that the Doctor did not explain how the defendant’s mental condition showed that he was not knowingly hiding the body from the police. The Court wrote: “Missing from Dr. Boyd’s many sworn statements was an explanation connecting Shaw’s mental condition to how it negated the state of mind required to violate Code § 18.2-323.02... Dr. Boyd’s testimony resembles that of other experts that courts have deemed inadmissible to negate mens rea: general psychiatric testimony that “may easily slide into wider usage that opens up the jury to theories of defenses more akin to justification.””

The Court ruled that the trial court did not abuse its discretion by excluding Dr. Boyd’s testimony after concluding that she failed to show how the defendant’s mental condition negated either of the two statutory state-of-mind requirements. In this case, the Court agreed that given the “separate missing variables” about which the trial court had complained, the jury would have “to speculate [about] which of Shaw’s numerous mental health symptoms impaired the differing intent requirements

and whether they did so in a manner significant enough to negate both intent requirements under the statute.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1349224.pdf>

Bailey v. Commonwealth: October 10, 2023

and

Green v. Commonwealth: October 10, 2023

Spotsylvania: Defendants appeal their convictions for Murder, Abduction, Child Cruelty, and related charges on Discovery grounds.

Facts: The defendants conspired to rob a man for drugs and money. The defendants then attacked the man and a woman, tying them up in their residence before slitting their throats and murdering a fourteen-year-old child. They then abandoned a seventeen-month-old toddler and one-month-old infant in the residence with the three dead victims for multiple days without anyone to care for them. The two surviving children suffered significant injuries and suffered dehydration until they were finally discovered three days later.

One of the co-defendants pled guilty prior to trial and agreed to cooperate and testify against his co-defendants. The witness stated that he was concerned about cooperating with law enforcement, given that his cooperation could put the safety of his daughter. The witness testified at trial that he tried to get his daughter into the witness protection program. Furthermore, the witness explained that one of the defendants “had connections to” the witness’ daughter.

Prior to trial, both defense counsel and the Commonwealth’s Attorney jointly moved the trial court to enter a discovery order pursuant to the newly amended Rule 3A:11(c). According to the trial court’s order, the Commonwealth could designate a significant amount of material as “Restricted Dissemination Material.” Any material designated as restricted dissemination material would be sealed. As a result of this order, the defendants could view the restricted dissemination materials while preparing for trial and during his trial, but they would be prohibited from keeping a copy of any of the restricted dissemination materials.

The trial court entered the requested order, and the Commonwealth designated a significant amount of material as restricted dissemination material. The Commonwealth’s attorney indicated that the material “comprises about of [sic] five hundred gigabytes of data” and “[i]t includes witness information, information gleaned from confidential sources, local and federal as well, it includes names, addresses for all those people, it includes victim information, it includes confidential law enforcement techniques that were used, it includes ongoing federal investigation information, and it is a mass of information.”

The trial court tried the defendants jointly as co-defendants in a jury trial. Prior to sentencing, the defendants’ attorneys noted that their clients had asked for a copy of their entire file. Therefore, the defendants filed a “Motion to Release to Defendant Restricted Dissemination Discovery Materials,”

where they argued that the trial court should grant the defendants “full access to all Discovery materials in this case so that counsel may then provide” their clients a copy of the file. They alleged that the restricted dissemination material order would force counsel to violate Rule 1.4 of the Rules of Professional Conduct because counsel would be unable to give their clients their entire case file once the representation terminated. The trial court denied the motions.

[Note: The defendants were tried alongside the defendant in the Wilson case, below, decided today as well – EJC]

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion when it denied the motion to release the restricted dissemination materials, especially given the serious ongoing risks of doing so for the safety of a key witness’s family members.

The Court pointed out that Comment 7 of Rule 1.4 specifies that “[r]ules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.” Given the plain reading of Comment 7 of Rule 1.4 of the Rules of Professional Conduct, the Court found that counsel would not violate Rule 1.4 by following the direction of the trial court’s order on restricted dissemination material that was governed by and entered pursuant to Rule 3A:11. Consequently, the Court ruled that the defendants had not shown good cause for requiring the removal of the restricted dissemination material designation on this basis.

Furthermore, the Court found that the trial court did not abuse its discretion in denying the motions, given the ongoing risk to the safety of the witness’ family – and the possibility of disrupting ongoing investigations in other jurisdictions. The Court wrote: “Indeed, the recent amendments to Rule 3A:11(c) certainly make clear that the Supreme Court has intended to provide the Commonwealth the opportunity to develop evidence in a case without compromising the safety of potential witnesses or their families or without compromising separate criminal investigations.” The Court pointed out that the Commonwealth and the accused’s attorney may even elect to designate evidence as restricted dissemination material for a wider range of reasons, such as evidence involving issues of national security.

In this case, the Court agreed that the record clearly showed that the witness expressed significant concerns about cooperating with law enforcement because he believed that the safety of his family (especially his daughter) would be put at risk if he assisted in the investigation and prosecution. The Court also expressed concern that nothing in the record suggested that the safety of the witness’ daughter and family is no longer at risk now that the trial has finished. Consequently, given the ongoing risk to the safety of the witness’ daughter and family and given Rule 3A:11(c)’s clear intent to protect the safety of witnesses and their families, the Court ruled that the trial court did not abuse its discretion in denying the defendants’ request to lift the designation of “Restricted Dissemination Material” for the documents so designated for the trial.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0676222.pdf>

and

<https://www.vacourts.gov/opinions/opncavwp/0643222.pdf>

Cheripika v. Commonwealth: September 19, 2023

78 Va. App. 480, 891 S.E.2d 754 (2023)

Fluvanna: Defendant appeals his convictions for Child Sexual Assault Under 13 on admission of Prior Bad Acts, Admission of Medical Records, Prohibiting Access to the Internet in Discovery, a Jury Instruction, and the Constitutionality of his Mandatory Life Sentence.

Facts: The defendant repeatedly sexually assaulted his own stepchild from age eight to age twelve. The child disclosed the years of abuse to her mother and revealed the abuse but could not remember specific dates because it happened at least two or three times a week for a long period of time. The mother contacted the police, who immediately investigated, along with CPS.

After speaking with police and CPS, the defendant left the family home and admitted himself into a hospital in New Jersey. While receiving mental health treatment, the defendant admitted that he had sexually assaulted a child who was a member of his family. The medical records also indicated that “everything seemed normal” when the defendant’s mother saw him for Easter, but a couple days later, he wanted to go to New Jersey for treatment. A police investigator obtained and executed a search warrant for the defendant’s medical records.

Before trial, the defendant moved to exclude from the evidence his medical records from the hospital in New Jersey that contained his admission that he had sexually assaulted a child who was a member of his family. He argued that admitting the records would violate his right to confront his accusers. The trial court denied the motion, finding that the statements were not testimonial because he was at the hospital seeking treatment.

The defendant elected to proceed pro se despite having several attorneys appointed for him. During discovery, the defendant asked the trial court to allow him to access the internet to “try and receive defense information” and “print off other materials as part of [his] defense.” The defendant asserted that he needed internet access to retrieve exculpatory evidence from cloud storage. He also argued that his lack of internet access violated his First Amendment rights. The defendant did not proffer what information was in the cloud storage, or what the nature of the purportedly exculpatory evidence was; he stated only that “they’re documents.” The trial court denied the defendant’s motion, finding that there was “nothing specific enough” for it to act upon.

The defendant had also sexually assaulted the victim’s sister, who was three years younger. At trial, over the defendant’s objection, the sister testified as well that the defendant sexually abusing her when she was eight years old. The defendant objected that the testimony served no purpose other than to prove his propensity to commit sexual offenses, but the trial court rejected his argument. Nonetheless, the Court instructed the jury that it could consider the other child’s testimony “only as evidence of [the defendant’s] motive or intent or as evidence of [his] scheme or plan as evidenced by his conduct and feelings toward the victim.”

At trial, the trial court gave the Flight instruction, over the defendant’s objection. The defendant had asserted that the record was devoid of evidence that he fled the scene of the crime to avoid detection, apprehension, arrest, or criminal prosecution.

During sentencing, the trial court appointed the defendant’s standby counsel for the sentencing phase of the trial. The defendant’s convictions for object sexual penetration of a victim under the age of

13 carried mandatory minimum terms of life imprisonment per § 18.2-67.2. The trial court sentenced him to the mandatory minimum of life imprisonment for each of two charges.

The defendant unsuccessfully asserted that the mandatory life sentences were grossly disproportionate to his crimes, arguing that he was a first-time offender with no criminal record. He also argued that the mandatory sentences violated his Sixth Amendment right to counsel because although represented, his attorney could do nothing to change the mandatory sentences. The trial court rejected the defendant's argument that the mandatory life sentences were unconstitutional.

Held: Affirmed.

Regarding the defendant's prior sexual assaults against the other child, the Court repeated that when the prior sexual abuse was committed against another victim, evidence of the abuse may be admissible to demonstrate a defendant's common motive, method, plan, or scheme, particularly in prosecutions for crime involving "a depraved sexual instinct." The Court repeated that acts "showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character."

In this case, the Court reasoned that when the two daughters provided substantially similar testimony that described the defendant's same pattern of abuse, each daughter's testimony had significant probative value of demonstrating the defendant's incestuous disposition toward his daughters and that his offenses against both were "inspired by one purpose." The Court found that the other child's testimony describing the sexual abuse was highly probative of the nature of the defendant's relationship with both children and established the parallel conduct of his abuse with both girls.

The Court pointed out that the children were siblings in the same household and close in age. Both testified that the defendant began abusing them when they were eight years old, which the Court reasoned demonstrated that he was sexually attracted to children of that age. The Court also noted that the defendant employed the same method of abuse with both children. Thus, the Court concluded that their testimony highlighting the defendant's parallel conduct was highly probative of the common scheme and method he employed to abuse the victim in this case.

The Court also relied on the trial court's jury instruction, repeating that it would presume the jury followed the trial court's limiting instruction.

Regarding the defendant's medical records, the Court found that the circumstances surrounding the challenged records demonstrated that the defendant was seeking medical treatment, during the defendant's treatment for his suicidal ideation. The Court applied *Crawford* and concluded that the primary purpose of the statements was not to create an out-of-court substitute for trial testimony. Rather, the statements were made to properly document the defendant's medical chart for his treatment. Accordingly, the Court found that the statements in the defendant's medical records were not testimonial, and the trial court did not abuse its discretion by admitting them.

Regarding the defendant's request for Internet access in discovery, the Court complained that the defendant failed to provide any proffer—let alone an adequate one—of the information he sought to obtain from the internet. On this record, the Court found no basis to determine whether the trial court committed reversible error by denying him that access.

Regarding the flight instruction, the Court agreed that there was sufficient evidence for the jury to have concluded that the defendant travelled to New Jersey to avoid detection, apprehension, arrest, or prosecution. The Court noted that there was no evidence that demonstrated that he could not seek treatment within the Commonwealth, a circumstance from which a rational factfinder could conclude he sought to distance himself from apprehension.

Regarding the constitutionality of the defendant's life sentences, the Court again declined to engage in a proportionality review, as the defendant's life sentence does not lack the possibility of parole. The Court noted that the defendant's convictions were not Class 1 felonies, so he will be eligible for geriatric release under § 53.1-40.01. Therefore, although the defendant was sentenced to life in prison, he was not sentenced to life without parole.

The Court also rejected the defendant's argument that the mandatory sentences deprived him of counsel who could advocate on his behalf. The Court found that the record demonstrated that despite the predetermined sentences, the defendant's counsel challenged the validity of the mandatory sentences, argued that the sentences should not have been imposed, addressed the Commonwealth's arguments, and cross-examined a witness. The Court noted that counsel's actions during the sentencing hearing preserved the defendant's arguments for appeal. Thus, the Court concluded that the defendant's Sixth Amendment right to counsel was fully vindicated at the sentencing hearing.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1153222.pdf>

Virginia Court of Appeals -
Unpublished

Roberts v. Commonwealth: April 16, 2024

Lunenburg: Defendant appeals his convictions for attempted murder, robbery, and abduction on Discovery and Admission of Jail Calls grounds.

Facts: The defendant held his mother-in-law, who was bound to a motorized wheelchair, at knifepoint and threatened to dismember her, even after police arrived. While speaking with his wife on recorded jail phone calls, the defendant told wife that he was sorry, acknowledged "it's my fault," and asked wife and mother to "drop the charges." He admitted, "I made a big mistake and I know I did and I'm really, really sorry for it."

The Commonwealth disclosed the recording of the 911 call as soon as she had it, although the Commonwealth had previously produced a written summary of the recording. Prior to trial defendant moved to exclude the jail recording as a "late disclosure" in violation of *Brady*. The defendant complained that he did not have "the exact words" that wife used or the location data that came with the recording. He argued that the tape was exculpatory and should have been produced earlier than several days before trial.

The trial court denied the motion. The defendant declined the trial court's offer of a continuance if the defendant needed more time.

The defendant also moved to exclude the jail call recordings by arguing that the telephone recording revealed to the jury that he was in jail when he called wife, so the recording should have been excluded. The trial court rejected that motion as well.

Held: Affirmed. Regarding the discovery issue, the Court noted that the defendant had the recording before trial, in time for "it to be put to use." Regarding admission of the jail calls, because the defendant's statements on the call to his wife from jail were probative of guilt, the Court ruled that the trial court did not abuse its discretion in admitting the recording into evidence.

Regarding the discovery objection, the Court repeated that there is no prejudice when the Commonwealth discloses the evidence as soon as it receives it or when evidence is disclosed "in time to be put to use." The Court also repeated that a defendant who "failed to move for a continuance or even for a recess in order to consider the material" untimely disclosed by the prosecution "will not be heard to complain that he had insufficient time to prepare for trial.

Regarding the defendant's objection to the jail calls' reference to his incarceration, the Court distinguished the ruling in *Estelle* about a defendant's appearing in prison garb throughout trial, which the Court noted provided a "constant reminder" to the jury of his incarceration. In this case, however, the Court noted that the jail references were intermittent and fleeting. The Court saw nothing in *Estelle* that would require trial courts to exclude a defendant's incriminating statements whenever they are made in a telephone call in which the defendant's incarcerated status is apparent. The Court pointed out that the defendant did not request a limiting instruction about the jail references, nor did he argue that the jail references could and should have been redacted.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0180232.pdf>

Harris v. Commonwealth: April 8, 2024

Fauquier: Defendants appeals the forfeiture of their dogs due to mistreatment on Bill of Particulars and Fourth Amendment grounds.

Facts: The defendants neglected their three dogs to the point that neighbors called the police, alerting them to the dogs being in imminent danger. When officers responded, they observed the dogs outside of the defendants' residence. Officers observed that all three dogs appeared in distress and in need of emergency aid. Officers entered the defendants' backyard and examined the dogs, including third dog, who began to whimper but could not stand. One dog was emaciated. Another had open, bloody cuts in his mouth. The third dog was emaciated and "appeared dead."

The officers rescued the dogs and obtained care for them. Two dogs survived and later were restored to health; one dog suffered a seizure and had to be euthanized.

The Commonwealth began forfeiture proceedings in the general district court pursuant to § 3.2-6569. After a hearing, the court ordered that the dogs were forfeited to the shelter's care. The defendants appealed to the circuit court. In circuit court, the defendants moved for a bill of particulars, allegedly to assist them in preparing a motion to suppress. The trial court denied the motion.

The defendants then moved to suppress, but the trial court denied that motion as well.

Following a trial, the court ruled that the dogs had been abandoned, cruelly treated, or had not been provided adequate care and were therefore forfeited.

[Good job to Nichole Geisenhof, ACA, Fauquier, who litigated this appeal with assistance from Michelle Welch at the AG's office – EJC].

Held: Affirmed.

Regarding the defendant's motion for a bill of particulars, the Court did not address the Commonwealth's argument that §§ 19.2-266.22 and 19.2-2303 apply only to criminal proceedings, not civil forfeiture proceedings. Instead, the Court simply ruled that any alleged error was harmless. The Court pointed out that the defendants already possessed the information a bill of particulars would have provided, as the Commonwealth had already presented its case in the general district court.

Regarding the motion to suppress, as with the previous issue, the Court declined to decide whether the exclusionary rule applies to civil forfeiture cases because it found that exigent circumstances justified the search of the property and seizure of the evidence at issue. The Court found that the officers' entry into the backyard did not extend beyond what was reasonably required to rescue the dogs. The Court ruled that the totality of these circumstances rendered the officers' actions objectively reasonable, and the court properly denied the motion to suppress.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1567224.pdf>

Lebron v. Commonwealth: April 8, 2024

Martinsville: Defendant appeals his convictions as a Principal in the Second Degree of Robbery, Use of a Firearm, and related offenses on Discovery and sufficiency grounds.

Facts: The defendant and his roommate agreed to assist a third man commit a robbery. The men discussed the contention that the victim owed one of the men money. The defendant drove his two confederates to the victim's residence. While the defendant drove, the two other men discussed the details of the planned robbery, including the use of a gun that was stored in the vehicle. The defendant then dropped off the man who would enter and carry out the robbery, while the defendant waited two blocks away. One of the other two men committed the armed robbery; the other directed him by phone. They then fled back to the defendant's vehicle, where they divided the proceeds of the robbery.

At trial, the defendant unsuccessfully argued that because he did not know what the men were planning. He argued that driving to the area where the victim lived was not a knowingly overt act in furtherance of the crimes.

After the jury was seated but before the presentation of evidence, the defendant moved the trial court to exclude the testimony of all the Commonwealth's witnesses except for the victim herself. The defendant argued that he did not receive the names and addresses of the witnesses before trial in violation of the trial court's discovery order.

The Commonwealth responded that it had an open file policy, that defense counsel had reviewed the file, that the witness list was in the file, and that the Commonwealth's office provided photocopying services to all counsel. The Commonwealth produced a list of witnesses and stated that the list was also emailed to counsel before trial. The defendant responded that he reviewed the file but did not remember seeing the witness list. He further argued that, in any case, the list referred to by the Commonwealth did not provide the unknown addresses of many of the witnesses, and he maintained that, notwithstanding his review of the file, the list was not provided to him.

The trial court denied the defendant's motion to exclude the witnesses.

Held: Affirmed.

Regarding sufficiency, the Court agreed that the evidence proved that the defendant agreed with his two confederates to drive to the victim's house to rob her by force and that he was at the scene, encouraging the robbery and assisting in the escape. The Court found that the defendant acted as a principal in the second degree in the commission of the offenses. The Court agreed that the defendant's actions demonstrated that he "countenanced and approved" of the robbery, burglary, and use of a firearm in the robbery and burglary.

Regarding the alleged discovery violation, the Court found that the trial court did not abuse its discretion in refusing to exclude the witnesses due to a discovery violation. The Court agreed with the trial court's finding that the Commonwealth complied with its discovery obligations, as the Commonwealth's actions were "the functional equivalent of notification" under the discovery order.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1937223.pdf>

Hernandez v. Commonwealth: December 12, 2023

Prince William: Defendant appeals his convictions for Murder, Conspiracy, Stabbing in Commission of a Felony, and Gang Participation on Jury Selection, Brady, and Double Jeopardy grounds.

Facts: The defendant and another man, both MS-13 gang members, decided to ambush a rival gang member outside a restaurant. The defendant repeatedly stabbed the victim while his confederate repeatedly shot the man, killing him. Video surveillance captured the murder and police found the murder weapons at the defendant's residence, along with MS-13 paraphernalia. Later, the defendant admitted his involvement to his girlfriend at the time and asked her to lie to create a false alibi.

During jury selection, a juror disclosed that he had been the victim of a violent assault by a group in which he was struck with a wine bottle while on a bus, causing an injury to his head requiring stitches. When asked if he could be fair and objective in reviewing the evidence, the juror stated, "It was

a minority that attacked me. I'm going to try but I'm just saying I had the top of my head taken off, I had a reverse mohawk, I had it sewn back on." The juror stated he would do his best to be impartial and denied believing the defendant more likely to be guilty as a minority. The defendant made no motion to strike the juror for cause, instead eliminating the juror with a peremptory strike.

At trial, another gang member testified for the Commonwealth. The witness testified that the defendant not only stabbed the victim, but also shot him. The witness admitted to having pending unrelated charges but denied that he was promised anything in exchange for his testimony. When asked why he was testifying, the witness stated that he wanted out of the gang and that the defendant wanted to blame him for the murder. On cross-examination, when asked what benefit he was getting for his testimony, the witness stated "None for right now. I'm not getting anything. I'm not receiving any kind of benefit."

After trial, the defendant learned that prosecutors, during several meetings, told the witness that they could not make specific promises to him about what impact his cooperation would have in his own case, and the witness admitted that he was cooperating to avoid jail time. The defendant moved for a new trial, arguing that the Commonwealth's failure to turn over the audio recording before trial was a violation of its obligations under *Brady* and that the Commonwealth's failure to correct the witness' testimony about why he was testifying and the number of times he met with the Commonwealth violated *Napue*.

The trial court denied the motion. The trial court found that the prosecutor under *Napue* "probably should have corrected" the witness' statement at trial that he was testifying only because he wanted to get out of the gang, and the witness' recorded admission of hope for limiting his incarceration was impeachment evidence that the Commonwealth should have disclosed under *Brady*. However, the trial court ultimately found that due to the overwhelming evidence establishing the defendant's guilt, these failures did not likely impact the jury's judgment.

After trial, the defendant also moved for a new trial, arguing that the trial court erred by failing to strike, sua sponte, the juror for cause due to bias. The trial court denied that motion as well.

Lastly, the defendant argued his three sentences for gang participation under § 18.2-46.2 violated double jeopardy. The trial court rejected the argument.

Held: Affirmed.

Regarding the *Brady* issue, the Court agreed that the record demonstrated that the Commonwealth made the witness no promises of any kind in return for his testimony. Thus, the Commonwealth was not obligated to correct the witness' testimony that no promises were made in exchange for his testimony, especially given the witness' admission at trial that he was given no promises "for right now." Assuming without deciding that this evidence should have been disclosed pre-trial and corrected at trial, the Court found that the record supported the trial court's finding that there was no impact upon the verdict.

The Court pointed out that, giving the overwhelming evidence in this case, the only charge that would have rested entirely on the witness' testimony was the felonious use of a firearm, as the other witness testified that the defendant was not armed with a gun. However, the jury acquitted the defendant of that offense.

Regarding the juror, the Court repeated that objections related to the selection of the jury must be raised either during voir dire or before the jury is empaneled. Although Rule 3A:14(b) permits a trial court to strike a juror on its own motion, a defendant is still required to timely object to preserve the argument under Rule 5A:18. While § 8.01-352 permits a litigant to make a post-trial juror motion with leave of court, the Court emphasized that for the defendant to succeed on appeal by way of his post-trial motion, he must show that the juror's "disability be such as to probably cause injustice" in his case, per § 8.01-352(B). In this case, the Court concluded that the defendant failed to establish what, if anything, would have differed in the empaneled jury as a result of his using a peremptory strike against the juror. Thus, the Court ruled that he did not prove that his use of a peremptory strike "probably cause[d] injustice."

Lastly, regarding the defendant's double jeopardy argument, the Court noted that, under § 19.2-297.1, both first-degree murder and conspiracy to commit first-degree murder are "acts of violence." Thus, each of the defendant's three underlying convictions were criminal acts that may serve as the "predicate" for a conviction under § 18.2-46.2. The Court reasoned that if the legislature had intended for only one punishment of gang activity for multiple predicate criminal acts, it would have used "one or more predicate criminal acts" in lieu of "any predicate criminal act." The Court ruled that the trial court did not err in rejecting the defendant's claim that sentencing him upon more than one conviction for criminal gang participation violated double jeopardy principles.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1221224.pdf>

Harris v. Commonwealth: November 28, 2023

Virginia Beach: Defendant appeals his convictions for Child Sexual Assault on Refusal to Strike a Juror for Cause and *Brady* grounds.

Facts: The defendant sexually assaulted a child repeatedly. A detective interviewed the defendant, who denied the assaults but made certain admissions. The Commonwealth played the video of the interview at trial.

At trial, during jury selection, the defendant asked prospective jurors "Do you believe that a child would probably not lie about a sexual assault occurring?" A juror responded, "I don't know, but I -- I mean, without having the facts and without hearing it right now, I would have a tendency to think that I would believe a child." However, she then went on to affirm her ability to impartially consider all the evidence and said she would not "just stick with that premise[.]"

The same juror also said she would want to hear from the defendant and would have a "lingering question" if he did not testify. But neither she nor the rest of the venire said they would hold it against the defendant or "feel that he is hiding or that he is probably guilty" if he did not testify. Lastly, the juror stated that she found child sexual assault upsetting, was sympathetic to children, and that she believed that children are vulnerable. However, she stated that she "wouldn't pass judgment on a particular case or incident without hearing all the components, all the factors involved." She then

affirmed her ability to impartially consider the evidence and follow the law, even if she did not agree with the law.

The defendant moved to strike the juror for cause, but the trial court denied the motion.

After trial, the defendant moved to set aside the verdict. He argued that investigations by the Attorney General and Virginia Beach police concluded that, in other cases, the detective used false certificates of analysis to obtain evidence against suspects. These investigations revealed five instances of Virginia Beach police allegedly using those certificates to obtain confessions. The defendant further asserted that, several months after his interview with the detective, she used a falsified certificate to question a suspect in another case. The defendant argued that the Commonwealth violated *Brady* by failing to disclose this practice, which impaired his ability to impeach the detective at trial. However, the defendant did not contend and produced no evidence indicating that the detective used a false certificate when interviewing him.

The trial court denied the defendant's motion.

Held: Affirmed.

Regarding the juror, the Court ruled that, considering her voir dire as a whole, the record showed that the juror could decide the case based on the law and evidence introduced at trial.

Regarding the *Brady* issue, the Court ruled that the Commonwealth's failure to disclose that the detective used false information in unrelated cases did not deprive the defendant of a fair trial. The Court noted that the record did not show, and the defendant did not argue, that the detective or anyone else used falsified certificates while investigating him in this case. Thus, the Court concluded that the failure to disclose the investigations of the detective's interrogation tactics in other cases was not a *Brady* violation.

The Court ruled that the defendant failed to satisfy his burden to show that he was prejudiced at trial by the Commonwealth's failure to disclose the investigations against the detective. The Court pointed out that, at trial, the defendant cross-examined the detective on her investigation tactics, including her admissions that she falsely told the defendant that the victim's diary implicated him and that she insinuated that the victim instigated the sexual touching, and the jury observed and heard those tactics when it saw the video of her interview.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0746221.pdf>

Smith v. Commonwealth: October 24, 2023

Norfolk: Defendant appeals his convictions for Murder, Robbery, and Use of a Firearm on Ineffective Assistance of Counsel and *Brady* Discovery grounds.

Facts: The defendant shot and killed two people who had been sitting in a car. Police found the defendant at the scene. Later, the defendant made contradictory statements about his knowledge and involvement. At trial, several people testified that the defendant confessed to the murders. Two of

those witnesses were incarcerated at the time of trial. The witnesses testified that they did not expect anything in exchange for their testimony. After the trial, those witnesses were resentenced favorably at the Commonwealth's initiative.

After trial, the defendant moved to set aside the verdict, contending that the Commonwealth knew or should have known that the witnesses had specific arrangements with their prosecutors to benefit from their testimony and that the Commonwealth's failure to correct the record when they testified had constituted *Brady* violations. The defendant also moved to set aside the verdict on the grounds of ineffective assistance of counsel.

The trial court denied the defendant's motions to set aside the verdict. Regarding the defendant's *Brady* motion, the trial court resolved those claims by treating them as a motion for a new trial based on alleged newly acquired evidence.

Held: Affirmed in Part, Reversed in Part.

The Court first repeated that claims of ineffective assistance of counsel are not properly raised on direct appeal and must be raised in a separate habeas petition to the appellate Court or the circuit court. Therefore, the Court ruled that the trial court committed no error when it held that the defendant's ineffective assistance of counsel claim was not properly before the court.

Regarding the defendant's *Brady* claims, the Court repeated that there are three components of a violation of the rule of disclosure first enunciated in *Brady*:

- (1) The evidence not disclosed to the accused must be favorable to the accused, either because it is exculpatory or because it may be used for impeachment.
- (2) The Commonwealth must have withheld the evidence, without regard to whether it did so willfully or inadvertently.
- (3) The evidence must be "material" under *Brady*, meaning there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

In this case, the Court ruled that because the trial court applied the wrong legal test in addressing and resolving the defendant's *Brady* claims, it erred as a matter of law, and thus abused its discretion.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1912221.pdf>

Stables v. Commonwealth: October 3, 2023

Giles: Defendant appeals his conviction for Possession with Intent to Distribute on Refusal to Disclose an Informant's Identity.

Facts: After multiple convictions for Drug Distribution, the defendant agreed to a Fourth Amendment waiver as a condition of his sentence. Later, after the defendant's release from incarceration, an officer visited the defendant's residence and searched it pursuant to the waiver,

finding various drugs, including Oxycodone and Methamphetamine, and paraphernalia for drug distribution.

At trial, during cross-examination, the officer confirmed that he had received a tip from a confidential informant that led to the search of the defendant's residence. The defendant asked the officer to identify the confidential informant. The Commonwealth objected and the trial court sustained the objection.

Held: Affirmed. The Court held that, because the identity of the confidential informant was not relevant or material to the case, the court did not abuse its discretion in refusing to require the Commonwealth to disclose it.

The Court agreed that the informant's identity was not relevant to any material issue in this case. The Court noted that the defendant had waived his Fourth Amendment right to challenge the search of his residence by executing a plea agreement, wherein he expressly consented to searches of his person and residence by law enforcement without first establishing probable cause or obtaining a search warrant. Based on the waiver, the Court noted, the officer did not seek or need a warrant before searching the defendant's residence; he did not need probable cause.

Accordingly, the Court found that the basis for the officer's search was not a material issue for trial, and the informant's identity was not relevant. The Court pointed out that the informant's identity was also irrelevant and immaterial because no evidence showed that he or she actively participated in the crime.

The Court noted that the defendant's theory was that the evidence did not establish his possession of the oxycodone pills recovered or his intent to distribute the methamphetamine discovered in his bedroom. The Court pointed out that none of these theories involved the participation of a confidential informant or even the actuality of a drug deal. Therefore, the Court ruled, the identity of the confidential informant remained privileged.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0799223.pdf>

Spinner v. Commonwealth: August 15, 2023

Lynchburg: Defendant appeals his convictions for Involuntary Vehicular Manslaughter, Hit and Run, and DUI on Admission of Witness Testimony, Video Evidence, a Certificate of Analysis, and HGN testimony.

Facts: The defendant drove while intoxicated and struck and killed a woman who was crossing the street. The video recording of the crash reflects that the car did not slow down after impact with the victim, nor did it stop at the scene. Instead of stopping immediately, the defendant circled the block, parked the car a block away, smoked a cigarette, and then returned to the collision scene on foot.

Despite the obvious damage to the driver's windshield, headlamp, and side mirror, the defendant first lied and told the responding officer that someone else hit the victim. On further questioning, he admitted to having hit the victim, but claimed that he did not stop sooner because he

did not know he had hit someone. He also testified at trial that he knew he hit “something” but did not realize at the time “it was a person.”

The defendant told the investigating officer that he had consumed alcohol in the early morning hours but none since he fell asleep at 5:00 a.m. that morning. The defendant failed FSTs, and the officer arrested the defendant. The officer first conducted a breath test, and then obtained a search warrant for the defendant’s blood.

One of the field sobriety tests that the officer administered was an HGN test. At trial, the officer testified that bodies are affected by alcohol consumption. Specifically, he testified that with a nystagmus field sobriety test, he looked for involuntary eye movement that can be present due to alcohol consumption. The defendant objected to this testimony, arguing that only a medical expert could testify about the effects of alcohol on the body. The trial court overruled the objection and allowed the testimony. The officer described how he conducted the nystagmus test and explained it was the “standard way that the test is administered.” He stated that he noticed a mild “nystagmus and jerking motion of the eye” during the test.

During the breath test, the officer forgot to inform the defendant of his right to observe the breath test process, the blood alcohol reading it produced, and the equipment used to perform the breath test, even though he attested on the certificate that he had in fact done so. However, the defendant was physically present during that entire process until the end of the process when the test results printed out on the printer of the machine. The officer observed the defendant for twenty minutes before conducting the breath test to ensure that the defendant did not burp or belch before the test, which would affect the test’s accuracy. The defendant was present through the entire procedure and was provided with a copy of the printout of the results. The officer also allowed the defendant to observe the test results and gave him a copy of those results.

At trial, the officer testified about his qualifications, the process, and the equipment he used for the test. He explained that he was a licensed breath test operator and used equipment approved by the Department of Forensic Science. The defendant objected to the admission of the certificate based on the officer’s failure to inform the defendant of his rights to observe, but the trial court overruled the objection and admitted the breath certificate.

At trial, DFS toxicologist Trista Wright testified. She had analyzed the defendant’s blood specimen and found a BAC of .038%. Dr. Wright also explained that she could calculate what the defendant’s BAC was at the time of the crash through a “retrograde extrapolation,” an analysis that determines an individual’s BAC at an earlier time based on specific information. To determine the appellant’s BAC using this method, Wright needed to know when he last consumed alcohol and that no alcohol was consumed after the accident. Over the defendant’s objection, Wright opined, based on the breath test certificate, the blood analysis result, and the information about the defendant’s last drink of alcohol, that the defendant’s BAC was between .08 to .13% by weight by volume at the approximate time of the crash.

The defendant argued that Dr. Wright’s retrograde extrapolation testimony was inadmissible under Rule 2:702(b), which provides that speculative testimony is not admissible. He suggested that the extrapolation was based on the unproven assumption that he did not consume alcohol after the accident. The trial court overruled his objection.

At trial, the defendant's cousin testified. The defendant objected because the cousin had not been on the Commonwealth's witness list and instead the Commonwealth only disclosed his name and identity two days before trial, rather than 21 days before trial as ordered. According to the prosecutor, she was unable to contact the cousin until two days before trial. She argued that there was "no surprise" because the defendant had originally subpoenaed the cousin as his own witness. The court allowed the testimony over the defendant's objection.

At trial, the Commonwealth also introduced a surveillance video from a nearby store. The store owner testified that she had video surveillance cameras at her store. Her son programmed the surveillance system, which included a date and time stamp synchronized to the internet clock. She noted that she and her son were the only ones with access to the video recordings. Following the incident, the owner saved the parking lot video from the relevant time to a DVD and provided it to the police. The surveillance system allowed the owner to download segments of the video but not to edit the recordings.

The defendant objected that the video was inadmissible under the "silent-witness theory" because the witness was unable to testify as to "the process by which the video was made." The trial court overruled his objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the cousin's testimony, the surveillance video, Dr. Wright's expert testimony on retrograde extrapolation, or the officer's HGN testimony, and it agreed that the evidence supported the findings that the defendant had knowledge someone was injured as a result of the crash and that he failed to stop immediately as required by statute.

The Court first addressed the admission of the cousin's testimony, despite the pretrial order. The Court rejected the defendant's contention that the lack of notice deprived him of the "opportunity to research, vet, and discuss with" with witness what he knew and why the Commonwealth called him as a witness, finding that his claim of alleged prejudice was both general and speculative. The Court complained that the defendant did not specify any portion of the cousin's testimony that surprised him, nor did he explain how an earlier disclosure would have benefited his defense or altered the course of the trial.

Regarding the video, the Court ruled that the owner's testimony provided the trial court with a sufficient basis to find that the video was what the Commonwealth claimed it to be: an accurate recording of the traffic accident that occurred outside her convenience store on the date of the crash. The fact that the owner did not have formal training on the computer recording system and was unaware precisely how the software worked did not change the Court's analysis.

Regarding the breath certificate, the Court ruled that the officer substantially complied with § 18.2-268.9 when he administered the breath test. The Court noted that the officer conducted everything in the defendant's presence and provided him with a copy of the results. The Court concluded that the officer's failure to specifically tell the defendant that he could watch the test and see the equipment did not render the certificate of analysis inadmissible. Instead, the procedural deficiency went to the weight of the evidence rather than its admissibility.

Regarding Dr. Wright's testimony, the Court found that under the evidence, a reasonable jurist could conclude that the defendant did not have any alcohol after the crash and before the BAC testing.

Consequently, the Court ruled that Dr. Wright's testimony on retrograde extrapolation of the BAC at the time of the collision was based on facts in evidence.

Regarding the officer's HGN testimony, the Court ruled that the officer was not offering a medical opinion. Instead, the Court noted that he simply explained how he conducted the nystagmus field sobriety test and that his execution of the test comported with the standard for test administration. Hertzog described the involuntary eye motion he looked for when conducting the test and noted that such motion can be present if the subject has consumed alcohol. Because this testimony was not a medical opinion, the Court ruled that the defendant's argument necessarily failed. The Court explained that, once the threshold for admissibility of the testimony was met, it was up to the jury to determine what weight to give it and the trial court did not abuse its discretion in permitting the testimony.

Lastly, regarding sufficiency, the Court agreed that the evidence was sufficient that the defendant, after striking a pedestrian, did not immediately stop as close to the scene of the accident as possible to do safely.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0725223.pdf>

Newberger v. Commonwealth: June 27, 2023

Orange: Defendant appeals his conviction for Child Sexual Assault on Discovery Issues, Best Evidence, and Admission of Prior Consistent Statements.

Facts: The defendant raped and sexually assaulted a six-year-old child. Prior to trial, the Commonwealth moved for the victim to testify by closed-circuit. In support of its motion, the Commonwealth called a licensed professional counselor who specialized in childhood trauma. She testified that she had been treating the victim and testified to the effects of trauma on the victim for almost two years following the incidents that led to these charges. The trial court granted the Commonwealth's motion.

On the day of trial, the defendant filed a motion in limine to exclude any expert testimony because the Commonwealth failed to make the required disclosures regarding expert evidence. The trial court found that the Commonwealth had not complied with the disclosure requirements of the discovery order but ruled that the expert could testify because her existence and the content of her opinions were known to the defense from the closed-circuit hearing. However, the trial court also ruled that the expert would not be permitted to opine on the victim's credibility or the source of her trauma.

Upon confirming that the Commonwealth intended to call the expert, the defendant did not request a continuance or an opportunity to question her outside the jury. Nor did he question the expert about the basis for her expert opinion during cross-examination.

The Commonwealth's trauma expert testified that she was a licensed professional counselor who specializes in treating both child and adult trauma. The trial court recognized her as an expert in child sexual trauma. The expert testified that, in her professional opinion, the victim displayed

symptoms of childhood trauma. She described typical symptoms of childhood trauma and the specific signs of sexual trauma that therapists look for in children. The expert also testified that it was not unusual for children to make inconsistent statements about traumatic events because of the way a child's brain works and processes trauma.

At trial, the Commonwealth introduced a screenshot of text messages that the defendant sent to a witness. The defendant objected on best evidence grounds, contending that the screenshots were duplicates and "no explanation was given for why the originals were unavailable." The trial court overruled the objection.

During defense evidence, the defendant called a detective to testify regarding previous statements that the victim had made to the detective that were inconsistent with her trial testimony. During cross-examination, the Commonwealth sought to elicit the victim's prior consistent statements to rehabilitate her credibility. The defendant objected, maintaining that the trial court should exclude any statements beyond the scope of the prior inconsistent statements he elicited to impeach the victim's credibility.

The trial court overruled the objection. On cross-examination, the witness testified to numerous statements that the victim made during the original police interview that were consistent with her statements at trial. The court issued a jury instruction requiring the jury to consider the evidence only for the purpose of rehabilitation.

Held: Affirmed.

Regarding the discovery violation, the Court began by noting that Rule 3A:11 and Code § 19.2-265.4 authorize the trial court to tailor the remedy for a discovery order violation to meet both the nature and degree of prejudice incurred by a defendant and the flagrancy of the violation. In this case, the Court found that the defendant failed to show prejudice from the late disclosure of the expert witness, and the trial court did not abuse its discretion in allowing her limited testimony.

Regarding admission of the victim's prior consistent statements, the Court examined Rule 2:801(d)(2)(A). The Court also noted that the trial court issued a limiting instruction. In this case, the Court found that, although some of the detective's testimony went beyond the victim's prior statements, the trial court did not err in allowing the testimony because the statements were not outside the scope of rehabilitation.

Regarding the defendant's best evidence objection, the Court acknowledged that text messages on a cell phone constitute "writings" for purposes of the best evidence rule. However, the Court then applied the concept of "duplicate originals," which concerns mechanically reproduced copies of writings. The Court noted that a screenshot, sometimes called a screen capture, is an image of a cell phone's screen that is saved as a graphic file in the phone's photographs. The Court wrote: "It is no different than photocopying or 'carbon copying' the cell phone screen. The screenshot of text messages from [the witness'] phone logically qualifies as a 'duplicate original' and may be treated as the original for purposes of the best evidence rule."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0677222.pdf>

Norfolk: Defendant appeals his conviction for Unlawful Entry in Violation of a Protective Order and related charges on a Discovery Violation and sufficiency of the evidence.

Facts: The defendant broke into his estranged wife's home in violation of a protective order. The home had been the parties' home prior to their separation. The victim had stopped living there a month prior, and the landlord had given the parties notice that they would have to leave the residence and completely move out by the end of the following month. Initially, the victim gave the defendant "free rein" of the residence for two or three weeks so he could remove his personal property from the house. Although the victim had stopped living at the house, she had numerous personal property items still at the house on the date of the offense, including clothing and furniture. The landlord informed the victim that the defendant was done moving his belongings so the victim could proceed to moving her property out of the house.

After the landlord discovered evidence that the defendant had damaged the home repeatedly, the landlord changed the locks on the residence and gave the victim the only keys. The next day, the defendant broke into the home and violently assaulted the victim over an extended period, drugging, stabbing, tasing, and beating her repeatedly.

The discovery order in this case stated that: "The Commonwealth shall disclose to the defendant before trial, a written list of witnesses including names and addresses. . . expected to testify for the Commonwealth at trial or sentencing." Prior to trial, the Commonwealth provided thirty-three items of discovery to defense counsel, but no list of witnesses.

At voir dire of the jury pool, the Commonwealth announced the names of its expected witnesses to determine if the potential jurors were acquainted with them. After the jury was selected and sworn, the Commonwealth made its opening statement during which it again named its expected witnesses. As the Commonwealth called its first witness to testify, the defendant objected. He argued that a discovery order had been in place and that he just learned in the Commonwealth's opening statement "for the first time who the Commonwealth intends to call as witnesses." Defense counsel objected to testimony by "any witness who has not been disclosed, per the discovery order, prior to trial."

The Commonwealth conceded that it had inadvertently violated the discovery order. However, the Commonwealth pointed to the "massive amount of discovery" that it gave to defense counsel pursuant to the court's discovery order and argued that there was no bad faith in its failure to also produce the list of witnesses expected to testify for the Commonwealth. The prosecutor noted that he and defense counsel had been in contact with each other since the prosecutor received the case, and it would have been appropriate for defense counsel to just ask for the witness list or file a motion to compel in advance of trial. The Commonwealth suggested the appropriate remedy was to adjourn the matter or grant a mistrial.

The defendant asserted that he was prejudiced because he was denied his right to prepare his defense, and due to the massive amount of information provided, he needed to know the list of expected witnesses to make effective use of that information. He also stated that the Commonwealth would have complied with the order if it handed the list to counsel immediately prior to the start of trial,

even “30 seconds before trial.” Defense counsel argued that declaring a mistrial or adjourning the matter would prejudice the defendant and maintained that the remedy should be to prevent the Commonwealth from calling witnesses to testify who were not disclosed in accordance with the discovery order.

The trial court denied the motion and permitted the Commonwealth’s witnesses to testify. The trial court noted that the Commonwealth subpoenaed the witnesses it intended to call, and those subpoena returns were “in the public court file for the defendant to see,” except for the forensic nurse examiner. As for the nurse, the trial court found that she prepared two reports, the sexual assault nurse examination and the strangulation examination, which were provided to the defendant and he was thus on notice that she was a witness in the case. The trial court found “very little prejudice” to the defendant under the circumstances, because there was “no surprise to the defendant here.”

At trial, the defendant argued that the evidence affirmatively established that the element of entry into the home of a protected person under a protective order in violation of § 16.1-253.2(C) did not occur because the victim abandoned the dwelling as her abode, and this was affirmative proof that she was not residing at the residence.

Held: Affirmed.

Regarding the discovery issue, the Court first observed that the discovery order, Rule 3A:11(h), and § 19.2-265.4(B) all point to the trial court’s broad discretion in determining an appropriate remedy for a discovery order violation. The Court pointed out that, under *Davis*, “[w]hen a discovery violation does not prejudice the substantial rights of a defendant, a trial court does not err in admitting undisclosed evidence.”

In this case, the Court noted that the Commonwealth named its witnesses during voir dire of the jury pool, which occurred more than 30 seconds before the trial began. The Court wrote: “It is untenable to suggest that receiving a written list of expected witnesses 30 seconds before the trial began would have affected defense counsel’s trial strategy and preparation differently than hearing the names of the expected witnesses called aloud minutes prior to selection of the jury.” Instead, the Court repeated that the purposes of discovery relevant to a case are disclosure of “all relevant and material evidence before trial in order that the trial may be an effective method for arriving at the truth and not a battle of wits between counsel,” and to eliminate surprise at trial.

The Court agreed that the trial court’s factual finding that there was no surprise to the defendant was supported by the record. The Court ruled that the trial court did not abuse its discretion by denying the defendant’s motion to prohibit all the Commonwealth’s witnesses from testifying, the only remedy the defendant requested at trial.

Regarding sufficiency of the evidence of the Unlawful Entry in Violation of a Protective Order, the Court noted that various circumstances may enter the determination of whether a particular dwelling place is the home of a protected party. In this case, the Court found that the evidence established that the victim had lived at the address for three years and continued to lease the property on the date of the offense. Furthermore, the Court explained that there is no requirement in the statute that the home involved in the offense be the only home of the protected party, or the permanent home of the protected party.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0846221.pdf>

Domestic Relations Court

Virginia Court of Appeals - Published

Yellock v. Commonwealth: January 30, 2024

Martinsville: Defendant appeals his conviction for Domestic Assault on sufficiency of the evidence.

Facts: The defendant battered the victim, his girlfriend, after an argument in the victim's vehicle. At trial, the victim testified that they were in a relationship that "involve[d] touching each other," including "touch[ing] each other's hair."

At trial, the defendant unsuccessfully argued that the Commonwealth failed to prove that the victim was "a family or household member," as required to sustain a conviction for domestic assault and battery pursuant to § 18.2-57.2.

Held: Reversed. The Court found that the Commonwealth failed to establish "cohabitation" between the defendant and the victim within the meaning of § 18.2-57.2. Because the Commonwealth failed to prove that the parties cohabited, it did not establish that the victim was "a family or household member" as required to sustain a conviction for domestic assault and battery pursuant to § 18.2-57.2.

The Court repeated the factors under *Rickman* to consider when assessing whether cohabitation has been established:

- (1) sharing of familial or financial responsibilities,
- (2) consortium, and
- (3) length and continuity of the relationship.

The Court quoted *Rickman*: "Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets." "Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations." The Court also explained that the duration and continuity of the relationship are also appropriate factors for consideration.

In this case, the Court complained that there was no evidence establishing that the parties shared familial or financial resources. The Court refused to infer sharing of familial or financial responsibilities solely because they were in a relationship that involved touching each other on the date of the incident. The Court also complained of a lack of evidence that the parties shared food, shelter, clothing, or utilities, and no evidence of comingled assets. Additionally, the Court noted that there was little to no evidence of consortium.

The Court wrote: “Furthermore, the undeveloped record simply does not demonstrate a relationship involving mutual respect, fidelity, and the type of partnership required under *Rickman*. While the Commonwealth suggests that the couple’s ride-sharing and touching evince affection, society, and cooperation, the evidence here relating to the consortium factor does not support a finding of cohabitation.”

Finally, the Court complained that the Commonwealth provided very limited evidence on how long the parties had been in a relationship. For example, there was no testimony that they had been a couple for a lengthy or continuous period; the evidence was only that they were in a relationship on the date of the incident.

The Court then remanded the case for trial on the lesser-included offense of simple assault and battery. The Court concluded that simple assault and battery requires no additional or different element than is required for a conviction for domestic assault and battery. Because simple assault and battery does not contain an element that the charged offense does not contain, the Court ruled that simple assault and battery is a lesser-included offense of domestic assault and battery.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1936223.pdf>

Virginia Court of Appeals - Unpublished

Hackett v. Commonwealth: December 5, 2023

Lynchburg: Defendant appeals his conviction for Domestic Assault, 3rd or Subsequent, on sufficiency of the evidence.

Facts: The defendant, who already had several convictions for domestic assault and battery, attacked his romantic partner. The defendant and the victim had been in a two-year romantic relationship. The relationship had faltered but persisted, and the defendant and victim lived together for the year prior to the attack. At trial, the defendant argued that their relationship was insufficient to constitute cohabitation, but the trial court disagreed.

Held: Affirmed. The Court examined the facts and concluded that the record demonstrated that the defendant and the victim had shared living arrangements and were in a long-term romantic relationship, wherein they cooperated with each other and provided each other society, friendship, and, viewed in the light most favorable to the Commonwealth, conjugal relations.

The Court reviewed some of the factors that can demonstrate cohabitation, including some establishing shared familial or financial responsibilities: shelter, food, clothing, utilities, and/or commingled assets. The Court also examined factors that might establish consortium, such as mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and

conjugal relations. The Court also repeated factors to examine such as the length and continuity of the relationship.

The Court also repeated that an abuser “cannot immunize himself from criminal liability” under § 18.2-57.2(B) merely because he maintains two domiciles; he cohabits with the victim even if he lives part-time elsewhere if he continues to reside the rest of the time with the victim and maintains a substantial relationship with her. Thus, in this case, the Court found that the “tumultuous nature” of the relationship did not preclude a finding that they cohabited with each other during the 12 months preceding the offense. Under a totality of the circumstances analysis, the circumstances provided the trial court with sufficient evidence to support the conclusion that the relationship was one which fell within the legislative intent of § 18.2-57.2, regardless of the “exact living circumstances of the victim and perpetrator.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1919223.pdf>

Eighth Amendment

Virginia Supreme Court

Smith v. Commonwealth: February 29, 2024

Rev'd Unpublished Ct. of App. Ruling of May 17, 2022

Richmond: Defendant appeals his convictions for Rape and Sexual Assault of a Child on Denial of Expert Testimony, Prosecutorial Misconduct, and Eighth Amendment grounds.

Facts: For several years, the defendant raped and sexually assaulted a child under the age of 13. He later confessed to law enforcement. Prior to trial, the defendant requested expert funds for two experts. The first expert was for a neuropsychological evaluation, alleging that he may be suffering from HIV-Associated Neurocognitive Disorder (“HAND”). The defendant proffered evidence, including that his longtime HIV doctor believed he “fit the profile” for HAND, that “half of all treated HIV patients have cognitive impairment,” and that cognitive impairments caused by HAND “cannot be reversed” by “antiretroviral therapy.”

The second expert he sought was an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. He proffered that he wanted to inform the jury as to the intrinsic (personal) and extrinsic (circumstantial) factors that render an individual particularly susceptible to falsely confess under the pressure of interrogation techniques. The trial court denied the motion for both experts.

The defendant also requested funds for an expert in the police “Reid Technique” and a “police interrogation expert.” The trial court denied those requests as well. The trial court excluded testimony from the defendant’s proposed interrogation expert on “the surprising frequency of false confessions” because the science of false confession work was not sufficiently reliable and because the proposed expert had insufficient experience.

While the defendant was incarcerated, the jail recorded his phone calls and video recorded his movements in the jail. The video system's software automatically recorded all audio and video calls, including with counsel but the deputies could change a setting to indicate the visit was professional and thereby prevent the video call from being recorded. Later, however, the Commonwealth provided discovery that included a disc containing recordings of the defendant's phone calls and video visits, including privileged videos of two meetings with his own attorneys.

Although several police recruits listened to some of the phone calls for training purposes, no investigator, police officer, or prosecutor listened to or watched privileged materials, including the video recordings of the trial strategy meetings. The defendant moved to dismiss the indictments or, in the alternative, exclude at trial all recordings of his communications from the jail. The trial court denied the motion.

The jury convicted the defendant of two counts of raping a child under the age of 13, as well as object sexual penetration of a child under the age of 13, and he received a life sentence on each of his three convictions. The defendant filed a post-trial motion in which he argued that his mandatory life sentence was unconstitutional. The trial court denied the motion.

The Court of Appeals Reversed and Remanded. The Court first found that the trial court erred in denying the defendant's request for funds for an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. The Court found that the defendant's "many proffers of proposed expert testimony made clear that mental illness and cognitive impairment, among other things, render a person more susceptible to interrogation techniques."

Regarding the HAND expert, the Court noted that the defendant's evidence was that he suffered from major depression and anxiety and had not been taking his anxiety medications for some time before the interrogation. The Court concluded that the defendant was therefore entitled to present expert testimony from a qualified expert on the susceptibility of a person suffering from major depression and unmedicated anxiety to making a false confession.

The Court agreed, however, that the trial court properly denied the defendant's requests for experts in the "Reid Technique" and police interrogation. The Court found that the defendant's expert's proposed testimony on the "false confessions" was unreliable under *Spencer*. The Court wrote that "Simply watching many interrogations does not give a person experience in understanding whether those confessions are false in the same way that arresting drug users and distributors teaches a police officer what quantities are kept for personal use and what quantities are kept for distribution, or in the same way that working with tracking dogs for years makes a person aware of how accurate those dogs are at tracking."

The Court continued, "The science or field of false confessions work is narrow in scope and is still in the early stages of development. The peculiar difficulties of verifying the truth or falsity of confessions have not yet been resolved in any way that allows observers in the field of false confessions to gather sufficient samples of empirical data from which to draw sufficiently reliable conclusions about how likely the Reid Technique is, in general, to produce a false confession in the context of an accusation of a serious crime such as murder or child abuse." "An additional empirical problem arises from the need to compare false confessions to the total number of confessions, and to then compare true and false confessions secured by interrogation techniques to those secured by purely investigative

techniques. In light of these uncertainties in a developing field of knowledge, we cannot say that no reasonable jurist could have reached the same conclusion as the trial court on this point.”

Regarding the jail recordings, the Court explained that *Gheorghiu* required the defendant to show that the recording and disclosure of his privileged trial strategy meetings harmed him during the criminal proceedings. In this case, just as in *Weatherford*, prosecutors and investigators never learned or used any confidential information. The Court concluded, “Even if we were to hold that Smith’s Sixth Amendment right to counsel had been violated, we would still conclude that he is not entitled to any remedy because he failed to show that he was prejudiced.”

Lastly, the Court of Appeals rejected the defendant’s contention that his sentence violated the Eighth Amendment.

Held: Conviction Affirmed. Court of Appeals Ruling Affirmed in Part, Reversed in Part.

The Court concluded that the trial court did not abuse its discretion in the manner in which it addressed the defendant’s multiple requests for expert assistance and, accordingly, the Court reversed the judgment of the Court of Appeals on those holdings. The Court affirmed the Court of Appeals’ refusal to dismiss the defendant’s indictment on the basis of the inadvertently recorded video conferences between the defendant and his counsel because the record establishes that the defendant suffered no prejudice. Finally, the Court concluded that the defendant’s mandatory life sentence for the rape of a young child did not infringe the Eighth Amendment.

Regarding the defendant’s request for a HAND expert, the Court reversed the Court of Appeals’ holding that the trial court abused its discretion in refusing to permit expert testimony to challenge the defendant’s confession on the basis of his major depression and failure to take medication before his interrogation. The Court complained that the defendant had not contended in the Court of Appeals that the trial court erred in failing to provide funds for an expert to testify concerning the effects of “major” depression and “unmedicated” anxiety on his interrogation. Instead, his argument had centered around a potential HAND diagnosis and the use of the Reid method.

The Court then noted that the trial court had repeatedly indicated that it was open to allocating funds for an expert if the defendant found a qualified expert who could reach a diagnosis of HAND or demonstrate a specific diagnosis beyond the understanding of the jury, and who could then “connect the dots” to demonstrate a link between the defendant’s mental condition and the possibility of a false confession. The Court pointed out that the trial court granted the defendant funds to hire an expert, Dr. Jeffrey Aaron, and determine whether his testimony was admissible during a pretrial hearing. The Court wrote: “Strikingly, Dr. Aaron did not appear, either to testify outright or proffer what his evaluation or testimony may have been.”

The Court concluded that the trial court’s rulings on the defense motions for expert assistance, whether for evaluation or potential trial testimony, did not constitute an abuse of discretion. The Court agreed that the trial court could sensibly conclude that allegations of a potential diagnosis of HAND, combined with commonly experienced circumstances such as depression and anxiety, did not rise to the level of a particularized need under *Husske*. The Court found that the trial court’s insistence on an expert or experts who were qualified to make a complex diagnosis, and who could then relate that diagnosis to the potential for making a false confession, were within the bounds of the circuit court’s discretion.

Regarding the defendant's "false confession" expert, the Court agreed with the trial court that empirical data did not support the conclusion about the "surprising frequency of false confessions." The agreed with the trial court's statement that "regardless of whether I used the Spencer or the Daubert, or the 2:702 standard, I just don't think it meets the test for that based on this proffer."

The Court ruled that the trial court did not abuse its discretion in declining to allow expert testimony on the "false confession" aspect of the expert's testimony because the jury could see for itself how the police interrogated the defendant. The Court pointed out that the trial court admitted a great deal of evidence of the defendant's potential susceptibility to manipulation. For example, the jury heard evidence that the defendant suffered from anxiety and depression, had some memory problems, and heard from his daughter about his difficulties in handling bills and stressful situations. The trial court also admitted the defendant's medical records into evidence. Lastly, the jury also saw the interrogation itself.

Regarding the inadvertent recordings of attorney-client communications, the Court agreed with the Court of Appeals that there was no evidence the recordings caused the defendant any prejudice and affirmed the Court of Appeals' ruling on this issue.

Lastly, regarding the defendant's Eighth Amendment challenge, the Court concluded that the life sentence imposed did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Court repeated that under the Eighth Amendment, there are two paths to review a sentence as cruel and unusual and, therefore, "grossly disproportionate" to the convicted offense. First, a court "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." On that question, the Court explained that it had no difficulty in concluding that the sentence imposed did not lead to an inference of gross disproportionality.

The second approach is to look at "categorical" rules to define Eighth Amendment standards. In determining whether a sentence is unconstitutional, a Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against the sentencing practice at issue. The court must then determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. Here, the Court acknowledged that few States impose a mandatory life sentence for the rape of a young child. However, the Court stated that it does not understand the Eighth Amendment to require uniformity in punishment, nor could such uniformity be expected in a union of sovereign States.

The Court examined the statutes of our other States that involve a crime analogous to § 18.2-61(B)(2), writing "The most salient fact is that many of our sister States punish the rape of a young child by an older adult with great severity." The Court was unable to conclude that objective indicia establish a national consensus against a severe punishment for the rape of a young child by an older adult.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220382.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0680212.pdf>

Lumpkin v. Commonwealth: July 18, 2023

Danville: Defendant appeals his convictions for Child Sexual Assault on Refusal to Appoint an Expert, Sentencing him via Video on Sixth Amendment Confrontation grounds, and Eighth Amendment grounds.

Facts: The defendant raped and sexually assaulted an 11-year-old child. Prior to trial, the defendant made motions for the appointment of two experts: a urologist and for urine testing for semen content before trial.

In support of his motion for a urologist, the defendant testified that since 2004 he has been unable to have an erection or ejaculate. He claimed that he saw a physician for this issue in 2004 and 2005, but initial treatment was unsuccessful. The defendant was unable to remember where he received treatment or the name of the physician who provided treatment. The defendant also moved for testing of a urine sample for semen content, based on the proffer that a test could show semen seeping into his urine which can be indicative of a male who has not ejaculated in some time. The trial court denied both motions.

At sentencing, the defendant appeared by video because of COVID issues. The defendant objected to appearing remotely, contending that doing so was a violation of the confrontation clause and his due process rights. The trial court overruled the objection.

The trial court sentenced the defendant to life plus 120 years. The defendant objected on Eighth Amendment grounds, but the trial court overruled the objection.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in refusing to appoint an expert, order medical testing, nor in sentencing the defendant. The Court also ruled that the trial court did not violate the defendant's Sixth Amendment right to confrontation.

Regarding the denials of experts, the Court ruled that the trial court did not abuse its discretion in concluding that the defendant failed to present a particularized need for an expert. The Court noted that the defendant had no documentation of his impotency, a problem he claimed existed since 2004. Nor did he assert that the condition, once diagnosed, would have persisted to the date of the offenses and beyond. Additionally, the Court pointed out that he was unable to otherwise identify the diagnosing physician and had failed to mention the condition to any subsequent physicians for eighteen years. Lastly, the Court also noted that the crimes for which he was convicted occurred roughly two years before he made the request to appoint a urologist.

The Court concluded that any finding that the defendant was impotent at the time of testing would therefore not necessarily prove that he was impotent at the time the crimes occurred. The Court wrote: "Although Lumpkin hoped that expert assistance would develop mitigating evidence that would lead to acquittal, 'a mere hope or suspicion that favorable evidence may result from an expert's services does not create a constitutional mandate.'"

Regarding his sentencing via video, the Court rejected the defendant's assertion that the trial court violated his Confrontation rights under the Sixth Amendment when it required him to appear via video conference at his sentencing hearing. The Court repeated that Confrontation is a trial right, and the Confrontation Clause of the Sixth Amendment does not apply to sentencing.

Lastly, the Court rejected the defendant's argument that his sentence was unconstitutionally disproportionate. The Court restated that it declines to engage in a proportionality review in cases that do not involve life sentences without the possibility of parole. The Court explained that "The only reason that the aggregate sentences exceeded [Lumpkin's] life expectanc[y] [is] because [he] committed so many separate crimes."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0129223.pdf>

Larue v. Commonwealth: June 6, 2023

Montgomery: Defendant appeals his life sentence for Sodomy of a Child on Eighth Amendment grounds.

Facts: The defendant was found guilty of forcible sodomy on a victim less than 13 years of age. He argued that the mandatory sentence of life in the penitentiary violated his constitutional right to be free from cruel and unusual punishment. He argued that a life sentence was disproportionate considering the applicable sentencing guidelines, which recommended a maximum sentence of 13 years and 7 months. The defendant also argued that the sentence violated the Eighth Amendment because the trial court was required to impose a life sentence, regardless of the mitigating evidence and the sentencing guidelines recommendation. The trial court overruled his argument.

Held: Affirmed. The Court held that the defendant's arguments had been squarely addressed in binding precedent, holding that a mandatory life sentence with the possibility of parole does not violate the parameters of the Eighth Amendment.

The Court noted that, under the precedent of both *Cole* and *Johnson*, the defendant was not entitled to proportionality review of his sentence. The Court also repeated the ruling from the U.S. Supreme Court's ruling in *Harmelin* that: "There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'"

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1108223.pdf>

Fifth Amendment: Double Jeopardy

U.S. Supreme Court

McElrath v. Georgia: February 22, 2024

Georgia: Defendant appeals his retrial on Murder charges on Fifth Amendment Double Jeopardy grounds.

Facts: The defendant stabbed and killed his mother, the victim in this case. One week prior to the murder, the defendant, who suffered from schizophrenia, had been released from a civil commitment. The defendant called 911 to admit his crime and confessed to police. He claimed that he killed the victim because she had been “poisoning” him, which was one of the delusions that he had harbored for many years.

At trial, the defendant faced with three charges: malice murder, felony murder, and aggravated assault. The defendant did not dispute that he killed the victim but asserted an insanity defense. Under Georgia law, a jury may find a criminal defendant “not guilty by reason of insanity” if, at the time of the crime, he “did not have mental capacity to distinguish between right and wrong” or he committed the crime “because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.” Even if a defendant fails to prove an insanity defense, a Georgia jury may still render a verdict of “guilty but mentally ill.”

In this case, the jury returned a split verdict, finding the defendant not guilty by reason of insanity on the malice- murder charge and guilty but mentally ill on the felony- murder and aggravated- assault charges.

The defendant appealed. He argued that his felony-murder conviction should be vacated because the guilty-but-mentally-ill verdict for that crime was “repugnant” to the jury’s “not guilty by reason of insanity” verdict for malice murder.

The Georgia Supreme Court agreed that the acquittal of the murder charge was “repugnant” under Georgia law. The Court found that the not guilty by reason of insanity verdict on malice murder and the guilty but mentally ill verdict on felony murder based on aggravated assault required affirmative findings of different mental states that could not exist at the same time during the commission of those crimes as they were indicted, proved, and charged to the jury.

However, instead of vacating only the felony-murder conviction, as the defendant had requested, the Georgia Supreme Court vacated both the malice-murder and felony-murder verdicts and remanded the case for re-trial on the original charges. The Court concluded that the acquittal at issue in this case “lost considerable steam” when considered alongside the verdict of guilty but mentally ill, and because the verdicts were repugnant, “both [were] rendered valueless.” In the court’s view, repugnant verdicts were no different for double jeopardy purposes from “a situation in which a mistrial is declared after a jury is unable to reach a verdict.”

Held: Reversed. In a unanimous ruling, the Court held that the jury’s verdict of not guilty by reason of insanity on the malice-murder charge was an acquittal for purposes of the Double Jeopardy Clause. The Court therefore held that the Double Jeopardy Clause therefore bars retrial of on that charge.

The Court rejected the state’s argument that because no verdict under state law issued, no acquittal took place. The Court concluded that a jury’s verdict of not guilty by reason of insanity is a ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense. The Court made clear that “Once rendered, a jury’s verdict of acquittal is inviolate.”

The Court found that the jury's apparently inconsistent verdicts were irrelevant to Double Jeopardy analysis, repeating that the inconsistency of a verdict is insufficient to overturn it under the Fifth Amendment. The Court emphasized that once there has been an acquittal, the cases prohibit any speculation about the reasons for a jury's verdict — even when there are specific jury findings that provide a factual basis for such speculation — “because it is impossible for a court to be certain about the ground for the verdict without improperly delving into the jurors’ deliberations.”

The Court explained that “while an acquittal might reflect a jury’s determination that the defendant is innocent of the crime charged, such a verdict might also be “the result of compromise, compassion, lenity, or misunderstanding of the governing law.” ... Whatever the basis, the Double Jeopardy Clause prohibits second-guessing the reason for a jury’s acquittal. As a result, “the jury holds an unreviewable power to return a verdict of not guilty even for impermissible reasons.”

Full Case At:

https://www.supremecourt.gov/opinions/23pdf/22-721_kjfl.pdf

Smith v. U.S.: June 15, 2023

599 U.S. ____ (2023)

11th Circuit: Defendant appeals his conviction for Theft of Trade Secrets on Double Jeopardy grounds.

Facts: The defendant stole trade secrets, and the Government indicted him in the Northern District of Florida. The defendant moved to dismiss on improper venue, but the District Court denied the motion, reasoning that the victim felt the effects of the crime at its headquarters in the Northern District of Florida. A jury convicted the defendant.

On appeal, the Eleventh Circuit held that venue was improper on the trade secrets charge, but it disagreed with the defendant that this error barred re-prosecution. It concluded that the remedy for improper venue was vacatur of the conviction, not acquittal or dismissal with prejudice, and that the Double Jeopardy Clause was not implicated by a retrial in a proper venue.

Held: Affirmed. In a unanimous ruling, the Court held that the Constitution allows a retrial when a conviction is reversed because the prosecution occurred in the wrong venue and before a jury drawn from the wrong location.

The Court examined the history of both the Double Jeopardy Clause and the common law right to proper venue, reaching back to 1593. The Court found that a judicial decision on venue is fundamentally different from a jury’s general verdict of acquittal. The Court acknowledged that when a trial terminates with a finding that the defendant’s criminal culpability had not been established, retrial is prohibited. The Court also agreed that it also extends to essentially factual defenses that negate culpability by providing a legally adequate justification for otherwise criminal acts.

Conversely, the Court repeated that retrial is permissible when a trial terminates on a basis unrelated to factual guilt or innocence of the offence of which the defendant is accused. Thus, the Court found that the reversal of a conviction based on a violation of the Venue or Vicinage Clauses, even when styled as a judgment of acquittal, does not resolve the bottom-line question of criminal culpability.

Instead, the Court concluded that such a reversal is quintessentially a decision that the Government's case against the defendant must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt. In this case, the Court ruled, the Eleventh Circuit's decision that venue in the Northern District of Florida was improper did not adjudicate the defendant's culpability and therefore did not trigger the Double Jeopardy Clause.

Full Case At:

https://www.supremecourt.gov/opinions/22pdf/21-1576_e29g.pdf

Virginia Supreme Court

Thompson v. Dotson: April 11, 2024

(Unpublished)

Williamsburg: Defendant seeks Habeas relief regarding his robbery conviction on Double Jeopardy grounds.

Facts: The defendant robbed a victim at a shopping center. The defendant approached the victim, who was with her two children, and asked her for money. When she replied she did not have any, the defendant showed her a gun in his waistband. The defendant then took the victim's cell phone and wallet, which he searched.

Thereafter, the defendant engaged in a series of separate acts to try to obtain cash from the victim. The defendant asked the victim for her ATM card, stating: "Here's what we're going to do. You're going to get in the car and you're going to take me to get money." The defendant instructed her to drive to two ATMs where she attempted to withdraw money using her card but was unsuccessful. The victim escaped after she mouthed "help" to a witness and the defendant noticed and fled.

At trial, among many different offenses, the trial court convicted the defendant of both robbery and attempted robbery. On habeas, the defendant contended that his simultaneous convictions for robbery of the cell phone and attempted robbery of the cash violated his right against double jeopardy, and thus, he was denied his Sixth Amendment right to counsel based on trial counsel's failure to object and move to dismiss the attempted robbery charge.

Held: Habeas Petition Dismissed. The Court found that the record demonstrated that the robbery of the cell phone and the attempted robbery of the cash were two distinct and separate acts, separated in time and space, and each conviction was sustained by different evidence.

The Court found that the robbery of the victim's cell phone was a distinct and separate act that was completed while the defendant and the victim were still in the parking lot of the shopping center. The Court concluded that the defendant was not punished twice for the same offense. Thus, the Court found that there was no basis for the double jeopardy claim.

Full Case At:

https://www.courts.state.va.us/courts/scv/orders_unpublished/191075.pdf

McBride v. Commonwealth: October 19, 2023

Rev'd Panel Ruling of October 4, 2022

Fairfax: Defendant appeals his conviction for PWID, 3rd offense, on Permitting the Commonwealth to Reopen its Case.

Facts: The defendant possessed drugs with the intent to distribute, after having two previous convictions for that offense in Maryland. The Commonwealth litigated a pretrial motion to admit the prior convictions. At the motion to strike phase of the trial, the defendant argued that none of the Commonwealth's testimonial or documentary evidence tied the defendant on trial to the person referenced in the Maryland documents through a birth date, social security number, DMV records, photos, fingerprints, or any other identifying information. The Court agreed and granted the motion to strike.

After the trial court granted the defendant's motion to strike, the Commonwealth objected. The Commonwealth explained that it had not submitted any evidence about the defendant's identity because of the trial court's ruling in the pre-trial motion in limine to admit those documents. The trial court allowed the Commonwealth to reopen its case and submit additional evidence, explaining "since it was a misunderstanding, I'm going to allow you to reopen to call one witness."

Based on that added evidence, the trial court reversed itself and ruled that the cumulative evidence was now sufficient and overruled the motion to strike.

The Court of Appeals reversed the conviction. The Court found that the trial court erred under Rule 3A:15(c) by not entering an order of acquittal after the court elected to grant the motion to strike based on the evidence presented in the Commonwealth's case-in-chief. [Note: After the trial in this case, the Court amended a number of rules, including Rule 3A:15, to replace the word "shall" with the word "must" as part of an effort to clarify the use of the word "shall." The change was intended as a clarifying amendment and does not alter the meaning of the rules. – EJC].

Held: Court of Appeals Reversed, Conviction Affirmed. The Court ruled that Rule 3A:15 does not preclude a trial court from timely reconsidering a motion to strike. The Court further ruled that the trial court could exercise its discretion to permit the Commonwealth to introduce additional evidence concerning the Maryland court records.

The Court began by recognizing the "inherent" authority of a court to reconsider an erroneous or flawed decision, even if it is not mentioned in the text of a rule. The Court wrote: "The power to decide carries with it the power to reconsider as a necessary adjunct." The Court then acknowledged that this power can be constrained by rules or statutes that limit its timing or scope.

The Court then ruled that when a court has concluded that its earlier ruling on a motion to strike was erroneous or flawed, it may timely reconsider its decision to grant (or deny) a motion to strike, just as it may reconsider other decisions. The Court explained that: "The requirement of Rule 3A:15 that a court 'shall enter a judgment of acquittal if it strikes the evidence reflecting the judgment of acquittal' ensures an accurate record and thus protects a defendant from future jeopardy. It is not meant to cabin the discretion of a judge to promptly reconsider an erroneously granted motion to strike." Thus, the

Court found, a verbal pronouncement from the bench granting a motion to strike is not a final judgement for Double Jeopardy purposes.

The Court then examined the Double Jeopardy rule, specifically as applied by the U.S. Supreme Court in the *Smith* case. The Court distinguished the ruling in *Smith*, noting that in this case, the prosecution here did what the prosecution in *Smith* had not done, which is to immediately object to the trial court's decision to grant the motion to strike. In this case, the trial court also promptly reversed itself, before the defendant presented any evidence or released any of its witnesses, further distinguishing this case from *Smith*.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220715.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1354214.pdf>

Virginia Court of Appeals - Published

Davis v. Commonwealth: November 21, 2023

Spotsylvania: Defendant appeals his convictions for Possession of a Controlled Substance, Possession of a Firearm by Felon, Transportation of a Firearm by a Felon, Carrying a Concealed Weapon by a Felon, and related charges on Double Jeopardy, Admission of Court Records, Jury Instruction, and sufficiency grounds.

Facts: The defendant possessed fentanyl and two handguns while he was driving a car. Police stopped him because his vehicle was reported as stolen. The defendant then ran on foot from law enforcement, taking a firearm with him as he fled into the woods. Thirty minutes later, police apprehended him and discovered that he was carrying the gun concealed. The defendant admitted to being a convicted felon. An officer searched the defendant and found pills, which the defendant stated were Percocet.

Prior to trial, the defendant moved to dismiss one of the two charged offenses under § 18.2-308.2, to wit: Possession of a Firearm by Felon and Carrying a Concealed Weapon by a Felon, on Fifth Amendment double jeopardy grounds. The trial court denied the motion.

At trial, the officers testified about the firearms that they recovered. One officer testified that the item he found in the front seat of the vehicle was a nine-millimeter Smith and Wesson pistol. He explained that he had experience with firearms and could tell if a gun was "real." The officer said that the item was a "real gun" and recited its serial number.

The other officer testified that he had experience with firearms, testified that the item he found on the defendant's person was a "forty-caliber Smith and Wesson handgun semiautomatic with an extended mag and . . . one round in the chamber." He specified that this item was a "real gun." The officer explained that after he recovered the gun, he "rack[ed] it" to expel the bullet that was "in the

chamber.” The officer provided its serial number and also described it as a “real gun.” The juries watched the video recording from the officer’s body-worn camera that showed one of the guns when officers found it on the defendant’s person. The video also recorded the officer clearing the cartridge from the chamber of that gun.

At trial, the defendant argued that the Commonwealth did not lay the proper foundation to allow testimony that the items were firearms under the statute. He suggested that the testimony of the officers did not exclude the possibilities that the items were toys or replicas.

To prove the defendant’s previous felony conviction, at trial, the Commonwealth introduced documents from the Circuit Court of Prince George’s County, Maryland, which identified the defendant by his full name and date of birth. They reflected that the Maryland court accepted the defendant’s guilty plea to the charge of “Robbery with a Dangerous Weapon” and that he was convicted of that offense. They also include a copy of the grand jury indictment, which charged that the defendant committed robbery in violation of Maryland Criminal Law Code § 3-403 and recited the elements of that offense. Maryland Criminal Law Code § 3-403, robbery with a dangerous weapon, is a felony. The Commonwealth presented a copy of that code section to the trial court, and the trial court admitted a copy into evidence.

The officer also testified that the NCIC report listed the defendant’s felony conviction for robbery with a deadly weapon in violation of “CR3403MD,” indicating Maryland Criminal Law Code § 3-403. The officer also recited the case number, which matched the case number provided on the Maryland court documents. Although the officer did not explain who maintains the NCIC database during his testimony, he stated that he routinely relied on information contained within it for police matters.

At trial, the defendant argued that the documents failed to meet the relevancy standard because they did not satisfy the requirements of a judgment order.

At trial, a forensic scientist testified that percocet contains oxycodone, a Schedule II controlled substance. In fact, however, the scientist testified that she located fentanyl, a different Schedule II controlled substance, in the pills. The defendant argued that the Commonwealth failed to prove that he knew the nature of the controlled substance in his possession.

Lastly, the defendant objected to the language in the jury instructions that referred to him as the “defendant.” The defendant contended that the use of the term “defendant” in the jury instructions instead of his surname biased the juries against him and therefore did not comport with the tenet that he was innocent until proven guilty. The defendant argued that by referencing him as “the defendant” in the jury instructions, the trial court improperly shifted the burden of proof to him and away from the Commonwealth.

Held: Affirmed. The Court held that the two convictions under § 18.2-308.2 involving the same gun do not violate the defendant’s constitutional protection against double jeopardy. The Court also ruled that the trial court acted within its discretion by admitting officer testimony that the guns were “real.” The Court held that the trial court also properly admitted the Maryland court documents. The Court held that the evidence was sufficient to prove that the defendant had previously been convicted of a felony, that each gun in his possession met the applicable legal definition of a firearm, and that his possession of a controlled substance was knowing. Finally, the Court held that the trial court did not err

by rejecting the defendant's suggested jury instruction wording to refer to him by name instead of as "the defendant."

Regarding the defendant's double jeopardy argument, the Court repeated that, under *Baker*, each separate act or occurrence violating § 18.2-308.2 constitutes a separate offense. The gravamen of each of the firearm offenses proscribed by the statute is placing the community in "heightened danger," so consequently, each separate instance resulting in a heightened danger to the community may be punished separately. In this case, although he ultimately was caught not far from his car, the Court found that the defendant's act of taking the firearm with him, concealing it, and keeping it with him for the thirty minutes during which he evaded police created a heightened danger to the community separate and distinct from the danger when the officer first encountered him in the car. Therefore, the Court ruled that the trial court did not err by denying the defendant's pre-trial motion to dismiss one of the charges on double jeopardy grounds.

In a footnote, the Court pointed out that *Baker* addressed three convictions for possessing a firearm under § 18.2-308.2. This case, the Court pointed out, involved two alternative ways in which the Commonwealth can establish a violation of § 18.2-308.2: possession of a firearm and carrying it in a concealed manner. The Court explained that, just as someone can possess the same firearm in separate instances, giving rise to separate offenses, it concluded that someone could possess a firearm in one instance and carry it in a concealed manner in a second instance, similarly supporting separate charges and punishments.

Regarding the sufficiency of the evidence about the firearms, the Court repeated that the Commonwealth was not required to show that the items were operable at the time of the offenses. The Court also explained that the testimony did not have to exclude all possibility that the items were toys or replicas in order to be admissible. In this case, the Court ruled that the juries could reasonably conclude that the items in question were "designed, made, and intended to fire or expel a projectile by means of an explosion" and therefore, the Commonwealth presented evidence sufficient to prove that the items were firearms within the meaning of § 18.2-308.2.

Regarding the evidence of the defendant's previous felony conviction, the Court ruled that the documents, viewed together as a single exhibit, provided enough information to permit a fact finder to conclude that the defendant was previously convicted of a felony. The Court also agreed that the defendant's admission, the Maryland documents, and the NCIC information met the Commonwealth's burden of proving that the defendant had a previous felony conviction.

Regarding the nature of the controlled substance, the Court repeated that in proving the offense of illegal drug possession, the knowledge requirement may be met by showing that the defendant knew the identity of the substance he possessed, regardless of whether he knew it was illegal. In this case, the Court noted that the evidence that the defendant believed he had Percocet was enough to show that he had knowledge of the pills' nature and character as a Schedule II controlled substance.

In a footnote, the Court pointed out that the trial court had also instructed the jury that "the defendant does not need to know precisely what controlled substance" he possessed, although this issue is pending an *En Banc* hearing in *Camann v. Commonwealth*, which had yet to be decided as of this ruling.

Regarding the defendant's complaint about using the word "defendant" in jury instructions, the Court complained that the defendant cited no authority holding that a trial court must refer to a defendant by name in the jury instructions, and the Court itself did not find any authority either. The Court explained that the term "defendant," in a criminal proceeding, means nothing more than the "person . . . accused" of the crime or crimes. Accordingly, the Court ruled that the trial court did not abuse its discretion by referring to the defendant as "the defendant" in the jury instructions.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0903222.pdf>

Virginia Court of Appeals -
Unpublished

Heverin v. Commonwealth: May 14, 2024

Mecklenburg: Defendant appeals his convictions for Attempted Aggravated Murder, Conspiracy to Commit Murder by Mob, and related offenses on Denial of Cross-Examination, Double Jeopardy, Jury Instruction, and sufficiency of the evidence grounds.

Facts: The defendant conspired with a group of individuals to invade a home and steal a collection of guns. The defendant and his coconspirators discussed the plan to burglarize the home and cased the house. On the night of the attempted robbery, they wore dark clothing to conceal themselves to enter the home, took guns to the property, drove to the house, approached the house, and came within 20 feet of the home.

However, a confidential informant had alerted police to the plan. On the night of the attempted robbery, officers hid at the targeted home awaiting the defendant and the three other armed men. When one member of the defendant's group reached the porch of the house, someone in the group said, "that's twelve," a slang term for the police. After the officers yelled "freeze," someone fired a gun, and the group fled. A shootout ensued between the defendant, his accomplices, and the officers. One of the defendant's accomplices was killed, and another was injured. None of the officers were injured or killed. The officers subsequently arrested the defendant and the other man at the scene.

The defendant later told another inmate that he had a gun and that he fired it while running to escape in the woods. The defendant said he "shot till his clip was empty." Afterward, he tried to hide his gloves, mask, and gun.

Prior to trial, the Commonwealth argued during a motions hearing that the defendant should be prohibited from inquiring into or presenting evidence regarding the lack of officer body camera footage from the shootout. The Commonwealth explained that the officers followed policy in turning off their cameras and that the officers were concerned with following appropriate policy and federal law while carrying out a tactical maneuver that included communications based on classified and confidential information.

The defendant unsuccessfully argued that the trial court violated his constitutional rights by limiting his presentation of evidence and cross-examination regarding the lack of body-worn camera recordings from the night of the attempted burglary. He contended that he should have been allowed to present evidence and cross-examine the deputies to challenge their credibility or to establish bias. The trial court granted the Commonwealth's motion to exclude the evidence.

At trial, over the defendant's objection, the trial court granted the Commonwealth's "Concert of Action" jury instruction. The defendant argued that this was error for two reasons: (1) that the jury instruction did not apprise the jury that the Commonwealth must prove the defendant's specific intent, and (2) the Commonwealth was required to prove that the defendant was a triggerman to secure an attempted aggravated murder conviction.

At trial, among other charges, the trial court found the defendant guilty of six counts of attempted aggravated murder of a law enforcement officer. The defendant unsuccessfully argued that he could not be convicted of attempted aggravated murder as a principal in the second degree because of the "Triggerman" rule. The defendant also unsuccessfully argued that he lacked the required specific intent for each of the six attempted aggravated murder charges, because he did not intend to kill each of the six deputies. Lastly, the defendant unsuccessfully argued that the multiple convictions for attempted aggravated murder violated his constitutional protections against multiple punishments.

Held: Affirmed.

The Court first ruled that the "triggerman rule" does not apply to Attempted Aggravated Murder. The Court found, therefore, that the defendant could be (and was) found guilty as a principal in the second degree based on the concert of action theory of conspiracy, as there was evidence that the defendant's group fired far more than six shots at the officers. As a result, the Court explained, the Commonwealth did not need to prove that the defendant was individually responsible for each of the six attempted aggravated murders, even though the evidence supported that inference. Instead, through the concert of action theory, the defendant was liable for his coconspirators' actions as well as his own.

Regarding intent for Attempted Aggravated Murder of an Officer, the Court explained that the intent required is merely that the defendant intended to kill someone, not a particular person. In this case, because the defendant and the coconspirators were engaging in criminal activity, the Court agreed that the jury could also infer that the defendant shot at the officers to interfere with their official duties. The Court reaffirmed that it is "entirely permissible to infer that every person intends the natural and probable consequences of his or her acts."

Regarding the conviction for Conspiracy to Commit Murder by Mob, the Court found that a reasonable jury could find, based on all this evidence together, that the group had either a spoken or unspoken agreement to commit murder by mob if they received any resistance to their burglary plans.

Regarding the cross-examination about the lack of body camera footage, the Court complained that the defendant did not explain how the proposed evidence would go to the issue of bias of the witness or motive of the witness to fabricate. In this case, the Court noted that the Commonwealth gave an explanation regarding the lack of body camera footage and the defendant failed to offer any evidence refuting that explanation. The Court concluded that the fact that the body camera footage was absent does not, by itself, prove any wrongdoing or bias by the deputies, especially because the Commonwealth argued that the department followed its policies. Thus, the Court ruled that it was

neither unconstitutional nor an abuse of discretion for the trial court to exclude evidence of the lack of body camera footage, especially given the unique circumstances of this case.

Regarding the defendant's double jeopardy argument, the Court ruled that because the evidence was sufficient to convict the defendant of all six attempted murder charges, the trial court did not violate the defendant's constitutional protections. The Court explained that there was enough evidence to support the defendant firing his gun six times and thus there were six separate criminal acts by the defendant, all punishable without violating double jeopardy.

Regarding the defendant's jury instruction argument, the Court repeated that "concert of action" is an accepted theory of culpability for attempted murder. In this case, the Court agreed that the Commonwealth put on more than enough evidence to support the theory that the defendant was working with his coconspirators to commit a burglary and in the course of the commission of that crime he and his coconspirators engaged in a shootout with the deputies. Thus, the Court ruled that it was not error for the trial court to give this instruction.

The Court again rejected the defendant's "triggerman" argument. The Court explained that §18.2-18 excludes principals in the second degree to aggravated murder from the rule by stating "principal[s] in the second degree to an aggravated murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." The Court found that the statute does not exclude principals in the second degree to attempted aggravated murder from being punished as a principal in the first degree.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1239222.pdf>

Commonwealth v. Carter: April 16, 2024

Wise: The Commonwealth appeals the Dismissal of an Indictment on Double Jeopardy grounds.

Facts: In May 2020, the defendant, a prison inmate, attacked a correctional officer. In April 2021, the defendant was indicted for the assault and battery of a correctional officer. In May 2023, over two years after the indictment was issued, the trial court arraigned the defendant for that offense. About a month later, in June 2023, the defendant was also indicted for aggravated malicious wounding of the same officer, in violation of § 18.2-51.2(A). That indictment concerns the same attack on the same victim.

The defendant moved to dismiss the 2021 charge of assault and battery of a correctional officer on constitutional speedy trial grounds. The trial court granted the motion. The Commonwealth petitioned for an appeal of that ruling, but the appeal was denied on procedural grounds.

Before trial for the aggravated malicious wounding offense, the trial court granted the defendant's motion to dismiss the indictment based on a claim of double jeopardy. Pursuant to §§ 19.2-398 and -400, the Commonwealth appealed that ruling.

Held: Reversed, Motion Improperly Granted. The Court reversed the trial court’s dismissal of the indictment and remanded the case to that court for further proceedings.

The Court first declined to address the Commonwealth’s argument that because the charge of assault and battery of a correctional officer was dismissed prior to trial, jeopardy never attached in the first place regarding that offense. In a footnote, the Court explained that “While the Commonwealth’s argument that jeopardy never attached is well taken, we do not reach that issue because of our duty to decide cases on the best and narrowest ground.”

Instead, the Court chose to analyze whether assault and battery of a correctional officer and aggravated malicious wounding are the “same” offense for purposes of double jeopardy. Applying the *Blockburger* test, the Court observed that each of the two greater offenses—assault and battery of a correctional officer and aggravated malicious wounding—requires proof of at least two elements that the other does not. The Court found that this fact made it clear that neither of those offenses is lesser included in the other.

The Court concluded that aggravated malicious wounding is not “the same offense” as assault and battery of a correctional officer under the *Blockburger* same-elements test. As a result, the Court found that the defendant’s trial for aggravated malicious wounding will not violate double jeopardy principles.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1788233.pdf>

Allen v. Commonwealth: January 9, 2024

Henrico: Defendant appeals his conviction for Malicious Wounding on Fifth Amendment Double Jeopardy grounds.

Facts: The defendant struck his stepmother, driving her teeth through her gums. When she attempted to flee, the defendant struck her repeatedly in the head with an axe handle. The J/Dr Court convicted the defendant of assault and battery of a family member in the juvenile and domestic relations district court regarding the incident where the defendant punched the victim. The Commonwealth then indicted the defendant with malicious wounding based on him attacking her with the axe handle.

The defendant moved to dismiss on double jeopardy grounds, arguing that his conviction for malicious wounding violates the Double Jeopardy Clause of the Fifth Amendment because he was previously convicted of assault and battery of a family member regarding the same incident. The trial court denied the motion.

Held: Affirmed.

The Court explained that, while assault and battery is a lesser-included offense of malicious wounding, “against a family or household member” is a separate element such that the offense is not lesser included of malicious wounding. The Court rejected the defendant’s argument that “against a

family or household member” is nothing but a sentencing enhancement. Accordingly, the Court ruled that malicious wounding and assault and battery of a household or family member are separate offenses under the Blockburger test, and the defendant’s conviction of both did not violate double jeopardy

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1014222.pdf>

Hernandez v. Commonwealth: December 12, 2023

Prince William: Defendant appeals his convictions for Murder, Conspiracy, Stabbing in Commission of a Felony, and Gang Participation on Jury Selection, Brady, and Double Jeopardy grounds.

Facts: The defendant and another man, both MS-13 gang members, decided to ambush a rival gang member outside a restaurant. The defendant repeatedly stabbed the victim while his confederate repeatedly shot the man, killing him. Video surveillance captured the murder and police found the murder weapons at the defendant’s residence, along with MS-13 paraphernalia. Later, the defendant admitted his involvement to his girlfriend at the time and asked her to lie to create a false alibi.

During jury selection, a juror disclosed that he had been the victim of a violent assault by a group in which he was struck with a wine bottle while on a bus, causing an injury to his head requiring stitches. When asked if he could be fair and objective in reviewing the evidence, the juror stated, “It was a minority that attacked me. I’m going to try but I’m just saying I had the top of my head taken off, I had a reverse mohawk, I had it sewn back on.” The juror stated he would do his best to be impartial and denied believing the defendant more likely to be guilty as a minority. The defendant made no motion to strike the juror for cause, instead eliminating the juror with a peremptory strike.

At trial, another gang member testified for the Commonwealth. The witness testified that the defendant not only stabbed the victim, but also shot him. The witness admitted to having pending unrelated charges but denied that he was promised anything in exchange for his testimony. When asked why he was testifying, the witness stated that he wanted out of the gang and that the defendant wanted to blame him for the murder. On cross-examination, when asked what benefit he was getting for his testimony, the witness stated “None for right now. I’m not getting anything. I’m not receiving any kind of benefit.”

After trial, the defendant learned that prosecutors, during several meetings, told the witness that they could not make specific promises to him about what impact his cooperation would have in his own case, and the witness admitted that he was cooperating to avoid jail time. The defendant moved for a new trial, arguing that the Commonwealth’s failure to turn over the audio recording before trial was a violation of its obligations under *Brady* and that the Commonwealth’s failure to correct the witness’ testimony about why he was testifying and the number of times he met with the Commonwealth violated *Napue*.

The trial court denied the motion. The trial court found that the prosecutor under *Napue* “probably should have corrected” the witness’ statement at trial that he was testifying only because he

wanted to get out of the gang, and the witness' recorded admission of hope for limiting his incarceration was impeachment evidence that the Commonwealth should have disclosed under *Brady*. However, the trial court ultimately found that due to the overwhelming evidence establishing the defendant's guilt, these failures did not likely impact the jury's judgment.

After trial, the defendant also moved for a new trial, arguing that the trial court erred by failing to strike, sua sponte, the juror for cause due to bias. The trial court denied that motion as well.

Lastly, the defendant argued his three sentences for gang participation under § 18.2-46.2 violated double jeopardy. The trial court rejected the argument.

Held: Affirmed.

Regarding the *Brady* issue, the Court agreed that the record demonstrated that the Commonwealth made the witness no promises of any kind in return for his testimony. Thus, the Commonwealth was not obligated to correct the witness' testimony that no promises were made in exchange for his testimony, especially given the witness' admission at trial that he was given no promises "for right now." Assuming without deciding that this evidence should have been disclosed pre-trial and corrected at trial, the Court found that the record supported the trial court's finding that there was no impact upon the verdict.

The Court pointed out that, giving the overwhelming evidence in this case, the only charge that would have rested entirely on the witness' testimony was the felonious use of a firearm, as the other witness testified that the defendant was not armed with a gun. However, the jury acquitted the defendant of that offense.

Regarding the juror, the Court repeated that objections related to the selection of the jury must be raised either during voir dire or before the jury is empaneled. Although Rule 3A:14(b) permits a trial court to strike a juror on its own motion, a defendant is still required to timely object to preserve the argument under Rule 5A:18. While § 8.01-352 permits a litigant to make a post-trial juror motion with leave of court, the Court emphasized that for the defendant to succeed on appeal by way of his post-trial motion, he must show that the juror's "disability be such as to probably cause injustice" in his case, per § 8.01-352(B). In this case, the Court concluded that the defendant failed to establish what, if anything, would have differed in the empaneled jury as a result of his using a peremptory strike against the juror. Thus, the Court ruled that he did not prove that his use of a peremptory strike "probably cause[d] injustice."

Lastly, regarding the defendant's double jeopardy argument, the Court noted that, under § 19.2-297.1, both first-degree murder and conspiracy to commit first-degree murder are "acts of violence." Thus, each of the defendant's three underlying convictions were criminal acts that may serve as the "predicate" for a conviction under § 18.2-46.2. The Court reasoned that if the legislature had intended for only one punishment of gang activity for multiple predicate criminal acts, it would have used "one or more predicate criminal acts" in lieu of "any predicate criminal act." The Court ruled that the trial court did not err in rejecting the defendant's claim that sentencing him upon more than one conviction for criminal gang participation violated double jeopardy principles.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1221224.pdf>

Newport News: Defendant appeals his conviction for Murder, Use of a Firearm, and Malicious Shooting on Admission of Hearsay Evidence and Double Jeopardy grounds.

Facts: The defendant shot and killed his ex-girlfriend in her apartment and staged the scene to make it appear to be a suicide. The victim was right-handed; police found that the victim's hand was underneath her body and the firearm was on a desk on her left side. Police also found gunshot residue on the defendant's hands and his DNA on the firearm. The Commonwealth indicted the defendant with second degree murder, use of a firearm, and shooting in an occupied building under § 18.2-279. The Commonwealth charged the Class 4 felony of shooting in an occupied building, rather than shooting resulting in death, which is punished as second-degree murder.

At trial, the Commonwealth introduced testimony from a witness who stated that the victim "told me she had been walking on eggshells and stated that [the defendant] had been drinking more and she was just trying to get through the next two weeks" before she moved out. The defendant objected, arguing that the victim's statements were inadmissible because her state of mind had not been relayed to the defendant prior to her death. The trial court admitted the evidence over the defendant's objection.

At the conclusion of the trial, the jury found the defendant guilty of second-degree murder, use of a firearm, and shooting in an occupied building (Class 4 felony). The defendant argued that it was a violation of Double Jeopardy to convict him of both second-degree murder and shooting in an occupied building, even if the shooting offense was not charged as a murder offense. The trial court rejected his argument.

Held: Affirmed. The Court held that the witness' testimony regarding the victim's statements was properly admitted, as it was both relevant and more probative than prejudicial. The Court also found that the trial court did not violate the protections against double jeopardy.

Regarding the witness' testimony, the Court found that the victim's state of mind was relevant, especially as the defendant argued at trial that the victim's death resulted from an accidental shooting or suicide. The Court noted that the witness did not testify as to any specific threats or acts of violence by the defendant in the past; instead, she testified only regarding the victim's state of mind. The Court analogized this case to the *Clay* and *Hodges* cases and rejected the defendant's analogy to the *Hanson* case. The Court ruled that the trial court did not err in finding that the witness' testimony was relevant to the main issue in the case and that its limited content was more probative than prejudicial.

Regarding the defendant's double jeopardy argument, the Court found that because the defendant was not convicted of second-degree murder under § 18.2-279, nor did he receive "multiple punishments" for the murder, his double jeopardy rights were not violated in this case. The Court applied the ruling from *Commonwealth v. Gregg* that reversed convictions for common law involuntary manslaughter and of involuntary manslaughter under § 18.2-154 as violative of Double Jeopardy. The Court examined the statutory language in § 18.2-279 and found it to be nearly identical to that found in

§ 18.2-154. Just as in *Gregg*, the Court concluded that § 18.2-279 “simply created a mechanism that permits the Commonwealth to substitute proof of distinct facts” to show second-degree murder. Thus, under *Gregg*, the Court found that the defendant could not be convicted of common law second-degree murder and of second-degree murder under § 18.2-279 for the same shooting.

In a footnote, the Court pointed out that the Blockburger analysis for maliciously shooting into an occupied building without causing the death of a person is quite different from the elements of second-degree murder and would not result in a double jeopardy violation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1313221.pdf>

Fifth Amendment: Interviews & Interrogations

Virginia Court of Appeals - Published

Paxton v. Commonwealth: March 12, 2024

Richmond: Defendant appeals his murder conviction on Fifth Amendment *Miranda* grounds.

Facts: The defendant shot and killed his girlfriend. Police arrested him, advised him of his *Miranda* rights, and interviewed him. During the interview, the following exchange took place:

Defendant: Sir I did not shoot her.

Officer: You did shoot her.

Defendant: I don't wanna talk no more.

Officer: Ok, that's fair enough, absolutely fair enough. I gave you the opportunity to talk, you didn't want to talk, and that's fine, so you're being charged right now with the carjacking of the car, and use of a firearm in the commission of a felony, and you will be taken to the magistrate and processed.

Defendant: Sir.

Officer: Yes.

Defendant: What?

Officer: Mmm-hmm, unless you can come up with a reasonable explanation, . . .

Defendant: Sir, what else do you wanna know? I'm tellin[g] you everything.

Officer: I wanna hear the truth.

The defendant then agreed to speak again and confessed to killing the victim.

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

The defendant testified in his own defense at trial.

Held: Reversed. The Court ruled that the police did not scrupulously honor the defendant's right to cut off questioning. The Court ruled that the trial court therefore should have suppressed his incriminating statements. The Court also ruled that the defendant did not waive his objection to the admission of incriminating statements by testifying at trial about the interrogation.

The Court first repeated that the statement, "I do not want to answer any more questions" is the exemplar of an unambiguous invocation of the right to remain silent. The Court found that the defendant's statement, "I don't wanna talk no more," was similarly unambiguous.

The Court then rejected the Commonwealth's contention that the defendant voluntarily re-initiated the conversation by stating "Sir. . . . What?" The Court pointed out that within moments of the defendant's invocation, the officer posed an interrogatory question. Thus, the Court argued, while facially claiming to honor the defendant's invocation of his right to silence, the officer "dangled the possibility of the defendant escaping criminal liability if he kept talking and provided [the defendant] with a "reasonable explanation" for the circumstances...". The Court contended that the officer's conduct undermined any claim that the interrogation had in fact ended.

The Court acknowledged that, if an officer is unsure whether a suspect wishes to reinitiate the interrogation, he properly may question the suspect about whether he still wishes to remain silent. Thus, for example, in *Rashad* officers did not violate *Miranda* when they responded to the suspect's post-invocation question by saying "we can't talk to you anymore [because] you've asked for a lawyer" and then asking several questions to clarify whether the suspect wished to waive his right. In *Medly*, the Court noted, police do not violate *Miranda* when they respond to an ambiguous reinitiation by emphasizing the suspect's rights and explaining that they may not talk to him about the case unless he voluntarily waives those rights. In this case, however, the Court complained that the officer did not reiterate the defendant's rights, attempt to answer the defendant's question, or ask the defendant to clarify his question.

The Court then ruled that when the prosecution's illegally obtained evidence impels the defendant's testimony, that impelled testimony cannot be used as a loophole to cleanse the illegally obtained evidence. The Court reasoned that even if the defendant would have testified had the Commonwealth not introduced his incriminating statements, the "natural inference" is that he would not have testified about those statements.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0910222.pdf>

Martinez Ayala v. Commonwealth: October 31, 2023

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

Facts: The defendant sexually assaulted his stepdaughter beginning when she was six years old. Police arrested the defendant and interviewed him. Although he could not read or write English, the defendant could understand and speak English. The defendant had a previous offense of domestic

violence and been to jail before. The officer gave the defendant a form written in Spanish that enumerated each *Miranda* right. The defendant reviewed each right written in Spanish as the officer verbally identified it in English. The defendant verbally acknowledged in English that he understood the rights. He then signed the Spanish rights form.

For about an hour, the defendant and the detective spoke entirely in English in a conversational manner. The officer told the defendant what the alleged crimes were, reciting the general offenses. The officer also conveyed that his circumstances were “serious” and told the defendant the identity of the victim. At the end of the interview, the defendant told the officer that he did not wish to speak any further and indicated that he planned to “wait ‘til [he] g[ot his] attorney.” As a result of those comments, the officer complied without question and ended the interview.

The defendant moved to suppress his statements, arguing first that he did not understand the consequences of the decision to abandon his *Miranda* rights because he did not know why he was in police custody. The defendant also contended that he did not waive his *Miranda* rights because he never expressed that waiver verbally.

The trial court denied his motion.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress.

The Court first agreed with the trial court that the record demonstrated that the defendant had a “firm understanding” of the seriousness of the charges. The Court then examined the defendant’s claim that he did not affirmatively waive his rights. The Court repeated that a waiver may be inferred from the words and actions of the individual being questioned. In this case, the Court ruled that the defendant’s review of the *Miranda* rights form and the ensuing voluntary communication with the officer, as well as his termination of that communication, demonstrated the validity of his waiver.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0748222.pdf>

Griffin v. Commonwealth: August 1, 2023

78 Va. App. 116, 890 S.E.2d 619 (2023)

Alexandria: Defendant appeals his conviction for Battery on Fifth Amendment *Garrity* grounds, *Batson* Jury Selection Issues, Jury Instruction Issues, Refusal to Admit Victim Character Evidence, and sufficiency of the evidence.

Facts: While delivering an ECO detainee to the hospital, the defendant, a police officer, moved the detainee to a registration desk. The detainee was in handcuffs at the time. When the detainee began to pull back and resist the officer’s control, the officer gave one or two demands to the detainee to “stop resisting.” The officer then grabbed the detainee with both hands and used his right leg to sweep the detainee’s legs out from under him. The detainee, still handcuffed behind his back, fell face-first onto the hospital floor, sustained facial injuries and broke his kneecap.

At trial, the defendant testified that he thought the detainee “was putting himself in a position where he could assault me.” The defendant also admitted, “I didn’t react properly” because he had intended to use some technique other than a leg-sweep to bring the detainee to the ground.

The defendant also testified that he was concerned about the detainee, whom he knew suffered from bipolar disorder. He testified that he was also aware that the detainee had “made threats to several government installations and had a previous conviction of arson.” The defendant also testified that he had heard that the detainee had assaulted a nurse and a deputy at a mental health hospital in the past and that the detainee “had physically confronted firefighters” in the past. However, the defendant acknowledged that the detainee had not made any verbal threats toward hospital staff and had not tried to bite or spit at anyone in the hospital.

A police sergeant investigated the case. The sergeant interviewed the defendant as part of the investigation. Before the sergeant spoke with the defendant during the administrative investigation, he gave the defendant a “*Garrity* Form” which stated that the “employee can be compelled to respond and failure to do so is subject to disciplinary action up to and including termination.” The defendant then made several statements. The sergeant then watched the video of the incident and interviewed the witnesses who were on the video.

Prior to trial, the defendant moved to dismiss the prosecution on the grounds that the sergeant violated the defendant’s Fifth Amendment rights under *Garrity*. The sergeant testified that he maintained a wall between both investigations. Furthermore, when he gave his criminal investigation file to the Commonwealth, the sergeant only included information obtained from the witnesses with whom he spoke, including those at the hospital. The sergeant testified that he specifically did not give any of the defendant’s *Garrity*-protected statements to the Commonwealth’s Attorney. The trial court denied the defendant’s motion, concluding that “there’s no evidence before the Court that there was anything” derived from the defendant’s protected statements.

During jury selection, the defendant challenged all four of the Commonwealth’s peremptory strikes under *Batson*, arguing that the Commonwealth had used its peremptory strikes to remove “all white males” from the jury. The prosecutor explained that she struck the first juror from the venire because “he was a neighbor of [another juror] and I didn’t want both of them on the panel.” The prosecutor added that the juror “also rolled his eyes at several attempts of humor to include Your Honor’s at the very end.”

Regarding the other juror, the Commonwealth explained that she struck the second juror because he “didn’t talk at all” and because she “couldn’t see him during most of the selection” process, which she said meant that she did not “know enough about him.” The trial court overruled the defendant’s *Batson* challenge.

At trial, the defendant sought to introduce several pieces of evidence concerning the detainee’s mental health history and aggressive behavior from various sources, including an incident at another hospital in the previous year and several incidents that took place after this incident. The defendant argued that the evidence of the detainee’s mental health history, his history of violence, and of his “history of resentment and hostility against first responders and hospital staff” was admissible under this exception because it was “relevant to the need for the use of force.”

The trial court excluded the defendant's proffered evidence, but allowed the defendant to testify regarding what he knew about the detainee's mental health and behavioral history that informed and affected the defendant's decisions that day.

At trial, the Court gave an instruction on the elements of Battery. The instruction, to which the defendant objected, read as follows:

"The defendant is charged with the crime of assault and battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant willfully touched James Lenzen without legal excuse or justification; and
- (2) That the touching was done in an angry, rude, insulting, or vengeful manner.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of assault and battery.

If you find that the defendant had a legal excuse or justification to touch James Lenzen but that the force used during the touching was excessive, then you shall find the defendant guilty of assault and battery.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the crime as charged, then you shall find the defendant not guilty."

During jury deliberations, the jury sent a question asking "Do both elements (1 & 2) apply to be found guilty? Paragraph 3 seems to negate Paragraph 1 by stating that the focus of the charge is based on the force used being excessive, is this accurate?" The trial court provided a written response to the jury stating, "Whether the touching was without legal excuse or justification or if there was legal excuse or justification but the force was excessive the Commonwealth, in either event, must prove that the touching was done in an angry, rude, insulting, or vengeful manner."

Held: Affirmed.

The Court first addressed the defendant's *Garrity* argument. The Court acknowledged that the Commonwealth bore the burden of proving by a preponderance of the evidence that the sergeant's administrative investigation did not taint the Commonwealth's criminal case but cautioned that "the burden of proof imposed by *Kastigar* does not require the prosecution to 'negate every abstract possibility of taint.'" In this case, the Court found that there was no evidence that the Commonwealth used the defendant's protected statements in any way to develop its case. The Court wrote: "While it certainly was not advisable or wise for the police department to have Sergeant East conduct both the administrative investigation and the criminal investigation of Griffin (a point Sergeant East made to the then-chief of police), *Garrity* and its progeny did not create a per se rule requiring different investigators for the different investigations."

Regarding the defendant's *Batson* challenge, the Court noted that the prosecutor based her reasons for striking the jurors based upon her observations (or lack thereof) of the jurors' body language. The Court repeated that a juror's body language or demeanor during voir dire is certainly a gender-neutral and race-neutral reason for striking a juror. The Court refused to find that the trial court erred in crediting the prosecutor's gender-neutral and race-neutral explanations for striking the jurors.

Regarding the excluded defense evidence, the Court first pointed out that the defendant did not present evidence that the defendant acted in self-defense. The Court then rejected the defendant's

argument that the entirety of the detainee's mental health history and criminal record were relevant to the question of whether the defendant's use of force was reasonable. Instead, the Court explained that evidence relevant to the question of whether the use of force was objectively reasonable would have been only circumstances known to him at the time of the incident.

In this case, the Court explained that testimony from others about their own experiences with the detainee and knowledge of his behavior do not bear on the reasonability of the defendant's decision because the specific details of their experiences did not inform the defendant's actions on that day. Conversely, the Court noted that the jury was able to hear quite a bit about the defendant's knowledge of the detainee's character and how it informed his decision to take the detainee to the ground that day.

Regarding the jury instruction, the Court found that, to the extent that it may have confused the jury as to whether the Commonwealth needed to prove that the defendant touched the detainee in an angry, rude, or insulting manner in addition to proving that the defendant acted with excessive force, the trial court remedied any such issue by the clarifying instruction it issued following the jury's questions. The Court concluded that, in the trial court's clarifying instruction in answer to the jury's question, the trial court clearly and unequivocally instructed the jury that regardless of whether the jury found that the defendant used excessive force, the Commonwealth still "must prove that the touching was done in an angry, rude, insulting, or vengeful manner."

Lastly, regarding the sufficiency of the evidence, the Court repeated that a police officer's use of excessive force is a battery because that touching is not justified or excused and therefore is unlawful. The Court also repeated that the reasonableness of the force is evaluated from the objective perspective of a reasonable police officer on the scene, allowing for officers to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary."

In this case, the Court noted that the detainee, who was handcuffed and in the defendant's custody, had not made any attempts to flee custody and had not made any threatening movements toward any of the hospital staff (or other patients). Furthermore, the Court pointed out that the evidence showed that the detainee had been compliant—at least until the defendant forced him to move a few steps closer to the registration counter.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0485224.pdf>

Virginia Court of Appeals -
Unpublished

Ali v. Commonwealth: May 28, 2024

Chesterfield: Defendant appeals his convictions for Abduction on Fifth Amendment *Miranda*, Hearsay, and sufficiency of the evidence grounds.

Facts: The defendant, a Lyft ride-sharing driver, picked up the victim, who was intoxicated and had requested a ride using a ride-sharing app. The defendant arrived at the victim's home and then provided notice to Lyft that he had arrived at the agreed destination. However, instead of leaving the victim at her home as agreed, the defendant then drove her to a nearby church parking lot while the victim was unconscious. While in the parking lot, the victim awoke, discovered that her pants and underwear had been pulled out of place, and the defendant was "close to" her. The victim immediately began striking the defendant while demanding that he take her home. The defendant finally took the victim home.

Officers investigated and spoke to the defendant at the police station. There, the officers explained to the defendant that he was not under arrest and that he could leave the interview whenever he wanted. That interview took place in English, although the defendant's brother translated some statements for him into Arabic. The defendant made various false statements, including denying that he brought the victim to the church at all.

Later the same day, an officer arrested the defendant and conducted a second interview. The officer began that interview by both reading the defendant his *Miranda* rights in English from a printed card and by explaining in greater detail the various *Miranda* rights he possessed. The defendant advised the officer that he had no questions about his rights and continued the interview. The officer used the language line to conduct the interview in Arabic.

Prior to trial, the defendant moved to suppress his statements to the police. The defendant argued that he had not validly waived his *Miranda* rights prior to being interrogated, based on his alleged lack of knowledge of the English language which he alleged prevented him from understanding the *Miranda* warnings given him by the officer. As a result, he asserted that he neither knowingly nor voluntarily waived his constitutional rights. After reviewing the videotaped statements, the trial court determined that the defendant was able to communicate in English.

The defendant also argued that the officer employed "a number of devious and deceptive tactics to attempt to coerce a confession from" him. He first contended that the officer's failure to advise him of his rights during the first interview followed by a second interrogation the same day constituted coercion. The defendant then asserted that the officer lied to him about having proof that a sexual assault occurred during the interrogation and that the officer repeatedly told the defendant that he was a "good and honorable man." The trial court overruled the defendant's motion to suppress and ruled that the defendant voluntarily waived his *Miranda* rights when the officer interviewed him.

During trial, the defendant objected to the responding officer's testimony, in which the officer described the victim's statements to him indicating that the defendant had touched or attempted to touch her sexually. The victim had testified that she could not recall any sexual assault or touching of any kind. The trial court overruled the objection and admitted the officer's testimony.

At trial, the defendant unsuccessfully argued that the evidence presented by the Commonwealth was insufficient to support a conviction for abduction because there was no evidence that he used force, intimidation or deceit to transport or confine the victim, nor was there any evidence that he intended to deprive her of her personal liberty. He contended that since the victim voluntarily entered the vehicle and then failed to exit it, his driving beyond her destination cannot constitute "force" within the meaning of the statute.

Although the defendant was indicted and tried by a jury for abduction with intent to defile, the jury convicted him only of the lesser-included offense of abduction.

Held: Affirmed.

Regarding the motion to suppress, the Court agreed that the record supported the trial court's factual determination that the defendant was able to communicate in English. The Court complained that the defendant provided no citation to any authority nor argument that two interviews on the same day constituted coercion that overbore his will.

Regarding the responding officer's testimony relating statements that the victim made indicating that the defendant had touched or attempted to touch her sexually, the Court concluded that although the admission of this hearsay testimony was in error, the error was harmless. The Court noted that although Rule 2:801(d)(2) expressly allows for admission of a "prior statement that is consistent with the hearing testimony of the witness," the victim testified at trial that she could not recall any sexual assault or touching of any kind. Hence, the Court pointed out, the prior hearsay statements admitted through the responding officer were not consistent with the victim's testimony at trial. Thus, the Court ruled that the statements were not admissible pursuant to Rule 2:801(d)(2), and the trial court erred in concluding that they were.

However, since the totality of the evidence submitted at trial was overwhelmingly indicative of guilt, the Court concluded that any influence the officer's testimony might have had upon the jury's determination was insignificant and slight, especially given that the defendant was convicted of the lesser-included offense of abduction.

Regarding sufficiency, the Court noted that in this case, the defendant took a woman to an unwanted location after arriving at the agreed destination. The Court found that the evidence that the victim was unconscious, intoxicated, and unaware that she had reached her destination also supported the jury's conclusion that the evidence met the degree of force required to support the conviction for simple abduction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1894222.pdf>

Pough v. Commonwealth: May 28, 2024

Portsmouth: Defendant appeals his conviction for Murder on Fourth Amendment, Fifth Amendment *Miranda*, Jury Instruction, and sufficiency grounds.

Facts: The defendant saw a man chase his girlfriend into their house over allegedly stolen marijuana. The defendant stabbed the man over sixty times in the back and side. The defendant disposed of the victim's body in a trash can and drove the victim's car for two days.

Two days after the murder, however, after seeing officers in the place where the defendant had last parked the stolen car, the defendant called 911 and reported that he was in possession of a stolen automobile and that the automobile's owner was dead and "stored in a nearby trash can." In response,

officers went to the defendant's home. Both were wearing uniforms and displaying their badges and had guns visible in their holsters. When they first encountered the defendant on the sidewalk in front of his home, they asked if he had any weapons and briefly patted him down. An officer told the defendant to take a deep breath, relax, "sit down," and explain the situation. The officers did not give the defendant any *Miranda* warnings at this time.

After the defendant confessed to the murder, officers discovered the body and arrested the defendant. He told the officers that his father was inside the home. Officers then entered the home and did a protective sweep of the house. Officers later explained that they did that "to secure it so there [were] no other people inside." Officers located the defendant's father and girlfriend inside the home. They secured the home, obtained a search warrant, and executed the warrant. Police also interrogated the defendant at the police station after informing him of his *Miranda* rights.

Prior to trial, the defendant moved to suppress. The defendant moved to suppress the evidence due to the protective sweep on Fourth Amendment grounds and moved to suppress his statements to police on Fifth Amendment grounds. In support of his argument that the conversation amounted to a custodial interrogation, the defendant noted that he was underage at the time of the conversation, there were multiple officers present, the officers never told him that he was free to leave, and they did not question him in his father's presence. The defendant further argued that the post-*Miranda* statement he gave at the police station should be suppressed, because it was the "natural outflow of the prior statements" he made "without the benefit of *Miranda* warnings."

The Court denied the motions to suppress.

At trial, the Commonwealth did not call the defendant's girlfriend as a witness. The Commonwealth asserted that it could not make her incriminate herself in court and the girlfriend was not a material witness. As a result, the defendant proffered a jury instruction that "[t]he unexplained failure of the prosecution to produce a material witness raises a presumption that the testimony of that witness would have been adverse to the prosecution, and beneficial to the defendant." The trial court denied the instruction.

At trial, the defendant claimed self-defense, citing the 2018 *Lienau* ruling to support his argument that "a violent, unwanted entry can constitute an overt act that may reasonably place a party in fear for their own life." The trial court rejected that defense.

Held: Affirmed.

Regarding the Fourth Amendment challenge to the officers' "protective sweep" of the home, the Court ruled that the protective sweep was justified as a warrantless search under the Fourth Amendment. The Court reasoned that the warrantless entry was a reasonable response to police perception of possible danger based on the defendant's statement that someone else, appellant's father, was inside the home. The Court explained that the fact that the defendant indicated his father was not aware of the situation did not automatically negate the threat the father may have posed; instead, it was reasonable for police to secure the premises in case other occupants posed a similar danger. The Court contended that the fact that police detained the defendant before entering did not render the sweep unreasonable, because they had reason to believe that the house harbored at least one other person.

Regarding the defendant's Fifth Amendment *Miranda* argument, the Court concluded that the defendant was not subject to a custodial interrogation when he made his initial, pre-*Miranda* statements, because his freedom of movement was not restrained to the degree associated with formal arrest. The Court observed that the conversation took place at the defendant's home. The Court pointed out that there was no evidence that officers were intentionally blocking him or physically restraining him until the conversation concluded. The Court noted that although officers patted the defendant down for weapons, it was not prolonged and did not restrict the defendant's freedom of movement. The Court also noted that the defendant volunteered most of the information with only minimal prompting by police. The Court also pointed out that the tone remained casual the entire five-minute conversation.

Regarding the defendant's post-*Miranda* statements, the Court pointed out that, unlike in *Seibert*, there was no evidence suggesting that police used a deliberate, two-step strategy to obtain the defendant's second statement. The Court agreed that in their initial interview, officers were "simply trying to find out what happened" and that *Miranda* warnings were not required as a result.

Regarding the defendant's proposed jury instruction, the Court ruled that because the jury instruction was not a clear statement of the law and was not supported by the evidence, the trial court did not err in rejecting it. The Court explained that a missing witness presumption instruction would be improper in a criminal case, regardless of which party it would favor.

Regarding sufficiency, the Court pointed out that the defendant followed directly behind the victim going up the stairs and stabbed him primarily in his left side and back, so the fact finder could reasonably infer that the victim was not facing the defendant head-on in an act of aggression. The Court also noted that the victim did not have anything in his hands, did not say anything to the defendant directly, and did not even look in the defendant's direction. In a footnote, the Court rejected the defendant's reliance on the *Lienau* ruling, noting that the victim did not use force or violence to enter the defendant's home but simply came through the door that the girlfriend had left open. For these reasons, the Court explained that *Lienau* does not support the defendant's self-defense argument.

Further, the Court contended that the defendant's use of a deadly weapon was not reasonable in relation to the harm threatened. Instead, the Court found that the defendant's reaction was grossly disproportionate in light of the harm threatened. Consequently, the Court ruled that the evidence was sufficient to permit a rational fact finder to reject the defendant's self-defense theory.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0236231.pdf>

Hamlin v. Commonwealth: May 14, 2024

Dinwiddie: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Fourth Amendment and Chain of Custody grounds.

Facts: The defendant, a convicted felon, possessed fentanyl, cocaine, heroin, and methamphetamine in his vehicle for distribution along with several firearms. Police received two calls about a vehicle traveling the wrong direction on a highway and a third call that the vehicle had stopped

in the middle of the highway. Around midnight, an officer approached the stopped vehicle after discovering it in the middle of the highway on top of the center dotted line with its brake lights on. When the officer first approached the vehicle, the defendant was not alert despite the officer shining his flashlight inside. The vehicle started rolling when the officer roused the defendant by repeatedly knocked on the driver's side window.

The officer told the defendant to put his vehicle in park and to step out of the car. After multiple instructions from the officer, the defendant complied. An unfired round of ammunition fell from the defendant when he moved to the rear of the vehicle with the officer. The defendant did not have any identification. Dispatch reported back by radio that the defendant was not licensed to drive and warned the officer to use caution. The defendant told the officer that he was a felon.

Another officer, from the roadway, looked through the open driver's side window of the vehicle and observed firearms. There was an AR-15 rifle standing straight up in the passenger side seat with a double drum magazine as well as a handgun with an extended magazine laying on the driver's side floorboard. In front of the defendant, the officer radioed dispatch to confirm the defendant's felon status. Without being asked, the defendant said, "I got felonies." Dispatch then reported that the defendant had been convicted of numerous felonies.

Officers searched the vehicle and recovered six bags of suspected narcotics, the AR-15 rifle, two handguns containing ammunition magazines with ammunition inside, and seven additional boxes of ammunition from inside the car.

The defendant moved to suppress, arguing that there was no probable cause for the search and that the officers only knew he was a felon because of information they gained when he was questioned while being detained without the benefit of *Miranda* warnings. The trial court denied the motion.

Prior to trial, pursuant to and in compliance with § 19.2-187, the Commonwealth provided written notice that it intended to use a certificate of analysis showing that the laboratory had tested various substances and determined them to contain fentanyl, cocaine, heroin, and methamphetamine. The defendant did not file an objection as required by the statute.

At trial, the arresting officer testified that he sealed, initialed, and locked the evidence in a secure facility. He then testified that someone from the sheriff's office was responsible for transporting that evidence to the laboratory, and that the certificate of analysis described sealed envelopes containing evidence exactly like that which the officer collected. The person who transported the drugs to the lab did not testify.

The defendant objected to the certificate of analysis on the ground that the Commonwealth did not establish the chain of custody for the drug evidence. He argued that there was no evidence about where those substances were in the days between collection and testing. The defendant stated that he was challenging only how the drugs were transported to the lab. The trial court overruled the defendant's objection.

Held: Affirmed.

Regarding the motion to suppress, the Court agreed with the trial court that the police had probable cause to search the vehicle. The Court agreed that the firearms that the officers saw, coupled with their knowledge that the defendant was a felon, gave the police probable cause to search the vehicle, even independent of the bullet that fell from the defendant's person.

Regarding the defendant's *Miranda* argument, the Court found that binding case law foreclosed the defendant's argument that the physical evidence obtained from the car was "the fruit of the poisonous tree" because the search stemmed from the defendant's unwarned admission that he had a felony conviction. The Court cited the US Supreme Court's *Patane* ruling that the Self-Incrimination Clause is not implicated by the admission into evidence of the physical fruit of a voluntary statement, even if that statement is obtained through custodial interrogation conducted without *Miranda* warnings. Accordingly, the Court explained, even if it agreed that the defendant was in custody at the time he admitted to having a felony conviction, the physical evidence obtained from the vehicle cannot be the fruit of the poisonous tree.

Lastly, regarding chain of custody, the Court agreed that the Commonwealth met its burden of proof. The Court acknowledged that the Commonwealth did not establish exactly who transported the evidence from the evidence lockup to the laboratory for testing. The Court ruled that the officer's testimony was enough to establish with reasonable certainty that the laboratory tested the same evidence that the officer collected.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0441232.pdf>

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim's brother called 911 and told the dispatcher that the victim had called him and told him that "her boyfriend had shot her and they were trying to kill her." The brother stated that the victim could barely speak. He also stated that he "d[idn't] know what to do" because he doesn't live near the victim. He stated that "she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster." On the recording, the brother said it sounded like the victim "was hiding" while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver's seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions

like, “You doing all right man?” and, “you still tired?” The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, “how was your day, though?” to which the officer responded, “It was good, how was yours?” The defendant answered: “It was horrible,” to which the officer reiterated, “horrible day?” The defendant also asked the officer, “you know, I found evidence of her almost burning me?” to which the officer responded, “[b]urning you?”

The defendant also asked the officer “hey, is that Michael Kors bag going to go . . . in my evidence file?” The officer asked, “what’s that?” The defendant clarified, “the Michael Kors bag in the car,” to which the officer responded, “I’m not sure what you’re talking about.” The defendant also asked, “did you guys search the vehicle?” to which the officer responded, “I’ve been with you the entire time.”

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim’s social media. The detective asked, “What’s her Facebook page?” to which the defendant responded. The defendant then talked about the victim cheating on him, saying, “I caught her!” The detective asked, “was it one of your boys?” to which the defendant responded that he doesn’t know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim’s first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that “only recently, on January 20th . . . received a letter from the Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse.” The trial court further stated that there was an “inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen.” The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness “is the father of a former classmate.” Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church “on a personal level.” All three of the jurors indicated that they would not credit the witnesses’ testimony simply based on the jurors’ familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors' assurances that they would not necessarily credit the officers' testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant's objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant's Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant's objection. An officer testified that the gun depicted in the defendant's Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers' questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did violate the defendant's Miranda rights.

Regarding the defendant's request for an expert witness, the Court ruled that the trial court did not err in denying the defendant's motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant's arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that "a number of things" had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court's approval. The Court noted that this delay was not intentional or due to the Commonwealth's negligence. The Court then held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother's statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother's call was to ask for help responding to an ongoing emergency—getting medical care for the victim's gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant's social media posts, the Court reasoned that evidence from the defendant's Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*, the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Thomas v. Commonwealth: March 12, 2024

Fairfax: Defendant appeals his convictions for Rape and Child Sexual Assault on Fifth Amendment *Miranda* and Expert Testimony grounds.

Facts: The defendant repeatedly raped and sexually assaulted a child at a day care center while the child was between four and eight years old. A year after the assaults, the defendant was convicted of an earlier child sexual assault. In 2019, about a decade after the assaults, the victim in this case disclosed the assaults to police. Police located the defendant and arrested him. The defendant was on probation at the time and had been for about five years.

While the defendant was in custody at the police station, the defendant's probation officer introduced him to the investigating officers. The probation officer told the defendant: "This is Detective Carter, Detective Gadell. They need to talk to you about some things. I'm going to be here for a little bit, but just go ahead and chat with them today, okay?" The probation officer then left the room.

The officers then reviewed the defendant's *Miranda* rights, stating "I know you're going to have questions about everything, and I'm happy to talk about that stuff with you, but we have to go over this form first." After waiving his rights, the defendant confessed to raping and sexually assaulting the child. The defendant moved to suppress his statements, but the trial court denied the motion.

Prior to trial, the Commonwealth provided notice of expert testimony from Anissa Tanksley, the forensic interviewer who had interviewed the victim. The expert testified that abused children often delay disclosing their abuse, but she did not suggest that delayed disclosures by child victims were more or less credible than contemporary disclosures or disclosures by adult victims. She testified that she does not evaluate the credibility of the children she interviews and expressly stated she does not know how often allegations turn out to be true. The defendant objected to this testimony, but the trial court admitted it over his objection.

At trial, the defendant also objected to the expert's repeated references to what the "research suggested" on hearsay grounds, arguing that this testimony was "tantamount to admitting the articles themselves." The trial court overruled the objection.

Held: Affirmed in Part, Reversed in Part. The Court held that, based on the totality of the circumstances presented in this case, the defendant's *Miranda* waiver was not the product of a free and unconstrained choice, and the trial court erred in reaching a contrary conclusion. The Court also ruled that the trial court did not abuse its discretion by allowing the Commonwealth's expert testimony.

In this case, the Court concluded that the specific facts and circumstances of this case demonstrated that the detectives employed coercive tactics. The Court argued that the defendant's probation obligation included not only being truthful with his probation officer, but also following all his probation officer's instructions. The Court noted that the defendant had signed a form at the outset of his probation acknowledging that condition and his understanding that failure to comply with his probation conditions could result in his probation being revoked. The Court reasoned that the defendant thus could not simultaneously comply with his probation officer's instruction to "chat with" the detectives "today" and invoke his Fifth Amendment right to remain silent.

The Court repeated that incriminating statements made to a probation officer are admissible when not made by someone in custody. The Court also rejected the contention that this situation was a "classic penalty situation," as in *Garrity*. Nevertheless, the Court emphasized that in an inherently coercive custodial interrogation setting the defendant need not invoke his Fifth Amendment privilege; rather, in that circumstance, the privilege is self-executing. In other words, if the surrounding circumstances show that the *Miranda* warnings were ineffective to safeguard the privilege, the resulting *Miranda* waiver is not voluntary.

The Court also complained that the officers did not provide any assurance that no penalty would be exacted if he disregarded the probation officer's instruction to "chat with" the officers. The Court also complained that the officers' recital of the *Miranda* warnings was ineffective to cure the coercive circumstances; the Court complained that the warnings did not clarify that the probation officer's instruction that the defendant "chat with" the detectives had no bearing on the defendant's right to remain silent. The Court also complained that neither the probation officer nor the detectives clarified that the defendant would not suffer any adverse probationary consequences if he chose to stand on his

self-executing right to remain silent even though doing so would violate the probation officer's express instruction.

Thus, the Court concluded that the defendant reasonably could have understood, based on the literal meaning of his probation officer's words, that he was required as a condition of his probation to talk to the detectives "today." The Court also contended that the defendant reasonably could have interpreted his probation officer's statement that he would remain at police headquarters "for a little bit" to indicate that he would know if the defendant had not obeyed his instruction to speak with the detectives, further raising the specter of revocation for non-compliance.

The Court repeated that a confession, even if obtained in full compliance with *Miranda*, may be inadmissible if it was not voluntary, and that *Miranda* warnings may be ineffective because of law enforcement conduct during or preceding the warnings. The Court explained that "special caution" should be applied in circumstances where pre-warning conduct obscures both the practical and legal significance of the admonition when finally given. Instead, in this case, the Court complained that the officer's review of the defendant's *Miranda* rights repeatedly deemphasized its importance and presented it as a mere formality. The Court contended that the officer's characterization of the *Miranda* rights as a mere formality, in the context of the doubly coercive environment the officers had created, rendered the warnings ineffective to resolve the apparent conflict between the defendant's rights and the probation officer's instruction.

Lastly, the Court concluded that the totality of the circumstances presented here demonstrated that the defendant's waiver was not the product of a free and unconstrained choice. Although the trial court made no findings concerning the defendant's education or intellectual ability, the Court determined that the record demonstrated that the defendant's background and experience made him particularly vulnerable to the coercion applied in this case. The Court pointed to the evidence that the defendant was "intellectually disabled." The Court also argued that the defendant's experience with the criminal justice system was dominated by compelled disclosures and acquiescence to the probation officer's instructions, even regarding the most intimate areas of his life.

The Court wrote: "Thomas is a man of limited intellectual functioning who for years had obeyed his probation officer's instructions because he knew that failure to do so could result in the loss of the "grace" the prior sentencing court had extended to him ... The detectives subjected Thomas to an inherently coercive custodial interrogation exacerbated by the tacit pressure of a possible probation revocation. The detectives' subsequent reading of the *Miranda* warnings—presented to Thomas as a mere formality—failed to cure the coercive circumstances presented here, which overbore Thomas's ability to make a free and unconstrained choice. We thus conclude that, under the unique circumstances of this case, Thomas's *Miranda* waiver was involuntary, and his incriminating statements were inadmissible."

The Court emphasized that "No new per-se rule follows from our recognition that the unique and specific facts of this case demonstrate Thomas was subjected to coercive pressures to waive his *Miranda* rights."

Regarding the Commonwealth's delayed disclosure expert, the Court acknowledged that the previous cases have been unclear and wrote: "We now clarify our case law. An expert may provide general testimony about memory formation and common post-abuse behavior but may not directly comment on the credibility of any witness. Expert testimony that child abuse victims often delay

disclosing their abuse may make it more likely that the jury believes a victim's testimony, but that consequence is different from an expert opining that the victim is credible. Thus, expert testimony about memory formation and the reason for and frequency of delayed disclosures can help the jury contextualize the victim's testimony without usurping the jury's ultimate role in determining credibility."

The Court repeated that experts can possess knowledge in delayed disclosure above that possessed by the average juror. The Court explained that although the average juror may understand that delayed reporting sometimes occurs, they can still benefit from context about why and how often provided by an expert in the field. In this case, the Court found that the expert's testimony was materially different from the expert's testimony in *Davison*, where the expert witness testified that "the majority of the times kids don't lie about" being abused and that the most common reason for a victim to recant "may apply directly to this case."

The Court also ruled that the expert's reliance on studies not entered into evidence did not render her testimony impermissible hearsay. The Court rejected the defendant's contention that the expert's repeated references to what the "research suggested" was "tantamount to admitting the articles themselves" because it clashed with the relevant precedents and would overly restrict expert testimony. The Court cautioned, however, that the Commonwealth may not enter those studies into evidence. The Court repeated that hearsay materials on which an expert relies are not admissible in a criminal case.

Judge Raphael dissented from the Court's ruling suppressing the defendant's statement. Justice Raphael explained that he would have held that the invocation requirement recognized in *Murphy* applies equally to a probationer in a custodial setting, provided he is given proper *Miranda* warnings, is not coerced into confessing, and is not expressly or implicitly threatened with probation revocation for exercising his privilege against self-incrimination. Judge Raphael wrote: "It is also difficult to see how, under the majority's logic, law-enforcement officers could ever involve a probation officer in a custodial interrogation without being required to give special warnings going beyond *Miranda*. Although the majority denies imposing such a per-se warning requirement, its opinion repeatedly implies that the probation officer or the detectives here had to tell Thomas that he could invoke his Fifth Amendment privilege without jeopardizing his probation."

Judge Raphael continued: "the majority commits a grave error by tacking a codicil onto standard *Miranda* warnings for cases involving probationers in custodial settings. This new exception to the invocation requirement finds no support in our caselaw or that of any other jurisdiction. The cost of that error here is to vacate Thomas's four life sentences for his vile crimes against A.R. That is bad enough. What is worse—and incalculable—is the disruption the majority's stealth rule will inject into future cases in which probation officers have any involvement in custodial interrogations."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1429224.pdf>

Johnson v. Commonwealth: March 12, 2024

Virginia Beach: Defendant appeals his convictions for Murder (No-Body Homicide) and Contributing on Fifth Amendment *Miranda* grounds and sufficiency of the evidence.

Facts: The defendant murdered the mother of his children and disposed of her body. The victim's employer and her family reported her missing after she failed to come to work, missed her son's baseball game, and stopped responding to text messages and phone calls. It was out of character for her to miss work or her son's baseball games. Prior to her disappearance, the victim was in daily contact with all her children. After her disappearance, however, she did not make contact with any of her family, friends, or colleagues.

Police investigated. The victim's vehicle, which contained her purse and wallet, was found abandoned about three miles from the apartment she shared with the defendant, but her keys were later found in a dumpster that came from their apartment complex. Police discovered that a day prior to the victim's disappearance, the defendant had searched the internet for "Suffolk garbage dump," "Suffolk waste disposal," "where does dumpster trash go Virginia," and "where does dumpster trash go Chesapeake." The defendant's cell phone records showed that on the day of the victim's disappearance, his phone moved in a direction consistent with a route to where the victim's vehicle was abandoned.

To date, no one has found the victim's body.

While killing the victim and disposing of her body, the defendant abandoned their 20-month-old twin children at home. Police arrested the defendant for four misdemeanor charges of contributing to the delinquency of a minor, based on the defendant's statements to police that he had left the twins alone at various times over two days.

Officers read the defendant his *Miranda* warnings and he agreed to speak with them. The interview began about 11:00 am and did not end until 5 am the next day. During the interview, police gave the defendant a snack upon arrival, and a snack and a meal later. He was continuously provided with water and given multiple opportunities to use the bathroom and take smoke breaks. The defendant was not questioned continuously throughout the entire 19-hour period. His actual interview sessions lasted, on average, about half an hour to an hour before the defendant was allowed some kind of break. Throughout, the detectives maintained a calm, even tone throughout the interview, except for a few instances of one officer raising her voice.

Roughly halfway into the interview, after several questions about leaving his children alone in the apartment, the defendant stated, "I don't have anything else to say, man. If y'all wanna take me to jail[.] I don't have anything else to say, man." In response, an officer told the defendant, "[T]his is your opportunity, this is your chance." She also reminded him that "you don't have to say anything. You know we already—we went through your rights and you have your rights." She then said that she was "concerned" about the defendant "making a really poor decision." The officer asked the defendant to "make the right decisions" for his children. The officer then began questioning the defendant again about leaving his children alone, and the interview continued.

During the interview, the officers told the defendant that his actions were understandable because of the victim's negative behaviors but did not explicitly promise him anything in exchange for an inculpatory statement. The officers stated that they were on his side and wanted to help him, and thus led him to believe that he would have a better outcome if he confessed. The defendant finally

confessed that he had murdered the victim, put her body in a dumpster, destroyed her cell phone, discarded her keys in another dumpster, and moved her car to the location where it was found.

Prior to trial, the defendant moved to suppress his confession, arguing that the officers' coercive interrogation tactics had rendered his confession involuntary. Specifically, he challenged the officers' use of two minimization tactics: (1) the officers' suggestion that the commission of a crime was understandable and justifiable, which could be considered an implied promise of leniency, and (2) the officers' presenting the defendant with a false choice, as they characterized the crime as either an accident or premeditated, when both alternatives were highly incriminating. The defendant also contended that he had attempted to exercise his right to remain silent.

The trial court denied the motion to suppress.

At trial, the trial court rejected the defendant's argument that the Commonwealth failed to prove the corpus delicti of the offenses.

Held: Affirmed. The Court held that the officers did not use coercive tactics to obtain the defendant's confession. The Court concluded that the trial court did not err in denying the motion to suppress statements made to police because his statements were voluntarily made and because he did not unequivocally invoke his right to remain silent. Further, the Court ruled that the trial court did not err in denying his motions to strike the evidence because the Commonwealth sufficiently proved the corpus delicti for all his convictions.

The Court rejected the defendant's contention that the officers' tactics, viewed in conjunction with the other circumstances of the interrogation, rendered his confession involuntary. The Court specifically rejected the defendant's argument that the detectives' sympathetic attitude rendered his confession involuntary. The Court reasoned that the minimization tactics used here that downplayed the seriousness of the offense and offered the defendant excuses for his actions were potentially coercive. However, the Court concluded that the use of such tactics, standing alone, does not render a confession involuntary. In this case, the Court found that the minimization tactics were not so unduly coercive as to overbear the defendant's free will.

The Court also concluded that any deceit or implied promise of leniency by the officers in stating that they supported the defendant and would help him were not so coercive as to completely overbear the defendant's free will.

Regarding the length of the interview, the Court found that while lengthy, the conditions were not so unduly coercive as to overbear the defendant's free will. The Court noted that, while a 19-hour interrogation is certainly longer than most, the defendant was not deprived of any physical need during the interrogation. The Court saw no evidence that the officers harmed or threatened to harm the defendant in any way if he did not answer their questions, nor was he subjected to unrelenting questioning.

Regarding the defendant's alleged invocation of his right to remain silent, the Court ruled that the defendant's statement did not constitute an unequivocal invocation of the right to remain silent. The Court found that, in context, the officers could have thought that the defendant's statement indicated only that he had nothing more to say regarding their questioning about the location of his children. The Court pointed out that the officers reminded the defendant of his *Miranda* right to remain silent, and after this reminder, the defendant did not state again that he had nothing to say to the

detectives; instead, he continued to answer their questions for the next ten hours before confessing to the murder.

Viewed in the context of a lengthy interrogation, during which the defendant actively engaged with officers, the Court reasoned that his single statement that he did not “have anything else to say” was not a statement that a reasonable police officer in the circumstances would understand to be an invocation of his Fifth Amendment right to remain silent. In a lengthy footnote, the Court distinguished the Virginia Supreme Court’s 2019 ruling in *Adkins*.

Regarding sufficiency of the evidence and corroboration of the defendant’s confession, the Court explained that the lack of physical evidence in this case was not dispositive as to whether the Commonwealth had evidence independent of the defendant’s confession to establish the murder. Instead, the Court ruled that the victim’s disappearance, coupled with her uncharacteristic lack of communication and her leaving behind important personal items, provided circumstantial evidence independent of the defendant’s confession to satisfy the corpus delicti rule. The Court also found that the defendant’s search history and the cellphone evidence corroborated the defendant’s statements that he disposed of the victim’s body in a dumpster.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1295221.pdf>

Whitney v. Commonwealth: February 20, 2024

Virginia Beach: Defendant appeals his convictions for Child Sexual Assault Offenses on Fifth Amendment *Miranda*, Sixth Amendment Right to Counsel, and Eighth Amendment proportionality grounds.

Facts: While on probation for a previous sexual offense, the defendant sexually assaulted a 14-year-old developmentally delayed child. During the investigation, the defendant voluntarily drove to the police station to speak to the investigator. There was only officer present during the interrogation and he did not physically restrain the defendant and did not make physical contact with him. The officer expressly told the defendant that the door was not locked and that he was “there on his own free will” and could “leave on his own free will.” The officer did not provide *Miranda* warnings.

The defendant later moved to suppress his statements to the officer. The defendant argued that the officer restrained the defendant by interviewing him in a small room, closing the door, and directing him to sit in a particular chair. The defendant argued that he therefore was in “custody” and that the officer was required to provide him with *Miranda* warnings. The trial court denied the motion.

The defendant then requested that the trial court replace his court-appointed attorney. The defendant’s discontent arose from counsel’s refusal to seek reconsideration of the motion to suppress. The trial court inquired about the basis for reconsideration and, finding none, explained to the defendant that he was “not entitled to a second suppression hearing on the same issues.” The trial court concluded that counsel’s refusal to move for reconsideration, absent a colorable basis to do so, was not good cause for the defendant to seek a different appointed attorney.

The defendant entered a conditional guilty plea. The trial court sentenced the defendant above the sentencing guidelines. The defendant contended that the trial court erred by imposing a sentence that exceeded the sentencing guidelines and that was excessive and disproportionate to the circumstances.

Held: Affirmed.

The Court first ruled that the trial court did not err in finding, under the totality of the circumstances, that the defendant was not in custody when he made the challenged statements to the police. The Court agreed that the relaxed nature of the conversation mitigates against length as an indication of a degree of coercion commensurate with formal arrest. The Court ruled that the trial court did not err in finding that the challenged statements made to the officer were voluntary and did not require *Miranda* warnings.

Regarding the defendant's complaint about his sentence, the Court again declined to engage in a proportionality review in this case, which did not involve a life sentence without the possibility of parole.

Regarding the defendant's request for new counsel, the Court repeated that an indigent defendant cannot have his original attorney replaced unless he shows good cause. Moreover, a defendant's dissatisfaction with and failure to cooperate with counsel does not constitute good cause. The Court found no abuse of discretion in the trial court's denial of the defendant's request for new counsel.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1408221.pdf>

Bush v. Commonwealth: December 28, 2023

York: Defendant appeals his conviction for Murder on Fifth Amendment *Miranda* and sufficiency grounds, claiming intoxication and self-defense.

Facts: The defendant, while intoxicated, became angry at a man for backing into his car and attacked the man. The two fought and the man bit the defendant during the fight. The defendant became angry and returned to his home, obtained a knife, declared that he was going to stab the victim, and then returned and attacked the man again, this time stabbing the victim repeatedly, killing the man.

An officer located the defendant in the hospital and spoke to him. The officer later described that the defendant "did not seem to be impaired" by alcohol during their conversation in the hospital. The officer questioned the defendant while the defendant was handcuffed to a hospital bed with a brace on his neck. The officer's body camera recorded their conversation. The defendant told the officer that he had been hit in the head three times and was trying to remember the night's events.

During the first conversation with the officer, the defendant said, "I should shut the fuck up until I talk to a lawyer." The officer told the defendant that he was just trying to figure out the order of events and said, "That's okay. You don't have to talk to me." Then the officer read the *Miranda* warnings aloud

to the defendant and asked, “Do you understand your rights?” The defendant stated that he did. When the officer explained that another investigator was on his way, the defendant stated, “I think I’m going to say something stupid” and added, “My brother has told me, ‘Don’t say shit.’ He’s a police officer.” The first officer then stopped asking questions.

Another investigator soon arrived and asked the defendant more questions. The investigator stated: “I understand that the deputy over here read you your rights and stuff like that, and you said you wanted an attorney, okay? You’re well within your rights, that’s completely up to you.” The investigator continued, “Basically, I was going to come and read you your rights again. I mean, obviously, you’re handcuffed, you’re not free to go right now, but I’d like to sit down and try to figure out what the heck happened with this whole thing.” The defendant replied, “I would like to talk to you.” The investigator read the defendant *Miranda* warnings and the defendant stated that he understood his rights. He then made several incriminating statements.

Prior to trial, the defendant made a motion to suppress statements made to police while hospitalized. The trial court noted that the defendant had prior experience with law enforcement, including prior encounters with this investigator. The trial court denied the motion.

At the conclusion of trial, the defendant moved to strike, contending that his intoxication made him incapable of premeditation and that he acted in self-defense. The trial court denied the motion.

Held: Affirmed.

The Court first examined whether the defendant had invoked his right to an attorney. The Court found that his statements, including his statement about what he “should” do was not an unequivocal request for a lawyer that required the police to cease questioning. The Court then concluded that the defendant’s will was not overborne by police coercion when he made statements to the police. The Court specifically held that the trial court did not err in finding that the defendant’s injuries and intoxication did not render him incapable of voluntarily consenting to converse with the police.

The Court pointed out that the trial court found that in speaking with the police (i) the defendant’s speech was not slurred, (ii) his answers were responsive to the questions asked, (iii) he was “able to move without being unsteady,” and (iv) he frequently volunteered statements without being questioned. The trial court also noted that the defendant was “oriented to person, place, and time” according to his medical records. Because the evidence supported the trial court’s findings, the Court concluded the trial court did not err in finding that the defendant had the capacity to voluntarily consent to converse with the police, despite his injuries and intoxication.

Lastly, the Court concluded that a rational factfinder could find that the defendant was not so intoxicated that he was incapable of premeditation when he killed the victim. The Court noted that the video recordings of the defendant on the night of the stabbing support findings that the defendant was lucid and mentally alert that night. In one recording, the defendant stated that he did not drink much alcohol that day, and only “had a pint since noon.” The jurors also heard evidence that the defendant “drank every day” and that frequent alcohol users have more tolerance for alcohol.

Based on the evidence, the Court also agreed that a rational factfinder could find that the defendant reapproached and stabbed the victim when the victim posed no imminent threat, and therefore the Court ruled that it could not conclude as a matter of law that the defendant stabbed and killed the victim in self-defense.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0682221.pdf>

Poulson v. Commonwealth: December 28, 2023

Accomack: Defendant appeals his conviction for DUI on Fourth Amendment and Fifth Amendment *Miranda* grounds.

Facts: The defendant drove while intoxicated and crashed his vehicle. An anonymous caller notified police of the crash, as did the defendant in a 911 call, but the defendant left the scene and drove home before police could arrive.

Officers drove to the defendant's house and saw the defendant's truck, which matched the description of the crashed vehicle the anonymous caller had provided, parked in the defendant's driveway. Furthermore, the truck's license plate was a custom vanity plate that read "Poulson," the defendant's name. The front end of the driver's side was damaged, and there were beer cans in the bed of the truck.

While the officers stood outside near the truck, the defendant exited his house and approached them. The defendant spoke to the officers and acknowledged that he was the driver at the crash scene. Officers observed that he was intoxicated. Before continuing the conversation and submitting to the preliminary blood test and field sobriety tests, the defendant returned inside, dressed, and again voluntarily exited his residence and continued his interaction with the officers. He admitted to drinking alcohol and failed field sobriety tests. His arrest revealed a BAC of .14.

Prior to trial, the defendant moved to suppress, arguing that he was seized when law enforcement spoke with and arrested him within the curtilage of his property and that he was not provided timely *Miranda* warnings.

Held: Affirmed. Because the defendant's interactions with the police were consensual prior to the time of his lawful arrest, the Court held that there was no violation of his Fourth Amendment or *Miranda* rights.

In a footnote, the Court initially rejected the defendant's argument that the police were unlawfully present on the curtilage of his residence. The Court repeated that there is an implied license that permits law enforcement to briefly enter the curtilage of a home "in the hopes of speaking with a resident [a]bsent affirmative steps to rescind the invitation by the homeowner." In this case, the Court pointed out that at no point did the defendant tell the police to leave, refuse to speak to the officer, or otherwise assert any expectation of privacy.

The Court explained that the defendant's encounter with the police began consensually, and it remained so. The Court pointed out that the police had not even knocked on the defendant's door or otherwise summoned him out of the house. Contrary to the defendant's assertion, the Court found that he was not seized until after he voluntarily submitted to the tests and was placed under arrest. Because the encounter remained consensual until the police arrested him, the Court ruled that police did not

subject the defendant to custodial interrogation before the arrest. Thus, he was not entitled to be advised of his *Miranda* rights at the time of his statements to the police.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1199221.pdf>

Beltran Saavedra v. Commonwealth: December 28, 2023

Fairfax: Defendant appeals his convictions for Unlawful Filming on Fifth Amendment *Miranda* and Admission of Prior Bad Acts grounds.

Facts: The defendant attempted to use a cellphone to secretly film a child who was in a bathroom at the defendant's office. The child notified her parents, who called the police.

A police officer responded and seized the defendant's phone. The defendant repeatedly requested to have his smartphone returned and declined to answer questions. The officer told the defendant, falsely, that ten officers were about to execute a search warrant at his residence, where his mother was at home. The defendant then asked, "What can we do so that you don't involve my mom?" The officer reiterated that if the defendant agreed to discuss the incident, then police would not have to search his residence. The officer said that he did not intend to threaten or intimidate the defendant, but merely to explain to the defendant what the officer would "do next as part of the investigation."

The officers interviewed the defendant in an unlocked office at the defendant's office for about 82 minutes. The defendant was not arrested or detained, and the officer maintained an "approachable, non-confrontational" demeanor throughout. The officers identified themselves at the start as detectives, confirmed that the defendant spoke English and was college-educated, and described the nature of their investigation. The officer repeatedly reminded him that he was free to leave and did not have to discuss the incident.

The defendant then admitted to making several previous videos of women without their consent and that he stored them on devices that he kept at home. Officers obtained a search warrant for the defendant's phone, which contained five videos of different women using the toilet or showering.

Prior to trial, the defendant moved to suppress his statements. He also moved to exclude evidence of five other videos found on the defendant's smartphone showing women using toilets or showering. The trial court denied his motions.

Held: Affirmed.

Regarding the *Miranda* issue, the Court ruled that although the defendant felt pressure to cooperate after the officer lawfully seized his smartphone and threatened to execute a search warrant for the defendant's other phone at his residence, the totality of the circumstances show that the defendant's statements were voluntary.

The Court repeated that a defendant's confession may be found voluntary under the totality of circumstances even when police use deception to procure it. In this case, the Court acknowledged that

the officers falsely told the defendant that ten officers were about to execute a search warrant at his residence, where the defendant's ailing mother was staying. But the Court pointed out that executing that search warrant would have been permissible.

Regarding the other videos found on the defendant's phone, the Court concluded that the videos were highly probative of the defendant's intent to film the victim. The Court also concluded that the videos also refuted the defendant's hypothesis of innocence that he sought only to "peek" at the victim, not record her. The Court agreed that the videos showed his "sexualized interest" in surreptitiously recording women using the restroom, generally, and his intent to record the victim, specifically. Although the videos of other women were not recorded using a smartphone and did not depict children using the toilet in a public restroom, the Court noted that the trial court found that they each depicted women either using the toilet or showering in bathrooms "under circumstances that" were "clear[ly] . . . inconsistent with consent."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1918224.pdf>

Kincaid v. Commonwealth: December 19, 2023

Albemarle: Defendant appeals his conviction for DUI Maiming on Fourth Amendment, Fifth Amendment *Miranda*, and Cross-Examination grounds.

Facts: The defendant drove while intoxicated and became angry at his girlfriend. The defendant stated "[F]uck you, I'll kill us both. I'll drive into a tree and kill us both." The ensuing crash paralyzed the victim from the neck down. Rescue workers found the defendant in the driver's seat and the victim in the passenger's seat.

An officer responded and investigated the crash. He also spoke with the defendant at the hospital, both after the crash and the next day. On both occasions, the defendant admitted to driving the vehicle. During the interviews, the defendant was neither handcuffed nor restrained in any way. Neither his, nor anyone else's, movements into or out of his exam or hospital room were restricted by law enforcement. While the officer was in uniform, with his badge and weapon displayed, but not drawn, he was the only law enforcement officer at the scene of either questioning.

Both encounters were very brief and consisted of very few questions. No one took the defendant into custody at the conclusion of either interview. The officer ended the first interview when he saw that the defendant was exhibiting pain. At the time, the defendant had a criminal history that included a prior felony, two recent misdemeanor offenses for assault and battery, and one misdemeanor charge for violating a protective order.

The officer obtained a search warrant for the defendant's medical records. The affidavit contained a detailed description of the single car crash. It identified the driver as the defendant and the passenger as the victim, as related to the officer by emergency personnel on the scene. It described an odor of alcohol coming from the passenger compartment of the vehicle and the observation of containers of alcohol within the vehicle. Finally, the affidavit contained a description of the defendant

not long following the crash as having glassy and bloodshot eyes. Using the records, the officer learned that the defendant's BAC was .15.

The defendant moved to suppress both his statements to the officer and the results of the search warrant. Regarding his statements to the officer, the defendant argued that he had been in custody for purposes of *Miranda* and that he had been administered sedatives and had been in a medically induced coma during his time in the hospital.

Regarding the search warrant, the defendant argued that the officer deliberately misrepresented the defendant's admission that he was driving the vehicle that night. The defendant further asserted that the officer intentionally omitted material information about the defendant's medical condition during the two interviews with him.

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

At trial, the defendant's mother testified that before the crash, she saw the victim driving the vehicle with the defendant in the passenger seat. On cross-examination, the mother admitted that she was convicted of filing a false police report regarding "a certain event involving [her] son." After the prosecutor played a portion of a 911 call where the mother identified herself, she eventually admitted that she gave information to a law enforcement officer and stated that the defendant "needs to go back to jail." An assault and battery charge and a protective order had been initiated against the defendant based on that incident. The mother later altered her complaint and told police that she did not want to press charges against her son.

The defendant objected to the Commonwealth's cross-examination of his mother, but the trial court denied the motion. The trial court did not, however, admit the 911 call into evidence.

Held: Affirmed.

The Court first examined whether the defendant was in custody when the officer questioned him and determined that he was not. Considering the facts, the Court agreed that the encounters did not amount to the custodial nature that would trigger the *Miranda* requirement. The Court also rejected the defendant's argument that his medical condition rendered his statement involuntary, noting that he did not argue that law enforcement used coercive tactics or engaged in flagrant police misconduct. The Court noted that the officer was able to demonstrate gestures made by the defendant and observed that the defendant was very coherent. The Court also found the defendant's experience with the criminal justice system to be relevant.

The Court then turned to the search warrant. The Court repeated that, under *Franks*, a defendant is entitled by the Fourth Amendment to a hearing that challenges what appears to be a valid search warrant only in limited circumstances. In addition, the defendant has the burden to make a "substantial preliminary showing" of a false statement that was "knowingly and intentionally included in the warrant affidavit or included with reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." Even if the trial court finds that the defendant has made the substantial preliminary showing, the trial court must "determine whether the allegedly false statement is necessary to the finding of probable cause."

In this case, the Court noted that the only statement that the defendant alleged to be false is that he admitted to the officer to being the driver of the vehicle. The Court concluded that sufficient content in the affidavit remained to support the finding of probable cause even after removing the

allegedly false part of the statement. The Court ruled that the defendant's admission that he was the driver of the vehicle was not necessary to the finding of probable cause for the issuance of the search warrant, and therefore no *Franks* hearing was required.

Lastly, the Court addressed the mother's cross-examination. The Court noted that the mother testified that the victim was driving at the time of the crash, contrary to all the evidence presented in the Commonwealth's case. The Court observed that, while any witness who testifies at trial places his or her credibility at issue, the mother's testimony was especially important for the jury's consideration of the case. The Court then quoted the 1936 *Haney* case regarding cross-examination and bias, where the Virginia Supreme Court had written: "The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness. . . . [O]n cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out." The Court agreed that the trial court properly limited the details of the assault and battery allegation that could be heard by the jury but permitted the jury to consider the mother's recantation on the issue of bias.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1381222.pdf>

Jackson v. Commonwealth: November 8, 2023

Newport News: Defendant appeals his conviction for Murder on Fifth Amendment *Miranda* grounds, Admission of Text Messages, Refusal of a Jury Instruction, and sufficiency grounds.

Facts: The defendant and her confederate murdered a man. Over the next few weeks, the defendant and her confederate exchanged numerous text messages which the parties deleted from their phones, but that law enforcement obtained from the providers. Of note, one exchange involved her response to her confederate's comments, "I don't do back stabbing shit. I take head shots. I'm coming to u face to face," and "I'm terrible in a late [sic] of ways but far from weak male." The defendant responded that she "loved" those comments. The victim had suffered shots to his head and torso.

The second text message of note was the confederate's response to the defendant's comment, "It made me realize I really did but u was there for me when I couldn't count on nobody else u didn't hesitate." The confederate responded that he "loved" that comment.

Police arrested the defendant. While she was in custody, an officer informed the defendant of her right to counsel and right to remain silent. When she invoked her right to remain silent, the officer left the interrogation room to complete the booking process and to seek search warrants. About an hour later, the officer returned and gave the defendant a business card, expressed her understanding that the defendant did not wish to talk, and then offered to hear the defendant's side of the story because she knew that the defendant "was there" and that "there was a lot of" acrimony between the defendant and the victim's friend.

When the defendant clarified, “you mean at the restaurant, is that what you’re talking about,” the officer responded, “yeah, I know that was part of it, I know you were jumped.” The officer explained that she wanted to hear the defendant’s side of it and that she knew there were a lot of issues between the two women, but she was not going to push. The defendant then made a series of statements to the officer but did not confess to the murder.

Prior to trial, the defendant moved to suppress her statements. The defendant argued that the officer violated her constitutional right to have an attorney present before questioning by re-initiating conversation with her after she unequivocally invoked her *Miranda* right to remain silent. The trial court denied the motion.

Prior to trial, the defendant moved to exclude the text messages she and her confederate exchanged following the murder. The trial court found that the text messages were adoptive admissions of criminal behavior.

At the end of the trial, the defendant submitted a proposed jury instruction on concert of action, utilizing the Virginia Criminal Model Jury Instruction for that phrase but adding the language: “[t]he resulting crime must be the natural and probable result of the crime originally contemplated by the parties.” The Commonwealth objected to the use of the word “must” in the instruction and argued that the additional language imposed a higher burden upon the Commonwealth than the law demands. The trial court agreed with the Commonwealth.

The defendant also submitted a proposed jury instruction on shared criminal intent, which stated that the defendant “must have either known or had reason to know of [her confederate’s] criminal intention and must have intended to encourage, incite, or aid [his] commission of the crime.” The Commonwealth objected to the instruction, arguing that it incorrectly provided that both shared criminal intent and an intent to aid in the commission of the crime were necessary for one to be a principal in the second degree, when the law required only one or the other. The trial court agreed and denied the instruction.

Held: Affirmed.

Regarding the *Miranda* issue, the Court examined whether the statements the defendant made to the officer were the result of interrogation and, if so, whether the continued questioning was appropriate after an initial refusal to answer questions. The Court applied the five factors articulated in the 1995 case of *Weeks v. Commonwealth*. The Court agreed that the first three factors favored the Commonwealth, while the last two factors favored the defense. The Court found that under the *Weeks* factors that the defendant’s initial invocation of her right to remain silent was not violated.

The Court first concluded that the defendant’s initial invocation of her right to remain silent was not violated. The Court acknowledged that when the officer returned, the officer did not give the defendant fresh *Miranda* warnings and the interrogation was on the same subject matter. However, the Court repeated that “the failure to offer defendant a new set of warnings does not render the second interview unconstitutional.”

Regarding the admission of the text messages, the Court found no error in the trial court’s admission of the text messages, finding that they were admissible as adoptive admissions and statements against penal interest, probative, and relevant to the defendant’s guilt. The Court ruled that the trial court did not abuse its discretion in admitting the two messages under the adoptive admission

exception to the hearsay rule. The Court found that the text messages were relevant to both the conspiracy and to the relationship between the defendant and her confederate, and they confirmed the defendant's participation in the murder. The Court agreed that the messages were relevant to the Commonwealth's theory of the case and their probative value outweighed the prejudice to the defendant.

Regarding the jury instruction on "concert of action," the Court ruled that the Virginia model jury instruction sufficiently instructed the jury on concert of action in plain terms. The Court complained that the defendant's proposed added language was unnecessarily repetitive and imposed a higher burden upon the Commonwealth than the law required. Thus, the Court found that the trial court did not abuse its discretion in refusing the defendant's proposed instruction on concert of action.

Regarding the jury instruction on "principal in the second degree," the Court noted that the model jury instruction clearly provides that the defendant acted as a principal in the second degree if the evidence proved she shared in her confederate's criminal intent or if she intended to assist him in his commission of the crime. The Court found that the defendant's instruction was therefore inconsistent with the model jury instruction. Thus, the Court ruled that the trial court did not err in refusing the defendant's proffered instruction on shared criminal intent.

The Court also ruled that the evidence sufficiently proved that the defendant conspired with her confederate to kill the victim and that she was present at the scene of the crime assisting in and encouraging the commission of the offense.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1182221.pdf>

Rhodes v. Commonwealth: October 3, 2023

Spotsylvania: Defendant appeals his convictions for Murder, Abduction, and related offenses on Fifth Amendment *Miranda* and Voluntariness grounds.

Facts: The defendant shot and killed the victim, who shot the defendant in the process. The defendant walked into the hospital under his own power, spoke to a nurse, and went to the emergency room. An officer responded to the hospital to interview the defendant. The defendant told the officer that he did not know who shot him, that he was sitting down near a crowd of people when it happened, and that he "just woke up super dizzy."

A few hours later, a detective responded to the hospital to interview the defendant further. Although the detective read the defendant some of his *Miranda* rights, he did not inform the defendant that he had the right to have an attorney present even if he could not afford one. The detective characterized the conversation as "easygoing" and testified that the defendant "didn't seem stressed out." The defendant was alert, was not under arrest, and was free to move around the hospital room. The detective did not touch or restrain the defendant in any way.

During the interviews, the defendant told the detective that he used to work in intelligence collection for the United States Army and expressed familiarity with interrogation techniques. The

detective returned and interviewed the defendant again twice in the next two days. The defendant made several false claims during these interviews.

The defendant moved to suppress his statements to the detective, complaining that the detective did not provide *Miranda* warnings. The defendant also contended that the detective overpowered his will. The trial court denied the motion to suppress.

At trial, the Commonwealth did not use any of the defendant's statements to the detective as part of its case in chief. Rather, it used those statements solely when cross-examining the defendant to impeach his credibility.

Held: Affirmed.

The Court first noted that the Commonwealth did not use the defendant's statements during its case-in-chief. Therefore, assuming without deciding that the trial court erred in concluding that the detective was not obligated to provide *Miranda* warnings, the Court ruled that any such error would be harmless. However, the Court acknowledged that, apart from *Miranda*, the Commonwealth must still prove that the defendant's statements were made voluntarily.

Regarding voluntariness, the Court found that the defendant was a sophisticated party who expressed familiarity with interrogation techniques. Distinguishing this case from *Mincey v. Arizona*, the Court observed that the defendant was coherent and answered some of the detective's questions while declining to answer others. The Court also pointed out that the defendant's statements were inculpatory primarily because he lied to the detective to conceal his guilt. The Court wrote: "It can hardly be said that Detective Horn coerced Rhodes into lying against his will."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0697222.pdf>

Smith v. Commonwealth: September 12, 2023

Prince William: Defendant appeals his convictions for Manslaughter and Use of a Firearm on Fourth Amendment, Fifth Amendment, and Jury Inconsistency grounds.

Facts: The defendant and his confederate shot and killed a man and shot a woman during a purported marijuana sale. The original call for emergency service indicated that the perpetrators of the shooting fled the scene. Police responded to the scene of the nearby shooting, learned the description of two suspected shooters, and sent a radio transmission to be on the lookout for the suspects. Officers found the defendant's confederate nearby with a gunshot wound nearby. A few hundred yards from that store, another individual reportedly offered cash for a ride to "escape" from the area.

Officers found the defendant wandering aimlessly near the shooting location soon thereafter; his arms were scratched, and he was underdressed in cold weather. He claimed to have been a victim of an attempted robbery and admitted he came from that shooting scene. He gave a name of his friend that was similar to the name of the confederate police found shot nearby. Officers detained him at

gunpoint and with handcuffs. Officers instructed the defendant that although he was being detained for investigative purposes, he was not under arrest.

At the police station, officers read the defendant his *Miranda* warnings. The defendant agreed to speak with officers and admitted to the offense. At trial, the officer testified that, although he did not record it, he read the defendant's *Miranda* rights from a card and that the defendant agreed to speak with him. At the time of his arrest, the defendant was 19 years old and had experienced 3 prior arrests for unrelated conduct. The interview lasted four and a half hours, but the defendant had four thirty-minute breaks during that time, and he was attentive and responsive when questioned.

Prior to trial, the defendant moved to suppress his seizure under the Fourth Amendment, arguing that the officers lacked reasonable suspicion to detain him and that because two officers detained him at gunpoint with handcuffs he was effectively arrested, requiring probable cause rather than reasonable articulable suspicion. Lastly, he argued that even if the initial seizure was permissible, after he gave an innocent explanation that he was the victim of an attempted robbery the officers no longer had cause to detain him, and his continued detention therefore violated his Fourth Amendment rights.

The defendant also moved to suppress his arrest, arguing that at the time he was transported from the scene in police custody for interrogation, the officers lacked probable cause to arrest him, in violation of the Fourth Amendment.

The defendant lastly moved to suppress his statements under the Fifth Amendment. He argued that the evidence was insufficient to establish that the officers read his *Miranda* rights because the officer did not record it with his body worn camera and, thus, violated his own department's procedures for advising suspects of their rights. He also contended that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights. Lastly, he contended that his statement to the police was inadmissible because it was involuntary. The defendant argued that his statement was involuntary because the officers suggested he would be punished less severely if he confessed and appealed to the defendant's religious preferences.

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

At trial, regarding the offense of Use of a Firearm, the verdict form advised the jury to find the defendant either guilty or not guilty of "Use or Display [of a] Firearm in Commission of a Felony, as charged in the indictment." The indictment stated, in relevant part, that the defendant "did use or display a firearm in a threatening manner while committing or attempting to commit the murder of [the victim], in violation of 18.2-53.1."

At the conclusion of the trial, the jury found the defendant guilty of voluntary manslaughter, and not murder, but found the defendant guilty of using a firearm to commit murder. The defendant argued that because the jury found him guilty of voluntary manslaughter, and not murder, that their inconsistent verdict of using a firearm to commit murder must be set aside. The trial court rejected his argument.

Held: Affirmed.

The Court first found that the officers had reasonable articulable suspicion that the defendant was involved in the criminal activity under investigation and was justified in detaining him. The Court then also ruled that it was reasonable to detain the defendant at gunpoint and with handcuffs. For these

reasons, the Court ruled that the initial seizure did rise to the level of an arrest and did not violate the Fourth Amendment.

The Court also explained that although there was a possibility that the defendant was innocent of criminal activity, his claimed explanation for his presence there did not negate the reasonable articulable suspicion that he was involved in the shooting. The Court noted that the defendant's own statements indicated his involvement in a nearby shooting to some degree, and the officers were therefore reasonable in continuing his detention to fully investigate whether the defendant was a perpetrator or victim of criminal conduct.

The Court then concluded that there was probable cause, in that an objective police officer could reasonably believe there was a substantial chance that the defendant was one of the suspects of the shooting incident. The Court therefore found that the defendant's Fourth Amendment rights were not violated when officers transported him to the police station, as there was probable cause justifying that seizure.

Regarding the *Miranda* issue, that Court rejected the defendant's argument that the evidence of a waiver was insufficient due to the lack of a video recording. The Court also found no basis to disturb the trial court's conclusion that the defendant knowingly and intelligently waived his *Miranda* rights. Lastly, the Court noted that the record contained no evidence of coercive conduct by the police. The Court agreed that the trial court's finding that the defendant's will was not overborne during the interview was supported by facts in the record.

Regarding the verdict form and the allegedly inconsistent verdict, the Court distinguished this case from the *Bundy* case, noting that the verdict form in this case referenced the predicate felony of murder by stating that the jury found him guilty of use of a firearm in commission of a felony "as charged in the indictment," and the indictment stated that the defendant was charged with use of a firearm in the commission of murder.

The Court explained that the fact that the defendant was convicted of manslaughter did not require the Court to reverse his conviction of use of a firearm in the commission of murder based on legal inconsistency. The Court repeated that a defendant can be convicted of using a firearm while committing an enumerated felony in § 18.2-53.1 even when the jury finds him not guilty of the enumerated felony.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0753224.pdf>

Fourth Amendment – Search and Seizure

Fourth Circuit Court of Appeals

U.S. v. Darosa: May 16, 2024

N.C.: Defendant appeals his conviction for Robbery on Fourth Amendment grounds.

Facts: The defendant robbed a store at gunpoint while wearing a mask. Investigating the offense, police discovered that the defendant left his notebook at the scene. The notebook had the defendant's fingerprint.

Police obtained a search warrant for the defendant's home and his vehicle. The affidavit in support of the search warrant explained that (1) the victim's store was robbed, (2) the robber left a notebook at the scene, and (3) a fingerprint on the notebook matched the defendant's prints. It also explained that, based on the officer's experience, the stolen items could be difficult to sell and thus may still be in the robber's possession. Finally, the affidavit noted that stolen items are often kept in a person's vehicle or home.

Executing the search warrant, police found many of the items that the defendant stole during the robbery in the defendant's home and his car.

The defendant moved to suppress the evidence seized during the search of his vehicle and home on the ground that the search warrant affidavit failed to establish probable cause. The district court denied the motion.

Held: Affirmed.

The Court agreed that the allegations in the search warrant provided at least a "substantial basis" for finding probable cause. While the Court acknowledged that the fact that a person's fingerprint is on a moveable object at a crime scene isn't particularly strong evidence of guilt, as there can be any number of innocent explanations for how the fingerprint got there, the Court repeated that potential innocent explanations don't defeat probable cause. The Court pointed out that the affidavit here connected the defendant's fingerprint to the crime, not just the crime scene.

The Court also found that the good faith exception would apply even if there were not probable cause in this case. The Court reached that conclusion by examining other information that the officer knew but didn't put in the affidavit. The Court explained that "Though it would have been better to include this information in the affidavit, Anderson's knowledge of it confirms our view that reliance on the search warrant was objectively reasonable."

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224726.P.pdf>

U.S. v. Briscoe: April 30, 2024

Baltimore: Defendant appeals his convictions for Murder, Drug Trafficking, and related offenses on Fourth Amendment and *Brady* discovery grounds.

Facts: The defendant robbed a woman of a large quantity of heroin, then shot and killed her. The defendant then shot and killed her seven-year-old son so that the child could not testify against him.

Police identified the defendant as the perpetrator. The investigators in this case obtained a tracking order which authorized them to use a cell site simulator to locate the defendant. Maryland law

provides a procedural mechanism for executing a search by means of cell site simulator. Police used this statutory procedure to obtain a tracking order in this case and “pinged” the defendant’s phone using a cell site simulator, which led them to an apartment building. Investigators then obtained a warrant to search an apartment because the cell site data was directing them to that unit.

After unsuccessfully searching the first apartment, the officers continued to receive cell site data indicating that the phone was nearby. Thus, the officers went to the second floor where they attempted, but failed, to enter a second apartment. They then knocked on the door of the second apartment, the unit where the defendant was ultimately located.

The occupant who opened the door of that apartment allowed them to enter. Officers saw several individuals running towards the back room. At that point, officers conducted a protective sweep of the apartment to locate all individuals and ensure that there was no threat to law enforcement. During their protective sweep, officers located the defendant on a couch in a common room and confirmed his identity. The officers secured the defendant and his cell phone and conducted a protective sweep of the apartment. They discovered narcotics and drug paraphernalia in a bedroom and brought everyone in the apartment, including the defendant, to the police department for questioning.

Prior to trial, the defendant moved to suppress the evidence. He contended his Fourth Amendment rights were violated in several ways during the investigation following the murders. First, the defendant contended his rights were violated when investigators used a cell site simulator to obtain his location. Second, the defendant contended that police lacked authority to search his person when they entered the apartment, and that he had standing to challenge their search as an overnight guest. The trial court denied his motion.

After trial, the defendant complained that the government failed to investigate whether a broken security camera found in the kitchen of the murder victims had recorded any footage from the time of the murder. A crime scene technician determined that the camera was not operational and a detective assigned to the case corroborated the technician’s report. Nonetheless, the defendant argued that the Government should have determined whether Comcast, the service provider associated with the security camera, retained any video footage.

Held: Affirmed.

Regarding the cellsite simulator order, the Court reviewed the tracking order and found that, like a search warrant, it set forth the requirement of probable cause and provided facts supporting probable cause. The Court pointed out that the application for a tracking order required the affiant officer to swear that there was “probable cause to believe that a misdemeanor or felony has been, is being, or will be committed by the owner of the [cell phone.]” It required the affiant to swear that “there is probable cause to believe that the location information being sought is evidence of, or will lead to evidence of, the misdemeanor or felony being investigated.” It then set forth the phone number that was the subject of the search, the defendant’s identity, and the facts supporting probable cause. Therefore, the Court rejected the defendant’s argument that the Government lacked probable cause to use a cell site simulator to obtain his location information.

Regarding the protective sweep, the Court concluded that the officers lawfully detained the defendant during a lawful protective sweep of the apartment.

Lastly, regarding the defendant's *Brady* claim, the Court complained that the defendant could not demonstrate that the footage on the camera would have been favorable to his case; instead, he could only speculate as to what the footage would have shown, and "rank speculation as to the nature of the allegedly suppressed materials cannot establish a *Brady* violation." The Court then noted that the government never had the recording, and so the defendant also failed to satisfy the test of *Brady*, not to mention the higher "bad faith" showing required to demonstrate a violation under *Youngblood*. Thus, the Court rejected the defendant's argument that the Government committed a *Brady* violation by failing to follow up on whether any footage was contained on the broken camera.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/234013.P.pdf>

U.S. v. Frazier: April 8, 2024

MD: Defendant appeals his convictions for Drug Distribution and Firearms Offenses on Fourth Amendment grounds.

Facts: The defendant possess a firearm and various drugs for distribution. Officers saw the defendant and another man who matched the description of a suspect from a recent shooting. Intending to speak to the suspect, officers approached in marked police vehicles. Officers saw the defendant and the suspect carrying a type of black bags that they knew were commonly used by drug dealers to conceal firearms and narcotics. As the officers approached, the defendant and the suspect suddenly ran away.

Officers chased the men, repeatedly yelling "Stop!" to them. They did not stop but instead responded by climbing over a railing. The shooting suspect dropped from the second-story railing to the ground and continued to run away. The defendant also attempted to climb from a railing to escape. The officer ordered the defendant to drop his bag, but the defendant went directly to the second-story railing where he had been dangling, took off his bag, and threw it at least 40 feet away, into the center of the apartment courtyard. After throwing his bag away, the defendant complied with the officers' commands. Officers placed him in handcuffs.

An officer recovered the bag and immediately felt the presence of a firearm. The officer opened the bag and found a loaded handgun along with drugs packaged for distribution.

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

Held: Affirmed.

The Court first applied the U.S. Supreme Court's *Wardlow* ruling and found that, in this case, the defendant and his companion's headlong flight was indicative of wrongdoing. The Court then ruled that, by throwing away his bag, the defendant voluntarily abandoned it. The Court explained that, once the defendant relinquished any legitimate expectations of privacy he had in the bag, the defendant lacked Fourth Amendment standing to contest the search.

The Court pointed out that, when officers searched the bag, the defendant neither disclaimed ownership nor made any attempt to protect it from a search and seizure. Therefore, the Court concluded, it was objectively reasonable for the officers to conclude that the defendant had relinquished any reasonable expectation of privacy he had in the black bag.

The Court rejected the defendant's argument that his tossing of the black bag into the apartment courtyard resulted from his subjective fear of the police officers and a fear of being tased.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/234179.P.pdf>

U.S. v. McDonald: April 8, 2024 (Unpublished)

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

Facts: The defendant, a convicted felon, possessed cocaine and marijuana with intent to distribute and possessed a firearm. Police encountered the defendant when they responded to the highest crime area in their jurisdiction to arrest the defendant's companion, a known gang member with an outstanding warrant for aggravated assault, who had been broadcasting live Instagram video of himself and another person brandishing firearms. This other person in the video had a dreadlock hairstyle.

When the officers arrived, the wanted man pulled a pistol from his pants and fled. Two officers chased the man, leaving one officer alone in the parking lot. Almost immediately, the defendant, who was seated in the driver's seat of a car, revved the engine of his car. The officer saw significant movement inside the car, as if the defendant and the passenger were reaching under their seats. The officer believed the defendant the other passenger may be either retrieving a firearm or discarding illegal items.

The officer then pointed his weapon at the car and ordered its occupants to show their hands and the defendant to shut off the vehicle. The defendant complied, at least at first. The officer then smelled marijuana, which detected was coming from the car. He also noted that the defendant had dreadlocks, like the person in the video with the firearm. The defendant and the passenger lowered their hands out of view. The officer ordered them to keep their hands where he could see them and directed the defendant to roll down the window. The defendant did so, sticking his head, then his hands, out of the vehicle.

The officer asked the defendant whether he had a gun and observed the defendant nervously looking down. Based on his experience, the officer believed that the defendant was looking at a hidden firearm. The officer opened the driver-side door and briefly frisked the defendant for weapons. He next ordered the defendant to exit the vehicle, where he handcuffed and again frisked the defendant. Once backup arrived nine or so minutes later, the officer searched the car, finding a handgun, two digital scales, vacuum seal baggies, and drugs. The officer also searched the defendant and found a pill bottle containing cocaine.

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

Held: Affirmed.

The Court emphasized the safety concern that the officers had in this case, as they knew a dreadlocked individual had a firearm who was seen interacting with an armed man wanted for aggravated assault; in addition, the defendant had dreadlocks, was in a running vehicle that he then revved, and was seen reaching under his seat as if to retrieve a weapon.

The Court rejected the argument that, under the 4th Circuit ruling in *Black*, the defendant's possession of a firearm could have been lawful and therefore was not a basis to detain him. The Court explained that, under the more recent decision in *Robinson*, *Black* doesn't apply when a person is otherwise lawfully stopped, and his potentially legal possession of a firearm poses a threat of danger to law enforcement. The Court explained that, in a situation where the defendant physically resembles the second armed individual, engaged in evasive behavior inside the vehicle, and revved the vehicle's engine, "*Black* and *Robinson* can co-exist."

Judge Wynn wrote a lengthy dissent.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224516.U.pdf>

U.S. v. Zelaya – Veliz, et. al.: February 16, 2024

E.D.Va: Defendants appeal their conviction for Child Sex Trafficking on Fourth Amendment grounds.

Facts: Defendants, members of MS-13, a violent criminal street gang, used violence to traffic several children for sexual acts during 2018. After one of the children escaped, the FBI investigated the scheme and obtained a series of four search warrants for data from Facebook.

The first search warrant ordered Facebook to give the government nine categories of information on five different Facebook accounts, including all private communications made or received by the accounts. The warrant followed a standard two-step search and seizure process. It first authorized the government to search the entirety of the data disclosed by Facebook. It then authorized the seizure of specific categories of information revealed during that search; namely, information that constituted fruits, evidence, or instrumentalities of violations of four federal criminal statutes.

The second search warrant ordered Facebook to give the government the same nine categories of information as in the first warrant, but this time on eight new Facebook accounts. The first two warrants only sought nine categories of information, including all communications sent to and from the accounts. The first two warrants did not have a timeframe limitation.

The second search warrant affidavit explained that established that one of the defendants was involved in the sex trafficking of the child who escaped, that he was operating multiple Facebook accounts under an assumed last name; and his MS-13 associates used Facebook to facilitate the child's trafficking and physical abuse.

The third search warrant ordered Facebook to disclose information associated with ten accounts. While the first two warrants contained no temporal limitation on what data could be searched, this warrant ordered Facebook to disclose information from January 2018 to the date the warrant was sworn out. The warrant also broadened the scope of the information that Facebook was required to turn over. It mandated disclosure of eighteen different categories of data from Facebook, including a broader set of user activity, IP addresses, device identifier logs, and all location information associated with the accounts. Just like the first two warrants, this warrant only permitted the government to seize information that constituted fruits, evidence, or instrumentalities of the four previously enumerated offenses plus one additional offense.

The third warrant provided a detailed description, based on interviews with the escaped child, of how one of the defendants was central to the sex trafficking conspiracy. The affidavit explained that a previously searched Facebook account had revealed that the targeted defendant used his Facebook account to advance MS- 24 13's other criminal endeavors, including the use of firearms, and were depicted through the transmission of photographs of firearms, illegal drugs, and gang signs.

The fourth and final search warrant authorized the search of information from twenty-two Facebook accounts, including most of the defendants' accounts, as well as multiple accounts of unindicted co-conspirators. Like the third warrant, the final warrant required Facebook to provide account information from January 2018 to the date the warrant was sworn out. The warrant used the same list of eighteen types of information for Facebook to disclose as in the third warrant. And, just like the previous warrant, it limited the government's seizure to include only information discovered during the search that constituted fruits, evidence, or instrumentalities of the five enumerated offenses.

Submitted to the court in February 2020—over ten months into the investigation— the affidavit supporting this warrant provided voluminous information on the sex trafficking conspiracy and directly tied the use of Facebook by each of the four defendants to their criminal activities. In doing so, the affidavit made extensive use of the Facebook records produced pursuant to the previous warrants.

The defendants moved to suppress the evidence gathered from the warrants. They began by arguing that the warrants lacked probable cause. Next, they argued that the Facebook warrants were insufficiently particularized in two ways: First, they claimed the scope of the warrants should have included fewer categories of data from the Facebook accounts; Second, they claimed that the timeframe of the warrants should have been limited to include only information during the trafficking of the escaped child instead of information from before and after that period.

The trial court denied the motions.

Held: Affirmed.

The Court first observed that none of the defendants had Fourth Amendment standing to challenge the first Facebook warrant because that warrant did not target the defendants' accounts or data. Because no protected interest of the defendants was implicated by the first warrant, the Court did not assess its constitutionality.

On the other hand, each of the next three warrants sought data from at least one of the defendants' accounts. The Court therefore assumed, without deciding, that the defendants have standing to challenge those warrants. The Court favorably cited cases from other circuits that found that private electronic communications are generally protected by the Fourth Amendment, even when

transmitted over third-party platforms. The Court wrote: “It cannot be the rule that the government can access someone’s personal conversations and communications without meeting the warrant requirement or one of the Supreme Court’s delineated exceptions to it.”

The Court then rejected the defendants’ argument that the warrants lacked probable cause. The Court agreed that the magistrates who approved the three Facebook warrants at issue each had a substantial basis for concluding that the searches would uncover evidence of wrongdoing. The Court agreed that each reasonably determined, based on the information averred in the supporting affidavits, that there was a fair probability that evidence of MS-13’s sex trafficking crimes would be found on the defendants’ Facebook accounts. The Court also agreed that the affidavits provided ample support for the magistrate’s determination that there was a sufficient nexus between the accounts to be searched and the evidence of sex trafficking to be seized.

Regarding particularity, the Court agreed that the warrants compelled Facebook to turn over a wide swath of personal information attached to the accounts, including all private communications, most user activity, and, in the case of the latter two warrants, all location information. However, the Court also pointed out that each warrant identified the items to be seized by reference to the suspected criminal offenses, as required by cases such as *Cobb* and *Blakeney*. Thus, while the warrants authorized the government to search all of the information disclosed by Facebook, they only permitted the subsequent seizure of the fruits, evidence, or instrumentalities of violations of enumerated federal statutes. The Court concluded that the warrants in this case thus appropriately confined the executing officers’ discretion by restricting them from rummaging through the defendants’ social media data in search of unrelated criminal activities.

The Court wrote that “this distinction between what may be searched and what can be seized counsels the government to execute social media warrants through a two-step process. This process—whereby the government first obtains a large amount of account data then seizes only the fruits, evidence, or instrumentalities of enumerated crimes—is crucial to the validity of social media warrants.” For authority for this “two-step process,” the Court looked to Federal Rule of Criminal Procedure 41(e)(2)(B) and its commentary, which permit officers, in searching electronically stored information pursuant to a warrant, to “seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.”

The Court concluded that the two-step process, as laid out in Rule 41, helps to mitigate particularity concerns in the social media warrant context. In this case, the Court reasoned that the terms of the warrants at issue ensured that the government executed the warrant in a reasonable manner. The Court also pointed out that the district court retained the authority to determine that prolonged retention of non-responsive data by the government violated the Fourth Amendment. For the Court, these safeguards helped ensure that, despite the large scope of information that the warrants here returned, the searches and seizures they authorized were not insufficiently particularized.

The Court emphasized that the affidavit showed how the conspirators were using Facebook extensively to communicate with co-conspirators, victims, and customers in furtherance of the conspiracy. Under such circumstances, the Court ruled that it did not violate the Fourth Amendment’s particularity requirement for law enforcement to obtain detailed Facebook user activity data on the sex trafficking suspects. The Court explained “The sheer magnitude of the sex trafficking conspiracy here

justified a concomitant breadth in the scope of the warrants, particularly as the seizures they authorized were limited to evidence of the specified offenses for which probable cause existed.”

The Court then turned to the timeframe in the search warrants. The Court acknowledged that some courts have found that a temporal limitation can help particularize warrants that authorize the search and seizure of Facebook account data.

Examining the third and fourth warrants, which had a more limited timeframe, the Court ruled that the timeframe was appropriately particularized as (1) the affidavits suggested that the escaped child been sexually abused by affiliates of MS-13 starting during or before June 2018; (2) the escaped child’s abuse was part of a broader sex trafficking conspiracy involving multiple minors before the escaped child’s abuse began; (3) each affidavit explained how gang members involved in a sex trafficking conspiracy often use social media to discuss the conspiracy before, during, and after its execution; (4) multiple defendants continued to use Facebook to message the escaped child after she was recovered by law enforcement in October 2018; and (5) it was appropriate for the magistrates to infer from the affidavits that the targeted MS-13 members and affiliates were engaged in what the district court called an “extensive ongoing interstate criminal enterprise of uncertain beginnings.”

The Court agreed with the 10th circuit that search warrants relating to more complex and far-reaching criminal schemes may be deemed legally sufficient even though they are less particular than warrants pertaining to more straightforward criminal matters.

The Court then examined the second warrant, which lacked a temporal limitation. The Court repeated that a time-based limitation is both practical and protective of privacy interests in the context of social media warrants. However, the Court refused to mandate a temporal restriction in every compelled disclosure of social media account data “for the simple reason that we cannot anticipate all future circumstances.”

Instead, the Court simply held that the motion to suppress was properly denied because the good faith exception to the exclusionary rule applied. Given the unsettled nature of whether a temporal limitation is required on a warrant authorizing the search and seizure of Facebook account data, the Court refused to find that a reasonably well-trained officer would have known that the search was illegal despite the magistrate’s authorization.

Nevertheless, the Court cautioned that future warrants “will enhance their claims to particularity” by requesting data only from the period of time during which the defendant was suspected of taking part in the criminal conspiracy. The Court emphasized that its ruling was a narrow one, and “we do not greenlight all warrants for and searches of social media data.” In a footnote, the Court pointed out that it was not, for example, addressing the question of whether officers sifting through Facebook account data for the fruits and instrumentalities of sex trafficking could lawfully build a different case under a plain view discovery of a distinct offense.

The Court concluded by writing: “We cannot read the Fourth Amendment to allow the indiscriminate search of many years of intimate communications. And because of the inherent interconnectedness of social media, permitting unbridled rummaging through any one user’s account can reveal an extraordinary amount of personal information about individuals uninvolved in any criminal activity. It is not only courts that are struggling to strike a balance between privacy and security in the rapidly changing digital domain, but society as a whole. When criminal offenders use social media to organize their enterprises and evade detection, it would seem unreasonable to disable law enforcement

from using those same media to apprehend and prosecute them. To hold otherwise would arbitrarily tip the scales away from law and justice for the benefit of increasingly sophisticated criminal schemes. But at the same time, there comes a point when the Fourth Amendment must emphatically yell STOP, lest we render obsolete the hallowed notion of a secure enclave for personal affairs.”

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224656.P.pdf>

U.S. v. Perry: February 6, 2024

E.D.Va: Defendant appeals his conviction for Possession of a Firearm and related offenses in Fourth Amendment and Evidence Spoliation grounds.

Facts: The defendant, a convicted felon, possessed two firearms while riding as a passenger in his girlfriend’s vehicle. Officers observed the vehicle in an area of Norfolk well-known for gang activity and violent crimes, noting that the vehicle had no front license plate and a temporary paper license plate on the rear. When the officers made a U-turn to investigate, the vehicle accelerated away from the patrol car in an evasive manner and ran two stop signs. The officers pursued, losing sight of the SUV for about ten seconds.

When they caught up, the vehicle had pulled over in a parking lot and the passenger door was open. The officers activated their emergency equipment. The defendant’s girlfriend exited the vehicle from the driver’s side door. The defendant, however, leaned towards the floorboard before “jump[ing] over the center console” of the car to exit the driver’s side door as well.

Officers handcuffed both the defendant and his girlfriend and questioned them separately. Officers placed the defendant in their patrol car and ran a background check on him. The girlfriend consented to a search of the vehicle which revealed two handguns. Officers arrested the defendant for felon in possession. They allowed his girlfriend to depart; she took the defendant’s cellphone with her.

The lead officer preserved the bodycam video from this encounter but failed to preserve the dashcam video, which was automatically deleted thirty days after the stop. He concluded, after watching his bodycam video, that the bodycam and dashcam videos would have shown largely the same things and that the bodycam would have shown a better recording of that night’s events. The officer never reviewed the dashcam footage, however.

Over the course of the next seven months the girlfriend was the only person to use the defendant’s cell phone. She regularly used the phone for purely personal purposes. During that time, she had access to the contents of the entire phone.

The Government then subpoenaed the girlfriend to appear and testify at Grand Jury. When the girlfriend returned to Virginia for the grand jury proceedings, she brought the defendant’s phone, and gave both it and the passcode to federal agents, along with her consent to search the phone. Agents discovered incriminating evidence on the phone.

The defendant moved to suppress the search of his vehicle and the search of the phone. The trial court denied those motions. The defendant also objected to the destruction of the dashboard

camera video, claiming a Due Process violation due to evidence spoliation, but the trial court rejected that argument as well.

Held: Affirmed.

The Court first concluded that the officers had reasonable suspicion sufficient to justify detaining the defendant. In this case, the Court applied *Rodriguez* and found that the mission for the seizure was not, at any point, limited to the observed traffic violation of running two stop signs. The Court contended that the officers reasonably suspected that criminal activity was afoot based on the reaction to the officers' U-turn. The Court explained that investigating that activity was therefore part of the traffic stop's mission from the beginning. The Court also pointed out that the initial detention revealed information that heightened their suspicions, such as the defendant's furtive movements toward the floorboard and the fact that both he and the driver exited out of the driver's-side door, even with the passenger's-side door wide open.

The Court rejected the argument that the officers' request for consent to search unlawfully prolonged the traffic stop. Instead, the Court repeated that one purpose of a *Terry* stop is to allow the officer to attempt to obtain a person's consent to a search when reasonable suspicion exists. In this case, the Court pointed out that the search advanced the traffic stop's mission of investigating suspected criminal activity.

The Court also repeated that the precautions that officers take to preserve their safety stem from the mission of the stop itself. Thus, just as the officers acted within the mission of the traffic stop by asking for consent and searching the car, they also acted within the mission of the stop by detaining the defendant throughout the search.

Regarding the search of the phone, the Court agreed that the girlfriend had the requisite authority to consent to the search. The Court restated that as long as the person who consents has "joint access or control for most purposes" over something, others with an interest in that effect will be seen to "have assumed the risk" that the consenter might submit the object to the police to be searched. In this case, the Court agreed that the girlfriend had at least joint, if not sole, access and control over the cell phone at the time of the search. The Court concluded that the girlfriend had actual authority to consent to the phone's search, and the government's failure to get the defendant's consent or a warrant was irrelevant.

Lastly, regarding spoliation, the Court repeated that spoliation will only violate due process where the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant yet still failed to preserve it. In this case, the Court agreed that the defendant failed to show that the officer did not preserve potentially exculpatory evidence in bad faith. Therefore, his due-process argument failed.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214684.P.pdf>

U.S. v. Davis: January 25, 2024

Published

W.Va: Defendant appeals his convictions for Drug Distribution and Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant unlawfully possessed drugs for sale along with a firearm. Law enforcement investigated the defendant's roommate and interviewed him during an investigation into unlawful firearms purchases. The roommate admitted that he had moved several firearms to the residence earlier that day for the purpose of selling them to prohibited persons, including the owner of the residence. Officers confirmed that the owner was a prohibited person and owned the residence. Officers obtained a search warrant to search for firearms, ammunition, and unlawful narcotics.

Executing the search warrant, officers seized firearms, cash, and additional controlled substances from the residence, including from the defendant's bedroom. As officers were executing the search warrant, they observed the defendant attempt to place baggies of controlled substances into an air vent. Officers arrested and searched the defendant and discovered more baggies of controlled substances. Officers also observed and seized the defendant's phone. They later obtained another warrant to search the phone.

The defendant filed a motion to suppress, arguing that the affidavit supporting the search warrant (1) lacked probable cause that evidence of a crime would be found at the residence, (2) lacked probable cause to search for and seize "controlled substances," and (3) lacked probable cause to search for and seize his phone. The district court denied the defendant's motion to suppress.

Held: Affirmed. The Court ruled that (1) the warrant to search the residence was valid, (2) the controlled substances were properly seized either incident to the defendant's arrest or because they were in plain view of the officers conducting the search; and (3) the defendant's cell phone was lawfully seized as an instrumentality of drug trafficking found in plain view.

Regarding the search warrant's probable cause, the Court found that the magistrate had a substantial basis for finding probable cause to believe that evidence of at least firearms-related offenses would be found at the residence. The Court ruled that the informant's statements established probable cause to believe that evidence of a crime—possession of a firearm by a prohibited person—would be found at the residence.

The Court then declined to reach the question of whether the search warrant affidavit supplied the probable cause necessary to search for and seize controlled substances. Instead, the Court ruled that the controlled substances at issue were properly seized either incident to arrest or because they were in plain view of the officers conducting the search. For example, regarding the drugs found in the defendant's bedroom, the Court concluded that the officers executing the search warrant were entitled to search for evidence of firearms offenses, including firearms and ammunition, and noted that the bag of drugs was in a location that officers were entitled to search.

Regarding the drugs found on the defendant's person, the Court agreed that officers had probable cause to arrest and search the defendant after observing him attempt to conceal drugs in the house.

Lastly, regarding the officers' seizure of the defendant's cellphone, the Court held that law enforcement lawfully seized the defendant's cell phone as an instrumentality of drug trafficking found in

plain view. The Court contended that, in this case, the officers executing the search had probable cause to associate the phone with criminal activity.

The Court pointed out that the phone was inside the residence, and therefore necessarily in a location that police were entitled to search. The Court then explained that the phone's incriminating character was immediately apparent given the substantial quantities of controlled substances that were found on the defendant's person and in his bedroom, the extent to which they were packaged for distribution, the evidence of drug trafficking found elsewhere in the common areas of the residence, and the known and obvious connection between drug trafficking and the use of cell phones.

The Court cautioned that it was not holding that cell phones in plain view may always be seized as instrumentalities of a crime. The nature of the alleged crime and the totality of the evidence are critical considerations. The Court explained that seizure was only justified because officers found the phone together with substantial evidence of drug trafficking—a crime that inherently involves coordination between multiple individuals. The Court analogized this case to *Runner*, involving seizure of a glass pipe, and wrote:

"A phone is an everyday object, like a kitchen scale, whose "predominate purpose" is not criminal. ... And a scale found together with evidence (e.g., bank records) of a crime not typically associated with the use of scales (e.g., tax fraud) does not adopt an incriminating character. But a scale found together with small baggies, large quantities of controlled substances, and firearms can adopt an incriminating character. So too can a cell phone. But for a cell phone to be seized in plain view, the "additional evidence or indicators" of criminality have significant work to do to establish probable cause."

The Court also cautioned that it was not holding that the warrant lawfully authorized the officers to search the contents of the phone, which required a second search warrant.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224088.P.pdf>

U.S. v. Everett: January 23, 2024

N.C.: Defendant appeals his convictions for Drug Distribution and Firearms offenses on Fourth Amendment grounds.

Facts: The defendant ran a large-scale drug distribution operation. Law enforcement investigated and learned of the extent of the activity. Law enforcement obtained a search warrant for one of the locations of his distribution operation and seized both firearms and drugs from that location, including a firearm near paperwork belonging to the defendant. Officers also arrested the defendant's compatriots and found firearms either on their person or nearby.

Based on their investigation, law enforcement obtained a warrant for the defendant's arrest. They then went to a residence that they concluded was the defendant's residence because the defendant, his truck, and his wife were located at that address, and the utility company associated his name with that address. Officers observed that the defendant's residence was protected by several surveillance cameras.

Officers visited the defendant's home, entered, and arrested him inside the residence. When the officers entered the residence, they immediately found an unexpected third person. The officers then conducted a three-and-a-half-minute "protective sweep" walkthrough of the residence. During the sweep, the officers observed items such as THC gummies and firearms, but looked only in locations where a human being might be.

Officers promptly secured the residence while an officer obtained a search warrant that was based, in part, on their observations. Armed with the search warrant, they conducted a thorough search of the residence and seized drugs, many loaded firearms, at least \$65,000 in cash, and drug packaging materials.

The defendant moved to suppress the evidence found in his home, but the district court ruled that the authorities satisfied the "protective sweep" exception to the search warrant mandate of the Fourth Amendment.

Held: Affirmed. The Court explained that "to deprive the officers of the right to conduct a protective sweep, in the circumstances existing at the Residence on the evening of July 17, 2018, would undermine officer safety." The Court repeated that a protective sweep of a residence is permissible when the facts warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Regarding the surveillance cameras, the Court found that the use of surveillance cameras at the home of a drug dealer who was at the top of his drug distribution scheme could reasonably support a protective sweep. Regarding the unexpected person inside the residence, although some courts have indicated that the surprise of an additional person is not alone sufficient to justify a protective sweep, in this case the Court agreed that the circumstances before the protective sweep were much more than just an additional person.

In a footnote, the Court pointed out that the officers took no longer than necessary to secure their safety. In another footnote, the Court also agreed that the officers had ample probable cause to conclude that the residence was the defendant's home.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224536.P.pdf>

U.S. v. Smart: January 22, 2024

E.D.Va: Defendant appeals his conviction for Drug Trafficking on Fourth Amendment grounds.

Facts: The defendant carried drugs for sale in his vehicle. An officer observed the defendant speeding and pulled out behind him. Instead of slowing down or putting on his brakes, the defendant stayed in the left-hand lane and began sorting through traffic, making it difficult for the officer to catch up to him. Ultimately, the officer was able to stop the defendant.

When the defendant reached the defendant's vehicle, he noticed that the defendant had a five-gallon can of gas in his passenger seat. The officer found that unusual because was "most people don't

want to travel with a gas can with the fumes inside their vehicle.” On the other hand, the officer knew that carrying extra gas is well-known drug trafficking behavior. The officer later explained that drug dealers sometimes bring gas with them when they are transporting drugs to avoid having to stop at gas stations and get their return trip over as fast as possible.

The officer also noted that the defendant immediately exhibited signs of “extreme” anxiety and stress that concerned. The defendant would take “long pauses while staring through the windshield” before answering his questions, resulting in a “very clunky” conversation. The officer was so concerned about the defendant’s behavior that he asked if he was all right and, seconds later, paused the interaction to allow the defendant to calm down. (The officer did not know it at the time, but the defendant was high on cocaine.)

The officer asked the defendant where he was going. The defendant’s responses to his intended destination were inconsistent. The defendant first advised that he was traveling from Lake Charles, Louisiana where he visited family for a ‘few’ days and was on his way to Biloxi, Mississippi. Moments later, though, he stated he was trying to get home to North Carolina.

The officer later explained, on cross-examination from the defendant himself (who represented himself at the motion to suppress): “My interview with you wasn’t just normal answers. It wasn’t even just “I don’t like the police” answers. It was a far-off, thousand-yard stare like I need to get out of here. And after you stop thousands of cars in your career, you can tell when someone is having an issue. Just like I asked you, “Are you okay?” That was for a reason. That’s because you were not giving normal responses. You were in a far-off place thinking about what you were going to do next.”

The officer extended the stop to allow his K9 unit to inspect the vehicle for the odor of illegal narcotics. The dog alerted to the presence of drugs in the car. After a struggle with the defendant, officers recovered the full 5-gallon gas can from the front passenger seat area, a second, full 5-gallon gas can in the trunk of the vehicle, and cocaine with a weight of 5.6 kilograms.

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

Held: Affirmed. The Court ruled that the officer’s decision to extend the traffic stop to deploy his drug-sniffing dog did not violate the Fourth Amendment. Accordingly, the Court agreed that the district court properly denied the motion to suppress.

The Court emphasized that the trial court was correct to rely on the officer’s inferences and the district court’s “context-sensitive judgment” to trust that inference. Looking at the circumstances as a whole—giving due weight to the officer’s experience and the district court’s factual findings—the Court agreed that the officer had a reasonable suspicion that criminal activity was afoot.

Regarding the defendant’s nervousness, the Court repeated that nervousness is not a particularly good indicator of criminal activity “because most everyone is nervous when interacting with the police.” However, the Court also noted that nervousness can still be a relevant factor to the reasonable suspicion inquiry where (1) the suspect’s nervousness is extreme - “unusual, beyond the norm, or evasive” - and (2) the officer articulates specific facts supporting his conclusion that the suspect was extremely nervous.

Judge Traxler filed a concurring opinion. Judge Wynn filed a dissent, complaining that “Little more than a driver’s nervousness and the presence of a can of gas now offer open invitations for police officers to invade drivers’ privacy.”

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224209.P.pdf>

U.S. v. Henderson: November 29, 2023

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

Facts: The defendant, a convicted felon, carried a firearm with an extended magazine in an area restricted pursuant to § 18.2-287.4, which prohibits, subject to exception, possession of certain loaded firearms equipped with a magazine that will hold more than 20 rounds of ammunition in certain localities. An officer saw the extended magazine clearly visible in the defendant's waistband. In addition, the officer saw a small portion of the butt of a firearm, and the angle of the magazine indicated that it was attached to a firearm. After seeing the officers, the defendant attempted to hide the magazine from the officers' view.

Officers detained the defendant and recovered his gun, an attached extended magazine, and a separate standard magazine. The defendant then moved to suppress the stop.

At the motion to suppress, the officer explained that the "cant" of the magazine and the way it responded to the defendant's attempt to push it into his pants were indicative of the magazine being attached to a firearm. The officer also shared his experience with the particular gun in question, Virginia firearm offenses, and the specific high-crime area where he saw the defendant. The officer also testified that people who are legally carrying a firearm do not generally attempt to hide a firearm and that standard magazines are less likely to extend past the butt of firearm. The officer explained that magazines are generally not carried in the waistband, unless they are attached to a firearm.

The trial court denied the motion to suppress.

Held: Affirmed. The Court found that the officer had reasonable suspicion that the defendant was carrying a concealed weapon and/or a weapon with an extended magazine in violation of § 18.2-287.4, which prohibits, subject to exception, possession of certain loaded firearms equipped with a magazine that will hold more than 20 rounds of ammunition.

Although the defendant complained that the officers acted too quickly in detaining him, the Court could find no bright line rule regarding the amount of time required to develop reasonable suspicion. The Court pointed out that in *Bumpers*, it had ruled that reasonable suspicion existed in a case where police seized a person suspected of trespassing "five to ten seconds" after seeing him. The Court distinguished this case from the recent *Peters* case.

In a footnote, the Court explained that because a longer magazine can hold more of the same type of ammunition than a shorter magazine, the length of the magazine is a factor to be considered regarding reasonable suspicion for a violation of § 18.2-287.4.

Full Case At:

U.S. v. Wilborne: November 7, 2023

Unpublished

W.Va.: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: Police arrested the defendant based on a warrant. After handcuffing the defendant, the police recovered his belongings, including a backpack and two bags of clothes. The police searched the backpack and found a loaded firearm. Police transported the defendant, his backpack, and his clothing bags to the police station.

At the time, the department had a policy requiring all property seized with an arrestee to be inventoried at the police station. Pursuant to this policy, the police were required to fill out a property report listing the seized items and indicating whether they constituted evidence that had to remain at the station or personal property that could go with the arrestee to jail. Also, under the jail's policy, all personal property taken to the jail was required to be searched for safety purposes before entering the jail. Based the policy, an officer searched the clothing bags and filled out two property reports that listed the contents of the defendant's bags.

The defendant moved to suppress the search. The district court denied the motion because it found that the firearm would have been inevitably discovered pursuant to a lawful inventory search.

Held: Affirmed.

The Court repeated that under the inevitable-discovery doctrine, evidence obtained through an unreasonable search is admissible if the Government shows by a preponderance of the evidence that police would have "ultimately or inevitably" discovered the evidence by "lawful means," such as through a lawful inventory search. The Court also repeated that, for an inventory search to be permissible, "the search must have been conducted according to standardized criteria, such as a uniform police department policy, and performed in good faith." The Court repeated the standard from *Bullette* that there must simply be sufficient evidence to show that law enforcement had a standard inventory procedure "and would have inevitably discovered the challenged evidence by conducting an inventory search according to routine and standard . . . procedures."

In this case, the Court found that, based on the police policy, even if the officers had not searched the defendant's backpack at the scene of his arrest, they still would have transported the defendant and his personal effects to the police station, searched the bags while filling out the property reports and characterizing the items as personal property or evidence, and inevitably discovered the firearm in the backpack. Therefore, the Court agreed that the district court did not clearly err in concluding that the police would have inevitably discovered the defendant's firearm pursuant to a lawful inventory search.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224452.U.pdf>

Armstrong v. Hutcheson: September 13, 2023

80 F.4th 508

W.D.Va: Plaintiff appeals the dismissal of his lawsuit against Law Enforcement on Fourth Amendment grounds.

Facts: The plaintiff's estranged wife called police to claim that her husband had locked her out of the house during a dispute. She told police that there were guns in the home but that those guns were not involved in the incident. When police arrived, the wife told police that although she and the plaintiff had separated, they had recently reconciled, and she had moved back into the residence. She also told the police that she had multiple vehicles at the residence.

When the officers arrived at the home, the wife asked to enter the home to retrieve her belongings. The wife used a key to cut a hole in an exterior screen located on the back door. After that, she pulled back the screen and used the key to unlock the back door. When the plaintiff/husband discovered the wife and police entering, he insisted that they had separated, and the wife did not live in the residence. The police asked why the wife would store all her belongings at the plaintiff's residence if she did not live there. The officers ordered the plaintiff to wait downstairs while the plaintiff retrieved her belongings. She then left with her property.

In fact, the wife was lying. The parties had already entered into a written premarital agreement which listed the residence at issue as separate property to which the wife had no rights. Police did not know that at the time, however.

The plaintiff then sued the officers under 42 U.S.C. § 1983 for violating the Fourth Amendment by entering his home and detaining him after they were inside. The officers moved to dismiss on summary judgment and the trial court granted the motion.

Held: Affirmed.

The Court first examined the question of whether the officers' reliance on the alleged co-tenant's consent to enter the home without a warrant was reasonable under the circumstances. The Court noted that the consent exception extends even to entries and searches with permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. The Court repeated that the determination of whether the police reasonably believed that an individual possessed authority to consent to their entering must be judged against an objective standard: would the facts available to the officer at the moment "warrant a man of reasonable caution in the belief" that the consenting party had authority over the premises.

The Court then examined who decides whether the officers' conduct was objectively reasonable, the judge or the jury. The Court ruled that when the historical facts are settled, the question of the objective reasonableness of officers' conduct is a question of law to be decided by the court.

The Court clarified that if after construing the historical facts in favor of the non-moving party, the court determines the officers' conduct was unreasonable, summary judgment for the officers is improper. The case would then proceed to trial for a jury to resolve not the ultimate question of the conduct's reasonableness—because that is a question for the court—but the disputes over any material

historical facts. Then, after the jury resolves those disputes, the court decides the objective reasonableness of the officers' conduct.

In this case, the Court agreed that the evidence establishes that it was reasonable for the deputies to believe that the wife possessed authority to permit them to enter the residence. The Court noted that the wife "told the deputies that they had reconciled. Couples—even those with rocky relationships—often reconcile."

Regarding the detention, the Court also agreed that the officers acted reasonably as a matter of law because they were responding to a domestic situation, there were guns in the house and the plaintiff was argumentative.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/221082.P.pdf>

U.S. v. Critchfield: August 31, 2023

81 F.4th 390

W.Va.: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant carried a gun and drugs while walking through a neighborhood. While leaving his home for work one morning, a Federal postal inspector saw the defendant walking out of an alley by an unoccupied home. This portion of the mixed-use neighborhood was largely residential but adjacent to "dense, higher-traffic, and commercial areas." When the defendant saw the inspector, according to the witness, he had an "Oh, no, I'm caught" look on his face and doubled back along his path.

The inspector followed the defendant on foot and later in his car. He saw the defendant come out of the alley near an occasionally unoccupied house, the defendant kept looking at him, and when he followed the subject in his car, he found him walking back the direction he just came from. He called the police and shared what he had seen, and also told the police that the pocket of the defendant's sweatshirt was "so heavy that the shirt was hanging down below his crotch."

Officers stopped the defendant and discovered that he was carrying a handgun and illegal drugs. The defendant moved to suppress, but the trial court denied the motion.

Held: Reversed. The Court ruled that, without more, these circumstances did not establish reasonable suspicion that the defendant had committed a theft or was about to do so.

The Court first concluded that the officers' stop was based entirely on the information that the inspector had communicated to them. Although the inspector worked in law enforcement, the Court pointed out that he did not make the stop or instruct these officers to do so. Rather, the Court described, the inspector acted as a known and credible tipster. The Court therefore focused on the facts known to the officers, rather than the inspector, at the time they stopped the defendant.

Considering the totality of the circumstances known to the officers when they stopped the defendant, the Court concluded they did not have objectively reasonable suspicion that he was, or had been, engaged in theft. The Court agreed that, when the officers stopped the defendant, they knew he

was a man with a weighed- down sweatshirt pocket who had walked through a residential neighborhood past an occasionally unoccupied home next to a commercial area in broad daylight and who had behaved evasively when a neighborhood resident watched and followed him. The Court concluded, however, that these circumstances, without more, did not give rise to reasonable suspicion of theft.

The Court found that the defendant's nervous and evasive reaction was not dispositive because it was not in response to an identifiable member of law enforcement. The Court noted that nothing in the record suggested that the inspector was in uniform or recognizable as a federal postal inspector when the defendant saw him. The Court contended that, depending on the circumstances, it may be significantly less indicative of criminal activity for a person to evade a stranger on the street than to evade the police. The Court wrote: "While headlong flight might provoke suspicion in any context, we think a nervous reaction and evasive route in response to being watched and followed by another civilian contributes less support to a finding of reasonable suspicion than efforts to evade law enforcement."

The Court also found an insufficient basis to find that the defendant's unusually heavy pocket suggested that officers could reasonably believe it contained theft implements or stolen goods. The Court complained that there was no testimony, for example, about the shape of any bulge in the pocket, anything protruding from it, any expectation about how thieves typically carry theft implements, or any recent thefts of objects of a particular size or weight. Instead, the Court argued, the only basis for thinking the defendant's heavy pocket held theft implements or stolen valuables was his temporary proximity to the occasionally unoccupied house by the alley at 8:30 a.m.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224063.P.pdf>

U.S. v. Podbielski: August 1, 2023

(Unpublished)

N.C. Defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: The defendant carried Methamphetamine for sale in his vehicle. An officer noticed the defendant cross the center and fog lines of the roadway. The officer was driving in front of the defendant, so to initiate a traffic stop, the officer slowed down under the speed limit on that roadway, 50 miles per hour, to cause the defendant to pass him. The defendant did not pass the officer until the officer had slowed to 35 miles per hour, which the officer found unusual.

The officer noted that the vehicle had Georgia license plates. The officer testified that the highway was a common drug trafficking route, and that Georgia is a source state for narcotics in North Carolina. The officer summoned a K9 officer to respond.

The officer asked the defendant to exit the vehicle and speak with him. At that point, the defendant exhibited "signs of nervousness above the norm," including sweating when the weather was cool, shifting feet from side to side, and becoming upset in response to questions about whether his car

contained anything illegal. When the officer spoke with the passenger, he noticed that the passenger's pants were unzipped and when he spoke to her, she became "a little more nervous," wouldn't make eye contact with him, and began looking inside the vehicle "as if she was making sure something was hidden."

The officer learned that the defendant's and the passenger's licenses were both suspended. He prepared summonses for the defendant for driving without a license and the traffic violation. The officer then searched a database for unrelated civil summonses, including any contempt orders for failure to meet child support obligations. The officer later testified that he checks that database "to make sure that none of those need to be served" as part of his duties, but at the motion to suppress, a backup officer from this case stated that officers do not do that routinely.

After about 20 minutes, the K9 officer arrived. The officer stopped for about two minutes to speak to the K9 officer, and then returned to his traffic stop. While the dog sniff was being carried out, the officer informed the defendant of the citations, explained them, and then read the two criminal summonses aloud in their entirety. The officer testified that he routinely reads the entire summons to a driver, but here again, the backup officer did not corroborate that in their testimony. Lastly, the officer explained the location of the courthouse in detail to the defendant.

After giving the defendant his license and the summonses, the defendant asked if he was free to go. The officer told him that he could not leave because they "were going to have to wait to see if the K9 had alerted on his vehicle."

After another minute, the K9 officer informed the primary officer that the dog had indicated the presence of narcotics. Officers searched the car and found the defendant's drugs and scales. The defendant moved to suppress, but the trial court denied the motion.

Held: Reversed.

The Court first concluded that the officer prolonged the stop beyond the scope of the traffic investigation. The Court repeated that an officer's decision to execute a traffic stop in a deliberately slow or inefficient manner, in order to expand a criminal investigation within the temporal confines of the stop without reasonable suspicion, could compel a conclusion that the officer has violated the Fourth Amendment.

Regarding the officer's search for child support obligations, the Court questioned whether an officer may prolong a stop to investigate potential child support obligations simply because a female passenger is present in the vehicle with a male driver. The Court wrote: "If the driver were female with a male passenger, would Deputy Porter still use this reasoning as a purported excuse to prolong the traffic stop? Doubtful." Regarding the officer reading the entirety of both summonses, the Court pointed out that North Carolina law does not require an officer to do that and that his fellow officer disavowed that it was standard procedure.

The Court also noted that the officer stopped his traffic investigation for two minutes to speak to the K9 officer, repeating that even a de minimis delay can violate the Fourth Amendment. Lastly, the Court pointed out that the officer prolonged the stop when he finished issuing the citation but required the defendant to wait for the results of the dog sniff.

The Court then examined whether the officer had reasonable suspicion of a drug offense. The Court first pointed out that the officer did not ask the defendant to complete any field sobriety tests and

did not show any signs of having consumed alcohol, despite having claimed to have stopped the vehicle on suspicion of DUI. The Court then cautioned that “simply driving a vehicle with a Georgia license plate and registered to a Georgia citizen is not a basis” for reasonable suspicion of drug trafficking, especially since the highway was one of only two highways in the area. Lastly, the Court found that the officer could not articulate the basis for his suspicion about the passenger’s unzipped pants.

The Court agreed that the passenger’s unusual, nervous behavior did provide some reason for suspicion. The Court also agreed that “sweating profusely on a cold day, hands shaking, . . . and increased agitation when asked routine questions” are indicative of “exceptional nervousness” contributing to reasonable suspicion. Even though the defendant’s license was suspended, which may have been a reason for his nervousness, the Court found that this observation was indicative of criminal activity.

The Court concluded that the officer did not possess reasonable suspicion of drug trafficking to prolong the search, writing: “Once we eliminate the facts that are reasonably attributable to innocent travelers, or are improper for consideration, we are left with very little. What remains is Appellant’s nervousness after being pulled over while driving on a suspended license and Parton’s unzipped pants.”

In a footnote, the Court acknowledged that “it is possible that officers would have inevitably found the drugs during an inventory search of the towed vehicle.” However, in this case the Court noted that the government did not make that argument, so it was waived.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224084.U.pdf>

U.S. v. Bailey: July 17, 2023

74 F.4th 151 (2023)

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

Facts: The defendant sold cocaine to a third party. A police officer stopped the third-party’s vehicle and found cocaine in the vehicle. The officer returned and confronted the defendant about the cocaine sale and instructed him to turn over any drugs still in his possession. In return, the officer assured the defendant that he was “going to take it and . . . leave,” and everything would still be “squared away.” The officer explained that he expected that the defendant would assist him in future investigations. The defendant agreed and handed over additional cocaine.

The defendant assisted the police, but not significantly, in the officers’ view. Officers therefore obtained two arrest warrants for the defendant, one for the cocaine that the defendant sold, and one for the cocaine that the defendant turned over to police. Executing the arrest warrants, police searched the defendant incident to arrest and located more cocaine. That third discovery led to a charge of Possession with Intent to Distribute.

The defendant moved to suppress the evidence from the third arrest on the grounds that the officers unlawfully obtained the arrest warrants. The defendant contended that the arrest violated his due process rights because, by obtaining the arrest warrants, the officer breached a promise not to

arrest him for either cocaine seizure. The trial court denied the motion to suppress. The trial court reasoned that because the arrest was independently supported by the arrest warrant for the original cocaine found in the third-party's car, the arrest and consequent search were lawful.

Held: Reversed and Remanded. The Court remanded this case to the district court to determine whether the non-arrest promise was made, relied upon, and breached as alleged.

The Court contended that the government's promise not to act on knowledge of wrongdoing cannot be deemed categorically unenforceable. While the Court agreed that a police officer does not have the authority to promise that someone will not be prosecuted, in this case, the Court pointed out that the officer promised not to arrest the defendant, which the Court found to be within his authority as a police officer.

The Court explained that when the government utilizes its discretion to strike bargains with potential defendants, those bargains can be enforced against the government. The Court cited examples such as a plea agreement, a non-prosecution agreement, and informal grants of transactional immunity. The Court saw no reason to treat a non-arrest agreement any differently than the non-prosecution and plea agreements it had previously held enforceable against the government. (The Court relied on a case from the 9th Circuit that addressed the issue in this case to reach its ruling.)

The Court ruled that when an individual fulfills his obligations under an agreement, "settled notions of fundamental fairness" may require the government "to uphold its end of the bargain." While the Court found that the proper remedy for a breached agreement will vary on a case-by-case basis, enforcement of the agreement is one remedy that the Court ruled that a trial court has in its "relief-fashioning arsenal."

In this case, the Court found that the defendant's allegations, if true, could warrant enforcing the alleged non-arrest agreement against the government. However, the Court then examined the question of whether the officer did, in fact, breach such an agreement. The Court remanded the case to the district court to determine whether the non-arrest promise was made, relied upon, and breached as alleged. The Court directed that if the district court determines that the officer did breach such an agreement, it should also "determine whether specific performance" or "other equitable relief" is appropriate to remedy that breach.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224134.P.pdf>

U.S. v. Thomas: July 6, 2023

(Unpublished)

E.D.Va: Defendant appeals his convictions for Possession of Child Exploitation Material on Fourth Amendment grounds.

Facts: Police arrested the defendant while he was trying to break into a business. Police found items stolen from a second burglary in the defendant's vehicle. That earlier burglary had taken place near the defendant's residence. Police obtained a search warrant for the defendant's residence, seeking

evidence from the second burglary, along with evidence from other recent burglaries. The warrant authorized the seizure of a long and detailed list of items, matched to those stolen from the second burglary and the victims of the other burglaries that the police were investigating:

“[a]ny and all items and evidence related to the crime of Larceny and Burglary, to include but not limited to cash, televisions, and other electronic devices, power tools, outdoor equipment, chainsaw’s [sic], firearms, bows, binoculars, rods and reels, game cameras, various types of hunting equipment and sporting goods, camouflage clothing and household goods and any and all similar items.”

Officer executed the warrant and quickly came upon a large amount of apparently stolen items. Officers also located several electronic devices, including a hard drive, a flash drive, and a computer, among other devices. The owners of some of the seized electronic devices could be identified by name tags on the devices or through service tags and serial numbers. To identify the rest of the devices, an officer accessed their contents, and in some cases succeeded in using stored videos or images to match devices with burglary reports and owners. When an officer accessed the hard drive, however, he found what he understood to be professionally produced child exploitation material. He contacted the FBI, who obtained a new search warrant and discovered the evidence in this case.

The defendant moved to suppress the first search warrant, making three arguments: First, the defendant contended that the warrants were unsupported by probable cause because the affidavit provided no basis for concluding that evidence from a burglary was likely to be found in his residence. Second, the defendant argued that the initial warrant did not describe the items to be seized with sufficient particularity. Lastly, the defendant also argued that the officers impermissibly seized the hard drive, flash drive, and computer because those items fell outside the scope of the warrant. The trial court denied the motion.

Held: Affirmed.

Regarding the nexus between the offense and the defendant’s residence, the Court first found that the normal inference in this case was that at least some of the missing items from the second indeed would be in the defendant’s home, located near the second burglary residence. The Court explained that “No more direct link between [the defendant’s] home and the stolen items is required.”

Regarding the warrant’s particularity, the Court agreed that the warrant provided a “readily ascertainable guideline” for the executing officers and found that fell well within the “practical margin of flexibility” permitted to the drafters of warrants. While the Court acknowledged that the listed categories in the warrant were not exclusive, as the warrant allowed for the seizure of all items and evidence related to the crime of larceny and burglary, “including but not limited to” the enumerated items, the Court noted that that provision itself was narrowed by the reference to specific crimes. The Court found that the warrant as a whole – which in addition to identifying the type of crime being investigated also identified the specific types of items sought – sufficiently guided and constrained the discretion of the searching officers.

Lastly, the Court rejected the defendant’s argument that the officers impermissibly seized the electronic devices. The Court first pointed out that the warrant permitted officers to seize “televisions and other electronic devices.” However, in this case, the Court found that the electronic devices would have been within the scope of the warrant even had they not qualified under the “electronic devices”

category. The Court repeated that law enforcement officers may seize an item pursuant to a warrant even if the warrant does not expressly mention and painstakingly describe it.

In this case, the Court noted that the officers here knew that electronic devices were among the items stolen in the burglaries they were investigating. The Court also noted that by the time they seized the devices in question, they also had determined that the defendant's illegal activities were so widespread that "virtually every new or higher-quality item in the residence was likely stolen." At that point, the Court found that it was entirely reasonable for the officers to conclude that the devices in question were at least "potentially" proceeds or evidence of burglary.

The Court also rejected the defendant's challenge to the search of the electronics because the defendant had failed to establish standing. The Court agreed that the defendant failed to establish a reasonable expectation of privacy in any of the three electronic devices on which evidence was discovered, and so cannot challenge their search. The Court emphasized that the defendant bears the burden of showing a reasonable expectation of privacy in the relevant property. In this case, the Court explained that the defendant was required to show lawful ownership of the electronic devices at issue; If those devices were stolen, then the defendant could not establish a reasonable expectation of privacy.

The Court pointed out that the defendant's "residence was literally full of . . . stolen merchandise," his ownership of the electronic devices was in serious doubt, and that required the defendant to come forward with evidence of ownership. Instead, the Court complained that the defendant did not even attempt to make such a showing in his reply brief or during the evidentiary hearing, and he thus failed to meet his burden on standing.

In a footnote, the Court rejected the defendant's argument that testifying as to ownership of the electronic devices for standing purposes would force him to potentially incriminate himself as to the underlying child pornography charges, in violation of his Fifth Amendment rights. The Court pointed out that the Supreme Court squarely addressed this ostensible dilemma in *Simmons v. United States* in 1968, holding that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214366.U.pdf>

U.S. v. Treisman: June 23, 2023

71 F.4th 225 (2023)

N.C.: Defendant appeals his conviction for Possession and Transportation of Child Pornography on Fourth Amendment grounds.

Facts: The defendant possessed child exploitation images on his phone, which he kept in a van. A bank manager summoned police after finding the defendant's van in the bank parking lot left overnight, after hours. Police responded and observed a high-powered rifle with a scope and an extended magazine, a handgun box, an ammunition box, a Tannerite container—a legal target shooting product that can also be used to make explosives—a container of pills and a suitcase. The officers could

not see into the rear of the van, which seemed to be modified with an air conditioner on the roof. However, the side door to the rear cargo area was slightly ajar.

Officers attempted to learn who the owner of the van was, but the vehicle had California plates and officers could not determine the owner. The VIN number was covered by papers. Officers were concerned that the heat might pose a danger since it was a hot day and the air-conditioning unit on the top of the van was not running, and the guns and ammunition in the front of the van added to their concerns. They both thought that unless something was wrong, the owner and occupants would not likely leave valuable and potentially dangerous items in plain view.

Officers pulled the handle on the slightly ajar side door to the back of the van. The door suddenly opened. Startled, the officers drew their guns. They did not see anyone inside the van but noticed more gun cases. But combined with what they had seen in the front seat, the officers felt these additional guns in an abandoned, and unsecure, vehicle presented a public safety concern. Officers did not find anyone inside the van. The bank manager signed a request that the officers tow the vehicle from the property, pursuant to police policy, as the bank's own tow company would not tow vehicles containing firearms. Officers decided to tow the vehicle to secure its contents.

Police policy stated that officers may remove abandoned vehicles from private property if the owner requests, in writing, that police remove the property and is not able to remove the property herself. Policy also stated that requests to tow vehicles on private property should be referred to the city zoning administrator. The officers did not call the zoning administrator. From his experience, the officer later testified that he felt that, due to the firearms, the zoning administrator would defer to the police in deciding whether to tow the van. Finally, the policy states that an inventory search should be conducted before a vehicle is lawfully impounded.

Before towing, the officers conducted an inventory search of the van's contents as stated by the policy. They began looking for and documenting valuables. During this inventory search, officers also found books about survival, bombmaking, and improvised weapons. An officer looked at each firearm and ran the serial numbers. Additionally, they found several electronic devices, a drone and a large amount of cash banded and sealed in bank bags. After discovering the cash in the bank bags, the officers suspected the owner of criminal activity and decided to obtain a search warrant. Based on what they found inside with the warrant, FBI agents obtained a second search warrant for the defendant's phone and found child exploitation material.

The defendant moved to suppress, arguing that the officers did not have reasonable grounds to enter and search the van under the community caretaking doctrine. Second, he argued that the officers' warrantless impoundment and inventory search were not lawful. The trial court denied the motion.

Held: Affirmed. The Court found that the officers searched the van in exercising community caretaking functions and not as a pretext for a criminal investigatory search. The Court explained that warrantless searches of vehicles carried out as part of law enforcement's community caretaking functions do not violate the Fourth Amendment if reasonable under the circumstances. The Court also concluded that the district court did not err in holding the search was reasonable.

The Court repeated that officers may inventory a vehicle without a warrant if:

- (1) the vehicle is in the lawful custody of the police;
- (2) the inventory search is routine and conducted pursuant to standard police procedures; and

(3) the search aims to secure the car or its contents and not to gather incriminating evidence against the owner.

In this case, the Court first agreed that it was reasonable for the officers to believe that the presence of guns, ammunition, and explosives in plain view in the front of the van combined with guns in the unsecured rear area of the van created a public safety concern. Likewise, the Court agreed that the officers reasonably believed the firearms, cash and other contents discovered in the van were valuables that needed to be safeguarded. The Court noted that the officers did not remove any items that would normally be seized—such as the firearms, unusual books, or pills—as they normally would have done in a criminal investigatory search. The Court also acknowledged that the officers lawfully ran the firearm serial numbers because the officers needed to ensure that the firearms were returned to the lawful owner.

In a footnote, the Court wrote: “Community caretaking may not be the most well-known of Fourth Amendment principles. But being lesser known hardly makes something unimportant. Take sports. Tom Glavine and John Smoltz were the most well-known pitchers on the 1991 Atlanta Braves pitching staff that led the Braves to the World Series. But Steve Avery, a lesser-known pitcher, was important to the team’s success. In fact, in the National League Championship series, he pitched over sixteen scoreless innings and was named Most Valuable Player.”

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214687.P.pdf>

U.S. v. Howell: June 22, 2023

71 F.4th 195 (2023)

E.D.Va: Defendant appeals his conviction for Drug Trafficking on Fourth Amendment grounds.

Facts: The defendant carried two kilograms of Methamphetamine with the intent to distribute in his vehicle. A detective instructed an officer to stop the defendant’s vehicle based on the detective’s suspicion that the defendant was engaged in drug-trafficking activity.

The detective’s suspicion was based on an aggregation of information. First, he had received information from a reliable informant that a target of his ongoing drug-trafficking investigation would be meeting other drug dealers at a hotel and that the target would be driving a specific vehicle and be accompanied by a woman. The vehicle on which the detective eventually focused matched the description in some ways but not others. The driver of the vehicle was not the originally named target, but was the defendant instead.

Second, the detective knew that the defendant had been a “director” of a business that sold illegal drugs in 2014 during a controlled buy, and an informant at the time told officers that he saw the defendant in possession of illegal drugs. The defendant had also been arrested in 2008 for drug trafficking and pled guilty to the offense of possession with intent to distribute. The defendant also had been arrested three times in other states. The defendant was the focus of a current drug investigation.

Third, the detective knew, from personal experience, that the hotel was a location that drug dealers preferred, as he had made multiple drug-trafficking arrests and seizures of drugs there. Lastly,

even though the detective was following the defendant in an unmarked vehicle, the detective noted that the defendant seemed to be driving in an overly cautious manner, so as to avoid drawing attention to his vehicle.

A patrol officer initiated the traffic stop and provided a false reason for the traffic stop. Five minutes later, a K-9 officer, along with his dog, arrived at the scene. The K-9 officer engaged in conversations and removed the defendant and his passenger from the vehicle during the next five minutes. The dog alerted to the presence of drugs within 30 seconds.

The defendant moved to suppress the evidence, arguing a lack of reasonable suspicion for the stop and that the officers exceeded the scope of the stop, but the trial court denied the motion.

Held: Affirmed. The Court concluded that the law enforcement officers had a reasonable suspicion to justify stopping the defendant and that, after stopping him, they diligently engaged in what was necessary to allay their suspicion and therefore did not unnecessarily prolong the stop.

In this case, the Court ruled that all the factors in this case supported a reasonable suspicion of ongoing criminal activity, justifying a brief stop to allay that suspicion. The Court repeated that the fact that some of the confidential informant's information proved to be erroneous did not preclude the officers from relying on other information that had been given them by the informant.

The Court then turned to the duration of the stop. The Court found that 11 minutes after the initiation of the stop, the officers had probable cause to search the vehicle. The Court noted that even if an individual is stopped for a routine traffic violation, the use of a trained drug dog to conduct an open-air sniff during that traffic stop does not violate the Fourth Amendment. However, in this case, the Court pointed out that the primary purpose of the stop was to allay suspicion of participation in a possible ongoing drug-trafficking conspiracy.

The Court explained that the mission of the stop was to investigate potential drug-trafficking activity and found no evidence in the record to suggest that the officers failed to "diligently pursue" their investigation to confirm or allay that suspicion. Because the Court concluded that the initial stop was supported by reasonable suspicion, the Court also concluded that the arrival of the K-9 officer within 5 minutes of the stop and the completion of the dog sniff within 10 to 11 minutes did not amount to an illegal prolonging of the stop.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214634.P.pdf>

U.S. v. Escamilla Villa: June 13, 2023

70 F.4th 704 (2023)

NC: Defendant appeals his conviction for Aggravated Re-Entry on Prosecutorial Vindictiveness and Fourth Amendment grounds.

Facts: Police stopped the defendant in a traffic stop and obtained consent to search his home, where they found a firearm and ammunition. The defendant does not have lawful status in the US. The Government charged the defendant with Possession of a Firearm by an Illegal Alien in violation of 18

U.S.C. § 922(g)(5) and Illegal Entry in violation of 8 U.S.C. § 1325(a). The defendant moved to suppress the evidence. In the meantime, the Government requested that DHS examine the ICE database to gather evidence about the defendant's immigration history.

After a hearing, the magistrate judge recommended that the district court suppress the evidence underlying the firearm possession offense. At almost the same time, the Government discovered that the defendant had been previously removed from the US under an alias, under which he had also been convicted of two felonies. The government obtained a new indictment charging the defendant with Illegal Reentry after Conviction for an Aggravated Felony in violation of 8 U.S.C. § 1326(a), (b)(2), an offense which carried a penalty that was twice the penalty for Possession of a Firearm.

The defendant moved to dismiss the new charges based on Prosecutorial Vindictiveness, contending that between the prosecutor and various federal agencies, "the government" collectively had all the information needed to discover his aggravated reentry, and the decision not to follow those leads earlier should raise a presumption of vindictiveness. The trial court denied his motion.

The defendant also sought to suppress his fingerprint records and the criminal and immigration records obtained thereby as the product of unlawful police activity under the Fourth Amendment, but the trial court denied his motion. The trial court found "no indication in the record that [the defendant's] fingerprints were taken for investigative purposes, such as to compare them to unidentified prints taken from a crime scene" or "for any reason other than the normal, administrative booking process."

Held: Affirmed.

Regarding the allegation of prosecutorial vindictiveness, the Court repeated that, when a prosecutor adds a new charge based on a new set of facts after a pretrial suppression ruling forecloses prosecution on the initial charge, it is at least as likely, or even more likely, that the decision was based on an assessment that the defendant posed a threat to public safety. The Court distinguished this case from the *LaDeau* case, finding that this is not a case where the prosecutor, in response to an adverse suppression ruling, obtained a more serious charge based on the same conduct that animated the original indictment. In this case, the Court pointed out that, although both charges included the defendant's unlawful presence in the United States as an element, they targeted different conduct—possession of firearms and ammunition in one and illegal reentry in the other.

The Court also found it significant that it was not until after the magistrate judge recommended granting in part the defendant's motion to suppress did the prosecutor learn that the defendant, under a different name, had previously been removed from the country. The Court concluded that the defendant failed to demonstrate that the presumption of vindictiveness applies. Therefore, the Court ruled, the presumption of regularity that attends a prosecutor's pretrial charging decision therefore remains in place.

The Court contended that to "find vindictiveness in these kinds of routine pretrial developments would be an ill fit with both Supreme Court precedent and our caselaw concerning vindictive-prosecution claims. And the construct of collective knowledge is out of place in a search for vindictiveness, which is a motive personal to the prosecutor who pursues the heightened charges."

Regarding the defendant's motion to suppress the results of his fingerprinting, the Court repeated that when police fingerprint an individual after an unlawful arrest, the fingerprint records and evidence obtained with them "are not automatically suppressible simply because they would not have been obtained but for illegal police activity;" rather, the critical question is whether the evidence was obtained by exploiting the illegal police activity.

The Court cited the U.S. Supreme Court's rulings in *Hayes v. Florida*, and *Davis v. Mississippi* as cases where the police, without probable cause, detained and then fingerprinted a person they suspected had committed a certain crime for the "clear investigative purpose" of using the fingerprints to tie the suspect to the crime. The Court explained that when police officers use an illegal arrest as an investigatory device in a criminal case for the purpose of obtaining fingerprints without a warrant or probable cause, then the fingerprints are inadmissible under the exclusionary rule as fruit of the illegal detention.

On the other hand, the Court explained, when fingerprints are administratively taken for the purpose of simply ascertaining the identity or immigration status of the person arrested, they are sufficiently unrelated to the unlawful arrest that they are not suppressible. The Court found that these principles dictate the outcome here and supported the district court's ruling. Even assuming that the arrest violated the Fourth Amendment, the Court found that the officers did not "purposefully exploit" an unlawful arrest in order to obtain his fingerprints.

The Court also rejected the defendant's argument that suppression was warranted because the fingerprints were later revealed to have investigatory value to law enforcement.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/204297.P.pdf>

Virginia Court of Appeals

Published

Lee v. Commonwealth: May 7, 2024

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

Facts: The defendant possessed drugs intending to distribute them. An anonymous caller reported to police seeing a "male assault a female, that he had a handgun with him, that he was arguing with the female about getting a bag out of the car that had some drug paraphernalia in it." Police responded and saw the defendant, who matched the suspect's description and was carrying a backpack. Officers approached the defendant and spoke with him.

During the conversation, one of the officers asked the defendant "Is there anything in that backpack that we need to know about?" The defendant replied, "No. I got my pills. That's it." The other officer then inquired, "Can he [the other officer] check it? Do you mind if he checks it?" The defendant

removed his backpack and handed it to the other officer. The defendant then watched the officer search his backpack.

The officer unzipped the backpack and found plastic baggies and a set of digital scales. When the officer found a prescription pill bottle in the backpack, the defendant quickly exclaimed, “That’s for my heart.” However, the defendant did not object to the ongoing search. While the officer continued to search the backpack, the defendant identified himself to the officers. The officer then removed a white pill bottle from the backpack, searched it, and determined that it apparently contained dietary supplements. He then searched the prescription pill bottle that the defendant had claimed contained his heart medication. The officer testified that inside the prescription pill bottle were five plastic baggies that each contained a white powder rocklike substance resembling crack cocaine. He noted that there were also several pills being pressed down by the plastic baggies.

The officer then collected the pill bottle containing the suspected drugs and arrested the defendant for possessing with intent to distribute a Schedule I or II controlled substance. DFS later determined that the substance contained Eutylone, a Schedule II controlled substance.

The trial court denied the defendant’s motion to suppress the evidence

Held: Affirmed. The Court agreed that the record demonstrated that the officer did not exceed the scope of the defendant’s consent to search his backpack by searching the pill bottles that were in the backpack for illegal narcotics. Consequently, the Court did not find that the trial court erred in denying the motion to suppress the evidence obtained from that search of the backpack and its contents.

The Court ruled that the officers did not exceed the scope of the defendant’s consent to search the contents of his backpack by searching the white bottle of dietary supplements or the prescription pill bottle. The Court found that the officers’ request for the defendant’s consent to search the backpack was not limited to just firearms. Instead, the Court concluded that it was objectively reasonable for the officer to infer that the defendant impliedly consented to a search of his backpack.

The Court reasoned that given the general, open-ended nature of the officer’s request for consent to search the backpack after the defendant mentioned his pills, coupled with the defendant’s failure to specify any restrictions, it was objectively reasonable for the officer to infer that the defendant provided a “general and unqualified consent” to search the backpack and its contents for anything illegal. Furthermore, the Court contended that the defendant’s “passive acquiescence” while the officer first searched the white bottle that apparently contained dietary supplements and then the prescription pill bottle that were both found inside the backpack affirmed that the containers in the backpack were “within the scope of his consent.” The Court noted that the defendant was aware that, at that point, the officer suspected him of selling narcotics, and he could reasonably infer that the officer sought evidence of drug distribution when the officer began searching the pill bottles. The Court pointed out that the defendant did not object, withdraw his consent, or state in any way that the search had at that point exceeded the scope of his consent.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0053232.pdf>

Hubbard v. Commonwealth: March 12, 2024

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

Facts: The defendant carried cocaine, packaged for sale, in his buttocks. During a traffic-related stop, officers searched the defendant on the side of the road. Officers found bags of white and brown powders that were “knotted up” and appeared to contain illegal drugs. The car also smelled of marijuana, and there was visible marijuana shake in the vehicle. [*This case took place before the 2020 statutory prohibition on searches based on marijuana odor – EJC*]. While searching the defendant, officers found about \$2,000 in his pockets.

An officer patted down the defendant, examined his pockets, put his hand between the defendant’s shorts and underwear and “swiped” his buttocks, all while the defendant stood by the side of the road. After feeling a hard object in his bottom, the officer struggled to remove the item as the defendant resisted by clenching his buttocks. During this engagement, the officer looked and reached inside the defendant’s underwear. The defendant’s shorts (though not his underwear) dropped to the ground. Officers gave up after more than a minute and a half of trying to remove the item and decided to take the defendant to the jail for further processing.

After a pause, the search resumed, and an officer again reached inside the defendant’s underwear, proclaiming that he could feel the item but could not remove it because the defendant was clenching his buttocks together. The officer later testified that the defendant (who was handcuffed with his hands behind his back) was “trying to reach down into the back of his shorts, making it obvious that he’s trying to get the item out of his shorts.” He said his “main concern is that somebody could get hurt having an item down near their butt. He could shake it out of his shorts’ pant leg at any time. He could stomp it out. He could kick it.” The officer had seen the defendant shake his leg as if he were trying to remove the item.

The officer also testified that he was concerned that the drugs in the defendant’s buttocks could have been fentanyl and if “he had stomped it out and a gust of wind would have come by, it could have killed all of us.” He explained that widespread concerns about fentanyl led to a new internal policy that they were no longer to “open up bags of white powder for the purposes of a field test” because “[f]entanyl has become so dangerous in today’s time that a simple poof of that powder that could reach our nostrils could kill us.” Ultimately, the officer extracted a plastic bag filled with smaller plastic bags containing crack and powder cocaine.

At the time of the search, the defendant had an active Fourth Amendment rights waiver from a plea agreement in which the defendant waived his Fourth Amendment rights and consented to warrantless searches of his person and property for ten years.

The defendant moved to suppress. The trial court concluded exigent circumstances were present because of the fear of fentanyl and denied the motion to suppress.

Held: Reversed. The Court held that the Commonwealth did not present enough evidence below to establish that the invasive search was justified by exigent circumstances, thus satisfying the

heightened Fourth Amendment standard, and therefore held that the evidence should have been suppressed.

The Court repeated that the standard for assessing the constitutionality of warrantless intrusive bodily searches under the Fourth Amendment is higher than it is for other types of warrantless searches. First, the officer conducting the search must have a clear indication that the concealed object is present. Second, exigent circumstances must justify the search. Finally, the search must be conducted in a reasonable manner, consistent with the Fourth Amendment.

The Court briefly examined whether this search was a strip search or a more intrusive body cavity search. Without answering that question, the Court simply reasoned that looking into underwear for drugs is at least a strip search, especially since in this case, officers also visually inspected his anal area, and touched and probed his buttocks while trying to remove the item. Applying the test for intrusive searches, the Court then agreed with the trial court that officers had a clear indication that drugs were likely present in the defendant's buttocks.

However, the Court disagreed with the trial court that exigent circumstances existed based on the mere speculation that the concealed item could have contained fentanyl. The Court complained that it could not find support in the record for any other exigent circumstances in the record. The Court specifically contended that even though the officers had a clear indication that the defendant may have drugs concealed in his bottom, that fact did not lead to the inference that the specific substance was fentanyl. The Court found no "actual information" in the testimony or body camera footage that ties the hard object in the defendant's buttocks to something more than a "theoretical possibility" about fentanyl.

The Court wrote: "the mere chance that fentanyl could be lurking around the corner is not an exigent circumstance." In reaching this conclusion, the Court explained that "we reject only the trial court's conclusion that the theoretical possibility that a dangerous drug like fentanyl is present is "in and of itself" an exigent circumstance that constitutes a per se exception to the warrant requirement ... Thus, we underscore that while there may be future cases where a specific concern about the presence of fentanyl could create an exigent circumstance justifying an intrusive search, the Commonwealth did not put on sufficient evidence to suggest that this was a risk in this specific case."

The Court also complained that the record had no testimony explaining how, if the defendant successfully shook the hard object out of his shorts, one of the three officers on the scene could not have grabbed it. Lastly, the Court complained that there was no evidence about the time it would have taken for officers to get a warrant.

Finally, while the defendant had waived his right against warrantless searches of his person in a prior plea agreement, the Court repeated that a general consent to a warrantless search does not include an intrusive search of private areas. The Court noted that it had already ruled that a defendant's consent to search her person does not include consent to an intrusive search of the body and "we see no reason why the same logic would not apply to written consent like we consider here." In a footnote, the Court noted that it was not ruling whether a waiver of Fourth Amendment rights in a plea agreement alone would permit an officer to unbutton a person's shorts and "swipe his buttocks" through his underwear.

Full Case At:

Camann v. Commonwealth: January 16, 2024

79 Va. App. 427, 896 S.E.2d 370 (2024)

Aff'd Unpublished Ct. of App. Ruling of February 28, 2023

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

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

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

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

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

A panel of the Court of Appeals affirmed in part and reversed in part. The panel affirmed the trial court's decision denying the defendant's motion to suppress the evidence but reversed the conviction for possession of a Etizolam.

Regarding the suppression motion, the Court first agreed that the defendant was seized when the officer told him to move his foot, not because the defendant was not free to leave, but because a reasonable person in the defendant's position would not have felt free to keep his foot planted. (In a footnote, the Court explained that its analysis evaluated whether the defendant's person was illegally seized, not whether the space under his foot was illegally searched.) Thus, to justify telling the defendant to move his foot, the officer needed reasonable, articulable suspicion that the defendant was engaged in, or was about to engage in, criminal activity.

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

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

The Commonwealth petitioned for rehearing en banc as to the reversal of conviction for possession of Etizolam. The defendant did not seek rehearing en banc as to the motion to suppress.

Held: Panel ruling affirmed. In a 14-2 ruling, the Court reversed and vacated the etizolam conviction. As it was not part of the en banc review, the panel's ruling affirming the denial of the defendant's suppression motion in part A of the panel opinion "remains undisturbed."

The Court examined the statute, previous cases, and the history of Virginia's possession statute to reach the conclusion that a conviction for possession under § 18.2-250 must be supported by proof of knowing possession. The Court likened this case to *Young* in explaining that the Commonwealth must establish that the defendant intentionally and consciously possessed the drug with knowledge of its nature and character.

The Court reaffirmed that § 18.2-250 requires a defendant to know that the substance he possesses is in fact a controlled substance, but not precisely what controlled substance it is. Thus, if a person thinks he has heroin, but it turns out to be fentanyl, that person has still knowingly or intentionally possessed a controlled substance in violation of § 18.2-250. The Court repeated that a claim by a defendant that he knew he was possessing a controlled substance but was unaware or mistaken as to the precise identity of that substance, is not a defense under § 18.2-250.

The Court made clear that each conviction for drug possession under § 18.2-250 requires the Commonwealth to prove that the defendant possessed the substance with knowledge of its nature and character as a controlled substance. Thus, for example, the Court explained that if a defendant buys white powder thinking it is heroin, but it turns out to contain 17 controlled substances, the defendant in that situation would have knowingly possessed only 1 controlled substance, not 17.

The Court explained that under *Sierra*, a person who knows that the pill or powder he possesses contains a controlled substance is criminally liable for possession, even if he thinks he possesses a particular controlled substance that turns out to be different. Likewise, when the Commonwealth seeks two convictions for possessing a mixture containing more than one controlled substance, the Commonwealth must prove that the defendant knew there were at least two controlled substances in the mixture. The Court explained that *Sierra* simply spares the Commonwealth from having to prove that the defendant knew which controlled substances were present.

In a footnote, the Court explicitly disavowed the language in its unpublished 2018 ruling in *Howard* that would permit strict liability for additional possession convictions when the Commonwealth proves knowing possession of only a single controlled substance.

Judge Athey, joined by Judge Beales, dissented from the conclusion that the Commonwealth needed to prove that the defendant knew he possessed two separate controlled substances.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0243224.pdf>

Gross v. Commonwealth: January 23, 2024

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

Facts: The defendant, a convicted felon, carried a firearm in his vehicle. Police observed him speeding and conducted a traffic stop. The defendant continued to drive for four blocks before stopping. The stop took place late at night in a high-crime area known for shootings and violent crimes. The vehicle had heavily tinted windows. As the officers walked toward his vehicle, the defendant made a series of movements within the vehicle, moving his hands out of the officers' view. The defendant turned his body away from the officers, concealing his body and hands from their view.

The officers ordered the defendant to exit the vehicle and conducted a "protective sweep" of the vehicle. Opening the glove compartment, an officer found the defendant's handgun.

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

Held: Affirmed. The Court held that, given the totality of the circumstances in this case and given the Supreme Court's decision in *Hill v. Commonwealth*, the officers had reasonable articulable suspicion to justify a protective sweep of the vehicle during the traffic stop. The Court agreed that there was reasonable articulable suspicion to believe that the defendant was armed and dangerous during the traffic stop – and thus that they could do a protective sweep of the vehicle for officer safety.

The Court pointed out that the defendant's delay in pulling over by driving on for four blocks after the police had turned on their siren and flashing lights gave the officers reasonable concern that he might be reaching for and preparing to use a weapon against them during the traffic stop. While the Court agreed that there are many non-nefarious reasons a vehicle may delay in pulling over, such as finding a safe place to do so, the Court found that the trial court properly considered the length of the delay, the location of the stop, and whether the defendant had opportunities to pull over sooner.

Furthermore, the Court concluded that the defendant's furtive movements gave the officers further reason to believe that the defendant could well be searching for and reaching for a weapon.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1043222.pdf>

Carter v. Commonwealth: December 28, 2023

79 Va. App. 329, 896 S.E.2d 73 (2023)

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

Facts: An officer observed the defendant speeding five miles per hour over the speed limit around 10:00 p.m. The defendant had remained stopped at an intersection for a full minute when there was no traffic. The officer also observed the defendant travel between two motels near Interstate 95, both of which were frequented by drug users and dealers.

The officer approached the defendant and ordered him to get out of his vehicle. The officer observed marijuana in the defendant's vehicle, which the defendant acknowledged; possession of marijuana was lawful at the time. The defendant exhibited no nervousness and no elusive or furtive behavior. The officer and the defendant then had the following exchange.

OFFICER: "Do you [have] any weapons or anything like that on you?"

DEFENDANT: "No, sir."

OFFICER: "Do you mind if I search you real fast just to make sure? Sir, if that's okay."

DEFENDANT: "Yeah, [you're] all right. You can search me. I don't have any weapons."

As the officer reached into the defendant's jacket pocket, he asked, "Nothing on you is gonna poke, prick, or stab me?" The defendant replied, "No, sir." The officer searched the defendant and found a large quantity of cash and empty plastic baggies.

The officer then decided to do "a probable cause search" of the defendant's car. In searching the car, the police found cocaine, heroin, a firearm, two digital scales, and over 300 unused baggies in various sizes. The defendant moved to suppress, but the trial court denied the motion to suppress.

Held: Reversed. The Court held that the trial court erred in denying the defendant's motion to suppress the evidence. The Court ruled that the police unconstitutionally searched the defendant beyond the scope of his consent to a weapons search. Then the police unconstitutionally searched the car based on purported probable cause founded on the evidence from the unconstitutional search of the defendant's person.

The Court examined the words between the officer and the defendant and concluded that a reasonable person considering this exchange would understand the defendant's consent to be limited to a search for weapons. The Court found it unreasonable to conclude that the defendant exhibited "passive acquiescence" to the officer's general search of his pockets. Because the defendant did not give prior consent to a general search of his person, the Court found that it is was objectively unreasonable to infer that the intrusive search of his pockets was within the scope of his consent to a weapons search. Therefore, the Court concluded that a general search of the defendant's pockets exceeded the scope of his consent to a search, in violation of the defendant's Fourth Amendment right against unreasonable searches.

Although the officer observed the defendant at night at or near two motels frequented by drug users and dealers, the Court concluded that the observed conduct—merely driving from one motel to the other—did not support a reasonable belief that the defendant was engaged in illegal drug activity. Regarding the marijuana in the defendant's vehicle, the Court found that the absence of such paraphernalia on the defendant's person did not support a reasonable inference that he intended to distribute the marijuana rather than use it himself.

Without the tainted information from the unconstitutional search of the defendant, the Court found no factual basis to conclude that his car did not contain paraphernalia for marijuana use. The Court also noted that smoking paraphernalia is unnecessary for marijuana consumption since, for

example, marijuana can serve as an ingredient in baked goods. Thus, the Court concluded that the possession of a small quantity of marijuana, coupled with the absence of smoking paraphernalia on one's person, did not give rise to reasonable suspicion or probable cause to believe that one intends to distribute the marijuana.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1478222.pdf>

Turay v. Commonwealth: December 19, 2023 (En Banc)

79 Va. App. 286 , 895 S.E.2d 805 (2023)

Reversed Panel Decision of March 21, 2023; Aff'd Panel Decision of October 18, 2022

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

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

Thirty minutes after the robbery, an officer detained the defendant, along with his confederate. The officer had seen the men walking on the street less than 10 blocks away, and less than a minute's drive from the crime scene. No other people were around, and the night was cold. He noted that there were only two men, not three, but that the defendant was wearing a black jacket. The confederate's clothing was not black. The officer detained both men for one and a half to two minutes until other officers could arrive with additional information learned from watching home security footage.

The trial court denied both defendants' motions to suppress. The Court of Appeals affirmed the denial of the motion to suppress regarding the defendant in this case. Six months later, though, after a re-hearing, the Court of Appeals reversed the trial court in this case, finding that it should have granted the motion to suppress. The Court held that the officer's detention violated the defendant's Fourth Amendment right against unreasonable seizures because, at the time of the seizure, there was no particularized, objective basis for suspecting the defendant of criminal activity.

[Note: In a separate, unpublished ruling in 2022, the Court of Appeals also reversed the conviction for the co-defendant in *Carr v. Commonwealth*. The Court issued no further rulings after that decision. – EJC].

Held: Trial Court affirmed, motion to suppress properly denied. In a 15-2 ruling, the Court found no Fourth Amendment violation when the officer detained the defendant for a few minutes while other officers, with more information about the suspects of the recent crime, were arriving to the scene. The Court also cautioned that it was not holding that the officer would have been justified in searching the defendant, or in detaining him for longer than a few minutes.

The Court examined whether reasonable suspicion supported the defendant's minutes-long detention until other officers arrived where he was detained. The Court likened this case to the *Davis* and *Jones* cases. The Court cautioned that "location" and the "time of the stop," on their own, cannot

provide reasonable suspicion of criminal activity. On the other hand, the Court emphasized that geographic and temporal proximity to the reported criminal activity is vital. The Court also emphasized that the level of detail in any available description of the suspect, and the degree to which the detained person matches that description, are also important, although an exact match is not required. Finally, the Court repeated that the number of persons out and about in the area who match the description of the suspect, as well as the observed behavior of the suspect, are also relevant considerations.

In this case, the Court initially concluded that the initial description, “three Black men wearing black, or black sweatshirts,” was, standing alone, too general to give rise to reasonable suspicion to detain any person. The Court wrote: “Without more, this vague description could not allow police to reasonably detain any Black male wearing dark clothing as a suspect in the crime.” The Court explained that whether the initial BOLO specified that the three Black men were “wearing black sweatshirts” or simply “wearing black” was irrelevant to their analysis.

However, the Court noted, the officer drove only a few blocks before seeing the defendant, who matched the description, and the men were walking, which also matched the method of transportation described by the witnesses. The Court found it plausible and reasonable to think suspects leaving on foot could still be in the neighborhood 6-10 blocks away only 30 minutes after the home invasion took place. The Court also emphasized that the men were walking down the road in a residential neighborhood, late at night (nearly midnight). During this time, the Court noted, the officer had not seen any other people out and about, nor would he expect to, given the late hour, the residential nature of the neighborhood, and the fact that it was cold. The Court pointed out that the officer did not see anyone else in the neighborhood that night.

As far as the discrepancies in the description, the Court explained that “we cannot isolate the fact that Turay was walking with only one other person, not two, or the fact that his companion was not wearing black. These factual differences are not enough, as a matter of law, to defeat reasonable suspicion.” In a footnote, the Court acknowledged that another panel of the Court of Appeals had reversed the conviction of the co-defendant, who was not wearing anything black, explaining that “The question of whether the reasonable suspicion calculus as to Carr was sufficiently altered by Carr’s clothing is not an issue before us today.”

Justices Chaney and Callins each filed a dissent. Judge Chaney wrote: “the majority grants police license to seize a Black man at gunpoint for merely walking late at night within the wide general area of a recent crime and “matching” the race and gender of the suspects.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0868213.pdf>

Rehearing Opinion At:

<https://www.vacourts.gov/opinions/opncavwp/0868213.pdf>

Original Court of Appeals Ruling at:

<https://www.vacourts.gov/opinions/opncavwp/0868213.pdf>

Ruling in Co-defendant’s Case at:

<https://www.vacourts.gov/opinions/opncavwp/1136213.pdf>

Parady v. Commonwealth: July 5, 2023

78 Va. App. 18, 888 S.E.2d 771 (2023)

Culpeper: Defendant appeals her conviction for Possession of Cocaine on Fourth Amendment grounds.

Facts: The defendant possessed several drugs on her person. Police stopped the vehicle in which she was riding for a traffic violation and arrested the driver on an outstanding warrant. A K9 unit alerted on the vehicle while the defendant was still seated inside. An officer patted the defendant down and asked the defendant to produce the drugs that he suspected she had on her person by taking them out of her pants. The defendant complied, producing a container that appeared to have several drugs.

The officer decided not to arrest the defendant, as she had tested positive for COVID, and he believed that the jail would not accept her. Instead, he told the defendant that he would send the drugs to the lab and arrest her when the results returned. The results returned two months later and the officer then arrested the defendant.

The defendant moved to suppress. The trial court denied the motion, ruling that the officer lawfully searched the defendant's person based solely on probable cause to believe she possessed narcotics. The Commonwealth also put on evidence to try to support two alternative theories— that exigent circumstances justified the search and that the defendant was actually under arrest at the scene, but the trial court rejected both arguments.

Held: Reversed. The Court ruled that probable cause to arrest does not permits a warrantless search in the absence of any actual arrest. The Court then concluded that the record was insufficient to apply any other ground. Finally, the Court found that the good-faith exception to the exclusionary rule did not apply.

The Court explained that “probable cause that an individual has contraband, without more, meets the standard for obtaining a warrant, not searching without one.” The Court acknowledged that an officer may search after—or even before—an arrest so long as the search is substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. The Court repeated that the reasons for that exception are officer safety and evidence preservation, noting that it is reasonable for an arresting officer to search for and seize any evidence on the arrestee's person to prevent its concealment or destruction. However, the Court emphasized that is the fact of the lawful arrest which establishes the authority to search.

In a footnote, the Court also described how the booking process allows for an even more intrusive search than permitted by a search incident to arrest. The Court explained that such an “inventory search” does not implicate the warrant requirement because the justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search.

The Court rejected the Commonwealth's argument that the search in this case was a search incident to arrest. The Court focused on the officer's repeated statements to the defendant that she was not under arrest and only “being detained” for further investigation, as well as the officer's testimony that he specifically told the defendant he would not arrest her until he received the lab results. The Court explained that “an officer's internal calculation that there is probable cause to arrest is not an actual arrest.”

The Court also rejected the Commonwealth's reliance on *Bunch v. Commonwealth*, finding that *Bunch* did not hold that probable cause alone justifies a warrantless search without some other exception to the warrant requirement. Instead, the Court noted that the officer in *Bunch* had probable cause to arrest the defendant for marijuana possession before searching him, and then arrested him on the scene. As such, the Court reasoned, the search incident to arrest exception applied to the facts of that case.

The Court concluded "under the Fourth Amendment, probable cause of contraband is the standard to obtain a warrant, not the standard to search a person without one." The Court also found that the record lacked enough undisputed facts to find on appeal that any other exception to the warrant requirement applied.

Lastly, the Court found that the exclusionary rule was the appropriate remedy in this case. The Court noted the lack of evidence that the officer relied on precedent that has since been overturned, or a statute that was later invalidated. Instead, the Court concluded that the officer mistakenly believed he could search the defendant without a warrant, and without arresting her, based on his own assessment of probable cause. The Court contended that a reasonably well-trained officer would have known that the search was illegal under these circumstances unless he searched incident to an arrest of the defendant or obtained a warrant. The Court wrote: "An officer's mistaken assessment of unambiguous case law is deliberate conduct that compels application of the exclusionary rule to deter future constitutional violations."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0744224.pdf>

Virginia Court of Appeals –
Unpublished

Pough v. Commonwealth: May 28, 2024

Portsmouth: Defendant appeals his conviction for Murder on Fourth Amendment, Fifth Amendment *Miranda*, Jury Instruction, and sufficiency grounds.

Facts: The defendant saw a man chase his girlfriend into their house over allegedly stolen marijuana. The defendant stabbed the man over sixty times in the back and side. The defendant disposed of the victim's body in a trash can and drove the victim's car for two days.

Two days after the murder, however, after seeing officers in the place where the defendant had last parked the stolen car, the defendant called 911 and reported that he was in possession of a stolen automobile and that the automobile's owner was dead and "stored in a nearby trash can." In response, officers went to the defendant's home. Both were wearing uniforms and displaying their badges and had guns visible in their holsters. When they first encountered the defendant on the sidewalk in front of his home, they asked if he had any weapons and briefly patted him down. An officer told the defendant

to take a deep breath, relax, “sit down,” and explain the situation. The officers did not give the defendant any *Miranda* warnings at this time.

After the defendant confessed to the murder, officers discovered the body and arrested the defendant. He told the officers that his father was inside the home. Officers then entered the home and did a protective sweep of the house. Officers later explained that they did that “to secure it so there [were] no other people inside.” Officers located the defendant’s father and girlfriend inside the home. They secured the home, obtained a search warrant, and executed the warrant. Police also interrogated the defendant at the police station after informing him of his *Miranda* rights.

Prior to trial, the defendant moved to suppress. The defendant moved to suppress the evidence due to the protective sweep on Fourth Amendment grounds and moved to suppress his statements to police on Fifth Amendment grounds. In support of his argument that the conversation amounted to a custodial interrogation, the defendant noted that he was underage at the time of the conversation, there were multiple officers present, the officers never told him that he was free to leave, and they did not question him in his father’s presence. The defendant further argued that the post-*Miranda* statement he gave at the police station should be suppressed, because it was the “natural outflow of the prior statements” he made “without the benefit of *Miranda* warnings.”

The Court denied the motions to suppress.

At trial, the Commonwealth did not call the defendant’s girlfriend as a witness. The Commonwealth asserted that it could not make her incriminate herself in court and the girlfriend was not a material witness. As a result, the defendant proffered a jury instruction that “[t]he unexplained failure of the prosecution to produce a material witness raises a presumption that the testimony of that witness would have been adverse to the prosecution, and beneficial to the defendant.” The trial court denied the instruction.

At trial, the defendant claimed self-defense, citing the 2018 *Lienau* ruling to support his argument that “a violent, unwanted entry can constitute an overt act that may reasonably place a party in fear for their own life.” The trial court rejected that defense.

Held: Affirmed.

Regarding the Fourth Amendment challenge to the officers’ “protective sweep” of the home, the Court ruled that the protective sweep was justified as a warrantless search under the Fourth Amendment. The Court reasoned that the warrantless entry was a reasonable response to police perception of possible danger based on the defendant’s statement that someone else, appellant’s father, was inside the home. The Court explained that the fact that the defendant indicated his father was not aware of the situation did not automatically negate the threat the father may have posed; instead, it was reasonable for police to secure the premises in case other occupants posed a similar danger. The Court contended that the fact that police detained the defendant before entering did not render the sweep unreasonable, because they had reason to believe that the house harbored at least one other person.

Regarding the defendant’s Fifth Amendment *Miranda* argument, the Court concluded that the defendant was not subject to a custodial interrogation when he made his initial, pre-*Miranda* statements, because his freedom of movement was not restrained to the degree associated with formal

arrest. The Court observed that the conversation took place at the defendant's home. The Court pointed out that there was no evidence that officers were intentionally blocking him or physically restraining him until the conversation concluded. The Court noted that although officers patted the defendant down for weapons, it was not prolonged and did not restrict the defendant's freedom of movement. The Court also noted that the defendant volunteered most of the information with only minimal prompting by police. The Court also pointed out that the tone remained casual the entire five-minute conversation.

Regarding the defendant's post-*Miranda* statements, the Court pointed out that, unlike in *Seibert*, there was no evidence suggesting that police used a deliberate, two-step strategy to obtain the defendant's second statement. The Court agreed that in their initial interview, officers were "simply trying to find out what happened" and that *Miranda* warnings were not required as a result.

Regarding the defendant's proposed jury instruction, the Court ruled that because the jury instruction was not a clear statement of the law and was not supported by the evidence, the trial court did not err in rejecting it. The Court explained that a missing witness presumption instruction would be improper in a criminal case, regardless of which party it would favor.

Regarding sufficiency, the Court pointed out that the defendant followed directly behind the victim going up the stairs and stabbed him primarily in his left side and back, so the fact finder could reasonably infer that the victim was not facing the defendant head-on in an act of aggression. The Court also noted that the victim did not have anything in his hands, did not say anything to the defendant directly, and did not even look in the defendant's direction. In a footnote, the Court rejected the defendant's reliance on the *Lienau* ruling, noting that the victim did not use force or violence to enter the defendant's home but simply came through the door that the girlfriend had left open. For these reasons, the Court explained that *Lienau* does not support the defendant's self-defense argument.

Further, the Court contended that the defendant's use of a deadly weapon was not reasonable in relation to the harm threatened. Instead, the Court found that the defendant's reaction was grossly disproportionate in light of the harm threatened. Consequently, the Court ruled that the evidence was sufficient to permit a rational fact finder to reject the defendant's self-defense theory.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0236231.pdf>

Hickman v. Commonwealth: May 21, 2024

Richmond: Defendant appeals his conviction for Murder on Fourth Amendment grounds.

Facts: The defendant shot and killed a person and fled the scene in a vehicle. Officers heard the rapid-fire gunshots and concluded that those shots resulted from the discharge of more than one firearm. Less than a minute later, those officers saw the defendant's car driving without headlights and fail to use a traffic signal. Officers stopped the car.

The officers learned that an unconscious gunshot victim had been found about three blocks away, at a location in the direction from which the car had come. At the time of the stop, the defendant,

who was the driver, was nervous, pale, breathing heavily, and sweating despite the cold outdoor temperature. Officers ordered the defendant and the other occupants out of the car.

During the stop, an officer saw a firearm in plain view on the floorboard on the driver's side, where the defendant had been seated. The officer seized that firearm and discovered it was both empty of ammunition and hot to the touch, indicating recent firing. Officers found a second firearm in a pocket behind the front passenger seat. That gun also was hot to the touch, and it was jammed in a fashion consistent with rapid firing of the type that the officers had heard. During subsequent questioning, the defendant admitted that he was near where the gunshots were fired and was, in fact, fleeing that location.

Officers seized the vehicle and towed it to a secured lot. Officers then obtained a search warrant and searched the car pursuant to that warrant.

The defendant moved to suppress, arguing that law enforcement violated his Fourth Amendment rights when they stopped his car, seized firearms found inside, and retained the car and the firearms after letting him go. The trial court denied the motion.

Held: Affirmed.

The Court repeated that if police have probable cause to believe that a lawfully stopped vehicle was used in the commission of a crime or contains evidence of a crime, they may seize the vehicle itself. In a footnote, the Court pointed out that the justification to conduct such a warrantless search does not vanish once the car has been immobilized.

In this case, the Court ruled that the police had probable cause to believe that the defendant's car contained evidence of the fatal shooting that had just occurred nearby and that the two recently fired handguns they initially seized from it were part of that evidence. The Court agreed that the officer lawfully seized the firearm that he saw in the vehicle. The Court ruled that the facts were sufficient to establish a probability or substantial chance that the two firearms had been used in the very recent nearby shooting. This probability gave the firearms independent evidentiary value and permitted the police to retain them to preserve that value.

The Court also ruled that these facts provided probable cause to believe that the vehicle, too, could contain additional evidence of that very recent shooting. As a result, the Court concluded that the police were justified in towing the car, securing a warrant, and searching it two days later. The Court pointed out that whether probable cause exists to seize a car and various objects inside it is different from whether probable cause supports the arrest of a particular person in that car. Nevertheless, assuming the police did have probable cause to arrest the defendant that day, the Court ruled that their decision not to do so did not defeat the existence of probable cause to retain the evidence of the likely getaway car and weapons used in the fatal shooting.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0298232.pdf>

Spivey v. Commonwealth: May 14, 2024

Newport News: The defendant appeals his conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: The defendant drove a vehicle carrying drugs for distribution despite having a suspended license. An officer observed the defendant driving and recognized him. The officer later ran a check on the defendant and learned that the defendant's driver's license had been suspended.

The next day, the officer saw the defendant driving the same car in the same area. The officer followed the defendant and initiated a traffic stop. When the defendant attempted to parallel park on the right side of the road, his car collided with another car. When the car stopped, it was about five feet from the curb and parked diagonally with the front end extending into the street. Since the defendant could not lawfully drive the car and the car was parked in a manner that obstructed traffic, officers called for a tow truck.

Before the tow truck arrived, the defendant flagged down an unrelated gentleman to contact the defendant's wife to move the car. Because the defendant was trying to contact his wife, the officers paused the towing process. The unnamed man went to the defendant's nearby home and, after several minutes, determined that the defendant's wife either was not there or was not responding. The police resumed the tow process when they could not locate the defendant's wife.

The officer obtained a standard police tow sheet and began filling it out with information about the car. The officers gave the defendant the name of the tow company used to tow the car. The officers then initiated an inventory search of the car. As an officer reached under the seat, he found a satchel containing cocaine on the floorboard of the driver's seat. The officer immediately stopped the inventory search. The officers then started a narcotics investigation.

The defendant moved to suppress the search. He first argued that the traffic stop in this case was not supported by reasonable suspicion because the officer did not have any information about the defendant's current license status and his "outdated and incomplete information" could not justify the stop.

The defendant also challenged the search of his car. At a hearing, the Commonwealth introduced the inventory search policy, which permitted officers to tow a vehicle when the vehicle impedes the movement of traffic. The defendant asserted that there was no evidence in the record indicating that the officers completed several of the eight requirements of the inventory search policy. The defendant also complained that the inventory search policy gave an officer complete discretion on whether to tow a vehicle. He argued that this discretion failed to provide standardized criteria that sufficiently limit an officer's discretion.

The trial court denied the motion to suppress.

Held: Affirmed.

Regarding the reason for the stop, the Court concluded that the day-old information regarding the defendant's license was close enough in time to provide the officer with a reasonable belief that the defendant was engaged in criminal activity. The Court found that it was reasonable for the officer to suspect that the defendant's license status had not changed since the previous day. Accordingly, the Court found that the officer had reasonable suspicion that the defendant was violating Virginia law by driving with a suspended license and he was justified in conducting a traffic stop to investigate.

Regarding the search of the car, the Court concluded that the evidence established that the defendant's car was lawfully impounded, that the impoundment and search were conducted pursuant to standard police procedures, and that the search was not pretextual in nature. Thus, the Court ruled that the trial court did not err in finding that the community caretaker exception applied and denying the motion to suppress evidence seized from the car on this basis.

The Court first that the officer's decision to impound the vehicle was objectively reasonable. The Court then found that the inventory search was transformed into a separate investigation once the officer had probable cause to search the rest of the car after finding suspected narcotics under the driver's seat. The Court concluded that nothing in the record demonstrated that the officers failed to adhere to the inventory search policy prior to the discovery of the narcotics in the car.

Regarding the inventory search policy itself, the Court explained that discretion as to impoundment is permissible so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity. The Court found that the inventory search policy in this case does allow for officer discretion, but this discretion is based on standard criteria related to law enforcement's community caretaking function. The Court noted that this policy provides that an officer may tow a vehicle when a vehicle is illegally parked. Further, a tow of an illegally parked vehicle is permitted only under certain circumstances, including where the vehicle impedes the movement of traffic. Because the search inventory policy does not give an officer unlimited discretion and does not allow impoundment based solely on the suspicion of criminal activity, the Court concluded that the policy fell within the confines of the community caretaker exception.

Lastly, the Court concluded that the inventory search was not pretextual. The Court examined the facts and found that they demonstrated that the officers' intent in towing the vehicle and conducting an inventory search was not simply to search for contraband. The Court rejected the defendant's analogies to the *Cantrell* and *Knight* cases. The Court pointed out that, unlike the officers in *Knight*, the officer in this case found the satchel containing suspected narcotics almost immediately after initiating the inventory search, and thus ended that search once there was probable cause to start a separate narcotics investigation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0282231.pdf>

Hamlin v. Commonwealth: May 14, 2024

Dinwiddie: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Fourth Amendment and Chain of Custody grounds.

Facts: The defendant, a convicted felon, possessed fentanyl, cocaine, heroin, and methamphetamine in his vehicle for distribution along with several firearms. Police received two calls about a vehicle traveling the wrong direction on a highway and a third call that the vehicle had stopped in the middle of the highway. Around midnight, an officer approached the stopped vehicle after discovering it in the middle of the highway on top of the center dotted line with its brake lights on.

When the officer first approached the vehicle, the defendant was not alert despite the officer shining his flashlight inside. The vehicle started rolling when the officer roused the defendant by repeatedly knocked on the driver's side window.

The officer told the defendant to put his vehicle in park and to step out of the car. After multiple instructions from the officer, the defendant complied. An unfired round of ammunition fell from the defendant when he moved to the rear of the vehicle with the officer. The defendant did not have any identification. Dispatch reported back by radio that the defendant was not licensed to drive and warned the officer to use caution. The defendant told the officer that he was a felon.

Another officer, from the roadway, looked through the open driver's side window of the vehicle and observed firearms. There was an AR-15 rifle standing straight up in the passenger side seat with a double drum magazine as well as a handgun with an extended magazine laying on the driver's side floorboard. In front of the defendant, the officer radioed dispatch to confirm the defendant's felon status. Without being asked, the defendant said, "I got felonies." Dispatch then reported that the defendant had been convicted of numerous felonies.

Officers searched the vehicle and recovered six bags of suspected narcotics, the AR-15 rifle, two handguns containing ammunition magazines with ammunition inside, and seven additional boxes of ammunition from inside the car.

The defendant moved to suppress, arguing that there was no probable cause for the search and that the officers only knew he was a felon because of information they gained when he was questioned while being detained without the benefit of *Miranda* warnings. The trial court denied the motion.

Prior to trial, pursuant to and in compliance with § 19.2-187, the Commonwealth provided written notice that it intended to use a certificate of analysis showing that the laboratory had tested various substances and determined them to contain fentanyl, cocaine, heroin, and methamphetamine. The defendant did not file an objection as required by the statute.

At trial, the arresting officer testified that he sealed, initialed, and locked the evidence in a secure facility. He then testified that someone from the sheriff's office was responsible for transporting that evidence to the laboratory, and that the certificate of analysis described sealed envelopes containing evidence exactly like that which the officer collected. The person who transported the drugs to the lab did not testify.

The defendant objected to the certificate of analysis on the ground that the Commonwealth did not establish the chain of custody for the drug evidence. He argued that there was no evidence about where those substances were in the days between collection and testing. The defendant stated that he was challenging only how the drugs were transported to the lab. The trial court overruled the defendant's objection.

Held: Affirmed.

Regarding the motion to suppress, the Court agreed with the trial court that the police had probable cause to search the vehicle. The Court agreed that the firearms that the officers saw, coupled with their knowledge that the defendant was a felon, gave the police probable cause to search the vehicle, even independent of the bullet that fell from the defendant's person.

Regarding the defendant's *Miranda* argument, the Court found that binding case law foreclosed the defendant's argument that the physical evidence obtained from the car was "the fruit of the

poisonous tree” because the search stemmed from the defendant’s unwarned admission that he had a felony conviction. The Court cited the US Supreme Court’s *Patane* ruling that the Self-Incrimination Clause is not implicated by the admission into evidence of the physical fruit of a voluntary statement, even if that statement is obtained through custodial interrogation conducted without *Miranda* warnings. Accordingly, the Court explained, even if it agreed that the defendant was in custody at the time he admitted to having a felony conviction, the physical evidence obtained from the vehicle cannot be the fruit of the poisonous tree.

Lastly, regarding chain of custody, the Court agreed that the Commonwealth met its burden of proof. The Court acknowledged that the Commonwealth did not establish exactly who transported the evidence from the evidence lockup to the laboratory for testing. The Court ruled that the officer’s testimony was enough to establish with reasonable certainty that the laboratory tested the same evidence that the officer collected.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0441232.pdf>

Alvin v. Commonwealth: April 23, 2024

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

Facts: The defendant, a convicted felon, carried a concealed firearm on his person. While on patrol, an officer saw the defendant walking with a heavy object swinging in his right pocket every time he made a step forward. The officer observed that the object “appeared heavier than a cellphone would be.” Further, the officer could see the object pressed against the inside of his pants pocket on the right side, between the pants pocket and his leg, each time the defendant stepped. Through the thin fabric of the defendant’s pants, the officer could clearly see an outline of a firearm against the defendant’s leg. He specified that this included the handle of the firearm and the barrel of the firearm.

The officer knew that the area was a “high crime” neighborhood in which arrests involving weapons and narcotics had been made. Specifically, the defendant walking next to an apartment complex at which the officer had made several arrests involving weapons, narcotics, and stolen autos. The block that the defendant was “walking from” had been the location of a shooting during a very recent traffic stop.

The officer stopped the defendant and patted him down. The officer discovered and seized a handgun from the defendant’s pocket.

The defendant moved to suppress, arguing that his “initial seizure” by the police was not supported by a reasonable articulable suspicion of illegal activity. The trial court denied the motion.

Held: Affirmed. The Court held that the officer had reasonable suspicion to seize and then pat down the defendant for concealed weapons.

The Court found that the totality of these circumstances—including the outline of the handle and barrel of the firearm that was visible through the thin fabric of the defendant’s pants—supported the trial court’s ruling that the officer reasonably believed the defendant was carrying a concealed weapon, a criminal offense. The Court noted that the Supreme Court of Virginia held in *Whitaker* that carrying a concealed weapon provides probable cause to arrest. The Court found that the officer’s observations, coupled with the obvious weight of the object, the officer’s experience, and the location of the encounter, justified a seizure of the appellant for a brief investigation to confirm or dispel his concerns.

[Note: This ruling appears to contradict the unpublished 2020 in Commonwealth v. Johnson, Rec. No. 1799-19-2, where the Court of Appeals ruled that the mere presence of a bulge that is consistent with the concealed carry of a firearm, without more, does not create probable cause that a crime is being committed. In this case today, the Court did not address the Johnson ruling. In Johnson, the Court had written: “An individual’s choice to exercise his fundamental right to bear arms cannot, standing alone, serve as the basis for reasonable suspicion or probable cause that in doing so, he is committing a crime. Thus, we do not presume that an individual carrying a concealed firearm must be in violation of the law in doing so. If there are other indicia of criminality present, the presence of a bulge consistent with a weapon can be considered under the totality of the circumstances in determining whether reasonable suspicion or probable cause exist.” The one distinguishing factor is that in Johnson, the Court expressed that there was no additional basis for the stop; for example, that defendant did not appear nervous or act furtively, and there was no evidence that the officers stopped that defendant for acting suspiciously in a “high crime” or drug market area. – EJC]

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1995221.pdf>

Roane v. Commonwealth: April 8, 2024

Newport News: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment, Jury Instruction, and sufficiency grounds.

Facts: The defendant, a convicted felon, carried a firearm while riding as a backseat passenger in a vehicle. During the stop, the defendant opened the door and started to get out. The officer ordered the defendant to get back inside, and the defendant complied. The defendant stated that he was getting a ride from the driver. The officer asked the defendant for ID, which the defendant provided.

After a dog alerted to the presence of narcotics in the vehicle, the officers ordered everyone out of the car and, consistent with departmental policy, proceeded to handcuff them and move them to the curb. The defendant began moving around and reached towards his right side. The officers ordered the defendant to raise his hands. When the defendant complied, the act of raising his arms lifted his shirt and officers noticed he was carrying a concealed handgun.

A struggle ensued between the defendant and the officers. The officers repeatedly shouted: “stop reaching.” Officers finally were able to control the defendant and an officer grabbed the defendant’s gun.

The defendant moved to suppress. The defendant argued that absent reasonable suspicion particularized to him, a mere passenger, the officer’s order to him to remain in the car when he tried to leave the scene violated his Fourth Amendment rights. The trial court denied the motion.

At trial, an officer identified the gun as a black “Glock 42” .380 caliber gun with a magazine inside it that contained six bullets. Officers also noted the gun’s serial number. One of the officers explained that a “BB gun fires BBs” whereas a “real firearm fires bullets.” He testified that the item was a firearm, not a BB gun. Another officer explained that when a firearm is discharged, “the firing pin hits the igniter[,] which releases the powder” that “caus[es] the explosion” and “mak[es] the bullet fly out of the firearm.” An officer also testified that he test-fired the firearm prior to trial and it worked as designed.

At trial, the defendant objected to the Commonwealth’s jury instruction defining the term “firearm” for purposes of § 18.2-308.2. The Commonwealth used Model Jury Instruction number 18.622: “A firearm is an instrument designed, made, and intended to expel a projectile by means of an explosion. It is not necessary that the firearm be operable, capable of being fired, or have the actual capacity to do serious harm.” The defendant argued that the prosecution did not offer any evidence regarding the definition of a firearm. The trial court overruled the defendant’s objection.

Lastly, at trial, the Commonwealth introduced two of the defendant’s prior felony convictions. The two orders reflected that a person with the defendant’s name and social security number was convicted for possession of a concealed weapon by a felon, a violation of § 18.2-308.2, based on an offense date of October 13, 1997. Both orders were copies certified by a circuit court deputy clerk. Additionally, the orders were entered by the same circuit court in which the defendant was tried for the instant offense. The trial court also admitted redacted copies of a certified prior conviction order from 1998 and a related “Correction Order” from 2021, entered nunc pro tunc to the date of entry of the 1998 order.

The defendant contended that the evidence was insufficient to prove he had the requisite prior conviction for a violent felony. He noted that the two prior conviction orders relied upon by the prosecution listed his name but reflected two different birthdates. He argued that these orders were “of suspect validity,” particularly given that they were signed by two different judges more than twenty years apart and the second one was entered in 2021, “after [the instant] case had started.” The trial court rejected his argument.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress. The Court also held that the trial court did not err in determining that the instruction properly stated the law. Lastly, the Court concluded that the evidence was sufficient to prove that the defendant had the requisite prior conviction for a violent felony at the time he possessed the firearm at issue in this case.

The Court reaffirmed that the officers’ order to the defendant to remain in the car during the traffic stop was reasonable and lawful under the Fourth Amendment. The Court also found that the officer was permitted to order the defendant to get out of the car pending completion of the routine traffic stop.

The Court then observed that the K9 alert provided an additional reason to continue the stop—to investigate the potential drug offense—as well as probable cause to search the vehicle. The Court found that, while removing the defendant from the car to conduct the search, the police acted reasonably by directing him to raise his hands for safety reasons. The Court noted that this action revealed the firearm, which had previously been concealed by the defendant’s shirt, in plain view at his waist. Once the firearm was in plain view, the Court concluded that the officers were entitled to seize it as evidence of the crime of carrying a concealed weapon.

Regarding the jury instruction, the Court explained that the prosecution was not required to call a witness from the forensic laboratory to provide testimony about the weapon to support the proffered instruction. In this case, the Court found the witness testimony about the weapon given by three different law enforcement officers provided the necessary quantum of evidence to support the instruction.

In this case, while the Commonwealth was not required to establish that the firearm was operable, the Court elucidated that proof that it was operable when he test-fired it provided evidence that it was, in fact, designed to function as a firearm and was not merely a replica of a firearm. The Court concluded that this evidence amply supported the trial court’s decision to overrule the defendant’s objection to the proffered “firearm” instruction.

Lastly, regarding the prior convictions, the Court agreed that the evidence was sufficient to permit the jury, as the finder of fact, to determine that the order accurately reflected the defendant’s 1998 conviction for the offense of possession of a concealed weapon by a convicted felon in violation of § 18.2-308.2 and that the only substantive difference between the two orders was a correction of the birthdate listed. The Court noted that both orders bore the identical name and social security number—the same name and social security number on the identification that the defendant provided to the officers shortly prior to his arrest for the instant offense.

The Court repeated that, while many persons have the same name, a social security number is a unique number that is assigned to and identifies a specific individual. Consequently, the Court found that the record supported the conclusion that the single-digit difference between the birthdate in the original order and the defendant’s birthdate was a clerical error, not a failure to adequately identify the person who was the subject of the prior conviction order.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0032231.pdf>

Johnson v. Commonwealth: April 8, 2024

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

Facts: The defendant carried a firearm and drugs for sale. Officers stopped the vehicle in which the defendant was a passenger for speeding. The stop took place in a high crime area known for violence where the officers had made several arrests. The driver did not stop the car until three to four

blocks later, passing several places where it could have stopped. The officers learned that the driver was suspended. The officers then had a conversation where one officer told the other that the defendant seemed “sketchy A.F.” The officers then discussed whether they had the justification to conduct a protective sweep.

While the primary officer investigated the driver, the backup officer asked the defendant to step out of the car and told him that because the driver did not have a valid driver’s license, the officers would “need somebody to drive the car.” The defendant exited the car and walked a few steps away from it, and the primary officer asked him to step to the back of the car. The defendant initially denied having any weapons. The primary officer then asked the defendant three times, in quick succession, whether he had any weapons. After the third prompt, the defendant stated, “Yeah, a registered firearm.”

The officer asked the defendant to raise his hands, which he did, and then frisked him and found a handgun in his front waistband. The officer placed the defendant in handcuffs and conducted a protective sweep of the car. He saw a black satchel which he described as “large enough to hold a firearm” on the front passenger seat. Within the satchel he found a plastic bag containing a white rock-like substance. The rock-like substance was later analyzed and found to be cocaine.

The defendant moved to suppress, arguing that a protective sweep for weapons must be based upon reasonable suspicion that the person is dangerous and that here, there was no evidence to support a suspicion that he was a danger to the officers. The defendant also argued that the evidence recovered from the search of the car should have been suppressed because the traffic stop was prolonged beyond what was required by the purpose of the stop. The trial court denied the motion.

Held: Affirmed. The Court held that the officers possessed an objectively reasonable suspicion to conduct a protective sweep of the car because the officers possessed a reasonable belief that the defendant was dangerous and might gain immediate control of additional weapons in the car. The Court also concluded that the conversation between the officers during the traffic stop did not unlawfully prolong the stop.

The Court concluded that the discovery of the firearm, together with the other circumstances of the stop, warranted a protective sweep of the car for additional weapons that might have endangered officers during and immediately after the stop. The Court reasoned that the defendant’s failure to pull over for several blocks provided officers with a reasonable fear that the car’s occupants could be using the delay to access weapons inside the vehicle. The Court also noted that the stop occurred in a high crime area and that while the defendant first denied having any weapons, he then admitted to having a firearm.

In a footnote, the Court explained that although 18.2-308(A) provides a statutory exception to the prohibition against carrying concealed weapons if an individual has a valid concealed handgun permit, it rejected the argument that the lawful presence of a firearm is not a factor to consider in determining whether officers have reasonable suspicion to conduct a protective sweep. In doing so, the Court cited the U.S. Supreme Court ruling *Adams v. Williams* and the 4th Circuit’s *Robinson* ruling. The Court also pointed out that the statutory exception contained in § 18.2-308 is expressly made an affirmative defense, and in this case the Court noted that the defendant provided no evidence that he had a concealed handgun permit.

In a separate footnote, the Court rejected the trial court's focus on the officers' subjective perceptions of danger. The Court explained that "the dispositive question is not whether these officers themselves felt that appellant was armed and dangerous, but instead whether an objectively reasonable officer would have, based on the circumstances presented. And, as we held above, based on our objective rather than subjective standard, we conclude that a reasonable officer would have had reasonable suspicion to believe that appellant was armed and dangerous, thus justifying the protective sweep of the car."

Regarding the length of the stop, the Court noted that, in this case, the officers were presented with the question of what to do with the car, and either needed to find someone who could drive it or arrange to have it towed. The Court found that this inquiry was necessarily part of an officer's mission in conducting a traffic stop after learning that the driver of the vehicle was unable to legally drive it, because it served to ensure that vehicles on the road are operated safely and responsibly. The Court found that the officers' conversation did not prolong the traffic stop in any way because the officers were conducting tasks related to the mission of the stop during these discussions.

In this case, the Court found that any extension of the traffic stop was necessitated by the officers' responsibility to secure a driver for the car which the driver could not herself legally drive. The Court noted that the officers were engaged in this task, which was directly related to the mission of the traffic stop, after learning that the driver was driving with a suspended driver's license, up until the point when the defendant admitted that he had a firearm. Because the officers had not reasonably completed the mission of the traffic stop at the time they developed reasonable suspicion for the protective sweep, the Court held that the trial court did not err in denying the motion to suppress.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1360222.pdf>

Drake v. Commonwealth: March 26, 2024

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

Facts: The defendant possessed methamphetamine in his vehicle while unconscious in a gas station parking lot. An officer noticed the vehicle parked after business hours, noting that there were no other vehicles in the parking lot and that the location was "a high drug traffic area." The officer observed the defendant slumped over in the driver's seat with a syringe stuck in his right hand. Suspecting the defendant may have overdosed, the officer immediately called for medical assistance.

The defendant awoke but could not operate the controls to open the window. The officer then opened the door and asked if the defendant was okay. The defendant responded that he "was just taking a nap" in slurred speech, appearing "confused." The defendant claimed that he was a diabetic but did not need assistance. An EMT arrived and determined that the defendant did not appear to be in medical distress and that his blood glucose levels were normal.

The officer asked the defendant what was in the syringe. At first, the defendant responded that it was insulin, but then stated that he did not know what the syringe contained. Officers searched the vehicle after seeing other syringes in plain view throughout the vehicle. During the search, the officers found a methamphetamine.

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

Held: Affirmed. The Court repeated that, when the police lawfully observe what they believe to be a controlled substance in plain view inside a vehicle, they possess probable cause to search the car. The Court agreed that, considering the totality of the facts and circumstances, the record supports the court's conclusion that the officer had probable cause to search the vehicle, the contents of the syringe initially in the defendant's hand, and to arrest the defendant.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0437233.pdf>

Harvell v. Commonwealth: March 19, 2024

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

Facts: The defendant possessed Fentanyl in his vehicle while unconscious in a convenience store parking lot. An officer responded to a call for an unconscious person and found the defendant. Looking inside the car, the officer noticed what appeared to be a bag of marijuana in the vehicle's open center console. The officer described it as a small amount of marijuana, roughly three or four grams. The officer ordered the defendant out of the vehicle and searched the vehicle. The officer later explained that based on the presence of the marijuana and the fact that the defendant was "passed out" in the driver's side of the vehicle, he thought there might be more marijuana, paraphernalia, or "something other than marijuana" in the vehicle.

At the time of the search, § 18.2-250.1 provided that possession of marijuana was unlawful unless it was obtained pursuant to a valid prescription and that violation of the section was "a civil offense" and "subject to a civil penalty of no more than \$25." Any violation of the section was to be charged by summons.

Searching the vehicle, the officer found a bag containing Fentanyl. The defendant moved to suppress, but the trial court denied the motion.

Held: Reversed. The Court ruled that, considering the totality of the circumstances, the officer did not have the requisite probable cause to search the vehicle.

The Court agreed that the officer acted lawfully in seizing the marijuana which was in plain view and immediately apparent as unlawful to possess saw marijuana, which was at the time still illegal contraband, inside the vehicle.

However, the Court complained that beyond the defendant's possession of the small amount of marijuana, the record provided no indication, prior to the further search of the vehicle, that it contained

additional contraband or evidence of any crime. The Court lamented that the officer did not provide any basis for his reasoning that there would be contraband or evidence of a crime elsewhere in the vehicle and offered no testimony to support a reasonable belief that the defendant was intoxicated with drugs. Additionally, the Court cautioned that the fact that the defendant was asleep in his vehicle, without more, did not support a reasonable conclusion that he was engaged in criminal activity.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1859221.pdf>

Cherry v. Commonwealth: March 12, 2024

Northampton: Defendant appeals his conviction for Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a gun and drugs in a car. An officer heard 20 gunshots late at night while patrolling in a residential area, gunshots that were corroborated by another resident. The police received reports that two suspects, one of whom was possibly armed and wearing all black, were in the area.

A deputy who responded then encountered two individuals walking down the street, one of whom was wearing all black and had a black ski mask. When the deputy asked the men if he could talk to them, the man in the ski mask walked to a house while the other man walked into the woods. The deputy talked to the man near the house, who denied involvement in the shooting. After about two minutes, the suspect near the house fled. The deputy gave chase but ultimately lost sight of the suspect. Less than two minutes later, the deputy saw what appeared to him to be the gray SUV he saw earlier, driving down the road. The SUV made several U-turns. The deputy instructed the other units to stop the SUV and see if there was someone wearing all black inside.

An officer testified that he received a radio dispatch to stop a silver SUV driving toward the highway. He stopped a vehicle that “looked silver” approximately 800 yards away from where the deputy was standing. The officer did not observe any traffic infraction or other basis to stop the vehicle. A woman was driving, and the defendant was in the front passenger seat, with others in the vehicle as well. During the stop, police located the defendant’s gun and drugs.

The defendant moved to suppress, but the trial court concluded that there was reasonable articulable suspicion for the police to stop the vehicle.

Held: Affirmed. The Court agreed that the police had reasonable suspicion to stop the vehicle in which the defendant was a passenger. The Court found that the facts made it reasonable for the deputy to believe that the SUV was looking for the suspects and may have information about the shooting.

The Court explained that, although officers did not provide a detailed description of the two suspects, the description, coupled with the suspects’ flight, made it reasonable for the deputy to suspect them of being involved in the shooting. Although the officer testified that the gunshots were not in the area, there was reason to believe the shooting suspects traveled from the direction of the gunshots to

the area. Finally, although it is possible to discharge a firearm without committing a crime, the Court explained that that does not mean that the police are prohibited from investigating the sound of 20 gunshots fired in a residential area after 10:00 p.m.

The Court explained that any error as to the color of the vehicle was not relevant, as a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1906221.pdf>

Heyward v. Commonwealth: March 5, 2024

Virginia Beach: Defendant appeals his convictions for Possession with Intent and Possession of a Firearm on Fourth Amendment grounds.

Facts: The defendant possessed a firearm while possessing several different drugs with the intent to distribute. The defendant's distribution operation was based in his apartment. While conducting fire extinguisher inspections at the defendant's apartment complex, two workers entered the defendant's apartment. There, they saw stacks of cash stacked about ten to twelve inches high, Ziploc bags, loose marijuana, bagged marijuana, money "strewn out" on a table, more stacks of money in the bedroom, and an automated money-counting machine on a nightstand. The workers photographed what they saw. To their surprise, the defendant then appeared, having stepped out of the shower, and they left.

The defendant soon left the apartment as well. As he did so, the witness saw the defendant take a license plate off a truck and place it on another vehicle that the defendant then left in. As the defendant left, the workers called the police. They shared their observations and the photos they took. Officers arrived and entered the apartment. The officers had not seen any indication that someone was inside the apartment, nor did they hear anything from inside the apartment. One officer later stated that his purpose in entering the apartment "[w]as to make sure nobody was in there, to make sure there was no evidence being destroyed." Inside, the officers confirmed what the witnesses saw.

Officers then called the defendant on the phone. The defendant confirmed that he had encountered the civilian witnesses in his residence. He admitted to having smoked marijuana in his residence. He claimed that the money they saw "was for Father's Day weekend and that he was on his way to South Carolina on vacation."

Officers then obtained a search warrant. The search warrant included the observations from the civilian workers as well as the officer who entered the apartment without a warrant and also included the details from the phone call. Executing the search warrant, officers seized over \$40,000, cocaine, fentanyl, marijuana, firearms, a bulletproof vest, two money counters, packaging equipment, and narcotic paraphernalia.

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

Held: Affirmed. The Court first held that the warrantless entry was not permitted under the protective sweep exception because the officers did not have reasonable suspicion that the defendant's apartment harbored a person who could harm police.

However, excluding from the affidavit the officers' observations, the Court found that there was still sufficient evidence in the affidavit to support a finding of probable cause. Because the officers' warrantless entries did not fall under an exception to the warrant requirement, the Court considered whether those warrantless entries affected the validity of the warrant. The Court held that the defendant had not made the preliminary showing necessary for a *Franks* hearing because he did not present any evidence of a design to deceive the magistrate or reckless disregard for the truth in the police's omission of information necessary to a finding of probable cause. Thus, the Court held that the trial court did not err in denying the suppression motions and upheld his convictions.

Regarding the warrantless entry into the apartment, the Court held that the warrantless entries were not permitted under the protective sweep exception because the officers lacked reasonable suspicion that the apartment could harbor an individual posing a threat to those on the scene. The Court noted that before entering the apartment, both officers knew that the defendant had left the apartment and neither saw any indication that someone was inside the apartment. Thus, the Court found that the officers did not have reasonable suspicion that the area "could harbor an individual posing a threat to those on the scene."

Further, the Court noted that both officers stated that part of their purposes in entering was to confirm what the witnesses had seen and to preserve evidence. The Court emphasized that those are not permissible purposes for police to enter a home without a warrant. Thus, the Court ruled that no exception to the warrant requirement applied to the officers' warrantless entries and such entries were unlawful.

The Court then turned to the search under the search warrant. The Court concluded that the defendant failed to make a preliminary showing that the police had a design to deceive the magistrate or reckless disregard for the truth in the police's omission of information and that such omissions were necessary to a finding of probable cause. In this case, the Court observed that the warrant affidavit contained five paragraphs of "material facts constituting probable cause." The trial court found that the second paragraph contained tainted information and should be set aside, and the Court pointed out that neither party challenged that finding on appeal.

The Court then rejected the defendant's argument that the first paragraph of the affidavit, relating the observations that the civilian workers shared with the police, was "tainted" by observations from each officer's warrantless search, making it impossible to know whether the information in the affidavit's first paragraph came from the civilians, or from the officers' own search. Instead, the Court explained that, excluding from the affidavit the officers' observations, there was still sufficient evidence in the affidavit to support a finding of probable cause.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1409221.pdf>

Webb v. Commonwealth: February 27, 2024

Williamsburg/James City: Defendant appeals his conviction for Distribution, 2nd Offense, on Fourth Amendment grounds.

Facts: The defendant sold drugs after having a previous conviction for that offense. The defendant's elderly landlord suspected that the defendant was engaging in drug activity and contacted police. He shared that people came to the property for "short stays" during all hours of the night. The landlord's caretaker also reported that people had approached him on the property offering to sell him methamphetamine. The caretaker passed along license plate numbers of visiting vehicles to an officer who was familiar with some of the vehicle owners from prior narcotics investigations.

Officers began to surveil the residence. Officers observed a truck arrive and then sit, idling with the headlights on, while the driver remained inside. Moments later, a young woman exited the house and approached the truck. She opened the passenger door and as she leaned into the vehicle, an officer looked through his binoculars and recognized the passenger. After roughly two minutes, the young woman left the vehicle and walked back into the house. The officer saw her look at her upturned palm as she walked, and he believed that she was holding something too small to identify.

Officers ran the license plate and learned that the owner of the truck was the defendant. Officers knew the defendant from his prior distribution activity. Officers also contacted the caretaker, who told them that the truck was one of the vehicles that he saw frequently visit the residence.

Officers followed the truck as it left the residence and visited another residence. Officers lost sight of the truck in the driveway. Fifteen minutes later, the truck left this second residence and returned to the area of where they had first observed it. Before it reached its destination, officers stopped the vehicle. They confirmed that the defendant was the driver. Officers deployed a K9 unit and discovered methamphetamine.

The defendant moved to suppress. The defendant argued that the officers lacked reasonable, articulable suspicion because they had not established that the defendant was the driver until after they stopped his vehicle and that any reasonable suspicion that developed at the observation at the first location dissipated after the truck arrived at the second residence. Further, he alleged the officers could not establish any connection between the second residence and drug activity.

At the motions hearing, the lead officer testified that he had observed thousands of drug transactions. He testified that the circumstances were consistent with the reports of numerous brief visits throughout the night and that it is not uncommon for methamphetamine users to make several purchases in one night. The officer explained this is because "careful" dealers often only "bring what's asked" and "do not carry more than that." The officer explained that he believed the defendant was returning to the property to make another sale after the stop off of at the second residence to "re-up." Another officer explained that it was not uncommon for a buyer to provide money for a "small sample" of narcotics, and then wait for the dealer to go to their supplier to acquire more.

The trial court denied the motion to suppress.

Held: Affirmed. The Court held that the officers had reasonable, articulable suspicion to stop the defendant.

The Court agreed that the facts demonstrated articulable facts that supported reasonable suspicion to briefly investigate whether the driver of the truck was engaged in the sale of narcotics. The Court found it reasonable to find that the seemingly innocent activities that officers observed were part of a series of acts that, combined, led experienced officers to recognize potential unlawful activity, and to justify brief investigation.

Regarding the officer's "assumption" that the defendant was the driver, the Court repeated that under *Kansas v. Glover*, an officer's belief that the registered owner of a vehicle is its driver is a "commonsense inference" and the fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of the inference.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1745221.pdf>

Meredith v. Commonwealth: January 30, 2024

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

Facts: The defendant suffered a gunshot wound and visited the hospital for treatment. In the emergency room, hospital staff cut off his bloody clothing to provide treatment and placed his personal effects in an open brown paper bag in his treatment room.

That night, there had been three homicides and five shootings in Richmond. An officer responded and asked the defendant about the shooting. The defendant refused to provide information beyond revealing that that he was shot in Richmond. After the officer ended the interview, a nurse gave him the brown paper bag containing the bloody clothing. The officer did not ask for the clothes; rather, the nurse gave him the bag as he was leaving. At that point, the officer did not know whether the defendant was a victim or a perpetrator of any crime.

The officer took the defendant's bloody clothes to police headquarters to place them in the forensics dry room. While checking the clothes' pockets, the officer found Eutylone, a Schedule I controlled substance. The officer later explained that he had taken the clothes pursuant to police procedure, wherein it is standard procedure to "take them to the forensic floor . . . put them in a dry room . . . open them up . . . go through them . . . [to ensure that there isn't] anything that shouldn't be in there."

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

Held: Affirmed. The Court held that the trial court properly denied the motion to suppress, as the defendant did not have a reasonable expectation of privacy in the emergency ward treatment room he was treated in, the police lawfully came into possession of his clothing, and the subsequent search of the pockets of his clothing was reasonable under the Fourth Amendment.

The Court concluded that the defendant had no reasonable expectation of privacy in the emergency room itself. The Court pointed out that the defendant's treatment room was part of the

emergency ward, its door was open, other people were present in the room, and there was no indication that anyone objected to the officer's presence there.

The Court contrasted this case with *Morris*, where the Virginia Supreme Court held that the defendant's hospital room, which he had been assigned and paid for, was equivalent to a hotel room and may not lawfully be entered without a search warrant. In this case, the Court pointed out that, unlike the *Morris* case, the defendant was not in a private hospital room, but a public room located in the emergency ward.

On the other hand, the Court agreed with the defendant that, pursuant to *Spaulding*, he retained a privacy interest in the pockets of his clothing. The Court repeated that an individual retains a privacy interest in the pockets of his clothing, notwithstanding that the clothing may have been removed by medical personnel during the administration of emergency medical care. However, the court found that the defendant consented to the removal of his clothing, and thereafter medical personnel gave his clothing to the police.

However, notwithstanding the fact that the officer lawfully came into possession of the defendant's clothing, the Court also agreed that the defendant still retained a privacy interest in the pockets of his clothing, per *Spaulding*. The Court contrasted the *Craft* case, where the clothing was itself probative evidence of a crime. In this case, because the police did not obtain a warrant before searching the pockets of the defendant's clothing, the Court ruled that the Commonwealth must show either that the warrantless search was reasonable and supported by an exception to the warrant requirement or that the exclusionary rule is inappropriate under the circumstances.

The Court then examined the "Inventory Search" exception, as articulated by the 5th Circuit in *U.S. v. Gravitt*. The Court elucidated that when police search a container under this exception, the exception is sometimes called the "community caretaker" exception. The Court explained that this exception accomplishes several goals:

- the protection of the owner's property while it remains in police custody,
- the protection of police against claims or disputes concerning lost or stolen property, and
- the protection of the public and the police from physical danger.

In this case, the Court concluded that the officer's search met the requirements set out in *Williams*:

- (1) the clothing was lawfully obtained;
 - (2) the search was conducted pursuant to standard police procedures; and
- the search was not a pretextual surrogate for an improper investigatory motive.

Therefore, pursuant to the inventory exception, the Court ruled that the search conducted by the officer was reasonable.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1006222.pdf>

Commonwealth v. Rowe: January 30, 2024

Chesterfield: The Commonwealth appeals the granting of a Motion to Suppress on Fourth Amendment grounds.

Facts: Police identified the defendant as a suspect in a murder case. The defendant had been a juvenile at the time. Officers sought a petition and a capias for the defendant pursuant to § 16.1-247(K), using a locally-created form to apply to juvenile intake for a petition and capias.

After submitting the documents, the juvenile intake officer filed a petition in the county juvenile and domestic relations district court for a capias against the defendant. The petition did not contain the detective's signature, nor was anything attached to the petition. Instead, the intake officer signed the petition "for" the detective. The same intake officer issued a capias to take the defendant into custody for second-degree murder and use of a firearm in the commission of a felony. The capias stated that it "appears from the petition . . . that there is probable cause to believe that" the defendant "committed the act alleged."

Executing the capias at the defendant's residence by forced entry, officers saw evidence in plain view. Based on their observations while executing the capias, officers obtained a search warrant and seized illegal drugs and a firearm.

The defendant moved to suppress the drugs and the firearm, arguing that the law enforcement officers unconstitutionally entered the house because they did not have an arrest warrant. At the motion to suppress, neither the detective nor the intake officer testified. The Commonwealth did not introduce evidence about why the police developed the defendant as a suspect in the murder or whether the detective made a sworn statement to the intake officer.

The trial court held that the capias was not an arrest warrant or its equivalent and, accordingly, that the entry was presumptively unreasonable. It held that no exigent circumstances existed justifying the forced entry. As a result, the court applied the exclusionary rule and granted the motion to suppress.

Held: Trial court affirmed; suppression properly granted. The Court examined the question of whether the capias against the defendant provided a constitutional basis for law enforcement to forcibly enter his home; In other words, whether the capias, since it was not an arrest warrant, was the functional equivalent of one, authorizing the entry. The Court held that the trial court correctly concluded that the capias at issue did not meet the Fourth Amendment requirements to qualify as an arrest warrant or the functional equivalent of one.

The Court held that the record did not show that the intake officer acted impartially or received a sworn statement supporting an independent determination of probable cause to believe that the defendant committed the murder and the accompanying firearm offense. Further, the Court held that the trial court did not err by applying the exclusionary rule here.

The Court first examined the statute which gives a juvenile intake officer authority to issue a capias for an adult under the age of 21 who is alleged to have committed, before attaining the age of 18, an offense that would be a crime if committed by an adult, § 16.1-247(K). The Court restated that, for a warrant to be valid, the issuing judicial officer must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. In addition, the person issuing it must be "neutral and detached" as well as capable of determining whether probable cause exists for the requested arrest.

The Court also emphasized that, under the Fourth Amendment, an arrest warrant for an individual accused of violating a criminal law must be based on sworn statements establishing probable cause. The Court acknowledged that, although a sworn statement must support a probable cause determination upon which the issuance of a warrant is based, the Fourth Amendment does not require that statement to be in writing. Nevertheless, whether oral or in writing, it must be presented to a neutral and detached officer and support a finding of probable cause.

The Court declared that without evidence in the record supporting probable cause, a reviewing court may not merely assume it existed. The Court found no facts in the record that supported a finding of probable cause and complained that the record lacked any indication of a sworn statement made to the intake officer. The Court also complained that the petition contained no indication of the information the detective provided to the intake officer supporting the belief that the defendant committed the alleged crimes. The Court also lamented that there was no testimony about what was presented to the intake officer. Thus, the Court wrote, “there is simply no evidence here of what information the intake officer received other than the mere assertion that Rowe committed the alleged offenses.”

The Court then rejected the Commonwealth’s “good faith” argument and ruled that the Exclusionary Rule applied in this case. The Court found it notable that the intake officer signed the petition as the petitioner on behalf of the detective, suggesting that he was not acting as an impartial judicial officer. The Court complained that the record “simply does not demonstrate why Detectives Waggoner and Gleason suspected Rowe of murder or use of a firearm in the commission of a felony.” The Court noted that the capias was also devoid of any indication that it was based on a sworn statement, contained no supporting facts, and provided only that probable cause appeared to exist based on the petition. The Court also complained that the petition did not contain any supporting facts, providing simply that the defendant committed second-degree murder.

Applying the exclusionary rule, the Court ruled that the confluence of these circumstances rendered reliance on the capias objectively unreasonable. The Court wrote: “Simply put, a reasonable law enforcement officer would not believe that this capias was a valid arrest warrant or the functional equivalent of one.”

In a footnote, the Court noted that it was not ruling on the trial court’s broad ruling that no capias issued under § 16.1-247(K) can meet Fourth Amendment standards for an arrest warrant.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1528232.pdf>

Commonwealth v. Jennings: January 23, 2024

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

Facts: The defendant drove while intoxicated, crashed into another car, crossed the median, and hit three more cars. EMS responded and found the defendant in one of the vehicles. The defendant was

disheveled, dazed, and confused. The defendant stated that she could not remember what happened. Due to her appearance and condition, the EMS worker asked if she was under the influence of anything. She replied that she and her boyfriend had “smoked some weed last night.”

EMS helped the defendant out of her car and into an ambulance that had arrived on the scene. EMS asked the defendant if she had her identification. She said it was in a pink bag in her car. EMS went to the vehicle and found a pink box. EMS opened the box and saw “what appeared to be a sizeable bag of marijuana,” two pipes, a jewelry screwdriver, a set of scales, and a “light bulb shaped container” with a “sugary looking crystallized product.”

Police arrived on the scene and noted that the defendant appeared very confused and had “pinpoint pupils.” The defendant said she wanted to get in her vehicle and drive home. The officer observed that the defendant’s car was completely “totaled,” and ultimately had been rendered entirely “immobile” by the events of the car crash. The ambulance left to transport the defendant to the hospital. Meanwhile, one EMS worker told the officer about the contents of the box, with what appeared to be marijuana and drug paraphernalia. The officer walked to the vehicle with the EMS worker, and at the officer’s request, the worker took the pink box out of the car and gave it to the officer.

The defendant moved to suppress the search. The trial court found that EMS was acting as a community caretaker when the worker initially entered the defendant’s car and discovered the box. The trial court then opined that “the issue turn[ed] on the question of the mobility of the car, could the car actually be driven.” The trial court concluded that because the car could not be driven, it “was not mobile” and the automobile exception to the Fourth Amendment therefore did not apply. The trial court granted the motion to suppress. The Commonwealth appealed.

[Good work to Mitchell Hanson, ACA Campbell County, in this case – EJC].

Held: Reversed, Motion Improperly Granted. The Court ruled that the automobile exception requires only that a reasonable officer have probable cause to suspect that a vehicle contains evidence of a crime and does not rise or fall on the “ready mobility” of the vehicle.

The Court reviewed the recent history of the automobile exception in detail. The Court explained that “Simply stated, automobiles are different in kind than a person’s home, and therefore the privacy interests involved are lessened. Further, it is clear that the automobile exception contains no exigency requirement, and given the lessened privacy interests involved, rises and falls solely on the presence or absence of probable cause.”

Judge Causey filed a dissent.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1443233.pdf>

Beamon v. Commonwealth: January 9, 2024

Hampton: Defendant appeals his convictions for Possession with Intent and Possession of a Firearm on Fourth Amendment grounds.

Facts: In February 2021, the defendant, a convicted felon, possessed a concealed firearm along with marijuana with intent to distribute it. An officer stopped the defendant for a traffic violation. The defendant was excessively nervous and appeared to be concealing something in his vehicle. During the stop, a dog that was trained to detect the odor of marijuana, along with other drugs, indicated the presence of drug odor in the vehicle. At the time, possession of a small amount of marijuana was unlawful but punishable by only a civil penalty.

The officer asked the defendant to step out of the car and when he did, the officer noticed a small bag of marijuana in the vehicle. Based on the bag and the dog's alert, the officer searched the car and found the defendant's marijuana and firearm.

The defendant moved to suppress the search, arguing that the dog's alert did not provide probable cause that there was contraband in the vehicle. The trial court denied the motion.

Held: Affirmed. Assuming without deciding that a probable cause search for contraband requires a nexus between the purported contraband and criminal conduct and the totality of the circumstances—including the drug dog's alert to the car—did not amount to probable cause to search the car for contraband or evidence of criminal activity, the Court concluded that the exclusionary rule was inapplicable here.

The Court explained that, at the time of the search, the caselaw and relevant statutes did not provide unambiguous guidance about whether an unlawfully but not criminally possessed substance constituted contraband for purposes of the Fourth Amendment. Thus, the Court could not find that a reasonably well-trained officer would have known that it was unconstitutional to search the car based on probable cause to believe that it contained unlawfully but not criminally possessed marijuana.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1136221.pdf>

Barlow v. Commonwealth: January 9, 2024

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

Facts: The defendant possessed heroin with the intent to distribute. Officers received an anonymous tip that there was a man who possessed drugs and a firearm among four subjects standing near the white Nissan sedan, which was parked next to the building located at the specified address. The tip stated that a black male wearing a white t-shirt "around his head" was near the Nissan, along with another man in a white shirt who "has a gun on his hip."

Officers arrived at the location and saw two black males, the defendant and his companion, dressed in white shirts were standing near a white Nissan sedan. When the first officer asked the companion if he was carrying a firearm, the companion reached for his waistband. The first officer could see that the companion had an object on his right hip, so the officer seized the man. The second officer

then took the defendant's cell phone from his hand and seized him as well. The second officer patted him down and discovered drugs.

Officers arrested the defendant and placed in the back of a transport van. The driver of the transport van advised law enforcement that she saw the defendant "digging inside of his waistband while his hands were behind his back" and "digging in the back of his pants." As a result, officers removed the defendant from the van. Since a portion of the defendant's stomach and the top of his underwear were visible, the officers formed a line to screen the defendant from the view of bystanders while an officer searched underneath the back of the defendant's pants. He saw what appeared to be part of a plastic bag. When an officer attempted to seize the bag, the defendant began to struggle and his pants dropped lower during the struggle exposing the top of his buttocks and revealing baggies.

After the struggle, officers seized the baggies, which contained cocaine and heroin.

Held: Affirmed. The Court concluded that the trial court did not err in finding the initial search and seizure was supported by reasonable articulable suspicion, and that the search of the back of the defendant's pants was reasonable in time, place, and manner in response to a specific justified need.

The Court first agreed that the officer seized the defendant when the officer seized his cellphone and concluded that that seizure was permissible under the Fourth Amendment. The Court explained that the companion being armed corroborated the anonymous tip, and until that tip was corroborated, the officers could not seize or search the defendant. However, once the tip was corroborated, the Court agreed that the officers could seize the defendant to investigate the allegations. The Court repeated that a defendant's reaching towards an area where a weapon might be secreted after being instructed by law enforcement to keep his hands visible can create reasonable articulable suspicion sufficient to justify a *Terry* stop, and then ruled that it was reasonable for the officer to seize the defendant to investigate whether he, like his companion, was involved in criminal activity.

The Court reasoned that the officer had more than an unspecified hunch of criminal activity. Instead, the Court explained, the officer had reasonable articulable suspicion to briefly detain the defendant at that moment and investigate his involvement in criminal activity as well as to ensure the safety of himself and his fellow officer. While an anonymous tipster's mere physical description of suspects is not enough to create reasonable articulable suspicion of criminal activity, the Court concluded that the companion's actions reasonably created the belief that he was armed, thus corroborating the tip.

The Court provided two primary reasons for the existence of reasonable suspicion. First, the tip also reported drug activity, and once the accuracy of the tip was corroborated with regard to the firearm in the companion's possession, the report of drug activity could also be considered in evaluating whether or not the defendant might be armed and dangerous. The Court repeated that "The connection between drug transactions and guns is well recognized." Further, the Court observed that the tip was ambiguous as to whether there were one or two guns present, and once the tip proved credible with regard to one gun, it was reasonable for the officer to ensure safety by checking that the defendant was not also carrying a firearm.

Regarding the search, the Court ruled that even if the officers subjected the defendant to a strip search, the search was justified. The Court first repeated that, while a lawful custodial arrest authorizes a full search of the person, a strip search requires special justification since they are peculiarly intrusive.

Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. The Court found that because there was a specific justified need to search the back of the defendant's clothing, the intrusion was minimal relative to the need for the search, and because the time, place, and manner of the search were reasonable, the strip search did not constitute a violation of the defendant's Fourth Amendment rights.

In this case, the Court concluded that the special justification for the search was the defendant reaching into his pants. The Court found it perfectly reasonable for officers to believe that the defendant possessed either contraband or a weapon, as he had already been found to be in possession of marijuana, and the tip had indicated the presence of guns and drugs. The Court agreed that officers were justified in believing a search of the back of the defendant's pants was necessary to negate any danger to themselves or the defendant.

The Court then weighed the minimally intrusive nature of the search against this particularized need. The Court found that the search here was at most only a strip search, not a visual body cavity search nor a manual body cavity search. Even considered as a strip search, the Court reasoned that the search was much less invasive than a full disrobing, since officers merely pulled the defendant's waistband down and back from his body revealing part of his buttocks; Neither his genitals nor his anus were exposed. The Court pointed out that despite the search being conducted on a public street with several people in the area, police officers formed a line between the defendant and the bystanders to shield him from view. Thus, the Court found nothing unreasonable about the place and manner of the search.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1133222.pdf>

Poulson v. Commonwealth: December 28, 2023

Accomack: Defendant appeals his conviction for DUI on Fourth Amendment and Fifth Amendment *Miranda* grounds.

Facts: The defendant drove while intoxicated and crashed his vehicle. An anonymous caller notified police of the crash, as did the defendant in a 911 call, but the defendant left the scene and drove home before police could arrive.

Officers drove to the defendant's house and saw the defendant's truck, which matched the description of the crashed vehicle the anonymous caller had provided, parked in the defendant's driveway. Furthermore, the truck's license plate was a custom vanity plate that read "Poulson," the defendant's name. The front end of the driver's side was damaged, and there were beer cans in the bed of the truck.

While the officers stood outside near the truck, the defendant exited his house and approached them. The defendant spoke to the officers and acknowledged that he was the driver at the crash scene. Officers observed that he was intoxicated. Before continuing the conversation and submitting to the preliminary blood test and field sobriety tests, the defendant returned inside, dressed, and again

voluntarily exited his residence and continued his interaction with the officers. He admitted to drinking alcohol and failed field sobriety tests. His arrest revealed a BAC of .14.

Prior to trial, the defendant moved to suppress, arguing that he was seized when law enforcement spoke with and arrested him within the curtilage of his property and that he was not provided timely *Miranda* warnings.

Held: Affirmed. Because the defendant's interactions with the police were consensual prior to the time of his lawful arrest, the Court held that there was no violation of his Fourth Amendment or *Miranda* rights.

In a footnote, the Court initially rejected the defendant's argument that the police were unlawfully present on the curtilage of his residence. The Court repeated that there is an implied license that permits law enforcement to briefly enter the curtilage of a home "in the hopes of speaking with a resident [a]bsent affirmative steps to rescind the invitation by the homeowner." In this case, the Court pointed out that at no point did the defendant tell the police to leave, refuse to speak to the officer, or otherwise assert any expectation of privacy.

The Court explained that the defendant's encounter with the police began consensually, and it remained so. The Court pointed out that the police had not even knocked on the defendant's door or otherwise summoned him out of the house. Contrary to the defendant's assertion, the Court found that he was not seized until after he voluntarily submitted to the tests and was placed under arrest. Because the encounter remained consensual until the police arrested him, the Court ruled that police did not subject the defendant to custodial interrogation before the arrest. Thus, he was not entitled to be advised of his *Miranda* rights at the time of his statements to the police.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1199221.pdf>

Kincaid v. Commonwealth: December 19, 2023

Albemarle: Defendant appeals his conviction for DUI Maiming on Fourth Amendment, Fifth Amendment *Miranda*, and Cross-Examination grounds.

Facts: The defendant drove while intoxicated and became angry at his girlfriend. The defendant stated "[F]uck you, I'll kill us both. I'll drive into a tree and kill us both." The ensuing crash paralyzed the victim from the neck down. Rescue workers found the defendant in the driver's seat and the victim in the passenger's seat.

An officer responded and investigated the crash. He also spoke with the defendant at the hospital, both after the crash and the next day. On both occasions, the defendant admitted to driving the vehicle. During the interviews, the defendant was neither handcuffed nor restrained in any way. Neither his, nor anyone else's, movements into or out of his exam or hospital room were restricted by law enforcement. While the officer was in uniform, with his badge and weapon displayed, but not drawn, he was the only law enforcement officer at the scene of either questioning.

Both encounters were very brief and consisted of very few questions. No one took the defendant into custody at the conclusion of either interview. The officer ended the first interview when he saw that the defendant was exhibiting pain. At the time, the defendant had a criminal history that included a prior felony, two recent misdemeanor offenses for assault and battery, and one misdemeanor charge for violating a protective order.

The officer obtained a search warrant for the defendant's medical records. The affidavit contained a detailed description of the single car crash. It identified the driver as the defendant and the passenger as the victim, as related to the officer by emergency personnel on the scene. It described an odor of alcohol coming from the passenger compartment of the vehicle and the observation of containers of alcohol within the vehicle. Finally, the affidavit contained a description of the defendant not long following the crash as having glassy and bloodshot eyes. Using the records, the officer learned that the defendant's BAC was .15.

The defendant moved to suppress both his statements to the officer and the results of the search warrant. Regarding his statements to the officer, the defendant argued that he had been in custody for purposes of Miranda and that he had been administered sedatives and had been in a medically induced coma during his time in the hospital.

Regarding the search warrant, the defendant argued that the officer deliberately misrepresented the defendant's admission that he was driving the vehicle that night. The defendant further asserted that the officer intentionally omitted material information about the defendant's medical condition during the two interviews with him.

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

At trial, the defendant's mother testified that before the crash, she saw the victim driving the vehicle with the defendant in the passenger seat. On cross-examination, the mother admitted that she was convicted of filing a false police report regarding "a certain event involving [her] son." After the prosecutor played a portion of a 911 call where the mother identified herself, she eventually admitted that she gave information to a law enforcement officer and stated that the defendant "needs to go back to jail." An assault and battery charge and a protective order had been initiated against the defendant based on that incident. The mother later altered her complaint and told police that she did not want to press charges against her son.

The defendant objected to the Commonwealth's cross-examination of his mother, but the trial court denied the motion. The trial court did not, however, admit the 911 call into evidence.

Held: Affirmed.

The Court first examined whether the defendant was in custody when the officer questioned him and determined that he was not. Considering the facts, the Court agreed that the encounters did not amount to the custodial nature that would trigger the *Miranda* requirement. The Court also rejected the defendant's argument that his medical condition rendered his statement involuntary, noting that he did not argue that law enforcement used coercive tactics or engaged in flagrant police misconduct. The Court noted that the officer was able to demonstrate gestures made by the defendant and observed that the defendant was very coherent. The Court also found the defendant's experience with the criminal justice system to be relevant.

The Court then turned to the search warrant. The Court repeated that, under *Franks*, a defendant is entitled by the Fourth Amendment to a hearing that challenges what appears to be a valid search warrant only in limited circumstances. In addition, the defendant has the burden to make a “substantial preliminary showing” of a false statement that was “knowingly and intentionally included in the warrant affidavit or included with reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.” Even if the trial court finds that the defendant has made the substantial preliminary showing, the trial court must “determine whether the allegedly false statement is necessary to the finding of probable cause.”

In this case, the Court noted that the only statement that the defendant alleged to be false is that he admitted to the officer to being the driver of the vehicle. The Court concluded that sufficient content in the affidavit remained to support the finding of probable cause even after removing the allegedly false part of the statement. The Court ruled that the defendant’s admission that he was the driver of the vehicle was not necessary to the finding of probable cause for the issuance of the search warrant, and therefore no *Franks* hearing was required.

Lastly, the Court addressed the mother’s cross-examination. The Court noted that the mother testified that the victim was driving at the time of the crash, contrary to all the evidence presented in the Commonwealth’s case. The Court observed that, while any witness who testifies at trial places his or her credibility at issue, the mother’s testimony was especially important for the jury’s consideration of the case. The Court then quoted the 1936 *Haney* case regarding cross-examination and bias, where the Virginia Supreme Court had written: “The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness. . . . [O]n cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out.” The Court agreed that the trial court properly limited the details of the assault and battery allegation that could be heard by the jury but permitted the jury to consider the mother’s recantation on the issue of bias.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1381222.pdf>

Thompson v. Commonwealth: November 28, 2023

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

Facts: The defendant possessed Eutylone, a Schedule I controlled substance, in a syringe. Officers met the defendant when they responded to a report of disorderly conduct. During the investigation, an officer noticed the syringe protruding from the defendant’s front right pants pocket as the defendant was walking around a car, circling it and walking back and forth. The officer could see the “top half of the syringe” sticking out of the defendant’s pants pocket and observed that the syringe contained a liquid. At one point, the officer saw the defendant try to push the syringe down into his pants pocket so as to conceal it, but the syringe “came back up again later on.”

For the officers' safety, the officer placed the defendant in handcuffs because he was concerned that the syringe might have a needle that could be used as a weapon against him. The officer then removed the syringe from the defendant's pocket and, at that point, saw that the needle was exposed and uncapped. The defendant denied knowing what liquid was in the syringe and claimed that the pants he was wearing — with the syringe sticking out of the pocket — were not his pants.

The defendant moved to suppress, arguing that because a syringe is "an item that law-abiding citizens, on a daily basis, also use for legitimate purposes," that the seizure was unlawful. The trial court denied the motion to suppress.

Held: Affirmed. The Court ruled that the officer had reasonable, articulable suspicion that the defendant was engaged in criminal activity.

The Court pointed out that a syringe is not necessarily "an innocent item" like a hand-rolled cigarette or a film canister. The Court concluded that, given the totality of the circumstances and for officer safety, the officer was entitled to seize dangerous items like the liquid-filled syringe, which could have endangered the officers' safety and others.

In a footnote, the Court explained that the record clearly supported the trial court's determination that the officer had reasonable, articulable suspicion to detain the defendant and to remove the liquid-filled syringe from his pocket, given the potential threat to the officer's own safety and given the defendant's suspicious, furtive behavior with the syringe when he tried to conceal it.

The Court then ruled that, once the officer removed the syringe and the defendant denied knowledge of it and denied ownership of his own pants, the officer had probable cause that criminal activity was occurring and that the defendant was in possession of a controlled substance.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1346222.pdf>

Tarpley v. Commonwealth: November 21, 2023

Newport News: Defendant appeals his convictions for Possession of a Firearm and Drug Possession on Fourth Amendment grounds.

Facts: The defendant drove while in possession of a gun, cocaine, a digital scale, and other contraband. An officer saw that the car windows appeared to be tinted "darker than legal" and that the license plate holder obscured the top portion of the word "Virginia" on the license plate. Based on these observations, the officer stopped the vehicle. Based on the odor of marijuana, the officer searched and found the defendant's contraband. [Note: The search took place in March 2020, before the restrictions on stops for violations of § 46.2-1052 and searches based on marijuana odor from the General Assembly 2020 Special Session took effect – EJC].

The officer later examined the windows and found that they were within the legal limit, and that they only appeared darkened due to a sunshade that the defendant had installed.

The defendant moved to suppress. He argued that the traffic stop violated the Fourth Amendment because the officer's reasons for making the stop— the perceived illegal window tint and partially obscured license plate—did not amount to a reasonable, articulable suspicion of criminal activity. The trial court denied the motion.

Held: Affirmed. The Court ruled that, based on the objective facts and circumstances presented by the Commonwealth, it was reasonable for an officer to suspect that the defendant was operating a vehicle with equipment violations; thus, the officer was justified in stopping the defendant.

Regarding the § 46.2-716(B) license plate violation, the Court pointed out that degree of obstruction is not relevant here, as the statute prohibits driving with a license plate frame that “in any way alters or obscures” a state's name on the license plate.

Regarding the § 46.2-1052 window tint violation, the Court found that the fact that the defendant's windows did not violate the tinting statute does not negate the trial court's finding that the stop was objectively reasonable. The Court noted that § 46.2-1052 regulates window tinting according to percentages of “light transmittance.” The Court concluded that it would be unreasonable to require police to determine the tinting percentage of a window before stopping a vehicle to investigate a violation—especially when, as here, the traffic stop occurred at night and one window was obscured by a sunshade.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1364221.pdf>

Preston v. Commonwealth: October 31, 2023

Southampton: Defendant appeals his DUI conviction on Fourth Amendment grounds.

Facts: Police responded to a call from tenants on the defendant's property who were complaining that the water connection to their camper had been turned off by a member of the defendant's family, who were their landlords. They also reported that the defendant had been “doing doughnuts” around yard and had “almost hit them.” They indicated that the defendant was intoxicated and passed out in a car in the parking area.

The officer who responded spoke to the tenants and observed the defendant in his vehicle, which was still running, about 20 yards away. The defendant was unconscious in the vehicle. The officer approached and knocked on the window and asked the defendant to lower the window. As the defendant complied, the officer smelled the odor of an alcoholic beverage. The defendant appeared to be intoxicated, was holding an alcoholic beverage, and his vehicle was full of empty alcoholic beverage cans.

The defendant admitted to drinking. Although he offered the officer a drink, he refused to complete FSTs. After arresting the defendant, the officers obtained a search warrant for his blood and learned that his BAC was .26.

The defendant moved to suppress, arguing that the police violated his Fourth Amendment rights when they entered his property concerning a landlord tenant “civil matter.” The trial court denied the motion.

Held: Affirmed.

The Court assumed, without deciding, that the defendant’s car was within the curtilage of his home when the officer approached it. The Court repeated the presumption that a police officer’s entry upon a citizen’s curtilage is presumptively unreasonable absent a warrant. The Court clarified, however, that although law enforcement officers may not enter the curtilage to gather evidence, there is a license “implied from the habits of the country,” for the general public (including a law enforcement officer) to approach a home in the hopes of speaking with a resident.

In this case, the Court observed that the officer responded to the defendant’s home in response to a tenant’s complaint that they had been denied access to water—a civil matter—and not to investigate and gather evidence of a crime. Like any other visitor, the Court noted that the officer followed the driveway from the road to the parking area near the home. The officer made his initial observations, in the Court’s view, within the implied license to be in his position, where he was “free to keep [his] eyes open” to make observations and then to investigate a reasonable articulable suspicion that criminal activity was afoot.

The Court pointed out that the officer then encountered the defendant, who was obviously intoxicated and who continued to consume alcohol in a running car. The Court then found that the officer possessed probable cause to arrest the defendant for DWI.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1876221.pdf>

Feagins v. Commonwealth: October 17, 2023

Newport News: Defendant appeals his convictions for Possession of Drugs and of a Firearm on Fourth Amendment grounds.

Facts: The defendant possessed a gun and drugs, while sitting in a parked vehicle at night. Uniformed officers driving a marked patrol vehicle noticed his vehicle parked in a high-crime area, known for many stolen vehicles, and noticed that it was backed into a spot at an apartment complex and that its engine was still running. The officers stopped their vehicle approximately one-and-a-half to two parking spaces away from the defendant’s vehicle. The police car’s headlights and the white lights on its light bar, which the officers referred to at the suppression hearing as “takedown lights,” were illuminating the vehicles in the parking lot. No emergency lights or sirens were activated.

The officers approached the defendant’s vehicle and spoke to him. During the conversation, the officers asked the defendant for identification; the defendant complied, and the officers returned the defendant’s ID a few seconds later. The officers then noticed a knotted plastic baggie on the defendant’s dashboard. The officers observed that the baggie was the kind of baggie used for narcotics. The

defendant tried to hide the baggie after the officers were out of sight of the driver's side or the passenger's side window in order to reach up and get it. The defendant then furtively reached up and grabbed the baggie, and he then kept it in his closed fist with his palm and knuckles facing down towards the floor as he attempted to keep the baggie's contents hidden from the two officers.

The officers demanded that the defendant turn over the baggie and the defendant complied. The officers then discovered the defendant's firearm on his person. The defendant moved to suppress, arguing that he was seized after he handed his identification card to the officers because the officers "accosted" him and demanded and retained his driver's license. The defendant also contended that the officers unlawfully demanded to examine the plastic baggie.

The trial court denied the motion.

Held: Affirmed. The Court held that the trial court did not err in denying the defendant's motion to suppress the evidence. The Court ruled that the initial encounter between the defendant and the officers was consensual because the defendant's ability to drive away from the parking lot (or simply to roll up his window and stay where he was) was not prevented until he was detained when reasonable, articulable suspicion had developed that "criminal activity may be afoot."

The Court ruled that the trial court correctly held that the defendant was not seized until the defendant reached for and concealed the plastic baggie. The Court repeated that "Two uniformed officers do not violate the Fourth Amendment by approaching a citizen in a parking lot and asking general questions in a conversational tone." The Court also repeated that using white lights to illuminate a parking lot and flashlights to illuminate the defendant's vehicle did not constitute, by itself, a seizure. Furthermore, the Court pointed out that no physical contact was made with the defendant that would communicate to him that he was seized, and he was not told that he was not free to leave. Also, the Court explained that the defendant's retention of the license for six seconds – before reasonable, articulable suspicion was established – as he looked at the driver's license and as he asked the defendant about the license did not transform these circumstances into a seizure. The Court also pointed out that the police car was not parked so as to block the defendant from leaving the parking lot.

The Court analogized this case to the *McCain* case. In a footnote, the Court distinguished this case from the *Brown* case, reasoning that in this case, the officers asked the defendant for his identification, rather than specifically for his driver's license.

The Court then held that the baggie and the defendant's furtive efforts to conceal the baggie provided the officers with reasonable, articulable suspicion to briefly detain the defendant to investigate whether criminal activity was afoot. The Court held that, once the officers seized the defendant after he grabbed the knotted plastic baggie and concealed it in his closed fist, the officers then had reasonable, articulable suspicion to detain the defendant.

The Court noted that the defendant was parked in a high-crime area in the evening when it was almost dark, in a running vehicle, and in a location known for car thefts. Most importantly, the Court pointed to the fact that, while conversing with the police officers, the defendant reached for a knotted plastic baggie (that the officers had already seen and identified as being the kind of baggie used for narcotics) and quickly concealed the baggie in his closed fist. Considering the totality of these

circumstances, the Court agreed that the law enforcement officers were justified to conduct a brief investigation under *Terry*.

Judge Chaney filed a dissent, contending that the officers seized the defendant when the first spoke to him due to their “intimidating display of police authority.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1241221.pdf>

Gordon v. Commonwealth: October 3, 2023

Pittsylvania: Defendant appeals her convictions for Strangulation, Battery, Assault on Law Enforcement, and Resisting on Fourth Amendment and Joinder grounds.

Facts: The defendant attacked and strangled her 14-year-old stepchild, and then did the same thing the next day. The victim fled the home and walked to the hospital to get help. Along the way, a motorist picked up the victim and brought her to the hospital, concerned over her visible injuries. A forensic nurse examiner documented numerous injuries and contacted law enforcement and CPS.

After investigating the offense, officers knocked on the door of the defendant’s residence. The defendant answered and sat on the stairway outside the door. After discussing the strangulation allegations, the officers informed the defendant that they were arresting her. She abruptly stood up and turned to reenter the residence. The officers stepped to grab her, “to keep her from going back inside,” but the defendant pulled away. The officers pursued her, entering the residence. During the ensuing struggle, the defendant bit at one of the officers.

After her arrest, the defendant denied strangling the victim but admitted to having “whooped” and “restrained” her. When told that the victim had marks on her throat, the defendant held up her right arm, in a choke-hold position, while offering a dubious explanation, “yeah, that’s probably from getting her to stop pulling on stuff.”

Prior to trial, the defendant moved to suppress the evidence derived from law enforcement officers’ entry into her home. The defendant argued that the absence of exigent circumstances rendered the officers’ warrantless entry unlawful. The trial court found that the officers made physical contact with the defendant before she went back inside her residence and denied the motion.

Prior to trial, the defendant also moved for separate jury trials, one for the strangulation charges and the other for the arrest-related charges. The trial court denied that motion as well.

Held: Affirmed. The Court found no reversible error in the trial court’s decision to conduct a single trial. The Court also rejected the defendant’s argument that the officers violated the Fourth Amendment by entering her home without a warrant to arrest her. Instead, the Court ruled that the trial court properly found that the arrest began outside the home, when an officer first touched the defendant to arrest her, thus justifying the officers’ subsequent pursuit as she retreated into her home.

Regarding the officers’ entry into the defendant’s home, the Court ruled that because the defendant had been lawfully arrested by the time she reentered her home, the officers could follow her

inside without a warrant. The Court observed that the officers spoke “words of arrest” and touched the defendant for the stated purpose of arrest. Thus, at that moment, notwithstanding the defendant’s subsequent resistance, the Court ruled that the arrest was effected and the defendant was in custody.

The Court then explained that Virginia courts follow the per se rule that once a suspect is placed under arrest, an officer is authorized in accompanying the arrestee wherever he goes, which includes following a defendant into his home. In other words, after arresting the defendant outside her home, the Court concluded that the officers properly followed her inside when she tried to escape.

Regarding the trial joinder issue, the Court focused on the harmless error question, examining whether evidence of the strangulations would be admissible at a trial on the arrest-related charges, and vice versa under Virginia Rule of Evidence 2:404(b). In this case, the Court found that the defendant’s attempted flight and resisting arrest were probative of her “consciousness of guilt” or “guilty knowledge” related to the strangulations. The Court also found that the defendant’s statements and body language as captured in the body-camera footage were relevant and admissible on the strangulation charges.

Similarly, to prove that the defendant bit the victim and resisted arrest, the Court found that the facts surrounding the strangulation incidents were probative of the defendant’s motive—to escape arrest on serious charges. Because evidence of the defendant’s crimes involving each set of charges was admissible in the prosecution of the other set, the Court ruled that any error in denying separate trials was harmless under *Cousett*.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1676223.pdf>

Nottingham v. Commonwealth: September 19, 2023

Virginia Beach: Defendant appeals his conviction for Carrying a Concealed Weapon on Fourth Amendment grounds.

Facts: The defendant drove while intoxicated. An officer stopped the defendant, investigated the offense, and arrested the defendant for DUI. The defendant’s black car was stopped in the dark, on the shoulder of a four-lane highway, where the speed limit was 55 miles per hour. Police policy required officers to impound vehicles “that constitute traffic hazards.”

During a search incident to arrest, the officer found a Percocet pill in the defendant’s pocket. It appeared that the defendant had a valid prescription for the pill. The officer then began an inventory search of the vehicle. The officer took notice of a package of methylprednisolone in the center console but quickly dismissed it, commenting “he’s got a prescription for it, so we’re good.” Then, after noticing an open and partially consumed bottle of alcohol, the officer excitedly exclaimed, “Oh! We got ourselves a liquor bottle! Hey! Open container! Neat!” As the officer went back into the car to continue searching, he said, “What other goodies are we gonna find in this car?” At a later suppression hearing, the officer admitted that he “made a decision to tow the vehicle and do a search of the vehicle based on the Percocet pill that was found on [the defendant’s] person.”

The officer found a concealed handgun in the vehicle. On his inventory form, the officer did not list most of the items he found during his search, including several significant items such as the firearm, a valuable Rolex watch, two out of the three cell phones, the methylprednisolone, and the Percocet.

The defendant moved to suppress, but the trial court denied the motion. The defendant entered a conditional guilty plea to the concealed weapon offense and appealed.

Held: Reversed. The Court held that the trial court erred in ruling that the officer conducted a valid inventory search of the vehicle and in thereby denying the motion to suppress.

The Court first examined whether the officer's decision to impound the automobile was objectively reasonable under the circumstances. The Court noted that the defendant was unable to drive his car away from the scene because he was under arrest. Furthermore, the Court noted that the record showed that the defendant was the only occupant of the vehicle and that he never asked that he be allowed to make alternative arrangements for the removal of his vehicle from the side of the highway. The Court did not disagree with the conclusion that the defendant's car constituted a traffic hazard. Therefore, the Court ruled that the impoundment of the vehicle was lawful under the community caretaker doctrine.

However, the Court then concluded that the officer's chief motivation for the search was to gather incriminating evidence against the defendant, who was driving the vehicle. The Court found that the officer's statements and conduct "clearly demonstrate that the officer had an improper investigatory motive when going through Nottingham's vehicle—namely, to gather incriminating evidence against Nottingham."

In this case, regardless of whether the vehicle was lawfully impounded, the Court ruled that the search was not "conducted pursuant to standard police procedures" and was a "pretextual surrogate for an improper investigatory motive." The Court observed that the officer's "actions and outspoken comments as he searched [the defendant's] vehicle show that [the officer] was not as much motivated by his role as community caretaker (which undergirds the inventory search exception) as by trying to find out what possible incriminating evidence could be in the vehicle." The Court continued, writing that the officer's "conduct and very clear statements demonstrate that he was primarily motivated instead by a desire to search for contraband to determine what charges he could add to the DUI charge for which [the defendant] had already been arrested."

The Court also rejected the argument that the officer had probable cause to search the vehicle, finding that the trial court had never considered that argument.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1028221.pdf>

Smith v. Commonwealth: September 12, 2023

Prince William: Defendant appeals his convictions for Manslaughter and Use of a Firearm on Fourth Amendment, Fifth Amendment, and Jury Inconsistency grounds.

Facts: The defendant and his confederate shot and killed a man and shot a woman during a purported marijuana sale. The original call for emergency service indicated that the perpetrators of the shooting fled the scene. Police responded to the scene of the nearby shooting, learned the description of two suspected shooters, and sent a radio transmission to be on the lookout for the suspects. Officers found the defendant's confederate nearby with a gunshot wound nearby. A few hundred yards from that store, another individual reportedly offered cash for a ride to "escape" from the area.

Officers found the defendant wandering aimlessly near the shooting location soon thereafter; his arms were scratched, and he was underdressed in cold weather. He claimed to have been a victim of an attempted robbery and admitted he came from that shooting scene. He gave a name of his friend that was similar to the name of the confederate police found shot nearby. Officers detained him at gunpoint and with handcuffs. Officers instructed the defendant that although he was being detained for investigative purposes, he was not under arrest.

At the police station, officers read the defendant his *Miranda* warnings. The defendant agreed to speak with officers and admitted to the offense. At trial, the officer testified that, although he did not record it, he read the defendant's *Miranda* rights from a card and that the defendant agreed to speak with him. At the time of his arrest, the defendant was 19 years old and had experienced 3 prior arrests for unrelated conduct. The interview lasted four and a half hours, but the defendant had four thirty-minute breaks during that time, and he was attentive and responsive when questioned.

Prior to trial, the defendant moved to suppress his seizure under the Fourth Amendment, arguing that the officers lacked reasonable suspicion to detain him and that because two officers detained him at gunpoint with handcuffs he was effectively arrested, requiring probable cause rather than reasonable articulable suspicion. Lastly, he argued that argues that even if the initial seizure was permissible, after he gave an innocent explanation that he was the victim of an attempted robbery the officers no longer had cause to detain him, and his continued detention therefore violated his Fourth Amendment rights.

The defendant also moved to suppress his arrest, arguing that at the time he was transported from the scene in police custody for interrogation, the officers lacked probable cause to arrest him, in violation of the Fourth Amendment.

The defendant lastly moved to suppress his statements under the Fifth Amendment. He argued that the evidence was insufficient to establish that the officers read his *Miranda* rights because the officer did not record it with his body worn camera and, thus, violated his own department's procedures for advising suspects of their rights. He also contended that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights. Lastly, he contended that his statement to the police was inadmissible because it was involuntary. The defendant argued that his statement was involuntary because the officers suggested he would be punished less severely if he confessed and appealed to the defendant's religious preferences.

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

At trial, regarding the offense of Use of a Firearm, the verdict form advised the jury to find the defendant either guilty or not guilty of "Use or Display [of a] Firearm in Commission of a Felony, as charged in the indictment." The indictment stated, in relevant part, that the defendant "did use or display a firearm in a threatening manner while committing or attempting to commit the murder of [the victim], in violation of 18.2-53.1."

At the conclusion of the trial, the jury found the defendant guilty of voluntary manslaughter, and not murder, but found the defendant guilty of using a firearm to commit murder. The defendant argued that because the jury found him guilty of voluntary manslaughter, and not murder, that their inconsistent verdict of using a firearm to commit murder must be set aside. The trial court rejected his argument.

Held: Affirmed.

The Court first found that the officers had reasonable articulable suspicion that the defendant was involved in the criminal activity under investigation and were justified in detaining him. The Court then also ruled that it was reasonable to detain the defendant at gunpoint and with handcuffs. For these reasons, the Court ruled that the initial seizure did rise to the level of an arrest and did not violate the Fourth Amendment.

The Court also explained that although there was a possibility that the defendant was innocent of criminal activity, his claimed explanation for his presence there did not negate the reasonable articulable suspicion that he was involved in the shooting. The Court noted that the defendant's own statements indicated his involvement in a nearby shooting to some degree, and the officers were therefore reasonable in continuing his detention to fully investigate whether the defendant was a perpetrator or victim of criminal conduct.

The Court then concluded that there was probable cause, in that an objective police officer could reasonably believe there was a substantial chance that the defendant was one of the suspects of the shooting incident. The Court therefore found that the defendant's Fourth Amendment rights were not violated when officers transported him to the police station, as there was probable cause justifying that seizure.

Regarding the *Miranda* issue, that Court rejected the defendant's argument that the evidence of a waiver was insufficient due to the lack of a video recording. The Court also found no basis to disturb the trial court's conclusion that the defendant knowingly and intelligently waived his *Miranda* rights. Lastly, the Court noted that the record contained no evidence of coercive conduct by the police. The Court agreed that the trial court's finding that the defendant's will was not overborne during the interview was supported by facts in the record.

Regarding the verdict form and the allegedly inconsistent verdict, the Court distinguished this case from the *Bundy* case, noting that the verdict form in this case referenced the predicate felony of murder by stating that the jury found him guilty of use of a firearm in commission of a felony "as charged in the indictment," and the indictment stated that the defendant was charged with use of a firearm in the commission of murder.

The Court explained that the fact that the defendant was convicted of manslaughter did not require the Court to reverse his conviction of use of a firearm in the commission of murder based on legal inconsistency. The Court repeated that a defendant can be convicted of using a firearm while committing an enumerated felony in § 18.2-53.1 even when the jury finds him not guilty of the enumerated felony.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0753224.pdf>

Green v. Commonwealth: September 5, 2023

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

Facts: An officer observed the defendant driving 124 mph in a 55-mph zone. The officer attempted to stop the defendant, but the defendant fled. The officer put out a lookout for the defendant's vehicle.

One week later an officer received an alert on the defendant's vehicle from a nearby license plate reader. The officer ran the license plate through NCIC, but "didn't have time to read through the . . . NCIC hit, other than the fact that it was the stolen vehicle that came through the [license plate reader]," before he spotted the vehicle. The officer followed the vehicle until it parked, and then with another officer, he blocked the vehicle in and conducted a "felony stop."

The officers exited their cars, drew their weapons, and ordered the defendant out of the subject vehicle. The defendant stepped out of the subject vehicle and was immediately placed in handcuffs, without incident. The officers re-holstered their guns and the officer returned to his vehicle and pulled the NCIC report, which confirmed that the defendant was the owner of the vehicle. He then had time to read the NCIC report and learned that the subject vehicle was not reported stolen but was suspected of felony eluding for the earlier incident.

Returning to the vehicle, an officer shined his flashlight through the front passenger window to check for other occupants and saw part of a pistol grip and gun magazine protruding from an unzipped backpack that sat on the front passenger floorboard and rested against the seat. Officers seized the gun. The defendant admitted he knowingly possessed the gun.

The defendant moved to suppress, arguing that the encounter amounted to an arrest because he "was ordered out of his vehicle at gunpoint and immediately handcuffed, his vehicle blocked in its parking space by police vehicles, and . . . was surrounded by at least 4 armed, uniformed officers within arm's reach." The defendant also argued that asserts that the seizure was unlawful because it was "prolonged beyond the time reasonably required to complete th[e] mission" of investigating the allegedly stolen vehicle. Lastly, the defendant argued that the officers unlawfully seized the firearm. The trial court denied the motion.

Held: Affirmed. The Court ruled that the law-enforcement officers possessed reasonable articulable suspicion sufficient to detain the defendant and the level of force applied was not more than necessary to detain him and investigate the situation.

In this case, the Court held that, having developed reasonable suspicion that the defendant was in possession of a stolen car, law-enforcement officers lawfully stopped and detained him to investigate a felonious offense. The Court then held that during that investigation, reasonable suspicion of a different crime, felony eluding, materialized, and the detention was properly extended to further investigate that offense. Because the investigative detention was lawful, the Court held that none of the defendant statements made to law enforcement were the fruit of the poisonous tree. Lastly, the Court

held that a firearm was visible in plain view, from a lawful vantage point, protruding from a bag sitting on the front passenger floorboard, and therefore, the trial court properly denied the defendant's motions to suppress.

The Court analyzed the officers' decision to draw their weapons for a few seconds to conduct a felony stop on a vehicle and their decision to place the defendant in handcuffs while continuing their investigation. In this case, the Court ruled that the intrusion on the defendant's personal privacy was reasonable under the circumstances and therefore did not transform the investigative detention into an arrest.

As far as the defendant's argument citing *Rodriguez* and contending that police exceeded the "mission" of the stop, the Court pointed out that although the initial "mission" of the stop was accomplished, a new "mission" arose. Consequently, the Court concluded that the officers were permitted to extend the length of the stop to investigate their newly developed reasonable suspicion that the defendant was involved in an eluding incident the week before.

Lastly, the Court agreed that because the gun was in plain view, protruding from an open bag, visible through the front passenger side window, and observed by the officer without entering the car, it was not found as a result of a search at all.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0861224.pdf>

Allen v. Commonwealth: August 15, 2023

Pittsylvania: Defendant appeals his conviction for Felony DUI on Fourth Amendment grounds, Implied Consent, and Admission of the Certificate of Analysis.

Facts: The defendant drove while intoxicated, with several prior convictions for that offense, passing out in a stranger's driveway. The defendant left his vehicle running, left the radio on, and blocked the driveway. The residents summoned the police, who noted that the defendant's vehicle was registered to a different vehicle that was registered to a different address. After several loud attempts to awaken the defendant, officers finally woke the defendant up after significant effort. The defendant was disoriented, claimed that he was in his family's driveway, smelled of alcohol, had glassy eyes, and spoke with slurred speech.

The officer asked him for identification and inquired whether he had any "weapons" or "anything like that" in his pockets. The defendant said that he did not. The officer asked for and retrieved the defendant's wallet from his pants pocket. While removing the wallet, the officer saw a syringe in the pocket. The defendant removed the syringe, which contained an unknown liquid.

The defendant's explanation for his possession of the syringe evolved. He first denied any knowledge of it, then claimed he was a "borderline" diabetic, and finally admitted that he did not have a prescription for any medications or "needles." The officer searched the same pocket where he found the syringe and discovered a folded piece of paper. It contained a tan powder that he suspected was an

illegal drug. When the officer asked the defendant when he had last used drugs, the defendant replied that “this [was] the first time” he had “used” in years.

After discovering the suspected drugs, the officers searched the car and found two cold beer cans. The defendant admitted that he had consumed alcohol before driving. The officer then performed the horizontal gaze nystagmus (HGN) test and found that his eyes were “really jumping” on all six parts of the test, indicating intoxication. The officer arrested the defendant. The officer obtained a search warrant for the defendant’s blood. At the hospital, a nurse drew the defendant’s blood using the DFS blood test kit that the officer provided to her. DFS determined his BAC to be .185.

The defendant moved to suppress, but the trial court denied the motion. At trial, the court rejected the defendant’s argument that, because his car was on private property, he was not required to submit to a blood test and forcing him to do so, without advising him of Virginia’s implied consent law, required exclusion of the test result, even though the police had a search warrant.

At trial, the trial court admitted evidence of the blood test result over the defendant’s chain-of-custody objection. The officer’s body camera and his testimony showed that the nurse who drew the defendant’s blood used the white DFS test kit that the officers provided. The nurse also completed a certificate of blood withdrawal for alcohol determination and attached the certificate to the vial as required by § 18.2-268.6. From the officers’ body-worn camera footage and the notations on that blood withdrawal form, the trial court found that the blood was taken by “Lori A. Crouch RN,” a registered nurse and therefore an authorized person under § 18.2-268.5. Then, when the blood was tested at the DFS laboratory, the certificate of blood withdrawal was affixed to the certificate of analysis produced by the lab, as directed by § 18.2-268.7(A).

The officers’ body-worn camera footage also indicated that the nurse used “Betadine” on the defendant’s arm. Betadine is a brand name for povidone-iodine, a “topical anti-infective,” which is one of the cleaning solutions specifically authorized for use by § 18.2-268.5. The defendant argued that the blood draw procedure was deficient because the evidence did not “meet the authentication requirement as to [the] qualifications” of the person who drew his blood “and how she did the draw,” but the trial court rejected his arguments.

Regarding the DFS lab certificate, Mika Smith, who was a DFS employee at the time she signed the certificate’s attestation clause as the examiner, testified at trial. Smith provided a detailed explanation of how evidence was received in and processed by the DFS lab where the blood sample was tested. She explained that the toxicology section “work[ed] kind of like . . . an assembly line” and that “different people c[ould] do different analyses.” Smith further testified that only eight or nine people worked in that section. Any of them could have performed the test, and all of them had “undergo[ne] a rigorous training program,” including competency and proficiency testing.

Smith additionally confirmed that no one else would have had access to the blood or the test results. Specifically, Smith explained that her job as the signer of the certificate was to look at all the data “with the [specific] case” and “generate” the certificate “based [on] that data.” Although Smith did not know whether she personally tested the blood, she was the official “examiner” for this case. Smith explained that she could have been the person who performed the blood alcohol test but that she could not be certain because she no longer had access to the file containing that information. She examined the data produced as a result of the laboratory’s analysis and “ma[d]e sure all of the data ma[de] sense” and “passe[d] all of [DFS’s] quality control criteria.”

The defendant contested the proof of the chain of custody at the DFS lab due to “doubts” about who analyzed the blood. He noted that the examiner who testified at trial “did not bring [the] file since she was no longer working for the lab,” and he suggested that without the file, the certificate of analysis was “useless.” He argued that the certificate and any derivative evidence must be excluded. Based on Smith’s testimony, the trial court admitted the certificate over the defendant’s objection.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress or admitting the certificate of blood alcohol analysis over the defendant’s chain-of-custody objections.

The Court first examined the officer’s initial interaction with the defendant, which the Court ruled provided the officers with reasonable suspicion, at the very least, to investigate further to determine whether the defendant was committing a variety of offenses, including trespassing, a vehicle licensing violation, and a DUI offense. The Court then ruled that, based on the discovery of the syringe and tan powder, as well as the defendant’s admissions, the officers had probable cause to arrest him for illegal drug possession. The Court found that the probable cause to arrest provided the officers with justification to search the car for additional evidence of that crime, during which they discovered two cold cans of beer, evidence of a DUI offense. The Court also ruled that the same probable cause that supported the arrest for driving under the influence of alcohol also supported the issuance of the search warrant to draw and test the defendant’s blood.

The Court also found that the results from the horizontal gaze nystagmus test supplied additional evidence of intoxication. The Court concluded that these facts, as well as the officers’ observations that he smelled of alcohol, had “glossy” eyes, and was either passed out or asleep and disoriented upon waking, provided probable cause to arrest him for driving while intoxicated.

Regarding the defendant’s Implied Consent argument, the Court found that nothing in Virginia’s implied consent statute states or even suggests that law enforcement may obtain a breath or blood sample from an individual only by means of that statute and no other statute or authorizing legal principle. Instead, the Court pointed out, since 2017, § 18.2-269(A) has expressly recognized the admissibility of test results from blood drawn pursuant to a search warrant in certain DUI prosecutions.

The Court explained that implied consent statute does not supplant the ability of an officer to obtain a search warrant for a defendant’s blood or breath in circumstances not covered by implied consent, such as when an individual has been detained for his behavior on private property rather than a public highway. Therefore, the Court ruled that the alleged failure to advise the defendant of implied consent principles when his blood was obtained pursuant to a valid warrant did not render the court’s ruling on the motion to suppress erroneous.

Regarding the certificate of analysis itself, the Court found that the record contained sufficient evidence to support the trial court’s factual finding that the person who drew the defendant’s blood was a registered nurse, who met the statutory qualification requirement under § 18.2-268.5. The Court agreed that the trial court properly found that the Commonwealth substantially complied with the statutory scheme, and the certificate was properly admitted.

The Court then held that the challenged certificate of analysis was properly admitted under substantial compliance over the defendant’s chain-of-custody objection. The Court noted that, although the defendant highlighted the absence of evidence regarding who actually performed the BAC analysis, he did not request a continuance to obtain the laboratory’s records or articulate any specific claim of

prejudice. The Court held that under these circumstances, the certificate was admissible, and it was up to the trier of fact to determine what weight to give it.

In a footnote, the Court noted that the defendant did not argue that the Confrontation Clause or any constitutional or statutory principle other than those in §§ 18.2-268.5 and -268.11 supported his contention, so the Court did not address those issues.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1247223.pdf>

Johnson v. Commonwealth: August 8, 2023

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

Facts: The defendant, a convicted felon, carried a firearm in his vehicle. An officer observed the defendant commit a traffic violation and stopped the defendant's truck. The stop occurred late at night, in a high-crime area known for narcotics. Upon stopping the vehicle, the officer noticed that the passenger had a knife sheath, and the passenger confirmed it contained a knife. The defendant and his passenger both appeared "very nervous." When the officer told them that he planned to search the vehicle, the defendant started reaching into areas of the vehicle. The officer told him to stop reaching, but the defendant reached "into his jacket or waistband area." After the officer asked the defendant to stop reaching for the second time, the defendant reached for a shirt or jacket from the center console and placed it toward the back area. After a third request to stop reaching, the defendant's hands came "back up front," after which he started reaching into his pockets.

The officer removed the defendant from the vehicle, frisked the defendant, but found nothing of note. The officer then returned to the defendant's truck and searched it for weapons, finding the defendant's firearm underneath the edge of the defendant's seat.

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

Held: Affirmed.

The Court repeated the ruling from *Michigan v. Long*, that if, during a lawful traffic stop, an officer develops reasonable suspicion that an individual is dangerous and may gain immediate control of weapons, the officer may search the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden. In this case, under the circumstances, and given the Virginia Supreme Court's decision in *Hill*, the Court ruled that a reasonable officer could have suspected that the defendant was armed and dangerous at the time the search was conducted. The Court found that the stop, the character of the surrounding area, the presence of an armed passenger, and the defendant's evasive conduct, all reasonably suggested to the officer that the defendant was attempting to access or conceal a weapon and was a potential threat to his safety.

In a footnote, the Court also found that the scope of the search was proper. The Court quoted *Long's* statement that, even though the defendant did not have immediate access to the vehicle at the

time of the search, “if the suspect is not placed under arrest, he will be permitted to reenter his automobile [once released from detention], and he will then have access to any weapons inside.” Because the defendant was not under arrest at the time of the search, the Court explained that the officer properly searched areas of the vehicle where the defendant could immediately access a weapon upon his return to the vehicle.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0726223.pdf>

Hussein v. Commonwealth: August 1, 2023

Spotsylvania: Defendant appeals his convictions for Felony Eluding, DUI, and related offenses on Fourth Amendment and sufficiency grounds.

Facts: An officer observed the defendant’s tractor-trailer on the side of the road and stopped nearby, asking him to turn on his hazard lights. Instead of turning on his lights, the defendant repeatedly yelled “no” at the “top of his lungs.” The officer then asked the defendant for his license, but the defendant rolled up his window, locked his door, and drove off slowly. The officer pursued him.

Fleeing the area, the defendant drove over double-yellow lines and into oncoming traffic that had to swerve to avoid being hit. The defendant drove through three red lights without engaging his brakes. Even after his front tires deflated from the spike strips, he disregarded repeated commands from the officers and other deputies to stop. He drove at speeds from 9 to 15 miles per hour for about 80 minutes. The pursuit ended when the defendant’s tractor-trailer “jackknifed” off the road and into a ditch. The defendant retreated to the sleeper cab of his tractor-trailer, precipitating a three-hour standoff with SWAT and tactical officers. Officers forcibly entered the vehicle and arrested the defendant.

Officers discovered Methamphetamine in the vehicle and arrested the defendant for various offenses, including DUI. A blood test revealed the defendant’s BAC to contain .18 mg of Methamphetamine.

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

Regarding the DUI offense, the defendant argued that the Commonwealth did not exclude every reasonable theory of innocence, including that he ingested methamphetamine when he was in the tractor-trailer’s sleeper cab and out of sight of the officers. The trial court rejected his argument.

Held: Affirmed.

Regarding the motion to suppress, the Court ruled that the defendant’s Fourth Amendment argument failed because he was not seized until officers removed him from the tractor-trailer, by which point they had ample suspicion that the defendant had committed several offenses. Before then, the Court pointed out that the defendant had not been physically restrained and had not submitted to the officers’ show of authority. The Court noted that his tractor-trailer was already stopped when the officer

arrived. The Court found that the defendant was not seized when the pursuit began, so his Fourth Amendment rights were not violated regardless of the level of suspicion the officer had at that time.

Regarding sufficiency of the Felony Eluding evidence, the Court concluded that even though the defendant drove at slow speeds throughout the incident, the trial court could reasonably conclude that the defendant endangered himself, the officers, and the motorists he encountered along the way.

Regarding sufficiency of the DUI evidence, the Court found that a reasonable jury could have rejected the defendant's hypothesis of innocence based on his behavior when interacting with the officer and his driving behavior.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0779222.pdf>

Lundmark v. Commonwealth: August 1, 2023

Henrico: Defendant appeals his conviction for DUI on Fourth Amendment and Admission of the Certificate of Analysis.

Facts: An officer stopped the defendant's vehicle because, despite having a green light, the defendant's car remained stopped, its brake lights illuminated, for several seconds. As the officer arrived at the intersection, the defendant's car finally moved forward. The defendant had remained stopped at the green light for nine seconds. There were no vehicles moving through the intersection that would have obstructed the defendant's path forward.

The officer approached the defendant's vehicle at the next stoplight, but the defendant drove away. The defendant then signaled for the defendant to stop, although the defendant did not stop for almost thirty seconds. The officer then conducted a DUI investigation after smelling the odor of alcohol. He arrested the defendant and transported the defendant for a breath test. The officer, a licensed breath-test operator, followed DFS procedures by observing the defendant for 20 minutes before administering the test. The defendant's hands remained secured behind his back the whole time.

Although the officer did not specifically inspect the defendant's mouth before administering the breath test, as called for in the DFS manual, the defendant did not appear to have anything in his mouth. The officer had engaged in "a very lengthy" conversation with the defendant while transporting him. During that time, the defendant did not consume any food or drink, did not "belch, burp, or vomit," and did not put his hands in his mouth. The officer took the breath sample, and the breath test revealed the defendant's BAC to be .11.

The defendant moved to suppress, arguing that his nine-second failure to move forward when the traffic light turned green did not give the officer reasonable suspicion to detain him. The trial court denied his motion.

At trial, the defendant asked the trial court to exclude the breathalyzer results because the officer did not first confirm that the defendant had nothing in his mouth before administering the test, as required by the DFS manual, which states: "The operator should always inspect the subject's mouth for any foreign objects." The trial court overruled the objection and admitted the certificate.

The defendant also contended that the certificate of analysis constituted expert testimony, requiring the Commonwealth to establish “the scientific validity” of the breath test as a condition of admissibility. The trial court rejected the argument.

Held: Affirmed. The Court held that the officer had a reasonable, articulable suspicion for conducting the traffic stop, and that he substantially complied with the DFS regulations for conducting the breath test.

The Court first concluded that, pursuant to *Joyce*, the officer had reasonable suspicion to believe that the defendant had violated § 46.2-833(A), which provides that a green signal “indicates the traffic shall move in the direction of the signal and remain in motion as long as the green signal is given, except that such traffic shall yield to other vehicles and pedestrians lawfully within the intersection.” The Court explained that the mere possibility that the defendant might have had an innocent explanation for not moving did not negate the officer’s reasonable suspicion that the defendant had violated § 46.2-833(A).

The Court also noted that impeding traffic is not an element of the offense under § 46.2-833. The Court also explained that, although the defendant’s apparent violation of § 46.2-833(A) alone provided reasonable suspicion for the stop, that reasonable suspicion was magnified when the defendant repeatedly ignored the officer’s signals to pull over. The Court pointed out that the defendant was not seized within the meaning of the Fourth Amendment until he “actually submitted” to the officer’s authority by stopping his vehicle.

Regarding the officer’s failure to check the defendant’s mouth, the Court noted that the purpose of visually inspecting the subject’s mouth is to ensure the absence of any foreign object that could cause an inaccurate result. The Court pointed out that the defendant never asserted, and the evidence did not suggest, that he had a foreign object in his mouth before or during the breath test. Based on the facts of this case, the Court found that the officer’s failure to adhere to the manual’s instruction that the officer should inspect the subject’s mouth was a “minor” and “trivial” departure.

The Court also rejected the defendant’s claim that the certificate of analysis constituted expert testimony, requiring the Commonwealth to establish “the scientific validity” of the breath test as a condition of admissibility.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0677212.pdf>

McEachin v. Commonwealth: July 25, 2023

Virginia Beach: Defendant appeals his convictions for Possession of a Firearm, PWID Cocaine, and related offenses on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried drugs for sale along with a firearm in his vehicle. An officer stopped the vehicle for an expired registration. The officer saw a bottle of liquor on the passenger side floorboard near the center console. The cap was screwed on the bottle, and less than a

quarter of the bottle's contents remained. When the officer asked about the liquor bottle, the defendant stated that he had not been drinking and immediately offered to take a breathalyzer test.

The officer observed that the defendant "had a somewhat odd manner of speech" and the officer stated that he "couldn't determine if that was simply his normal speech pattern or if he had a lisp or possibly if he had been drinking." Another officer later testified that the defendant's speech pattern was "consistent with somebody that [the officer] believed at the time had used either alcohol or drugs or had a speech impediment. One of the three."

The officer had not observed any unusual driving behavior and neither officer smelled alcohol on or around the defendant. The defendant did not have bloodshot eyes or a flushed face, his clothing and appearance were normal, and he was steady on his feet. The officer also stated that the defendant responded coherently and appropriately to all his questions and commands.

The officer searched the vehicle and found the defendant's firearm and drugs. The defendant moved to suppress, but the trial court denied the motion. The trial court found that the officers had probable cause to search the vehicle because there was evidence that the defendant violated § 18.2-323.1.6, which prohibits consuming alcohol while driving on the Commonwealth's public highways.

Held: Reversed. The Court held that the police did not have probable cause to search the defendant's vehicle.

The Court began by noting that § 18.2-323.1.6 does not criminalize possession of open containers in a vehicle. The Court then examined the rebuttable presumption in the statute that the driver has consumed alcohol when:

- (i) an open container is located within the passenger area of the motor vehicle,
- (ii) the alcoholic beverage in the open container has been at least partially removed, and
- (iii) the appearance, conduct, odor of alcohol, speech, or other physical characteristic of the driver of the motor vehicle may be reasonably associated with the consumption of an alcoholic beverage.

In this case, the Court explained that, although the first two elements were met, the Commonwealth did not establish the third element of § 18.2-323.1(B)'s rebuttable presumption. The Court noted that the defendant's clothing and appearance were normal, the officers did not detect the odor of alcohol, and the defendant did not possess physical characteristics that were reasonably associated with the consumption of alcohol—his eyes were not bloodshot, his face was not flushed, and he was steady on his feet. The Court disagreed with the trial court that the defendant's speech and conduct provided the officers with probable cause to search for additional alcohol.

The Court then complained that the Commonwealth offered no other evidence giving rise to probable cause that the defendant consumed alcohol while driving. The Court wrote that, "at most, the liquor bottle and "odd" speech gave officers a "strong suspicion" that the defendant had been drinking while driving on a public highway, but strong suspicion is not probable cause... Because the open container alone was not illegal under Code § 18.2-323.1 and there was no evidence McEachin consumed alcohol while driving, the officers did not have probable cause to search the vehicle for contraband or evidence of a crime relating to alcohol consumption, and the search was unlawful."

[See also the Durham case, below, also this week – EJC]

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0543221.pdf>

Durham v. Commonwealth: July 25, 2023

Norfolk: Defendant appeals his convictions for Possession of a Firearm and Concealed Weapon on Fourth Amendment grounds.

Facts: The defendant, a convicted felon, carried a handgun in the console of his vehicle. An officer stopped the defendant's car, knowing that his license was suspended. The defendant was driving, and three other people were in the car. As the officer approached, he noticed that the defendant was "twisting his body to the right" and reaching to his right toward the center console. As he did so, the officer could see the defendant's arms, but not his hands, and noticed that no one else was moving.

The officer approached the driver's side window and saw an open bottle of alcohol on the floorboard behind the driver's seat. When the defendant rolled down the window and provided his identification card, the officer could smell the odor of alcoholic beverage coming from inside the vehicle. The officer also noticed a Styrofoam cup in the center console, which was between the driver's seat and front passenger's seat. The defendant handed the officer the Styrofoam cup when he asked about it. The officer believed the liquid was liquor due to its appearance and smell and poured it out.

After asking the occupants to exit the vehicle, the officer observed another cup in the cupholder on the driver's side of the center console which he testified was in "plain view." That cup also contained liquor. The officer then searched the vehicle and found the defendant's handgun.

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

Held: Affirmed. The Court concluded that the trial court did not err in concluding that probable cause existed to search the vehicle and accordingly in denying the motion to suppress the evidence found in that search. The Court ruled that the totality of the circumstances supported the trial court's finding that the search of the car was properly supported by probable cause of a violation of § 18.2-323.1(A), which proscribes consuming alcoholic beverage "while driving a motor vehicle upon a public highway of the Commonwealth."

The Court reasoned that, with two cups each containing an alcoholic beverage in between the driver and the passenger, it would be a fair inference on the part of the officer that at least one of the cups belonged to the driver. Given that each alcoholic beverage was in an open cup, the Court also found that it would also be a reasonable inference that the beverage was there for immediate consumption—i.e., the defendant was drinking it while driving the vehicle and not saving it for later. The Court ruled that the totality of these circumstances supported a reasonable belief that the vehicle contained further evidence of that offense, such as an open bottle from which the blue liquid came, or miniature liquor bottles. Thus, the Court found that the warrantless search of the vehicle was justified by probable cause.

The Court cautioned that the conduct proscribed by § 18.2-323.1 is drinking while driving, not simply having an open container containing alcohol. Thus, while the open bottle of liquor in the rear

floorboard alone would likely not supply probable cause of drinking while driving, the Court found it to be relevant to the totality of the circumstances and the reasonable inferences that the officers on the scene and judges are permitted to draw from the facts established.

Judge Lorish dissented, although the majority noted in a footnote “the dissent’s peculiar approach to an unbriefed issue.” The Court also criticized the dissent [*and by corollary, this week’s ruling in McEachin, above – EJC*] for misconstruing the statutory purpose of the rebuttable presumption in § 18.2-323.1, which the Court found is only relevant to proving the Commonwealth’s case at trial, not proving probable cause.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0650221.pdf>

Commonwealth v. Hudson: July 18, 2023

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

Facts: The defendant was a passenger in a car with four other people. Both the defendant and another person had outstanding warrants. Police observed the car and stopped it, arresting both the defendant and the other passenger. When they searched the defendant, they found he was carrying a digital scale with a white powdery substance on it. During the stop, the officers had a drug K-9 scan the outside of the car. When the dog alerted to the car— indicating the presence of illegal drugs—the officers began to search the car.

Inside the car, officers found three handguns, marijuana packaged for sale, and six phones, some of which were claimed by the car’s five occupants. Four phones were in a single bag, but the occupants only claimed three of them. One of the seized phones had a picture of the defendant as the lock screen, but the defendant never claimed any of the phones, nor was he carrying one when he was arrested. At the motion to suppress, a detective testified that cell phones, in conjunction with other evidence, can sometimes indicate drug distribution.

Officers seized the phone and obtained a search warrant for it, as well as a subsequent search warrant for the phone’s records from T-Mobile. The Commonwealth later indicted the defendant for multiple charges alleging his involvement with a murder.

The defendant moved to suppress the seizure of the phone. The trial court granted the motion. The trial court reasoned that although the officers lawfully conducted the search under the automobile exception, the plain-view doctrine did not justify the seizure of the phone. The Commonwealth appealed.

Held: Reversed, Motion Improperly Granted. The Court ruled that, assuming without deciding that the defendant had standing to challenge the seizure of the phone, the officers had probable cause to search the car and seize the phone. The Court held that the officers had probable cause to seize the cell phone as evidence of a crime and the trial court therefore erred in granting the motion to suppress.

The Court first found that the automobile exception to the warrant requirement provided the justification to search throughout the car for evidence of narcotics, satisfying the plain-view doctrine's first and third requirements under *California v. Acevedo*. The Court then focused on the question of whether the phone's "incriminating character" was "immediately apparent."

The Court criticized the trial court for focusing only on the fact that a cell phone, on its own, is a common, unsuspicious item. The Court explained that the trial court's approach failed to consider the totality of the circumstances, which in this case gave the officers probable cause to believe the unclaimed phone was evidence of a crime. The Court found that those circumstances raised the possibility that the scale, guns, and marijuana were related to drug distribution.

The Court then examined the phones themselves. The Court pointed out that officers found six phones in the car and only five occupants. The Court repeated that cell phones, in conjunction with other evidence, can sometimes indicate drug distribution. The Court acknowledged that a cell phone alone is typically a common, unsuspicious item. But considering the totality of the circumstances here—including the guns and marijuana found in the car, the number of phones, and the fact that three phones went unclaimed—the Court concluded that an officer could reasonably conclude the unclaimed phone at issue was evidence of a crime and seize it.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0359232.pdf>

Moon v. Commonwealth: July 12, 2023

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

Facts: An officer stopped the defendant for a traffic violation, but the defendant fled the vehicle on foot. After capturing the defendant, the officer learned that the vehicle was registered to an unidentified female, not to the defendant.

The officer also learned that in 2015, the defendant was convicted of two charges of possession with intent to distribute cocaine in addition to other felony drug and firearm convictions. His 2015 conviction and sentencing order provided:

The defendant specifically agrees to waive his Fourth Amendment right against a warrantless search for a period of 10 years from this day. The defendant agrees to consent and voluntarily submit to a warrantless search of his person, place of residence or any vehicle he is occupying, at any time of the day or night by any law enforcement officer during this period. The defendant further agrees that any evidence seized from such search shall be admissible in any hearing or trial resulting therefrom.

Given the defendant's Fourth Amendment waiver, officers moved the vehicle to a nearby park and searched the vehicle and its contents. Inside, officers found a backpack containing fentanyl, oxycodone, marijuana, a loaded handgun, and ammunition with a receipt that bore the defendant's name.

The defendant moved to suppress, arguing that his waiver applied only to searches of his own person or property, not to a vehicle owned by a third party. In addition, the defendant contended that his waiver did not authorize the search of the vehicle after it was moved from the place where the defendant had occupied it. The trial court denied his motion.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in interpreting the defendant's Fourth Amendment waiver and did not err in denying the suppression motion.

The Court examined the explicit terms of the Fourth Amendment waiver and found that, although the defendant did not own the vehicle stopped by police, his Fourth Amendment waiver authorized police to search the vehicle. The Court also pointed out that the defendant agreed that any evidence seized from such search shall be admissible in any hearing or trial resulting therefrom. Therefore, the Court ruled that the trial court did not err in denying the motion to suppress the evidence obtained from the vehicle search.

The Court also rejected the defendant's contention that the police unlawfully searched the vehicle after it was moved and allegedly no longer had a temporal or physical connection to the defendant at the time of the search. The Court rejected the defendant's interpretation of his Fourth Amendment waiver, where his consent to a warrantless search of "any vehicle he is occupying" applied only when he is inside or in physical proximity to the vehicle. Instead, the Court ruled that the trial court reasonably construed the defendant's waiver of his Fourth Amendment right against warrantless searches and his consent to a warrantless search of "any vehicle he is occupying" to include the warrantless search of the vehicle he was driving after it was moved to a nearby park.

In a footnote, the Court noted that it was not deciding whether, in a hypothetical case, the defendant's Fourth Amendment waiver would authorize police to search a vehicle owned by a third party and occupied by both the vehicle's owner and the defendant.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0667223.pdf>

Granderson v. Commonwealth: June 27, 2023

Petersburg: Defendant appeals his convictions for Possession of a Firearm and Narcotics on Fourth Amendment grounds.

Facts: The defendant carried a gun and drugs. Officers responded to a report of a "subject with a gun" at a specified apartment building. The subject left before they arrived. The two officers spoke with the family who had called 911 to report the incident. The officers then left. A second 911 call reported that someone with a gun had trapped the family inside their apartment. The 911 call said the suspect wore blue jeans and a blue jacket.

Officers responded from a block away and arrived within ten seconds. The officers noticed the defendant, who wore dark pants and a "gray hoodie jacket." The defendant was the only person present and appeared to be walking away. As soon as the defendant saw the officers walking toward him, his

hands quickly went into his beltline. The officer ordered the defendant to stop, but the defendant did not initially comply. The defendant stopped only when the officers blocked his path.

Officers detained the defendant, and an officer patted him down. During the pat down, the officer felt a “very hard object” near the defendant’s “private area” under the beltline of his pants. The officer removed the object, which was a firearm. After finding the gun, the officer searched the defendant and found cocaine in one of his pockets.

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

Held: Affirmed. The Court held that reasonable suspicion supported the investigatory stop and accompanying pat down that led to the discovery of the firearm and cocaine. In addition, the Court held that the arrest was supported by probable cause.

The Court acknowledged that the defendant’s clothing somewhat differed from the general description that the officers had received. However, the Court pointed out that the officer did not have to be certain that the defendant was the man with the gun to conduct a limited stop to further investigate the reported crime. The Court found that totality of the circumstances supported the reasonable suspicion that the defendant was the person who had just recently entered the family’s residence with a firearm. Therefore, the Court held that the circumstances permitted the officer to lawfully stop, seize, and detain the defendant to conduct a brief investigation. The Court also ruled that the pat down for weapons was supported by a reasonable suspicion that the defendant was armed and dangerous.

The Court then ruled that the defendant’s location and behavior, as well as his possession of a firearm, established a probability that he was the armed person who had trapped the family inside their apartment without legal justification. Therefore, the Court ruled, the facts established probable cause to believe that the defendant had abducted the family.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0996222.pdf>

Williams v. Commonwealth: June 20, 2023

Chesterfield: Defendant appeals his convictions for Possession with Intent to Distribute on Fourth Amendment and Admission of Expert Testimony grounds.

Facts: In December 2020, an officer stopped the defendant on suspicion of DUI and learned that the defendant’s license was suspended. To impound the vehicle, the officer began an inventory search.

When the officer opened the defendant’s trunk during the inventory search, he smelled the odor of marijuana. He also recognized that plastic containers in the trunk were labelled with the street names of different strains of marijuana, and he noted the presence of what appeared to be marijuana residue on the containers. Also in plain view were bags of pills. The pills were grouped inside multiple knotted corner bags that he recognized as items used in the narcotics trade. The officer recognized the pills as comprising Xanax based upon the fact that they exhibited the “pretty specific” and “pretty

unique” appearance of Xanax pills. Each of the multiple knotted bags or baggies was the size of a golf ball. The officer searched the car and located a large quantity of drugs and paraphernalia.

Prior to trial, the defendant moved to suppress. First, he argued that the officer’s detection of the odor of marijuana did not provide probable cause for him to expand the scope of his warrantless search. He argued that § 4.1-1302(A), which took effect on July 1, 2021, more than six months after the search of his car, is procedural in nature, that the statute applies retroactively and that it was thus unlawful for the officer to expand his search based upon his detection of the odor of marijuana. Second, he argued that the plain view doctrine did not justify expansion of the search, because the pills’ incriminating nature as contraband was not immediately apparent to the officer. The trial court denied the motion.

DFS only tested three of the more than 1,300 similar pills recovered from the defendant’s car and only certified that those three specific pills contained Alprazolam, or Xanax. DFS also certified that the unanalyzed pills had been visually examined and compared with the analyzed ones and that based upon their common physical characteristics, including their shape, color, and manufacturer’s markings, all were “consistent with a pharmaceutical preparation containing Alprazolam.” Additionally, DFS noted that “[t]here was no apparent tampering of the [pills].”

At trial, the Commonwealth’s expert testified that the amount of drugs was inconsistent with the personal use of the drugs. The defendant objected that the Commonwealth’s expert opinion testimony regarding possession for personal use and the street value of the Xanax was “based on the total number of pills rather than the number of pills tested” and shown to contain the drug, and therefore was not “based upon facts in evidence.” The trial court overruled the objection.

Held: Affirmed.

The Court first rejected the defendant’s argument that under § 4.1-1302(A), it was unlawful for the officer to expand his search of the car based upon his detection of the odor of marijuana. The Court repeated that its decision in *Street* controlled its analysis, and that the statute was not retroactive.

The Court then applied the three requirements for the plain view exception and observed that the incriminating character of the pills as contraband narcotics was immediately apparent to the officer. At that point, the Court concluded that there was ample probable cause for the officer to move from an inventory search to a broader investigatory search. The Court also agreed that the distinctive odor that the officer smelled emanating from the trunk was a basis for probable cause to believe that the car contained marijuana. The Court also noted that there was more than mere “plain smell” to provide the officer with probable cause to expand his inventory search into a broader search for contraband narcotics. The Court found it clear that upon opening the defendant’s trunk during a lawful inventory search, a trained police officer applying common sense would have reasonably believed he had found contraband narcotics. Thus, the Court ruled that the officer had probable cause to search for contraband.

Regarding the expert’s testimony and the certificate of analysis, the Court ruled that based on the facts in evidence from the certificate of analysis, together with the additional factual and circumstantial evidence introduced at trial, the expert could provide expert opinion testimony about a large quantity of Xanax, the likelihood of its possession for personal use, and its potential street value.

Such opinion evidence, grounded as it was in the facts and evidence presented at trial, did not violate the rules governing such testimony.

In a footnote, the Court pointed out several cases where DFS tested only a portion of a large amount of suspected controlled substance.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0238222.pdf>

Fourteenth Amendment – Due Process & Equal Protection

U.S. District Court

U.S. v. Moore: February 12, 2024

Richmond District Court: Defendant challenges his charge of Possession of a Firearm by Felon on Equal Protection grounds.

Facts: The defendant, a convicted felon, carried a firearm. Officers observed him driving with the exact same temporary tag number that they had already seen in two other traffic stops earlier that night. Officers initiated a traffic stop, but the defendant fled. Officers captured him and then discovered his firearm in his vehicle.

The defendant moved to dismiss the indictment, claiming that Richmond Police officers selectively stop Black people and that this selective enforcement led to his current charges. As part of his evidence, the defendant introduced two experts, Dr. Eli Coston and Dr. Marvin Chiles.

Dr. Coston testified Black drivers were 5.13 times more likely to be stopped than white drivers and that “throughout almost every step of a traffic stop, from the likelihood that a driver is pulled over, to the actions taken during the stop, to the eventual outcome of that stop, Black drivers are at a significant disadvantage compared to White drivers.”

Dr. Chiles testified to the “history of racialized policing in Richmond.” He testified regarding the Confederate foundations of the Richmond police department and discussed Richmond’s racialized zoning and “redlining.” The witness also discussed the establishment of three Richmond Police precincts that overlap Black neighborhoods in Richmond and fourth precinct that “aligns exactly” with the boundaries of the “white section” of Richmond.

Held: Indictment Dismissed. The District Court found that the defendant successfully demonstrated that Black drivers represent a disproportionate share of individuals pulled over for traffic stops in Richmond. The Court concluded that the defendant had shown both elements of a selective enforcement claim: a discriminatory intent and a discriminatory effect.

The Court reviewed *U.S. v. Armstrong*, a 1996 US Supreme Court case, which required that a litigant asserting a selective prosecution claim must demonstrate nearly identical underlying criminal

behavior of comparators, and he must show that discriminatory intent led to different treatment. The Court acknowledged that the defendant here did not make that claim; instead, he claimed that police selectively stop Black drivers. However, the Court ruled that it would not require the defendant to provide evidence of similarly situated individuals, because it would be “impossible” to collect that data.

Instead, the Court decided that it would permit the defendant to use statistics to prove, by a preponderance of the evidence, that the Richmond police stopping process has a discriminatory effect and was motivated by discriminatory intent. The Court acknowledged that Fourth Circuit precedent is unclear about what the standard is for a defendant to satisfy his burden of proof, but the Court ruled that the defendant may use statistics to meet his burden.

Regarding discriminatory intent, the Court concluded, based on Dr. Chiles’ testimony, that the Richmond Police were “pulling over Black drivers five times more often than white drivers because those drivers are Black.” The Court reviewed several factors that may be probative in determining discriminatory intent, from the Fourth Circuit’s *Century Radio* case:

1. Evidence of a “consistent pattern” of actions by the decision making body disparately impacting members of a particular class of persons;
2. Historical background of the decision, which may take into account any history of discrimination by the decision making body or the jurisdiction it represents;
3. The specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedure;
4. Contemporary statements by decisionmakers on the record or in minutes of their meetings.

Focusing on the first two factors, while the Court acknowledged that the data did not show that race caused a particular stop, but instead that there was a relationship between the driver’s race and the result of the traffic stop. The Court acknowledged that the defendant had not shown that the officers in this case had any bad faith or bad intent.

The Court also complained that the Government had not introduced evidence beyond the fact that serious crimes occur in predominantly Black neighborhoods. For example, the Court complained that “no one from RPD testified that it had a strategy to quell major crime by stopping Black motorists. No one testified that modern criminology demonstrates that picking on motorists somehow makes cities safer. And most significantly, no one explained by Black motorists are disproportionately stopped in white areas of Richmond, where the crime rate is lower.”

The Court also complained that the Richmond Police had not provided data that could have provided a “benchmark” to evaluate how many Black drivers are, in fact, driving in the city. The Court noted that the Police could not provide racial data on people involved in crashes and that they declined to share data on the racial breakdown between stops during the day and stops at night, when the driver’s race would be less visible.

The Court concluded that “in 2020, the Commonwealth of Virginia began to require police to keep track of the race of people stopped. This data was essential to this case. It shows a disgraceful disparity in enforcement of traffic laws, with Black drivers getting the short end of the stick. Richmond is not the only locality with this problem; the state wide statistics show a remarkable record of picking on Black drivers. And subsequent reports by the Commonwealth show that the trend continues.”

Full Case At:

Guilty Pleas - Withdrawal

Virginia Supreme Court

Thomas v. Commonwealth: May 30, 2024

Rev'd Court of Appeals Ruling of April 11, 2023

Fauquier: Defendant appeals his conviction for Unlawful Wounding on Refusal to Allow Withdrawal of his Guilty Plea.

Facts: On the morning of his trial for Aggravated Malicious Wounding, the defendant reached a plea agreement with the Commonwealth to reduce the offense to Unlawful Wounding. Under the agreement, the defendant would be sentenced within the guidelines. The trial court engaged in a plea colloquy in which the defendant agreed that he intended to plead no contest. The trial court then found the facts sufficient for a finding of guilt, but it withheld a finding of guilt and took the plea agreement under advisement, deferring adjudication of guilt to consider whether to accept the plea agreement. The Court stated that it would amend the indictment if it accepted the agreement.

The trial court then ordered preparation of a presentence report and sentencing guidelines. It continued the case to April 2020. Soon thereafter, COVID resulted in a closure of normal court proceedings.

During COVID, the parties re-negotiated the terms of the plea agreement. The parties reached this agreement in part because, of the Commonwealth's two main witnesses, one had died and the other had new felony charges. Under the new agreement, the defendant would plead guilty to misdemeanor assault and battery and receive an agreed sentence. Noting that the court was limiting appearances to agreed dispositions, the parties requested a hearing before an available judge who was not the original judge.

The parties presented the new judge with the new plea agreement, which referenced the original plea agreement but did not recite the procedural history or posture of the agreement. Neither party orally referred to the earlier agreement. The new judge accepted the plea and sentenced the defendant according to the terms of the new plea agreement.

One week later, the original judge issued an order staying the new judge's ruling and, after a hearing, vacated those orders, including the sentencing order. The defendant then moved to withdraw his original guilty plea to Unlawful Wounding. The original judge denied the motion and found the defendant guilty of Unlawful Wounding. The Commonwealth and the defense both filed objections, but the trial court rejected them and sentenced the defendant under the original plea agreement.

The Court of Appeals affirmed. The Court of Appeals noted that the trial court had been presented and taken under advisement the original plea, as it was permitted to do both by Rule 3A:8 and its inherent authority. The Court then found that, at a minimum, the defendant was required to

either present the new plea agreement to the same trial judge that already had taken the agreement under advisement or otherwise inform the circuit court that he requested that the issue be withdrawn from the circuit court's consideration. The Court wrote: "The parties simply presented a new plea agreement to a different judge without clearly informing that judge that a prior plea agreement was under consideration by another judge. We will not enable this type of gamesmanship and allow parties to ignore courts acting within their lawful authority."

Held: Reversed. The Court held that the trial court's enforcement of a plea agreement that the parties did not agree to was reversible error.

The Court emphasized that, pending acceptance of a plea agreement, trial courts have no authority to enforce an agreement and may not participate in the plea negotiation process under Rule 3A:8(c)(1). The Court noted that a trial court's only participatory role in the plea agreement process begins with its ratification, rejection, or deferral pending the receipt of additional information, such as a review of a criminal record and a pre-sentence investigation report. Thus, if the agreement has been neither ratified nor rejected, and the parties to the plea agreement no longer assent to the agreement, the Court explained that the agreement cannot be enforced by the trial court under both contract principles and the plain language definition of "agreement." In other words, a trial court cannot enforce and ratify an agreement when there is no longer mutual assent.

In this case, because the plea and plea agreement had not been accepted by the trial court, the Court found that the parties were free to amend their agreement as it was merely executory. The Court wrote: "The record makes clear that the only entity satisfied with the plea agreement on August 6 was the court, which had no authority to ratify or reject the agreement that, in effect, no longer existed... Ultimately, a plea agreement which has no connection to an accepted plea exists in vapor."

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230403.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1234214.pdf>

**Virginia Court of Appeals -
Published**

Holland v. Commonwealth: October 24, 2023

Henry: Defendant appeals her conviction for Felony Child Neglect on Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant gave her three-year-old son Methadone, causing the child to stop breathing. The family called for rescue and the hospital was able to revive the child using Narcan. The defendant repeatedly told DSS and police investigators that she thought that she was giving her child Zyrtec.

The defendant was indicted on a single count of felony child neglect in July 2020. The defendant entered a plea of no contest in June 2021, with no plea agreement. The Commonwealth provided to the court—but did not read into the record—a written case summary recounting the facts. Then, less than a week before the scheduled sentencing, defense counsel revealed that his license to practice law had been suspended for 18 months. At the start of the hearing, the court appointed new counsel for the defendant and continued the sentencing hearing, ultimately to April 2022.

The defendant moved to withdraw her no contest plea the day before the sentencing hearing. The defendant proffered that she had pleaded no contest based on a misrepresentation from her attorney that she had a plea agreement with the Commonwealth where she would not receive any sentence of incarceration and that her attorney had not reviewed the elements of the offense or the evidence in discovery with her before she entered the plea. She also proffered that, now that her newly appointed counsel had reviewed the elements of the offense and discovery evidence with her, she thought she had a defense to the felony child neglect charge—specifically that she lacked the requisite intent. For all those reasons, she argued her plea had been “improvident and not intelligently made.”

The Commonwealth objected, proffering that had the case gone to trial when originally scheduled, the Commonwealth had 17 witnesses ready and able to testify against the defendant, but now 3 had changed jobs or moved; the lead investigating officer was no longer employed in law enforcement and works out of town, the forensic scientist who analyzed the prescription bottle was no longer employed by the state, and a DSS witness had moved out of the area. The Commonwealth also argued that the timing of the motion suggested that the defendant sought only to delay proceedings.

The trial court denied the defendant’s motion. It made no factual findings.

Held: Reversed. The Court reversed the trial court’s judgment denying the defendant’s motion to withdraw her no contest plea.

The Court reviewed the three requirements under *Parris* that a defendant must meet in a pre-sentencing motion to withdraw a guilty plea:

- (1) that the defendant can present a “reasonable defense” to the charge,
- (2) that the plea was entered in good faith,
- (3) that the motion to withdraw the plea was not filed merely to cause undue delay in the administration of justice or otherwise represents bad faith or misconduct by or on behalf of the defendant.

The Court then repeated that even if the defendant makes the requisite showing, the trial court must consider whether granting the motion would “unduly prejudice the Commonwealth;” The Commonwealth bears the responsibility of raising the issue of prejudice with enough specificity to enable the defendant to respond and the trial court to consider the same.

The Court first found that the defendant made a prima facie showing of a reasonable defense to the charge, that is, that she did not willfully provide her child Methadone, as she had insisted from the first interview. Regarding her good faith, the Court complained that the trial court did not review the elements of the offense with the defendant during the plea colloquy. The Court wrote: “A defendant is more likely to have entered a plea based on poor advice from counsel if she has a potentially strong defense yet pleads guilty or no contest anyway—particularly when, as here, she lacks a plea agreement and thus gains little benefit from pleading no contest.” The Court found that the record supported the

defendant's claim that she was unaware of the elements of the charged offense and that upon learning of them, she reasonably sought to withdraw her plea.

Although the defendant did not present evidence and only proffered to the Court, the Court wrote that "we have never held that proffered evidence is insufficient to establish good faith, and we decline to do so today." In a footnote, the Court explained that because there was no evidence contradicting the defendant's proffer that she did not understand the elements of the offense, the Court had relied only on defense counsel's failure to advise her as to the elements of the offense here.

Lastly, regarding prejudice, the Court first complained that the Commonwealth failed to proffer that any specific witness would be particularly difficult to call, let alone unavailable at trial. Second, the Court found that, in this case, the passage of time alone was not so great as to establish undue prejudice. The Court also distinguished the rulings in *Thomason, Ramsey, and Griffin*, noting that in this case, the defendant did not have the benefit of a plea deal and the Commonwealth was not prejudiced by her attempt to withdraw her no contest plea when it never gave up any benefit in exchange for her plea. The Court wrote: "The mere inconvenience of proceeding to trial cannot alone constitute undue prejudice."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1088223.pdf>

Virginia Court of Appeals -
Unpublished

Harris v. Commonwealth: April 8, 2024

Fauquier: Defendants appeals the forfeiture of their dogs due to mistreatment on Bill of Particulars and Fourth Amendment grounds.

Facts: The defendants neglected their three dogs to the point that neighbors called the police, alerting them to the dogs being in imminent danger. When officers responded, they observed the dogs outside of the defendants' residence. Officers observed that all three dogs appeared in distress and in need of emergency aid. Officers entered the defendants' backyard and examined the dogs, including third dog, who began to whimper but could not stand. One dog was emaciated. Another had open, bloody cuts in his mouth. The third dog was emaciated and "appeared dead."

The officers rescued the dogs and obtained care for them. Two dogs survived and later were restored to health; one dog suffered a seizure and had to be euthanized.

The Commonwealth began forfeiture proceedings in the general district court pursuant to § 3.2-6569. After a hearing, the court ordered that the dogs were forfeited to the shelter's care. The defendants appealed to the circuit court. In circuit court, the defendants moved for a bill of particulars, allegedly to assist them in preparing a motion to suppress. The trial court denied the motion.

The defendants then moved to suppress, but the trial court denied that motion as well.

Following a trial, the court ruled that the dogs had been abandoned, cruelly treated, or had not been provided adequate care and were therefore forfeited.

[Good job to Nichole Geisenhof, ACA, Fauquier, who litigated this appeal with assistance from Michelle Welch at the AG's office – EJC].

Held: Affirmed.

Regarding the defendant's motion for a bill of particulars, the Court did not address the Commonwealth's argument that §§ 19.2-266.22 and 19.2-2303 apply only to criminal proceedings, not civil forfeiture proceedings. Instead, the Court simply ruled that any alleged error was harmless. The Court pointed out that the defendants already possessed the information a bill of particulars would have provided, as the Commonwealth had already presented its case in the general district court.

Regarding the motion to suppress, as with the previous issue, the Court declined to decide whether the exclusionary rule applies to civil forfeiture cases because it found that exigent circumstances justified the search of the property and seizure of the evidence at issue. The Court found that the officers' entry into the backyard did not extend beyond what was reasonably required to rescue the dogs. The Court ruled that the totality of these circumstances rendered the officers' actions objectively reasonable, and the court properly denied the motion to suppress.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1567224.pdf>

Jeffrey v. Commonwealth: December 12, 2023

Roanoke: Defendant appeals his conviction for Embezzlement on Refusal to Permit Withdrawal of his Guilty Plea.

Facts: Working as a property manager, the defendant used business accounts to purchase appliances and lawn care for himself and his family members. A jury tried and convicted the defendant on two indictments for obtaining money by false pretenses. The defendant was also subsequently tried by a jury on indictments for embezzlement. On the second day of the embezzlement jury trial, the defendant withdrew his not guilty plea and entered a no contest plea to one count of embezzlement pursuant to a plea agreement with the Commonwealth.

The trial court asked the defendant "if he was tricked, threatened, or forced to enter his plea in any way" and the defendant responded under oath that he had not. The defendant also affirmed under oath that he was entering his plea freely and voluntarily. The trial court noted that it had given the defendant three hours and fifty-one minutes to consider his pleas and its ramifications.

Prior to sentencing, the defendant moved to withdraw his guilty plea, arguing that he was prevented from calling his mother as a witness to testify on his behalf and that he did not have sufficient time to consider whether to change to his plea. He claimed that he was coerced into making a plea he did not wish to make and therefore the trial court should have permitted him to withdraw his no contest plea. The defendant also argued that a variance existed between the indictments for embezzlement and

the Commonwealth's proffer given during the plea colloquy and therefore he should have been allowed to withdraw his no contest plea.

The trial court denied his motion, concluding that the defendant's efforts to withdraw his plea were "a subterfuge to manipulate this Court and to manipulate a trial that [the defendant] saw on March 17th was going very badly for him" and that the defendant's motion to withdraw his plea was made in bad faith.

Held: Affirmed. The Court repeated that, under *Parris*, a defendant claiming his plea was the product of coercion bears the burden of providing proof that the plea was induced by coercion and would not otherwise have been made. In this case, the Court agreed that the defendant did not carry his burden, pointing out that the trial court found that the defendant had "demonstrated, at best, a casual relationship with the truth."

The Court also agreed that there was no variance, let alone a fatal variance, between the indictments and the proffered facts, and therefore that the defendant's claimed variance did not amount to a reasonable basis for contesting guilt.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1257223.pdf>

Martinez-Nolasco v. Commonwealth: November 14, 2023

Fredericksburg: Defendant appeals his convictions for Murder and Attempted Murder on Refusal to Permit Withdrawal of his Guilty Plea.

Facts: After an argument, the defendant approached a woman from behind and repeatedly stabbed her in the back, killing her, and then attacked another woman and stabbed her repeatedly as well. After three competency evaluations found that the defendant was competent to stand trial, the defendant entered a plea agreement in which he would plead guilty pursuant to *Alford*. The trial court conducted an extensive plea colloquy with the defendant.

Before sentencing, the defendant moved to withdraw his Alford pleas, arguing that he was unable "to enter his plea[s] with the requisite intent." He maintained that "due to his mental state, he was unable to assess the situation with which he was faced" at the plea hearing. The trial court ordered a fourth competency evaluation. Evaluators concluded that the defendant possessed "the skills required for adjudicative competence and could assist in his own defense if he chooses to do so."

At the hearing on his motion to withdraw his pleas, the defendant asserted that his "mental health history" in the case and inability to recall the commission of the crimes showed that he should be permitted to withdraw his pleas. He further argued that the plea colloquy demonstrated his lack of understanding of the proceedings. He acknowledged that he was not "ill advised by his counsel or that his counsel did anything that induced him to enter into the plea agreement."

Held: Affirmed. Applying *Parris*, the Court observed that regardless of whether the defendant demonstrated that his motion to withdraw was made in good faith, he did not establish a reasonable defense to the charges. The Court complained that the defendant's claims that he did not remember the offenses were not supported by proofs, other than the results of his competency evaluations.

The Court also rejected the defendant's reliance on the Commonwealth's evidence that he was angry and jealous when he attacked the victims. The Court repeated that such facts, without more, do not constitute a reasonable defense to first-degree murder. The Court concluded that, given the proffered facts, the defendant did not meet his burden to prove that he has a defense to the charges against him, such that trying the case would not be futile.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1596222.pdf>

Perry Mitchell v. Commonwealth: October 17, 2023

Williamsburg: Defendant appeals his conviction for Robbery on Refusal to Permit Withdrawal of a Guilty Plea.

Facts: The defendant and his confederates abducted and robbed a man at gunpoint. Just after the robbery, police found the victim's cellphone in the defendant's pocket. The victim identified the defendant at preliminary hearing. The defendant entered a guilty plea where he would plead guilty to robbery and the Commonwealth would move to nolle prosequi three remaining charges. There was no agreement as to sentence. The trial court accepted the guilty plea, finding that the defendant entered it freely, intelligently, and voluntarily and with an understanding of the nature of the charge and the consequences of his plea. It also accepted the written plea agreement. The trial court convicted the defendant of robbery and continued the matter for sentencing.

The defendant then fired his attorney and moved to withdraw his guilty plea. He argued that he had entered into the plea agreement under a "good faith" misunderstanding concerning the sentence he faced. He submitted an affidavit in which he averred that his understanding when he entered the plea agreement was that he would receive a sentence of no more than four years of incarceration, that he was a passenger and had remained in the car during the robbery, that at trial he could have cross-examined the victim, and that the victim may have misidentified him.

At the hearing regarding the defendant's motion, the Commonwealth submitted the plea agreement, the transcript of the hearing, and the transcript of the preliminary hearing, including the testimony from the police and the victim. The Commonwealth also called the defendant's original attorney, who testified that he never represented to the defendant that there was an agreement to cap his sentence at no more than four years. The Commonwealth also argued that it would be prejudiced because it was no longer in contact with the victim, whose phone had been disconnected.

The trial court found that there had been both a "written colloquy," in the form of the guilty plea questionnaire, and a plea colloquy. The trial court noted that it had reviewed the plea agreement with the defendant, and the trial court confirmed it contained the bargain that the defendant had struck

with the Commonwealth. The trial court found that the defendant had been asked if any other promises had been made to him, and he confirmed there had been no other promises. The court also noted that the defendant had been advised that the court was ordering a pre-sentence report and continuing the matter for sentencing. The trial court further found that there was not a reasonable basis for contesting guilt and that the Commonwealth would be prejudiced if it permitted the defendant to withdraw his guilty plea.

Held: Affirmed. The Court held that the defendant failed to meet his burden to demonstrate to the trial court that he had a good faith basis for seeking to withdraw his guilty plea, that he had a reasonable basis for contesting his guilt based on a proposition of law or credible witness testimony, and that the Commonwealth would suffer no prejudice.

The Court repeated that, to withdraw a guilty plea, an asserted defense must be “substantive” and a “reasonable defense.” In this case, the Court noted that the defendant’s proffered defense consisted of his assertion that he remained in the car during the robbery and his suggestion that the victim may have been mistaken in his identification. However, the Court found that the proffer amounted only to an attack on the victim’s identification and was therefore insufficient under binding precedent.

Regarding the prejudice to the Commonwealth, the Court found that the record supported the finding of prejudice to the Commonwealth. The Court pointed out that the Commonwealth fulfilled its commitment to nolle prosequi the four additional felony charges. The Court also credited the Commonwealth’s proffer that it “no longer ha[d] a good number for this victim.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1471221.pdf>

Sanchez Gomez v. Commonwealth: October 10, 2023

Bedford: Defendant appeals his conviction for Murder and Abduction on Voluntariness of his Guilty Plea.

Facts: The defendant and his confederates, MS-13 gang members, abducted and murdered a child. Pursuant to a written plea agreement, the defendant pleaded no contest to charges of first-degree murder and abduction, and to one charge of gang participation. The Commonwealth agreed that the defendant had “provided substantial assistance” by testifying against three of the other gang members involved with the abduction and murder.

Under the plea agreement, the defendant stated that he understood that, regardless of the guidelines’ recommended range, and regardless of any expectation of how the trial court might adjust the guidelines, the court could sentence him to a maximum of two life sentences plus 20 years’ incarceration under the express terms of the plea agreement. The trial court accepted the defendant’s pleas and convicted him of first-degree murder, abduction, and gang participation.

Following argument by counsel, the trial court pronounced the sentence and commented: “[A]s a general principle ... maybe I might at some point ... but generally, I do not check the box of accepting

responsibility,” (which would reduce the sentencing guidelines’ range) “when someone pleads nolle contendere.” The trial court explained it would not reduce the guidelines and would instead impose a sentence exceeding the guidelines, although the trial court advised that it would have imposed more incarceration but for the defendant’s cooperation with the Commonwealth.

The defendant argued that the trial court erred by not informing him of its “personal rule” against reducing the low end of the sentencing guidelines’ recommended range when a defendant pleads no contest instead of guilty.

Held: Affirmed.

The Court first examined the record and concluded that the record conclusively established that the defendant entered his pleas freely, intelligently, and voluntarily with an understanding of their consequences and of the nature of the charges against him. The Court then found no authority to support the defendant’s contention that, for his pleas to be voluntary, the trial court was required to inform him of its general thoughts about how the sentencing guidelines should be calculated and interpreted.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1493223.pdf>

Nicol v. Commonwealth: August 22, 2023

Hampton: Defendant appeals the acceptance of his Alford Plea of Guilty.

Facts: The defendant shot and killed a man. A grand jury indicted the defendant for second-degree murder, use of a firearm, three counts of maliciously shooting into an occupied dwelling, conspiracy to commit murder, and shooting in the commission of a felony. In exchange for the defendant’s Alford pleas to an amended indictment of voluntary manslaughter and shooting in the commission of a felony, the Commonwealth agreed to nolle prosequi the remaining indictments.

The trial court conducted a plea colloquy with the defendant including confirming that the defendant had discussed the charges and possible defenses with his attorney and that he fully understood the elements the Commonwealth was required to prove, that he understood his right to plead not guilty and to be tried by a jury, and that, other than the charges the Commonwealth would nolle prosequi, no one had induced his pleas by threat or promise. The defendant also confirmed that he had sufficient time to discuss his case with counsel and did not require any additional time before entering his pleas. The defendant acknowledged that he was “entering these Alford pleas freely and voluntarily.”

During the colloquy, the defendant confirmed that his attorney advised him of the “minimum and maximum punishments allowed by law for these charges.” In addition, the defendant’s attorney averred that he had reviewed the charges, the evidence, and the “pros and cons” of proceeding to trial or entering the Alford pleas. Counsel also averred that he had provided the defendant with an Alford plea of guilty form, and had reviewed the form with him, and desired to “put that on the record.”

The defendant did not raise an objection to the trial court's acceptance of his guilty plea until filing his appeal, but on appeal argued that the trial court should not have accepted his guilty plea.

Held: Affirmed. The Court found that the defendant's pleas were entered knowingly and voluntarily.

The Court repeated that a plea of guilty constitutes a "self-supplied conviction." The Court also emphasized that no authority requires that the trial court review each specific element of each offense for an Alford plea to be valid, and the Court was unpersuaded by the defendant's contrary argument. The Court also rejected the defendant's argument that his Alford pleas were not knowing and voluntary because the record did not demonstrate that he was advised of various "collateral consequences" of his pleas.

Lastly, the Court rejected the defendant's argument that the plea colloquy was deficient because the trial court did not ask two questions from the "Suggested Questions to Be Put by the Court to an Accused Who Has Pleaded Guilty," found in an appendix to the Rules of the Supreme Court of Virginia. Those questions query whether a defendant understands that "by pleading guilty/no contest," they are waiving "basic rights," including to a jury trial, against self-incrimination, to confront and cross-examine witnesses, and to present a defense on their own behalf.

The Court repeated that trial courts need not read from a fixed script or conform to a single liturgy. The Court also emphasized that satisfying the Constitution's guarantees does not require a "specific monition as to the several constitutional rights waived by entry of the plea."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1281221.pdf>

Indictment

Virginia Court of Appeals – Published

Tatusko v. Commonwealth: February 6, 2024

Chesterfield: Defendant appeals his conviction for Reckless Driving on many grounds.

Facts: The defendant drove at 100 miles per hour or more in a 60 mile per hour zone. An officer observed the defendant speeding and visually estimated his speed to be in the "high 90s." The officer's LIDAR2 device yielded two readings: 103 and 100 miles per hour. The officer stopped the defendant and issued a summons for "reckless by speed 100/60 (LASER)," in violation of § 46.2-862. The General District Court convicted the defendant. He appealed to the circuit court.

In circuit court, the defendant first moved to suppress the stop, arguing that the officer lacked reasonable suspicion for the stop. During the motion, the defendant moved for a rule on witnesses.

Over the defendant's objection, the trial court allowed the Commonwealth's trial expert, a police sergeant, to remain in the courtroom during the motion to suppress. The expert did not testify during the motion.

At the motion to suppress, over the defendant's objection, the officer testified to his visual estimate of the defendant's speed. He explained that he positioned himself on the highway, observed the flow of traffic, noticed the defendant's vehicle traveling faster than the flow of traffic, and estimated the defendant's speed. The trial court denied the motion to suppress.

Prior to trial, the Commonwealth moved to strike the words "100/60 (LASER)" from the summons so that it would just read "reckless by speed" under § 46.2-862. The court overruled the defendant's objection that the amendment materially altered the underlying charge. The court also denied the defendant's motion to continue the trial date, rejecting his claim of "surprise" that the summons had been amended.

After the trial court re-arraigned the defendant, he demanded to be sentenced by a jury if convicted. However, the trial court denied the request as the defendant had failed to demand jury sentencing in writing at least 30 days prior to trial under § 19.2-295(A).

At trial, the defendant argued that the LIDAR calibration was invalid because the LIDAR was tested for distance, not speed. The Commonwealth offered an expert to testify about how LIDAR works, but the defendant objected that the expert could not testify before the facts were in evidence. The trial court overruled the objection.

The Commonwealth's expert explained that the LIDAR sends about 200 laser pulses per second to the target and measures the nanoseconds for the pulses to reflect, calculating speed by measuring the differential. The device is calibrated at certified locations using targets at distances of 50 and 100 feet. The officer testified that he calibrated the device that way before his shift.

At trial, on cross-examination, the defendant requested that the trial court take judicial notice of the stopping-distance table in § 46.2-880. The trial court declined to do so.

During closing argument, the defendant objected twice to the prosecutor's oration. At one point, the prosecutor said: "What I find interesting about this case is that," until interrupted by an objection. At another, the prosecutor remarked: "I found" defense counsel's questions of the two officers "confusing," drawing an objection. The trial court overruled the objections.

Held: Affirmed.

The Court first ruled that the trial court properly struck "100/60 (LASER)" from the summons. Interpreting §§ 16.1-129.2 and -137, the Court repeated that, on appeal, a circuit court may amend a warrant or a summons. The Court then noted that the amendment came before trial, and therefore a continuance was warranted only "upon a showing that such amendment operated as a surprise." In this case, the Court complained that the defendant never proffered what he would have done differently or what evidence he would have offered at trial if the continuance had been granted.

The Court also rejected the defendant's call for a Bill of Particulars, finding that the charging document gave the defendant notice of the nature and character of the offense charged so he could make his defense, and therefore a bill of particulars was not required.

The Court also ruled that the amendment did not reset the 30-day period before trial for the defendant to make written demand under § 19.2-295 for jury sentencing if convicted. The Court agreed

that the trial court was right to proceed directly to trial after determining that a continuance was unwarranted.

The Court also found no reversible error in the trial court's decision to let the expert witness remain in the courtroom during the suppression hearing. Construing § 19.2-265.1 and Va. R. Evid. 2:615(a), the Court noted that the expert was not a witness at the suppression hearing.

The Court also agreed that the trial court properly permitted the officer to testify at the suppression hearing about his estimate of the defendant's speed, repeating that "anyone with a knowledge of time and distance is a competent witness to give an estimate." The Court also ruled that the officer's visual estimate of speed was sufficient alone to provide reasonable suspicion that the defendant was driving at speeds in violation of § 46.2-682.

The Court also found that the evidence supported the prosecution's claim that the LIDAR was properly calibrated. The Court rejected the defendant's argument that the calibration was invalid because the LIDAR was tested for distance, not speed. The Court pointed out that § 46.2-882 permits calibration by "any . . . method employed in calibrating or testing any laser speed determination device."

The Court then rejected the defendant's objection that the expert improperly testified first and before the fact witness. The Court concluded that the expert's description about how LIDAR devices work was fact testimony about how such devices work in general, how they are calibrated, and what an officer would see if a device malfunctioned.

Regarding the defendant's attempt to cross-examine the officer using the speed tables in § 46.2-880, the Court found no error in the trial court's ruling that it was irrelevant and would confuse the jury. The Court pointed out that the Va. Supreme Court has "repeatedly discouraged" instructing a jury "on the tables of speed and stopping distances unless it is clearly supported by the evidence."

Lastly, the Court examined the prosecutor's closing argument and agreed that the prosecutor's statements here did not cross the line into "injecting their own personal opinion of the evidence, or personal opinion as to the competency of witnesses and the weight to be accorded their testimony."

Regarding the defendant's 18 separate arguments on appeal, the Court stated: "We recognize that criminal defendants may sometimes insist that their lawyers raise as many arguments as possible, including arguments that, even though not frivolous, have virtually no chance of succeeding." The Court described the defendant's appellate strategy as a "blunderbuss approach" and wrote: "Appellate courts have sometimes lamented that 'the number of claims raised in an appeal is usually in inverse proportion to their merit.' ... When a party comes to us with nine grounds for reversing the [trial] court, that usually means there are none. ... Those predictions have been borne out here."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1500222.pdf>

Clark v. Commonwealth: October 17, 2023

Richmond: Defendant appeals his conviction for Murder, Rape, and Abduction on Amending the Indictment and Juror Misconduct.

Facts: The defendant attacked the victim, raped her, and strangled her to death. After killing the victim, the defendant submerged her in a bathtub in an ineffectual attempt to destroy his semen that was inside her body. Later while incarcerated pending trial, the defendant told his ex-wife that police could not have discovered his DNA at the crime scene because the victim had been “soaked in hot water.” Prior to trial, the Commonwealth notified the defendant before trial that the medical examiner determined that the victim died within a 48-hour “window.”

Prior to trial, the trial court permitted the Commonwealth to amend the indictments to reflect that the offenses occurred “between May 8, 2019, and May 9, 2019,” rather than “on or about” May 9, 2019, over the defendant’s objection that doing so violated his due process right to present an alibi defense.

After trial but before sentencing, the trial court discovered that one juror, who had served on the jury, was not a resident of the City of Richmond. The trial court found that he had failed to provide truthful answers about his residency during voir dire, held the juror in contempt and sentenced him to ten days in jail, all suspended, and a fine of \$250.

The defendant moved for a mistrial on grounds that seating the juror violated his right to an impartial jury under the federal and Virginia constitutions and required setting aside the verdicts and granting a new trial under § 8.01-352 because the juror was not a Richmond resident. After trial, the defendant argued that seating the juror violated the vicinage clause in Article 1, section 8 of the Virginia Constitution, which states that “in criminal prosecutions a man . . . shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.” The defendant also argued that the juror’s dishonesty suggested that he was not impartial and may have disregarded the trial court’s jury instructions during deliberations.

Held: Affirmed.

Regarding the amendment to the indictment, the Court found no due process violation. The Court first repeated that because due process requires an indictment to provide the accused notice of the charges against him, amendments under §19.2-231 are permissible only if they do not alter “the nature or character” of the accusations. Nonetheless, where the date of the offense is “not of the essence of the offense,” nor shown to be significant, the Court also repeated that the Commonwealth is not required to charge that it occurred on a specific date, and the Commonwealth may even prove that the offense occurred on a date other than that alleged in the charging instrument.

In this case, the Court noted that time was not an element for any of the charged offenses. The Court also pointed out that the defendant had knowledge that the Commonwealth would attempt to prove that the crimes may have occurred on May 8, 2019. The Court also pointed out that the amendments occurred before the defendant presented his alibi witness. Lastly, the Court concluded that the defendant’s failure to move for a bill of particulars to clarify the offense date before trial or request a continuance after the amendment to seek additional alibi witnesses undercuts his claim that he did not have adequate notice to prepare an alibi defense.

Regarding the juror who lied about his residence, the Court explained that, to demonstrate “cause” for setting aside the jury’s verdicts and granting a new trial under § 8.01-352, the defendant had the burden of establishing either that (1) the juror had a legal “disability” that “probably cause[d] injustice” to him or (2) the juror’s misconduct during jury selection caused an “irregularity” in

impaneling the jury that was either “intentional” or “probably cause[d] injustice” to him. The Court explained that an “irregularity” is “intentional” under § 8.01-352 only if the trial court clerk or trial judge intentionally committed an act or adopted a practice that varies from the normal conduct of an action in making the “list or lists of jurors” or in “drawing, summoning, returning or impaneling” jurors or “in copying or signing or failing to sign the list.”

On the other hand, the Court agreed that juror misconduct during jury selection may cause an unintentional irregularity in summoning or impaneling a jury under § 8.01-352. In this case, the Court found the juror’s non-residency was a legal disability and his dishonesty regarding that fact on voir dire caused an unintentional irregularity in impaneling the jury. The Court then explained that it was the defendant’s burden to establish that the defects “probably cause[d] injustice” to him.

In this case, the Court concluded that the defendant failed to establish that the juror harbored an actual bias against him. The Court found the defendant’s claim that the juror harbored actual bias against him or disregarded the trial court’s instructions to be speculative. Regarding the defendant’s vicinage argument, the Court simply ruled that the defendant failed to raise a timely challenge to seating the juror based on Virginia’s vicinage clause.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0620222.pdf>

Virginia Court of Appeals -
Unpublished

Marsh v. Commonwealth: October 17, 2023

Charlottesville: Defendant appeals his conviction for Carjacking, alleging unlawful Amendment of the Indictment.

Facts: The defendant committed an armed carjacking. The defendant was indicted for seven charges arising from the same event along with a probation violation. He pleaded guilty under a plea agreement to a misdemeanor assault and battery and the felony carjacking charges and stipulated to his probation violation. In exchange, charges for robbery, violent felon in possession of a firearm, use of firearm during a carjacking, assault and battery, and brandishing a firearm were nolle prosequied by motion of the Commonwealth.

The language in the indictment described the offense carjacking while using a firearm. The defendant’s written plea agreement listed the offense as “Carjacking w/firearm.” At the plea hearing, the trial court confirmed, during the colloquy, that the defendant pleaded guilty voluntarily pursuant to the terms of the plea agreement. The facts proffered by the Commonwealth specified the use of a firearm and emphasized the significance of the use of that firearm in the commission of the crime. The defendant agreed on the record that the proffered facts were the Commonwealth’s evidence. Accordingly, the trial court found the defendant guilty of carjacking with the use of a firearm.

At the sentencing hearing, the Commonwealth moved to correct the VCC on the indictment to reflect the proper VCC for carjacking with the use of a firearm. The defendant objected on the grounds that such an amendment after a finding of guilt would violate § 19.2-231. The defendant contended that altering the VCC constitutes a material amendment to the indictment barred by § 19.2-231, in part, because the defendant never agreed to plead guilty to carjacking using a firearm.

The trial court granted the Commonwealth's motion over the defendant's objection, stating that "the charging language is not changing, the code section is not changing, the plea agreement is not changing, and the facts summary that was given is the same."

Held: Affirmed. The Court repeated 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."

The Court explained that the defendant "cannot maintain all the benefits accruing from his guilty plea while simultaneously challenging his sentence under that plea. His decision to plead guilty to "Carjacking w/firearm" and his failure to contest the Commonwealth's proffer of facts about the use of the firearm prevents him from now contending on appeal that he did not plead guilty to carjacking with the use of a firearm... If there was some mistake about the facts that formed the basis for accepting his plea, Marsh's remedy was to withdraw his guilty plea and his refusal to do so is inconsistent with his arguments."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0552222.pdf>

Gordon v. Commonwealth: September 19, 2023

Lynchburg: Defendant appeals his convictions for Computer Solicitation of a Child, Child Sexual Abuse, and Indecent Liberties on Admission of Recent Complaint Hearsay Evidence and Variance with the Indictment, and Sufficiency of the Evidence.

Facts: The defendant solicited a 13-year-old child for sexual acts and sexually assaulted the child repeatedly. The first incident occurred in January, when the defendant grabbed her buttocks on her birthday. He did not apologize or say it was accidental; he "smirked" and walked away.

The assaults quickly escalated and continued into February. About three weeks later, he pulled out his penis and told the victim to touch it. Then about a week after that, he forced the victim to touch his penis before making her perform oral sex. Later, the defendant sent the victim a text message conveying his desire for oral sex and intercourse.

Initially, the victim did not tell anyone because, in her words, she "didn't know how to," "didn't know what to say," and "didn't know how people would react." She later explained that she felt embarrassed. She told her sister not to tell anyone because she was scared and wanted to handle it herself. Nevertheless, the victim disclosed in detail to her mother in early March, less than two months

later, after the victim received the lewd text message from the defendant. Soon thereafter, the victim also disclosed the facts to a police investigator.

At trial, the defendant objected to admitting the victim's recent complaint hearsay statements to corroborate her testimony about the sexual abuse she suffered. Over the defendant's objection, the trial court allowed the victim's mother and the police officer to recount the victim's out-of-court statements about the assaults.

At trial, the defendant also argued that the evidence was insufficient to prove that he committed an act of sexual abuse during the time frame alleged in one of the indictments, concerning February. As to that time frame, the defendant contended that the victim's testimony established only that she "saw [his] penis" and there was "no evidence of any touching whatsoever." The trial court rejected his argument.

At trial, regarding the Indecent Liberties offense under § 18.2-370.1, the defendant argued at trial that there was no evidence that the touching of the victim's buttocks was "intentional" or "of a sexual nature." The trial court disagreed.

Held: Affirmed.

The Court first noted that § 19.2-268.2 provides that "in any prosecution for criminal sexual assault . . . the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness." "[T]he 'only time requirement is that the complaint have been made without a delay [that] is unexplained or is inconsistent with the occurrence of the offense.'"

In this case, the Court observed that the delay here was not long. Moreover, the Court found that the evidence sufficed to explain that relatively brief delay. The Court wrote that the victim's reasons were "perfectly understandable hesitations by a 13-year-old child who was being sexually abused by a member of her extended family."

Regarding the variance with the date of the offense, the Court explained that even assuming that the third incident occurred in March, not February, it would not invalidate the conviction. The Court repeated that an indictment that imperfectly states the date of the offense is not invalid when, as here, "time is not the essence of the offense."

Regarding the indecent liberties offense, the Court agreed with the trial court's conclusion that the defendant grabbed the victim's buttocks intentionally and in "a state of mind . . . eager for sexual indulgence." The Court found that the facts, viewed in their entirety, supported the trial court's conclusion that the defendant possessed the requisite intent when he grabbed the victim's buttocks.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1056223.pdf>

Cabrera v. Commonwealth: July 12, 2023

Fairfax: Defendant appeals his convictions for Murder, Burglary, and Larceny on Variance with the Indictment, Admission of Flight Evidence, and Admission of Autopsy and Crime Scene Photos.

Facts: The defendant and his confederate broke into a home, strangled, and bludgeoned the victim to death, and stole items, such as a safe and paintings, from his home. At trial, the Commonwealth's expert testified that the victim died from strangulation and from blunt force injuries to his head. The defendant's confederate also testified for the Commonwealth at trial.

During his police interview in 2020, the defendant admitted that he was present at the apartment during the murder, that he stole valuable items from the deceased, and that he took the victim's car. The defendant also admitted that he fled to El Salvador after the murder because he was scared. The defendant objected to the Commonwealth introducing evidence of his flight to El Salvador, but the trial court overruled his objection.

At trial, the defendant objected to the admission of crime scene and autopsy photos. He argued that the photographs had little probative value because the manner of death was not in dispute and that the risk of unfair prejudice substantially outweighed the photographs' probative value.

The indictment in this case alleged that the defendant murdered the victim "[o]n or about the 23rd day of November 2016." The evidence adduced at trial showed that the defendant killed the victim sometime between 11:00 p.m. on November 22 and 12:30 a.m. on November 23. The trial court rejected the defendant's argument that this variance was fatal to the indictment.

Held: Affirmed.

Regarding the defendant's flight, the Court found that the defendant's admission, taken in conjunction with his knowledge of the crime and his presence at the scene of the crime, supported the conclusion that the defendant had some knowledge that he might be a suspect. The Court also found that the defendant's conduct of quickly fleeing the country after the murder and his later statements to law enforcement tended to prove that immediately after the killing, the defendant sought to avoid any contact with law enforcement officials and the courts. Thus, the Court ruled that the trial court did not abuse its discretion in balancing the probative value of this evidence against its potential prejudicial effects and in admitting this evidence.

Regarding admission of the crime scene photos and autopsy photos, the Court concluded that the autopsy and crime scene photographs, which depicted the brutality of the murder, were highly probative of the defendant's malice and premeditation (two elements of first-degree murder). The Court also contended that the photographs corroborated the confederate's account of the incident, rendering the photographs essential to the Commonwealth's case given the defendant's attempts to discredit his confederate's testimony. Thus, the Court ruled that the photographs were highly probative and essential to the Commonwealth's case, and the probative value was not substantially outweighed by any unfair prejudice and the Court held that the trial court did not abuse its discretion in admitting the autopsy and crime scene photographs.

Lastly, regarding the variance with the offense date in the indictment, the Court ruled that the evidence clearly established that the defendant murdered the victim on or about November 23, 2016, and no variance or inconsistency between the date alleged in the indictment and the evidence existed. Consequently, the Court held that the trial court did not err in denying the defendant's motion to strike.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1038224.pdf>

Joinder & Severance

Virginia Court of Appeals - Unpublished

Rodriguez Hernandez v. Commonwealth: April 30, 2024

Fairfax: Defendant appeals his convictions for Murder and related charges on Joinder grounds.

Facts: The defendant got into a dispute with victim #1 at a bar. Outside the bar, the defendant brandished a firearm at victim #1 and shot at him. Later in the evening, the defendant and his accomplice shot and killed a different person, victim #2, outside the bar.

Both victims had arrived together at the bar earlier in the day. The shootings occurred within approximately two hours in the early morning, and both outside the same bar. Officers discovered victim #2's body in the street within a few hundred feet of the bar where the defendant first fired his weapon. The next day, police found a nine-millimeter handgun with the defendant's DNA that was involved in both shootings. Police also later found text messages communicating the defendant's need to "take . . . out" one of the "guys" that "pressured" him.

A grand jury indicted the defendant for attempted malicious wounding, brandishing a firearm, first-degree murder, and use of a firearm in the commission of murder. The defendant moved to sever the attempted malicious wounding and brandishing charges from the murder and use of a firearm in the commission of murder charges. He argued that the charges related to the first shooting at victim #1 were too distinct in time, place, and character to be tried together with the charges related to victim #2's murder and that doing so would be highly prejudicial to him.

The Commonwealth opposed severance and proffered that it would use the evidence of the first shooting to prove premeditation and motive for victim #2's murder. The trial court denied the defendant's motion, citing the involvement of common witnesses, the travel back and forth to the crime scene, and the earlier interaction between the defendant and the two shooting victims.

At trial, the trial court ultimately struck the attempted malicious wounding and brandishing charges.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in finding that the four offenses were "connected" under Rule 3A:6(b). Additionally, the Court concluded that justice did not require severance. The Court explained that the charges were properly tried together because the events surrounding the first altercation served as evidence of his motive and intent for the murder by

showing a prior conflict between the defendant and the victims, per Va. R. Evid. 2:404. Accordingly, the Court found that the probative value exceeded any incidental prejudice.

The Court also found that the fact that the trial court ultimately struck the attempted malicious wounding and brandishing charges cannot color the review of the trial court's pretrial determination that evidence of the first altercation would have been admissible in a separate trial for the murder.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1888224.pdf>

Horton v. Commonwealth: February 13, 2024

Albemarle: Defendant appeals his conviction for Murder and related offenses on Joinder, Admission of Bad Acts Evidence, and Refusal to Declare a Mistrial grounds.

Facts: The defendant and his co-defendant shot and killed a man during a robbery. During the robbery, the defendant dropped his phone. Police recovered the phone and subjected it to forensic analysis. Later, police executed a search warrant at the defendant's mother's house, arresting the defendant, his confederate, and locating a box of ammunition of the same brand and type recovered from the crime scene. The trial court agreed to join the defendant's trial with his co-defendant's trial, over the defendant's objection. The defendant did not testify at trial, nor did the Commonwealth introduce any statements by the co-defendant.

At trial, over the defendant's objection, the Commonwealth introduced photographs extracted from the defendant's phone, including some that depicted the defendant and others that depicted a hand holding a black handgun consistent with the murder weapon. The Commonwealth also introduced the ammunition, again over the defendant's objection.

During jury deliberations, one of the jurors sent the court a note, reading: "Dear, Your Honor, English is my second language[.] I am not sure that all the things were understood correctly. I'm very afraid for that. So, can you please release me from this case?" The defendant expressly objected to the court releasing the juror and made no other motions concerning that juror. The court declined the juror's request to be released.

Held: Affirmed.

Regarding the joinder issue, the Court noted that, since the defendant did not testify at trial, nor did the Commonwealth introduce any statements by the co-defendant, the defendant could not show any actual prejudice. Since the defendant could not point to any evidence admitted against him that would not have been admitted had the Commonwealth tried him and the co-defendant separately, the Court agreed that the trial court did not abuse its discretion by granting the Commonwealth's joinder motion.

Regarding the admission of the photographs and the ammunition, the Court pointed out that the evidence pertained to whether the defendant would have had the means to complete the elements of the offense, which is not the type of unfair prejudice contemplated by Va. R. Evid. 2:403(a)(i)

Lastly, regarding the juror, because the defendant did not ask for a mistrial and in fact told the court that he wanted the juror to remain on the panel, the Court ruled that it was barred from reaching the merits of the defendant's argument.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0870222.pdf>

Jury Instructions

Virginia Supreme Court

Moisin v. Commonwealth: October 19, 2023

Aff'd in Part Ct. of App. Ruling of August 2, 2022

Norfolk: Defendant appeals his convictions for Child Sexual Assault on jury instruction issues.

Facts: For several years, the defendant sexually assaulted two very young children. At trial, the defendant sought to call a witness to testify that she had been present at one of the incidents and that the defendant he had not been in contact with the children when the assault took place. The Commonwealth objected that the testimony would constitute an alibi and that the defendant had not given notice of an alibi. The trial court sustained the objection.

At trial, over the defendant's objection, the court gave Model Jury Instruction 2.600, which stated: "You may infer that every person intends the natural and probable consequences of his acts." He argued that the instruction was not appropriate for the case and impermissibly shifted the burden of proof to him.

The Court of Appeals Affirmed. The Court first ruled that the trial court did not abuse its discretion by instructing the jury that it could infer that a person intends the natural and probable consequences of his acts.

The Court also held that the defense witness' proffered testimony served as an alibi because it placed the defendant outside of the room where the offenses occurred, thus making it physically impossible for the defendant to have committed the offenses. The Court defined alibi as a defense based on the physical impossibility of committing a crime. Therefore, the Court of Appeals concluded that, under Rule 3A:11(d)(2), the defendant was obligated to notify the Commonwealth of his alibi testimony.

Held: Affirmed in Part, Reversed in Part; Conviction Affirmed. The Court affirmed the judgement of the Court of Appeals affirming the conviction, but vacated the portion of the Court of Appeals' opinion that ruled that the defense witness' proffered testimony provided the defendant with an alibi.

Regarding the alibi issue, the Court simply ruled that the defendant did not adequately preserve his objection to the trial court's ruling, and therefore the Court of Appeals erred by addressing it in their ruling.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220536.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1038211.pdf>

**Virginia Court of Appeals -
Published**

Drexel v. Commonwealth: May 7, 2024

Alexandria: Defendant appeals his conviction for Threats to Damage a Building on First Amendment, Admission of Bad Acts, Jury Instruction, and sufficiency grounds.

Facts: Over a day, the defendant spoke with his therapist on the phone several times. As their conversations progressed, the defendant sounded more and more agitated. At first, he was angry and made some homicidal statements but did not express intent to act on them. Later, though, the defendant had some very specific ideas and plans for how to harm others, including bombing city hall and stated that he was going to act on these thoughts. The therapist contacted the police.

On the phone with police officers, the defendant told officers that he was “extremely angry” and “passionately upset about the fact that he felt like he was . . . being wronged by the City of Alexandria.” The defendant angrily stated he would burn down city hall. During this same conversation, he told the officers that “he was going to be the next Timothy McVeigh” because “he wanted to send a message.” He vowed he would kill “any law enforcement officers [who] approached him.” The defendant expressed a desire “to dismember Judges and their families.” One of the officers later testified that he was “very concerned” because he believed that the defendant “meant” “the words he was saying.”

At trial, the defendant objected to the admission of four of his statements that he made on the same phone call speaking with police in which he said he would burn down city hall: (1) his “threats against law enforcement” generally, (2) his statement “that if any law enforcement officers approached him, or saw him, he was going to kill them,” (3) his expressed desire “to dismember Judges and their families,” and (4) his statement “that if he were to douse himself in gasoline, law enforcement would be unable to tame him because he could light on fire.” The trial court overruled his objection and admitted the statements.

At trial, the defendant sought to have the jury instructed on the constitutional definition of threat for purposes of safeguarding his First Amendment protections of his freedom of speech. He also asked the court to instruct the jury that malice was an element of the crime under § 18.2-83. The trial court declined to give those instructions.

The defendant also requested a jury instruction defining “true threat” under the First Amendment, but the trial court refused the instruction. The rejected instruction read:

“The First and Fourteenth Amendments to the United States Constitution protect the right to free speech unless the speech constitutes a true threat, which is defined as those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

During trial, the jury sent a note that read: “What do we do if we cannot come to unanimous agreement? That is the stance of the jury at this time.” Over the defendant’s objection, the trial court instructed the jury as follows:

“As you’ve been told, your verdict must be unanimous. If you can possibly reach a verdict, it is your duty to do so. You should listen to the views and opinions of your fellow jurors with fairness and candor. And you should give consideration to what they say. However, you must decide the case for yourself and you should reach an agreement only if it can be done without sacrificing your individual judgment. During the course of your deliberations, each of you, whether in the majority or the minority, should not hesitate to reexamine your own views and change your opinion, if you are convinced that it was wrong. No juror however, should give up their honest opinion as to the evidence solely because the opinion of your fellow jurors, or for the mere purpose of returning a verdict. If you can reach a decision without surrendering your conscientious opinion, it is your duty to do so. So, I’d ask you to return to the jury room and give the matter your further consideration. Thank you.”

Held: Affirmed. The Court held that the trial court acted within its discretion by admitting the defendant’s challenged statements into evidence. The Court also held that the trial court acted within its discretion by rejecting his proposed jury instructions on threat and malice, as well as by giving the jury an “Allen charge.” Lastly, the Court held that the Commonwealth presented sufficient evidence to prove that he made a threat and that he had the requisite intent.

Regarding the defendant’s First Amendment instruction, the Court repeated that to constitute a threat, the communication must also “reasonably cause the receiver to believe that the speaker will act according to his expression of intent.” The Court then noted that the First Amendment protects the freedom of speech generally but does not protect “true threats of violence.” The Court explained that the speaker’s intent is irrelevant to determining whether the communication constitutes a true threat under the First Amendment. The Court then pointed out that, for purposes of Code § 18.2-83, a threat is a communication conveying to a reasonable person a serious intent to “bomb, burn, destroy or in any manner damage” certain property, regardless of whether the actor subjectively intended to convey such a message.

The Court then examined the separate element of the intent of the person making the communication. The Court repeated that for a threat to be punishable from a constitutional standpoint, at a minimum, the offender must have “consciously disregarded a substantial risk that his communications would be viewed as threatening violence;” The speaker need not actually intend to carry out the threat.” In other words, the Court explained, as used in this context, the phrase “unlawful intent” does not define a specific level of mens rea but instead denotes the fact that some level of intent

is required to make a particular act criminally punishable. The Court concluded that § 18.2-83 does not require that the offender acted with malice.

Regarding the defendant's proposed instruction on "true threat," the Court found that the defendant's proposed instruction—defining a threat in part as an expression of intent to commit violence against an individual or group of individuals—was not relevant to the charge that he made a threat against any place of assembly, building, or other structure under § 18.2-83. Further, the Court found that the defendant's proffered instruction attempted to incorporate the subjective intent of the speaker into the constitutional definition of a threat. The Court held, under *Counterman*, that a communication must be both a "true threat" and that the speaker must have acted with some subjective intent for the communication to fall outside of the umbrella of the First Amendment. Proving that a particular statement is a threat is separate from proving the speaker made it with the requisite mens rea. The Court concluded that the defendant's requested instruction defining "true threat" was confusing and apt to mislead the jury. The Court also criticized the instruction because it conflated two separate elements of the offense—the threat and the required mens rea.

Regarding admission of the defendant's statements, the Court found that the statements were relevant to the context in which he stated his intent and desire to burn down city hall. The Court held that the legitimate probative value of the challenged statements outweighed their incidental prejudice to the defendant. The Court reasoned that the similar statements made in a single conversation implicating violence against law enforcement, judges and judges' families, and himself, in support of his cause, were probative to the elements of threat and intent. Therefore, the Court agreed that the trial court acted within its discretion by admitting evidence of the defendant's other statements intimating related acts of violence.

Regarding the trial court's "Allen charge," the Court held that the trial court did not abuse its discretion by giving its instruction. The Court observed that in this case, the jury did not declare an inability to agree but asked what to "do if" they could not "come to a unanimous agreement," expressing that was its current "stance." The Court credited the trial court for instructing the jury to deliberate further in the case, noting that the trial court did not tell the jurors to go against their individual consciences.

Lastly, regarding sufficiency, the Court rejected the defendant's contention that the evidence was not sufficient to prove that he made a threat under the statutory or constitutional definition. In this case, the Court agreed that the jury could conclude that the defendant's statement that he would burn down city hall reasonably conveyed a serious intent and would cause a listener to believe that he would act on that intent. The Court ruled that the evidence was therefore sufficient to support the jury's finding that the defendant's statement that he would burn down city hall was a threat.

Regarding sufficiency of intent under § 18.2-83, the Court repeated that in establishing the element of intent, the Commonwealth must show, at a minimum, that the offender consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The Court ruled that the evidence was sufficient for the jury to find that the defendant intended to make and communicate a threat to burn down city hall. Further, the Court agreed that the evidence supported a finding that, at a minimum, when speaking with the police, he "consciously disregarded a substantial risk that his" statement "would be viewed as threatening violence."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1805224.pdf>

Sheets v. Commonwealth: May 7, 2024

Washington: Defendant appeals his conviction for Rape on Jury Instruction issues.

Facts: The defendant raped the victim. During trial, one of the jury instructions addressed how the Commonwealth would have to prove intimidation. At the conclusion of the evidence, the trial court orally read all the jury instructions to the jury, including the intimidation instruction. However, the trial court later learned from the jury that they did not receive a copy of the intimidation instruction.

The trial court directed the jury to stop deliberating. The trial court conferred with counsel and then gave each juror a copy of the missing instruction and a new packet of all the jury instructions. Later, the defendant complained that the instruction was not provided to the jury early enough in their deliberations. The defendant also complained that the jury was not instructed to restart its deliberations or to reconsider what had already been discussed now that it had the proper instruction on what would constitute intimidation.

Held: Affirmed.

In this case, given that the trial court orally gave the instruction before the jury began deliberating, and given that the trial court provided each juror a copy of the instruction early in its deliberations (and before the jury had reached any verdict), the Court concluded that the facts here do not at all resemble a “defect affecting the framework within which the trial proceeds.” Consequently, the Court ruled that the trial court’s delay in providing the jury a copy of the instruction – an instruction it had already given the jury orally – was not a structural error.

The Court further rejected the defendant’s contention that the trial court erred by not issuing new guidance to the jury after it provided each juror a paper copy of the instruction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0081233.pdf>

Davis v. Commonwealth: November 21, 2023

Spotsylvania: Defendant appeals his convictions for Possession of a Controlled Substance, Possession of a Firearm by Felon, Transportation of a Firearm by a Felon, Carrying a Concealed Weapon by a Felon, and related charges on Double Jeopardy, Admission of Court Records, Jury Instruction, and sufficiency grounds.

Facts: The defendant possessed fentanyl and two handguns while he was driving a car. Police stopped him because his vehicle was reported as stolen. The defendant then ran on foot from law

enforcement, taking a firearm with him as he fled into the woods. Thirty minutes later, police apprehended him and discovered that he was carrying the gun concealed. The defendant admitted to being a convicted felon. An officer searched the defendant and found pills, which the defendant stated were Percocet.

Prior to trial, the defendant moved to dismiss one of the two charged offenses under § 18.2-308.2, to wit: Possession of a Firearm by Felon and Carrying a Concealed Weapon by a Felon, on Fifth Amendment double jeopardy grounds. The trial court denied the motion.

At trial, the officers testified about the firearms that they recovered. One officer testified that the item he found in the front seat of the vehicle was a nine-millimeter Smith and Wesson pistol. He explained that he had experience with firearms and could tell if a gun was “real.” The officer said that the item was a “real gun” and recited its serial number.

The other officer testified that he had experience with firearms, testified that the item he found on the defendant’s person was a “forty-caliber Smith and Wesson handgun semiautomatic with an extended mag and . . . one round in the chamber.” He specified that this item was a “real gun.” The officer explained that after he recovered the gun, he “rack[ed] it” to expel the bullet that was “in the chamber.” The officer provided its serial number and also described it as a “real gun.” The juries watched the video recording from the officer’s body-worn camera that showed one of the guns when officers found it on the defendant’s person. The video also recorded the officer clearing the cartridge from the chamber of that gun.

At trial, the defendant argued that the Commonwealth did not lay the proper foundation to allow testimony that the items were firearms under the statute. He suggested that the testimony of the officers did not exclude the possibilities that the items were toys or replicas.

To prove the defendant’s previous felony conviction, at trial, the Commonwealth introduced documents from the Circuit Court of Prince George’s County, Maryland, which identified the defendant by his full name and date of birth. They reflected that the Maryland court accepted the defendant’s guilty plea to the charge of “Robbery with a Dangerous Weapon” and that he was convicted of that offense. They also include a copy of the grand jury indictment, which charged that the defendant committed robbery in violation of Maryland Criminal Law Code § 3-403 and recited the elements of that offense. Maryland Criminal Law Code § 3-403, robbery with a dangerous weapon, is a felony. The Commonwealth presented a copy of that code section to the trial court, and the trial court admitted a copy into evidence.

The officer also testified that the NCIC report listed the defendant’s felony conviction for robbery with a deadly weapon in violation of “CR3403MD,” indicating Maryland Criminal Law Code § 3-403. The officer also recited the case number, which matched the case number provided on the Maryland court documents. Although the officer did not explain who maintains the NCIC database during his testimony, he stated that he routinely relied on information contained within it for police matters.

At trial, the defendant argued that the documents failed to meet the relevancy standard because they did not satisfy the requirements of a judgment order.

At trial, a forensic scientist testified that Percocet contains oxycodone, a Schedule II controlled substance. In fact, however, the scientist testified that she located fentanyl, a different Schedule II

controlled substance, in the pills. The defendant argued that the Commonwealth failed to prove that he knew the nature of the controlled substance in his possession.

Lastly, the defendant objected to the language in the jury instructions that referred to him as the “defendant.” The defendant contended that the use of the term “defendant” in the jury instructions instead of his surname biased the juries against him and therefore did not comport with the tenet that he was innocent until proven guilty. The defendant argued that by referencing him as “the defendant” in the jury instructions, the trial court improperly shifted the burden of proof to him and away from the Commonwealth.

Held: Affirmed. The Court held that the two convictions under § 18.2-308.2 involving the same gun do not violate the defendant’s constitutional protection against double jeopardy. The Court also ruled that the trial court acted within its discretion by admitting officer testimony that the guns were “real.” The Court held that the trial court also properly admitted the Maryland court documents. The Court held that the evidence was sufficient to prove that the defendant had previously been convicted of a felony, that each gun in his possession met the applicable legal definition of a firearm, and that his possession of a controlled substance was knowing. Finally, the Court held that the trial court did not err by rejecting the defendant’s suggested jury instruction wording to refer to him by name instead of as “the defendant.”

Regarding the defendant’s double jeopardy argument, the Court repeated that, under *Baker*, each separate act or occurrence violating § 18.2-308.2 constitutes a separate offense. The gravamen of each of the firearm offenses proscribed by the statute is placing the community in “heightened danger,” so consequently, each separate instance resulting in a heightened danger to the community may be punished separately. In this case, although he ultimately was caught not far from his car, the Court found that the defendant’s act of taking the firearm with him, concealing it, and keeping it with him for the thirty minutes during which he evaded police created a heightened danger to the community separate and distinct from the danger when the officer first encountered him in the car. Therefore, the Court ruled that the trial court did not err by denying the defendant’s pre-trial motion to dismiss one of the charges on double jeopardy grounds.

In a footnote, the Court pointed out that *Baker* addressed three convictions for possessing a firearm under § 18.2-308.2. This case, the Court pointed out, involved two alternative ways in which the Commonwealth can establish a violation of § 18.2-308.2: possession of a firearm and carrying it in a concealed manner. The Court explained that, just as someone can possess the same firearm in separate instances, giving rise to separate offenses, it concluded that someone could possess a firearm in one instance and carry it in a concealed manner in a second instance, similarly supporting separate charges and punishments.

Regarding the sufficiency of the evidence about the firearms, the Court repeated that the Commonwealth was not required to show that the items were operable at the time of the offenses. The Court also explained that the testimony did not have to exclude all possibility that the items were toys or replicas in order to be admissible. In this case, the Court ruled that the juries could reasonably conclude that the items in question were “designed, made, and intended to fire or expel a projectile by means of an explosion” and therefore, the Commonwealth presented evidence sufficient to prove that the items were firearms within the meaning of § 18.2-308.2.

Regarding the evidence of the defendant's previous felony conviction, the Court ruled that the documents, viewed together as a single exhibit, provided enough information to permit a fact finder to conclude that the defendant was previously convicted of a felony. The Court also agreed that the defendant's admission, the Maryland documents, and the NCIC information met the Commonwealth's burden of proving that the defendant had a previous felony conviction.

Regarding the nature of the controlled substance, the Court repeated that in proving the offense of illegal drug possession, the knowledge requirement may be met by showing that the defendant knew the identity of the substance he possessed, regardless of whether he knew it was illegal. In this case, the Court noted that the evidence that the defendant believed he had Percocet was enough to show that he had knowledge of the pills' nature and character as a Schedule II controlled substance.

In a footnote, the Court pointed out that the trial court had also instructed the jury that "the defendant does not need to know precisely what controlled substance" he possessed, although this issue is pending an *En Banc* hearing in *Camann v. Commonwealth*, which had yet to be decided as of this ruling.

Regarding the defendant's complaint about using the word "defendant" in jury instructions, the Court complained that the defendant cited no authority holding that a trial court must refer to a defendant by name in the jury instructions, and the Court itself did not find any authority either. The Court explained that the term "defendant," in a criminal proceeding, means nothing more than the "person . . . accused" of the crime or crimes. Accordingly, the Court ruled that the trial court did not abuse its discretion by referring to the defendant as "the defendant" in the jury instructions.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0903222.pdf>

Cheripika v. Commonwealth: September 19, 2023

78 Va. App. 480, 891 S.E.2d 754 (2023)

Fluvanna: Defendant appeals his convictions for Child Sexual Assault Under 13 on admission of Prior Bad Acts, Admission of Medical Records, Prohibiting Access to the Internet in Discovery, a Jury Instruction, and the Constitutionality of his Mandatory Life Sentence.

Facts: The defendant repeatedly sexually assaulted his own stepchild from age eight to age twelve. The child disclosed the years of abuse to her mother and revealed the abuse but could not remember specific dates because it happened at least two or three times a week for a long period of time. The mother contacted the police, who immediately investigated, along with CPS.

After speaking with police and CPS, the defendant left the family home and admitted himself into a hospital in New Jersey. While receiving mental health treatment, the defendant admitted that he had sexually assaulted a child who was a member of his family. The medical records also indicated that "everything seemed normal" when the defendant's mother saw him for Easter, but a couple days later, he wanted to go to New Jersey for treatment. A police investigator obtained and executed a search warrant for the defendant's medical records.

Before trial, the defendant moved to exclude from the evidence his medical records from the hospital in New Jersey that contained his admission that he had sexually assaulted a child who was a member of his family. He argued that admitting the records would violate his right to confront his accusers. The trial court denied the motion, finding that the statements were not testimonial because he was at the hospital seeking treatment.

The defendant elected to proceed pro se despite having several attorneys appointed for him. During discovery, the defendant asked the trial court to allow him to access the internet to “try and receive defense information” and “print off other materials as part of [his] defense.” The defendant asserted that he needed internet access to retrieve exculpatory evidence from cloud storage. He also argued that his lack of internet access violated his First Amendment rights. The defendant did not proffer what information was in the cloud storage, or what the nature of the purportedly exculpatory evidence was; he stated only that “they’re documents.” The trial court denied the defendant’s motion, finding that there was “nothing specific enough” for it to act upon.

The defendant had also sexually assaulted the victim’s sister, who was three years younger. At trial, over the defendant’s objection, the sister testified as well that the defendant sexually abusing her when she was eight years old. The defendant objected that the testimony served no purpose other than to prove his propensity to commit sexual offenses, but the trial court rejected his argument. Nonetheless, the Court instructed the jury that it could consider the other child’s testimony “only as evidence of [the defendant’s] motive or intent or as evidence of [his] scheme or plan as evidenced by his conduct and feelings toward the victim.”

At trial, the trial court gave the Flight instruction, over the defendant’s objection. The defendant had asserted that the record was devoid of evidence that he fled the scene of the crime to avoid detection, apprehension, arrest, or criminal prosecution.

During sentencing, the trial court appointed the defendant’s standby counsel for the sentencing phase of the trial. The defendant’s convictions for object sexual penetration of a victim under the age of 13 carried mandatory minimum terms of life imprisonment per § 18.2-67.2. The trial court sentenced him to the mandatory minimum of life imprisonment for each of two charges.

The defendant unsuccessfully asserted that the mandatory life sentences were grossly disproportionate to his crimes, arguing that he was a first-time offender with no criminal record. He also argued that the mandatory sentences violated his Sixth Amendment right to counsel because although represented, his attorney could do nothing to change the mandatory sentences. The trial court rejected the defendant’s argument that the mandatory life sentences were unconstitutional.

Held: Affirmed.

Regarding the defendant’s prior sexual assaults against the other child, the Court repeated that when the prior sexual abuse was committed against another victim, evidence of the abuse may be admissible to demonstrate a defendant’s common motive, method, plan, or scheme, particularly in prosecutions for crime involving “a depraved sexual instinct.” The Court repeated that acts “showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character.”

In this case, the Court reasoned that when the two daughters provided substantially similar testimony that described the defendant’s same pattern of abuse, each daughter’s testimony had

significant probative value of demonstrating the defendant's incestuous disposition toward his daughters and that his offenses against both were "inspired by one purpose." The Court found that the other child's testimony describing the sexual abuse was highly probative of the nature of the defendant's relationship with both children and established the parallel conduct of his abuse with both girls.

The Court pointed out that the children were siblings in the same household and close in age. Both testified that the defendant began abusing them when they were eight years old, which the Court reasoned demonstrated that he was sexually attracted to children of that age. The Court also noted that the defendant employed the same method of abuse with both children. Thus, the Court concluded that their testimony highlighting the defendant's parallel conduct was highly probative of the common scheme and method he employed to abuse the victim in this case.

The Court also relied on the trial court's jury instruction, repeating that it would presume the jury followed the trial court's limiting instruction.

Regarding the defendant's medical records, the Court found that the circumstances surrounding the challenged records demonstrated that the defendant was seeking medical treatment, during the defendant's treatment for his suicidal ideation. The Court applied *Crawford* and concluded that the primary purpose of the statements was not to create an out-of-court substitute for trial testimony. Rather, the statements were made to properly document the defendant's medical chart for his treatment. Accordingly, the Court found that the statements in the defendant's medical records were not testimonial, and the trial court did not abuse its discretion by admitting them.

Regarding the defendant's request for Internet access in discovery, the Court complained that the defendant failed to provide any proffer—let alone an adequate one—of the information he sought to obtain from the internet. On this record, the Court found no basis to determine whether the trial court committed reversible error by denying him that access.

Regarding the flight instruction, the Court agreed that there was sufficient evidence for the jury to have concluded that the defendant travelled to New Jersey to avoid detection, apprehension, arrest, or prosecution. The Court noted that there was no evidence that demonstrated that he could not seek treatment within the Commonwealth, a circumstance from which a rational factfinder could conclude he sought to distance himself from apprehension.

Regarding the constitutionality of the defendant's life sentences, the Court again declined to engage in a proportionality review, as the defendant's life sentence does not lack the possibility of parole. The Court noted that the defendant's convictions were not Class 1 felonies, so he will be eligible for geriatric release under § 53.1-40.01. Therefore, although the defendant was sentenced to life in prison, he was not sentenced to life without parole.

The Court also rejected the defendant's argument that the mandatory sentences deprived him of counsel who could advocate on his behalf. The Court found that the record demonstrated that despite the predetermined sentences, the defendant's counsel challenged the validity of the mandatory sentences, argued that the sentences should not have been imposed, addressed the Commonwealth's arguments, and cross-examined a witness. The Court noted that counsel's actions during the sentencing hearing preserved the defendant's arguments for appeal. Thus, the Court concluded that the defendant's Sixth Amendment right to counsel was fully vindicated at the sentencing hearing.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1153222.pdf>

Virginia Court of Appeals -

Unpublished

Pough v. Commonwealth: May 28, 2024

Portsmouth: Defendant appeals his conviction for Murder on Fourth Amendment, Fifth Amendment *Miranda*, Jury Instruction, and sufficiency grounds.

Facts: The defendant saw a man chase his girlfriend into their house over allegedly stolen marijuana. The defendant stabbed the man over sixty times in the back and side. The defendant disposed of the victim's body in a trash can and drove the victim's car for two days.

Two days after the murder, however, after seeing officers in the place where the defendant had last parked the stolen car, the defendant called 911 and reported that he was in possession of a stolen automobile and that the automobile's owner was dead and "stored in a nearby trash can." In response, officers went to the defendant's home. Both were wearing uniforms and displaying their badges and had guns visible in their holsters. When they first encountered the defendant on the sidewalk in front of his home, they asked if he had any weapons and briefly patted him down. An officer told the defendant to take a deep breath, relax, "sit down," and explain the situation. The officers did not give the defendant any *Miranda* warnings at this time.

After the defendant confessed to the murder, officers discovered the body and arrested the defendant. He told the officers that his father was inside the home. Officers then entered the home and did a protective sweep of the house. Officers later explained that they did that "to secure it so there [were] no other people inside." Officers located the defendant's father and girlfriend inside the home. They secured the home, obtained a search warrant, and executed the warrant. Police also interrogated the defendant at the police station after informing him of his *Miranda* rights.

Prior to trial, the defendant moved to suppress. The defendant moved to suppress the evidence due to the protective sweep on Fourth Amendment grounds and moved to suppress his statements to police on Fifth Amendment grounds. In support of his argument that the conversation amounted to a custodial interrogation, the defendant noted that he was underage at the time of the conversation, there were multiple officers present, the officers never told him that he was free to leave, and they did not question him in his father's presence. The defendant further argued that the post-*Miranda* statement he gave at the police station should be suppressed, because it was the "natural outflow of the prior statements" he made "without the benefit of *Miranda* warnings."

The Court denied the motions to suppress.

At trial, the Commonwealth did not call the defendant's girlfriend as a witness. The Commonwealth asserted that it could not make her incriminate herself in court and the girlfriend was not a material witness. As a result, the defendant proffered a jury instruction that "[t]he unexplained failure of the prosecution to produce a material witness raises a presumption that the testimony of that

witness would have been adverse to the prosecution, and beneficial to the defendant.” The trial court denied the instruction.

At trial, the defendant claimed self-defense, citing the 2018 *Lienau* ruling to support his argument that “a violent, unwanted entry can constitute an overt act that may reasonably place a party in fear for their own life.” The trial court rejected that defense.

Held: Affirmed.

Regarding the Fourth Amendment challenge to the officers’ “protective sweep” of the home, the Court ruled that the protective sweep was justified as a warrantless search under the Fourth Amendment. The Court reasoned that the warrantless entry was a reasonable response to police perception of possible danger based on the defendant’s statement that someone else, appellant’s father, was inside the home. The Court explained that the fact that the defendant indicated his father was not aware of the situation did not automatically negate the threat the father may have posed; instead, it was reasonable for police to secure the premises in case other occupants posed a similar danger. The Court contended that the fact that police detained the defendant before entering did not render the sweep unreasonable, because they had reason to believe that the house harbored at least one other person.

Regarding the defendant’s Fifth Amendment *Miranda* argument, the Court concluded that the defendant was not subject to a custodial interrogation when he made his initial, pre-*Miranda* statements, because his freedom of movement was not restrained to the degree associated with formal arrest. The Court observed that the conversation took place at the defendant’s home. The Court pointed out that there was no evidence that officers were intentionally blocking him or physically restraining him until the conversation concluded. The Court noted that although officers patted the defendant down for weapons, it was not prolonged and did not restrict the defendant’s freedom of movement. The Court also noted that the defendant volunteered most of the information with only minimal prompting by police. The Court also pointed out that the tone remained casual the entire five-minute conversation.

Regarding the defendant’s post-*Miranda* statements, the Court pointed out that, unlike in *Seibert*, there was no evidence suggesting that police used a deliberate, two-step strategy to obtain the defendant’s second statement. The Court agreed that in their initial interview, officers were “simply trying to find out what happened” and that *Miranda* warnings were not required as a result.

Regarding the defendant’s proposed jury instruction, the Court ruled that because the jury instruction was not a clear statement of the law and was not supported by the evidence, the trial court did not err in rejecting it. The Court explained that a missing witness presumption instruction would be improper in a criminal case, regardless of which party it would favor.

Regarding sufficiency, the Court pointed out that the defendant followed directly behind the victim going up the stairs and stabbed him primarily in his left side and back, so the fact finder could reasonably infer that the victim was not facing the defendant head-on in an act of aggression. The Court also noted that the victim did not have anything in his hands, did not say anything to the defendant directly, and did not even look in the defendant’s direction. In a footnote, the Court rejected the defendant’s reliance on the *Lienau* ruling, noting that the victim did not use force or violence to enter the defendant’s home but simply came through the door that the girlfriend had left open. For these reasons, the Court explained that *Lienau* does not support the defendant’s self-defense argument.

Further, the Court contended that the defendant's use of a deadly weapon was not reasonable in relation to the harm threatened. Instead, the Court found that the defendant's reaction was grossly disproportionate in light of the harm threatened. Consequently, the Court ruled that the evidence was sufficient to permit a rational fact finder to reject the defendant's self-defense theory.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0236231.pdf>

James v. Commonwealth: May 21, 2024

Henrico: Defendant appeals his conviction for Rape on Jury Instruction issues.

Facts: The defendant raped an intoxicated victim while she was asleep. Dr. Robyn Amos-Kroohs testified as a toxicology expert for the Commonwealth, while the defendant called Dr. Richard McGarry as a toxicology expert for the defense.

At trial the defendant proffered two jury instructions defining criminal negligence. The defendant argued that, because his defense rested on a claim of consent, it was proper to instruct the jury on the standard for criminal negligence. The defendant asserted that his instructions properly defined the terms "knew or should have known."

The first proposed instruction read:

"In order to find the defendant guilty of rape the Commonwealth must show that the defendant knew or should have known that . . . [S.T.] was mentally incapacitated or physically helpless. The requirement that the defendant knew or should have known means that the Commonwealth has to show that the conduct of the defendant constitutes a great departure from that of a reasonable person (gross, wanton or willful conduct) which creates a great risk of harm to others and where by the application of an objective standard the accused should have realized the risk created by his conduct."

The second proposed instruction read:

"To prove that the Defendant knew or should have known that the Defendant was mentally incapacitated or physically helpless requires the Commonwealth to prove that the conduct of the Defendant was of a wanton or willful character, committed or omitted, show a reckless or indifferent disregard of the rights of others, under circumstances reasonably calculated to produce injury, or which make it improbable that injury will be occasioned, and the offender knows, or is charged with the knowledge of, the probable result of his [or her] acts."

The trial court rejected both instructions. In doing so, it questioned whether the first instruction would assist the jury in understanding the meaning of "knew" or "should have known" because the language was confusing. Further, the trial court noted that the instruction contained additional undefined words, such as wanton and gross.

Held: Affirmed. The Court agreed with the trial court that the defendant's proffered instructions were "confusing" and "convoluted." The Court accepted the trial court's finding that a reasonable juror

with reasonable intelligence could easily be confused by the defendant's instructions and that the use of several additional and undefined terms in the instructions—such as gross, wanton, and willful—would serve only to cause confusion. Finally, the Court refused to overrule the trial court's finding that the instructions were duplicative considering other accepted instructions.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1557222.pdf>

Farley v. Commonwealth: May 14, 2024

Mecklenburg: Defendant appeals his convictions for Rape, Burglary, Arson, Aggravated Malicious Wounding, and related offenses on Jury Instruction and sufficiency grounds.

Facts: The defendant broke into the home of his mother-in-law, who had custody of his two daughters, raped, beat, and sexually assaulted her, and then set her house on fire. To escape, the victim leapt from a window, causing her severe injuries. Due to the injuries, the victim had to use a cane to walk and needed knee replacement surgery. At trial, the defendant argued that he did not proximately cause that injury, but the trial court found otherwise.

At trial, the parties agreed on a jury instruction for sodomy under § 18.2-67.1. The agreed instruction stated that to establish sodomy the Commonwealth had to “prove beyond a reasonable doubt” the defendant’s penis “penetrated into the mouth, anus or sexual organ of D.W. . . . against her will” and “by force, threat or intimidation.” The defendant did not object to this instruction at trial.

After trial, the defendant complained that the jury was misinformed on the elements of the offense. He asserted that the jury could have believed his testimony that the fellatio was consensual, and thus not a crime, but found he committed sodomy because the penetration of his penis into the victim’s “sexual organ” was nonconsensual.

Held: Affirmed.

The Court noted that a sodomy conviction under § 18.2-67.1 requires proof of cunnilingus, fellatio, anilingus, or anal intercourse. Even though the instruction improperly stated the elements of the offense, the Court held that no reversible error occurred. The Court repeated that “It can hardly be a ‘grave injustice’ for a trial court to give an agreed upon jury instruction.”

The Court acknowledged that a “grave injustice” occurs if a jury instruction omits an element of the crime and the Commonwealth failed to prove the omitted element. In this case, however, the Court noted that the defendant did not deny that fellatio had occurred; he asserted only that the victim had initiated the oral sex. The Court distinguished the *Campbell* case, noting that the instruction in this case did not omit an essential element of the offense, and evidence pertaining to the elements required to prove sodomy was presented. The Court found that in this case the error was harmless because there was overwhelming evidence that the defendant’s penis penetrated the victim’s mouth without her consent.

Regarding the Aggravated Malicious Wounding offense, the Court agreed that the injuries inflicted by the defendant were a “permanent and significant physical impairment.” The Court also agreed that the defendant proximately caused the knee injury because the victim hurt her knee when she jumped out of her bedroom window to escape from the defendant.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0234232.pdf>

Heverin v. Commonwealth: May 14, 2024

Mecklenburg: Defendant appeals his convictions for Attempted Aggravated Murder, Conspiracy to Commit Murder by Mob, and related offenses on Denial of Cross-Examination, Double Jeopardy, Jury Instruction, and sufficiency of the evidence grounds.

Facts: The defendant conspired with a group of individuals to invade a home and steal a collection of guns. The defendant and his coconspirators discussed the plan to burglarize the home and cased the house. On the night of the attempted robbery, they wore dark clothing to conceal themselves to enter the home, took guns to the property, drove to the house, approached the house, and came within 20 feet of the home.

However, a confidential informant had alerted police to the plan. On the night of the attempted robbery, officers hid at the targeted home awaiting the defendant and the three other armed men. When one member of the defendant’s group reached the porch of the house, someone in the group said, “that’s twelve,” a slang term for the police. After the officers yelled “freeze,” someone fired a gun, and the group fled. A shootout ensued between the defendant, his accomplices, and the officers. One of the defendant’s accomplices was killed, and another was injured. None of the officers were injured or killed. The officers subsequently arrested the defendant and the other man at the scene.

The defendant later told another inmate that he had a gun and that he fired it while running to escape in the woods. The defendant said he “shot till his clip was empty.” Afterward, he tried to hide his gloves, mask, and gun.

Prior to trial, the Commonwealth argued during a motions hearing that the defendant should be prohibited from inquiring into or presenting evidence regarding the lack of officer body camera footage from the shootout. The Commonwealth explained that the officers followed policy in turning off their cameras and that the officers were concerned with following appropriate policy and federal law while carrying out a tactical maneuver that included communications based on classified and confidential information.

The defendant unsuccessfully argued that the trial court violated his constitutional rights by limiting his presentation of evidence and cross-examination regarding the lack of body-worn camera recordings from the night of the attempted burglary. He contended that he should have been allowed to present evidence and cross-examine the deputies to challenge their credibility or to establish bias. The trial court granted the Commonwealth’s motion to exclude the evidence.

At trial, over the defendant's objection, the trial court granted the Commonwealth's "Concert of Action" jury instruction. The defendant argued that this was error for two reasons: (1) that the jury instruction did not apprise the jury that the Commonwealth must prove the defendant's specific intent, and (2) the Commonwealth was required to prove that the defendant was a triggerman to secure an attempted aggravated murder conviction.

At trial, among other charges, the trial court found the defendant guilty of six counts of attempted aggravated murder of a law enforcement officer. The defendant unsuccessfully argued that he could not be convicted of attempted aggravated murder as a principal in the second degree because of the "Triggerman" rule. The defendant also unsuccessfully argued that he lacked the required specific intent for each of the six attempted aggravated murder charges, because he did not intend to kill each of the six deputies. Lastly, the defendant unsuccessfully argued that the multiple convictions for attempted aggravated murder violated his constitutional protections against multiple punishments.

Held: Affirmed.

The Court first ruled that the "triggerman rule" does not apply to Attempted Aggravated Murder. The Court found, therefore, that the defendant could be (and was) found guilty as a principal in the second degree based on the concert of action theory of conspiracy, as there was evidence that the defendant's group fired far more than six shots at the officers. As a result, the Court explained, the Commonwealth did not need to prove that the defendant was individually responsible for each of the six attempted aggravated murders, even though the evidence supported that inference. Instead, through the concert of action theory, the defendant was liable for his coconspirators' actions as well as his own.

Regarding intent for Attempted Aggravated Murder of an Officer, the Court explained that the intent required is merely that the defendant intended to kill someone, not a particular person. In this case, because the defendant and the coconspirators were engaging in criminal activity, the Court agreed that the jury could also infer that the defendant shot at the officers to interfere with their official duties. The Court reaffirmed that it is "entirely permissible to infer that every person intends the natural and probable consequences of his or her acts."

Regarding the conviction for Conspiracy to Commit Murder by Mob, the Court found that a reasonable jury could find, based on all this evidence together, that the group had either a spoken or unspoken agreement to commit murder by mob if they received any resistance to their burglary plans.

Regarding the cross-examination about the lack of body camera footage, the Court complained that the defendant did not explain how the proposed evidence would go to the issue of bias of the witness or motive of the witness to fabricate. In this case, the Court noted that the Commonwealth gave an explanation regarding the lack of body camera footage and the defendant failed to offer any evidence refuting that explanation. The Court concluded that the fact that the body camera footage was absent does not, by itself, prove any wrongdoing or bias by the deputies, especially because the Commonwealth argued that the department followed its policies. Thus, the Court ruled that it was neither unconstitutional nor an abuse of discretion for the trial court to exclude evidence of the lack of body camera footage, especially given the unique circumstances of this case.

Regarding the defendant's double jeopardy argument, the Court ruled that because the evidence was sufficient to convict the defendant of all six attempted murder charges, the trial court did not violate the defendant's constitutional protections. The Court explained that there was enough

evidence to support the defendant firing his gun six times and thus there were six separate criminal acts by the defendant, all punishable without violating double jeopardy.

Regarding the defendant's jury instruction argument, the Court repeated that "concert of action" is an accepted theory of culpability for attempted murder. In this case, the Court agreed that the Commonwealth put on more than enough evidence to support the theory that the defendant was working with his coconspirators to commit a burglary and in the course of the commission of that crime he and his coconspirators engaged in a shootout with the deputies. Thus, the Court ruled that it was not error for the trial court to give this instruction.

The Court again rejected the defendant's "triggerman" argument. The Court explained that §18.2-18 excludes principals in the second degree to aggravated murder from the rule by stating "principal[s] in the second degree to an aggravated murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." The Court found that the statute does not exclude principals in the second degree to attempted aggravated murder from being punished as a principal in the first degree.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1239222.pdf>

Jones v. Commonwealth: May 7, 2024

Pittsylvania: Defendant appeals his convictions for Malicious Wounding and Destruction of Property on Denial of Jury Instructions.

Facts: The defendant's wife attacked a woman during an argument, knocking her to the ground and stomping on her head. When someone attempted to stop the attack, the defendant struck the victim from behind in the back of the head with a piece of steel rebar, causing a severe head injury.

Before closing arguments, the trial court provided a "waterfall" instruction to the jury defining the offense of malicious wounding and the lesser-included offenses of unlawful wounding and assault and battery. The Court also gave an instruction defining the word "malice" and another explaining the law of defense of others. The trial court also instructed the jury that it could "infer that every person intends the natural and probable consequences of his acts." Lastly, the court provided an instruction which defined a "deadly weapon" and stated, "You may, but are not required, to infer malice from the deliberate use of a deadly weapon unless, from all the evidence, you have a reasonable doubt as to whether malice existed."

The defendant requested three additional instructions. The defendant first asked for an instruction that clarified that the jury did not have to presume that he intended the "probable consequences" of his actions and reminded the jurors of their obligation to find him guilty of a lesser-included offense of malicious wounding if they had a reasonable doubt regarding his intent. Second, the defendant asked to instruct the jury that "[i]t is a husband's duty to protect his wife, and in doing so he may injure another in her defense." He asserted that the instruction was necessary to clarify the instruction defining defense of others.

Lastly, the defendant requested an instruction stating, “The word ‘disfigure’ means a permanent and not merely a temporary and inconsequential disfigurement. Similarly, the word ‘disable’ must refer to a permanent, not a temporary disablement.” He argued the instruction emphasized that malicious wounding required proof that he specifically intended to wound the victim permanently, rather than temporarily.

The trial court denied all three instructions.

Held: Affirmed. In this case, the Court simply found that each of the proffered instructions was “fully and fairly covered” by the granted instructions and therefore the trial court did not abuse its discretion in refusing the defendant’s proffered instructions.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1696222.pdf>

Webb v. Commonwealth: May 7, 2024

Pittsylvania: Defendant appeals his conviction for Aggravated Sexual Battery on Denial of a Circumstantial Evidence Instruction.

Facts: The defendant sexually assaulted a thirteen-year-old child. At trial, the Commonwealth partially relied on circumstantial evidence to corroborate the child’s account and discredit the defendant’s alternative version of events. However, the crux of the Commonwealth’s case was the victim’s testimony, which provided direct evidence of her sexual abuse.

At the conclusion of the evidence, the Court gave a jury instruction that defined the elements of aggravated sexual battery. The Court also gave the standard instruction that specified that the defendant was “presumed to be innocent,” the Commonwealth was required to prove each element “beyond a reasonable doubt,” and the defendant had no obligation “to produce any evidence.” That instruction also defined “reasonable doubt” as “a doubt based on [the jury’s] sound judgement after a full and impartial consideration of all the evidence” and explained that mere “suspicion or probability of guilt” was insufficient to convict.

The Court also gave the standard instruction that the jurors that they were the “judges of the facts, the credibility of the witnesses, and the weight of the evidence” and that they could “accept or discard” witness testimony after considering “all the evidence . . . and . . . circumstances of the case.”

The defendant also requested the “Circumstantial Evidence” jury instruction. The trial court found that the Commonwealth’s case relied primarily on direct evidence to prove the elements of the charged offenses. Accordingly, the trial court rejected the proffered instruction.

Held: Affirmed. The Court held that the trial court did not abuse its discretion by refusing the circumstantial evidence instruction because the Commonwealth did not rely exclusively or substantially

on circumstantial evidence to prove the charged offense and the granted jury instructions fully and fairly covered the same principles of law as the proffered jury instruction.

The Court examined the record and found that the Commonwealth's case was not wholly or substantially circumstantial and the proffered jury instruction was not warranted. Instead, the Court found that the granted instructions "fully and fairly" covered the principles of law contained in the proposed instruction. The Court concluded that those instructions fully and adequately informed the jury of its authority to weigh and draw inferences from all the evidence—including circumstantial evidence—and instructed the jury on the burden of proof and reasonable doubt.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0154233.pdf>

Jones v. Commonwealth: April 16, 2024

Henrico: Defendant appeals his conviction for Unlawful Wounding on Jury Instruction, Mistrial, and sufficiency grounds.

Facts: While obtaining marijuana from the victim, the defendant shot him. The defendant brought the firearm with him to purchase marijuana well after midnight. During the transaction, he phoned his cousin, who appeared to be waiting outside. He then brandished his firearm and instructed the victim to be quiet and get on the ground. When the victim lunged at him, the gun fired and the defendant shot the victim, resulting in serious injuries.

The defendant made statements to a police officer after the incident. The defendant also admitted to shooting the victim on recorded jail calls, calls that the Commonwealth admitted into evidence. At trial, the defendant claimed that someone else shot the victim.

During the jail phone calls, the defendant and the victim spoke to one another. Both referenced the fact that the defendant was in jail. The defendant discussed being released and "com[ing] back out there" "on the streets." At one point, the victim said to the defendant, "you're on a f&*ing jail call." The defendant also told the victim that he was not "trying to jail talk" with a man because he had women to do that with. The defendant talked about being "in here" and, trying to convince the victim not to testify, said that if he did not appear in court "they gotta let [him] up out of this" facility.

At trial, the Commonwealth sought to instruct the jury that if it believed that the defendant previously made a statement that was inconsistent with his testimony at trial, his prior statement could be considered as proof that what he previously said was true. The defendant objected and asserted that the evidence failed to show he made an inconsistent statement. He argued that his testimony at trial was entirely consistent with the statements he made to the officer.

During closing arguments, the Commonwealth referred to the defendant's "jail calls." The defendant objected and moved for a mistrial. The trial court denied the motion.

Held: Affirmed.

Regarding the jury instruction, the Court agreed that the statements that the defendant made in the jail calls were inconsistent with his trial testimony. Therefore, the evidence supported the jury instruction.

Regarding the defendant's motion for a mistrial, considering the "innocuous nature" of the prosecutor's comment in light of all of the facts and circumstances of this case, and that the calls themselves—even without the prosecutor's comment—indicated that they were made when the defendant was in jail, the Court concluded that the prosecutor's reference to "jail[call]s" in closing in no way interfered with the defendant's right to a fair trial. Accordingly, the Court ruled that the trial court did not abuse its discretion in refusing to grant the defendant's motion for a mistrial.

Lastly, regarding sufficiency, the Court found it entirely foreseeable that a shooting might occur when brandishing a loaded firearm.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1412222.pdf>

Johnston v. Commonwealth: March 26, 2024

Hampton: Defendant appeals his convictions for Manslaughter and related offenses on Denial of a Jury Instruction.

Facts: During an argument, the defendant shot and killed his girlfriend's father. At trial, the defendant proposed the following jury instruction: "If you find from a consideration of all of the evidence in the case that the defendant's claim of self-defense creates a reasonable doubt that he committed the offense, then you shall find him not guilty." The defendant argued that he was entitled to specifically instruct the jury that if it found that his claim of self-defense created a reasonable doubt that he committed the offenses, it had to acquit him. The trial court denied the instruction.

The trial court gave several model instructions including that the defendant was presumed innocent and could not be convicted unless the Commonwealth proved every element of each of the crimes beyond a reasonable doubt. The trial court also instructed the jury on self-defense and provided that the jury must find the defendant not guilty if it believed that he acted in self-defense. In addition, the trial court instructed the jury that if it had a reasonable doubt as to the grade of homicide, it must resolve that doubt in favor of the defendant.

Held: Affirmed. The Court ruled that the trial court's separate instructions on reasonable doubt and self-defense fully and fairly conveyed the substance of the defendant's proposed instruction. Further, the Court found that the defendant's proffered instruction was repetitious, and as such the trial court did not abuse its discretion by refusing to give it. The Court reasoned that the jury was able to consider the instructions together and conclude that they required it to acquit the defendant if it found reasonable doubt based on self-defense.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1761221.pdf>

Diaz Martinez v. Commonwealth: March 26, 2024

Fairfax: Defendant appeals his convictions for Murder and Gang Participation on Refusal of a Jury Instruction and sufficiency of the evidence.

Facts: The defendant and three other members of MS-13 abducted and murdered a child, beating him to death behind a school. They did so on orders of the MS-13 gang, who had ordered a “birthday party” for the victim, which is a form of violent gang-enforced discipline. The four attackers beat the victim to death, with the defendant joining the attack by helping to surround the victim and by striking one of the blows against the victim.

Police interviewed the defendant, who admitted to going to the school that night, admitted to knowing that the gang had ordered an attack on the victim, and admitted to meeting one of the co-conspirators at the school. Cellphone data confirmed that the co-conspirator had been at the crime scene that night.

At trial, one of the accomplices testified against the defendant. Prior to the trial verdict, the trial court denied the defendant a proposed cautionary jury instruction regarding uncorroborated accomplice testimony, finding that the accomplice’s testimony was corroborated by other evidence.

Held: Affirmed. The Court held that the trial court did not err in refusing the proposed cautionary jury instruction, as other evidence corroborated the accomplice’s testimony that the defendant was present during the murder. The Court also held that the evidence was sufficient to support a jury finding that the defendant participated in the murder as a principal in the second degree, as the defendant joined the other attackers and struck the victim at least once. Lastly, the Court held that the evidence was sufficient to convict the defendant of criminal street gang participation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0591224.pdf>

Holmes v. Commonwealth: March 19, 2024

Augusta: Defendant appeals his convictions for Strangulation and Assault and Battery on Expert Testimony and Jury Instruction grounds.

Facts: The defendant attacked the mother of his child and her teenage daughter on multiple occasions, strangling and striking them repeatedly over several months, once in front of a pastor’s wife.

At trial, over the defendant’s objection, the Commonwealth called Renee Pullen, a forensic nurse, as an expert on strangulation. The expert testified that strangulation is a form of asphyxia that occurs when an external pressure on the neck induces pressure in the veins, arteries, or airway

impeding oxygen or blood. She explained how the victim can be rendered unconscious from about 4 pounds and 10 seconds of pressure to the jugular veins in the neck—or 33 pounds of pressure applied to the airway. She also testified that although strangulation victims may sustain visible injuries, about half do not.

The defendant objected to the expert's testimony, contending that the subject matter was not beyond a lay person's common knowledge and did not help the jury understand the evidence or determine a fact in dispute. He also argued that the expert did not conduct a physical examination of either victim.

During the charging conference, the Commonwealth proposed instructing the jury, among other things, "You may infer that every person intends the natural and probable consequences of his acts." The defendant objected, arguing that the instruction created a "presumption" that would "short circuit" the jury's fact-finding function and relieve the Commonwealth of its burden to prove the defendant's intent beyond a reasonable doubt.

The defendant asked the trial court either to refuse the instruction or to give his alternative instruction: "You may infer that every person intends the natural and probable consequences of his acts, unless, from all the evidence, you have a reasonable doubt as to whether the consequences that resulted were in fact intended." The court rejected the defendant's instruction and granted the Commonwealth's.

Held: Affirmed.

Regarding the expert testimony, the Court found no abuse of discretion in the trial court's decision to admit the expert's testimony. The Court agreed that the time and pressure to render a person unconscious from strangulation are matters unlikely to be commonly known. The Court found that information to be useful to the jury in understanding the victims' testimony about being choked. The Court also noted that the expert's testimony that a visual mark is not left behind in about half of the cases in which a person has been strangled was also a matter beyond common knowledge and was relevant to understanding the strangulation incidents involving the victims.

Regarding the jury instruction, the Court reaffirmed its holdings in *Kelly*, *Schmitt*, and *Tizon* that repeatedly rejected the assertion that the "natural and probable consequences of his acts" instruction unconstitutionally shifts the burden of proof to the defendant. In this case, the Court pointed out that the trial court had already given the "presumption of innocence" instruction. Because that instruction fully and fairly covered the presumption of innocence and the Commonwealth's burden of proof on every element of the crime, the Court ruled that it was unnecessary to append a variation of that instruction to the permissive-inference instruction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0097233.pdf>

Gamaz Amaya v. Commonwealth: January 23, 2024

Prince William: Defendant appeals his convictions for Murder, Abduction, and related offenses on Admission of Hearsay and Jury Instruction issues.

Facts: The defendant and his fellow gang members murdered a man by stabbing him over a hundred times and cutting off his ear. After his arrest, the defendant called his sister from jail. A jail recording captured him telling his sister that his confederates were “innocent” and they had “nothing to do with it.” He claimed that they were “there because of ignorance.” When his sister urged him to defend himself, the defendant replied, “I know what I’ve done. I know I alone did it. ... I did the sin.” Later, the defendant claimed that he, not the victim, “would have been the dead person” if he had not defended himself.

At trial, a gang expert testified that only certain high-ranking gang leaders have the authority to order murders. Moreover, members from various cliques coordinate to execute such orders, and “[e]veryone [must] participate” to advance in rank.

At trial, one of the defendant’s fellow gang members testified against him. Consistent with the gang expert’s account, the witness testified that gang leaders ordered them to bring other victims to where the defendant was holding the murder victim captive. The defendant contended that the gang leaders’ statements were inadmissible hearsay. Over the defendant’s hearsay objection, the trial court permitted the gang member to testify that he received an order to kill the man from leaders of the gang. He explained that after the defendant and his cohorts transported the victim to the woods to murder him, they sought “permission to kill” him. After the call, the men stabbed and murdered the victim.

At the conclusion of trial, the defendant requested that the trial court give a jury instruction cautioning the jury on the “uncorroborated” testimony of a co-conspirator. The trial court denied the instruction, finding that the testimony was corroborated.

[Great job to Katie Pavluchuk and Dave Husar, ACAs, for their work in this case – EJC].

Held: Affirmed.

The Court ruled that the trial court did not abuse its discretion by allowing the co-conspirator to testify that the gang leaders ordered him to kill the victim under Virginia Rule of Evidence 2:803(0)(E), which permits a co-conspirator’s statements made during and in furtherance of a conspiracy. The Court ruled that evidence, independent of the challenged out-of-court statements, established a prima facie case of conspiracy among the MS-13 members to abduct and murder the victim. The Court found that the evidence permitted the trial court to infer that the gang members conspired with the defendant and the other MS-13 members to abduct and murder the victim. Accordingly, the trial court’s admission of the gang member’s testimony that the gang leaders ordered him to kill the victim under Rule 2:803(0)(E) was not an abuse of discretion.

Regarding the defendant’s request for a co-conspirator jury instruction, the Court repeated that although a jury may convict a defendant based solely on accomplice testimony, the danger of collusion between accomplices and the temptation to exculpate themselves by fixing responsibility upon others is so strong that it is the duty of the court to warn the jury against the danger of convicting upon their uncorroborated testimony. Conversely, though, the Court repeated that where accomplice testimony is corroborated, it is not error to refuse a cautionary instruction.

In this case, the Court agreed that the defendant's own statements to his sister corroborated the co-conspirator's testimony "in material facts" that "tend[ed] to connect" him to the charged offenses, "sufficient to warrant the jury in crediting the truth" of the testimony. Accordingly, the Court ruled that the trial court did not abuse its discretion in refusing the proffered cautionary instruction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1141224.pdf>

Jackson v. Commonwealth: November 8, 2023

Newport News: Defendant appeals his conviction for Murder on Fifth Amendment *Miranda* grounds, Admission of Text Messages, Refusal of a Jury Instruction, and sufficiency grounds.

Facts: The defendant and her confederate murdered a man. Over the next few weeks, the defendant and her confederate exchanged numerous text messages which the parties deleted from their phones, but that law enforcement obtained from the providers. Of note, one exchange involved her response to her confederate's comments, "I don't do back stabbing shit. I take head shots. I'm coming to u face to face," and "I'm terrible in a late [sic] of ways but far from weak male." The defendant responded that she "loved" those comments. The victim had suffered shots to his head and torso.

The second text message of note was the confederate's response to the defendant's comment, "It made me realize I really did but u was there for me when I couldn't count on nobody else u didn't hesitate." The confederate responded that he "loved" that comment.

Police arrested the defendant. While she was in custody, an officer informed the defendant of her right to counsel and right to remain silent. When she invoked her right to remain silent, the officer left the interrogation room to complete the booking process and to seek search warrants. About an hour later, the officer returned and gave the defendant a business card, expressed her understanding that the defendant did not wish to talk, and then offered to hear the defendant's side of the story because she knew that the defendant "was there" and that "there was a lot of" acrimony between the defendant and the victim's friend.

When the defendant clarified, "you mean at the restaurant, is that what you're talking about," the officer responded, "yeah, I know that was part of it, I know you were jumped." The officer explained that she wanted to hear the defendant's side of it and that she knew there were a lot of issues between the two women, but she was not going to push. The defendant then made a series of statements to the officer but did not confess to the murder.

Prior to trial, the defendant moved to suppress her statements. The defendant argued that the officer violated her constitutional right to have an attorney present before questioning by re-initiating conversation with her after she unequivocally invoked her *Miranda* right to remain silent. The trial court denied the motion.

Prior to trial, the defendant moved to exclude the text messages she and her confederate exchanged following the murder. The trial court found that the text messages were adoptive admissions of criminal behavior.

At the end of the trial, the defendant submitted a proposed jury instruction on concert of action, utilizing the Virginia Criminal Model Jury Instruction for that phrase but adding the language: “[t]he resulting crime must be the natural and probable result of the crime originally contemplated by the parties.” The Commonwealth objected to the use of the word “must” in the instruction and argued that the additional language imposed a higher burden upon the Commonwealth than the law demands. The trial court agreed with the Commonwealth.

The defendant also submitted a proposed jury instruction on shared criminal intent, which stated that the defendant “must have either known or had reason to know of [her confederate’s] criminal intention and must have intended to encourage, incite, or aid [his] commission of the crime.” The Commonwealth objected to the instruction, arguing that it incorrectly provided that both shared criminal intent and an intent to aid in the commission of the crime were necessary for one to be a principal in the second degree, when the law required only one or the other. The trial court agreed and denied the instruction.

Held: Affirmed.

Regarding the *Miranda* issue, the Court examined whether the statements the defendant made to the officer were the result of interrogation and, if so, whether the continued questioning was appropriate after an initial refusal to answer questions. The Court applied the five factors articulated in the 1995 case of *Weeks v. Commonwealth*. The Court agreed that the first three factors favored the Commonwealth, while the last two factors favored the defense. The Court found that under the *Weeks* factors that the defendant’s initial invocation of her right to remain silent was not violated.

The Court first concluded that the defendant’s initial invocation of her right to remain silent was not violated. The Court acknowledged that when the officer returned, the officer did not give the defendant fresh *Miranda* warnings and the interrogation was on the same subject matter. However, the Court repeated that “the failure to offer defendant a new set of warnings does not render the second interview unconstitutional.”

Regarding the admission of the text messages, the Court found no error in the trial court’s admission of the text messages, finding that they were admissible as adoptive admissions and statements against penal interest, probative, and relevant to the defendant’s guilt. The Court ruled that the trial court did not abuse its discretion in admitting the two messages under the adoptive admission exception to the hearsay rule. The Court found that the text messages were relevant to both the conspiracy and to the relationship between the defendant and her confederate, and they confirmed the defendant’s participation in the murder. The Court agreed that the messages were relevant to the Commonwealth’s theory of the case and their probative value outweighed the prejudice to the defendant.

Regarding the jury instruction on “concert of action,” the Court ruled that the Virginia model jury instruction sufficiently instructed the jury on concert of action in plain terms. The Court complained that the defendant’s proposed added language was unnecessarily repetitive and imposed a higher

burden upon the Commonwealth than the law required. Thus, the Court found that the trial court did not abuse its discretion in refusing the defendant's proposed instruction on concert of action.

Regarding the jury instruction on "principal in the second degree," the Court noted that the model jury instruction clearly provides that the defendant acted as a principal in the second degree if the evidence proved she shared in her confederate's criminal intent or if she intended to assist him in his commission of the crime. The Court found that the defendant's instruction was therefore inconsistent with the model jury instruction. Thus, the Court ruled that the trial court did not err in refusing the defendant's proffered instruction on shared criminal intent.

The Court also ruled that the evidence sufficiently proved that the defendant conspired with her confederate to kill the victim and that she was present at the scene of the crime assisting in and encouraging the commission of the offense.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1182221.pdf>

Barnes v. Commonwealth: November 8, 2023

Norfolk: Defendant appeals his convictions for Murder and related charges on Denial of a Jury Instruction on Eyewitness Testimony.

Facts: The defendant and his confederates abducted a man from a bar at gunpoint and brought him to an alley where they beat him. The man's friend came to his rescue, but the defendant shot and killed him. A video captured the abduction and murder. Several witnesses testified at trial, identifying the defendant.

At the end of the trial, the defendant offered a proposed jury instruction on eyewitness testimony. The defendant argued that the general instructions were insufficient because eyewitness identification is the least reliable type of evidence. He asserted that an instruction dealing specifically with eyewitness identification was warranted due to the inherent dangers of eyewitness identification testimony or the possibility of the witness making a sincere mistake. The trial court denied the instruction, instead granting the Virginia model jury instruction concerning the jury's role in judging the credibility of witnesses, the burden of proof, and circumstantial evidence.

Held: Affirmed. The Court found that the trial court appropriately instructed the jury regarding the Commonwealth's burden of proving identity beyond a reasonable doubt, as well as on the presumption of innocence. The Court concluded that the instructions given by the trial court addressed the defense theory that the eyewitness testimony lacked credibility and accuracy. As such, the Court reasoned that granting the defendant's proposed instruction would have been duplicative.

The Court repeated that under the Virginia Supreme Court cases of *Daniels* and *Payne*, it is within the trial court's discretion to deny an instruction on eyewitness identification.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0930221.pdf>

Mitchell v. Commonwealth: October 24, 2023

Portsmouth: Defendant appeals his conviction for Manslaughter on Denial of Voir Dire Questions and Denial of Jury Instructions.

Facts: The defendant confronted, shot, and killed the current boyfriend of his child's mother. When police arrived, the defendant admitted that he had been angry and intended to kill the victim. At trial, however, the defendant testified that he believed the victim was reaching for a weapon.

During voir dire, the defendant requested to ask the following voir dire question: "Does anyone here believe that no one other than a police officer should be allowed to carry firearms out in the open in public? If yes, would you hold a person who did responsible for anything bad that happened with the firearm regardless of the circumstance?" The trial court refused that question, but did permit the defendant to ask: "If there would be evidence presented that the defendant essentially always carries a firearm; so asking that, with that in mind, is there anyone here who has a strong feeling about firearms and guns that you think would make it difficult for you to be fair and impartial here today?"

At the end of the trial, the defendant asked the trial court to give two instructions, in addition to the standard self-defense instructions. The first read: "It does not matter if the belief later turns out to be erroneous that the defendant was in any real danger. As long as the defendant has reasonable grounds for believing that he was in danger of death or serious bodily harm, the killing is justifiable."

The defendant's second proposed instruction stated: "If a person stays at the place where a crime was committed, this creates no presumption that the person is innocent of having committed the crime. However, it is a circumstance which you may consider along with the other evidence."

The trial court refused those instructions.

Held: Affirmed.

Regarding the voir dire question, the Court ruled that the trial court did not abuse its discretion in denying the defendant's proposed voir dire question, particularly where another permitted question covered similar ground.

Regarding the defendant's jury instructions, the Court ruled that the defendant's proposed instructions improperly sought to focus the jury on specific evidence. Although the defendant was free to argue his reading of the facts to the jury in closing, the Court ruled that the trial court did not err in refusing to permit the instructions to focus on isolated facts.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0879221.pdf>

Smith v. Commonwealth: August 15, 2023

Norfolk: Defendant appeals his convictions for Murder, Child Abuse and Neglect, and related charges on Jury Instruction and sufficiency issues.

Facts: The defendant repeatedly left the victim, his four-year-old son, in the care of his girlfriend's fourteen-year-old son. Over the course of several months, the older son beat the child repeatedly until one day when he beat the victim to death. The defendant had been aware that the older child had been violent towards the victim.

During an autopsy, a physician determined that the victim died due to several severe beatings throughout the weekend. The physician noted that the victim's body was covered with 80 to 100 bruises, some of which were in groups, suggesting they were grip marks or knuckle marks. There were patterned injuries on the child's back suggesting he had been hit with a belt and sustained repeated injuries. The injuries were in various states of healing, indicating that the victim had sustained them over an extended period.

Police later interviewed the older child, who finally confessed to killing the child by punching him in the stomach while pinning him down with a knee. He also admitted to having choked the child earlier in the year.

A police investigation found that the defendant's cell phone contained photos, taken months before the murder, of bruises on the victim's body. The defendant admitted to police that the victim told him that the older child was hurting him, but the defendant did nothing but warn the older child to stop disciplining the victim, which the defendant admitted was ineffective. Someone also informed the defendant that the older child and his girlfriend were both abusing the victim.

The defendant was aware that the victim had come to harm while in the older child's care on other occasions. On one occasion, both boys had strangulation injuries that required emergency medical treatment at the hospital. Although the hospital warned the defendant, the defendant instead concocted a false narrative to protect himself from a CPS investigation. Three days before the victim's death, the defendant noticed bruises on the victim's body and saw that the victim was vomiting blood, in pain, and defecating. The defendant did not take the victim to the hospital, but instead again left the victim in the older child's care a couple of days later, which is when the victim finally died.

At trial, the parties agreed to use the Virginia Model Jury Instruction defining "willful." However, the defendant also proffered an additional proposed instruction regarding the meaning of "willful." His proposed instruction was as follows: "The term willful is stronger than voluntary or intentional; it is traditionally the equivalent of malicious, evil or corrupt." This proposed instruction used a Black's Law Dictionary definition of willful taken from *White v. Commonwealth*, 68 Va. App. 111, 119 (2017). The trial court refused the instruction, noting that the model jury instruction was sufficient.

Held: Affirmed.

Regarding the defendant's proposed jury instruction, the Court found that the model instruction the trial court granted was an accurate statement of law and provided the jury with proper guidance concerning a factual finding required for conviction. The Court explained that the trial court was not required to accept an additional instruction simply because it was taken from the language of an opinion. Accordingly, the Court found no abuse of discretion in the trial court's decision to refuse the defendant's proposed additional instruction on the term "willful."

The Court then concluded that the evidence was sufficient to prove that the defendant acted willfully under § 18.2-371.1(A). The Court agreed that the evidence was sufficient to prove that the defendant, like the defendant in Barrett, knew that the victim, was at risk of harm from the older child, and despite this risk, he repeatedly entrusted the victim to the older child's care.

In this case, the Court concluded that the defendant knew of the older child's propensity to injure the victim and recklessly ignored the prior situations in neglect of his duty to protect the victim. "Even assuming for a moment that Smith did not know that Robbie was the direct cause of L.C.'s injuries, he was, at minimum, aware that L.C. had been seriously harmed while in Robbie's care on multiple occasions, and he continued to leave L.C. in Robbie's care. A reasonable factfinder could conclude beyond a reasonable doubt that Smith's conscious decision to leave L.C. with Robbie while unsupervised created a situation likely to cause L.C. serious injury and even the death that ultimately resulted. Thus, we find the evidence was sufficient to find that Smith's actions were willful."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0346221.pdf>

Jury Selection

Virginia Supreme Court

Warren v. Commonwealth: March 14, 2024

Aff'd Court of Appeals Ruling of March 7, 2023

Chesapeake: Defendant appeals his conviction for DUI on Jury Selection issues and denial of his Defense of Necessity.

Facts: An officer stopped the defendant for driving 96 in a 60 mile-per-hour zone and learned that the defendant was intoxicated. The defendant claimed that he had just received a phone call from his cousin's girlfriend, who told him that his cousin had been shot, and was dying of a wound in front of his grandmother's home. The defendant told the officer that he got in his car and drove back to Portsmouth, because he had the belief that given the situation, it would take an ambulance quite a while to get to that scene to take his cousin to the hospital to receive medical treatment. The cousin died from that gunshot wound later that evening. The defendant's BAC was .12.

Prior to trial, the Commonwealth raised a pre-trial motion to object to the defendant's presentation of a necessity defense. The trial court required the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The defendant proffered the facts of the case and the trial court ruled that the facts were insufficient to support a defense of necessity and granted the Commonwealth's motion.

During voir dire of the jury pool, a juror stated that he had been convicted of felony DUI. However, the juror stated that the governor had restored his civil rights, although he did not know

when or which governor restored his rights. The Commonwealth investigated and the evidence showed that the juror was twice convicted of felony DUI. The VCIN record reflected these convictions and did not show that his rights had been restored. When the court accessed the Governor's website for any clarifying information on the rights restoration, the website did not show records matching the juror's name, which he testified had never changed. The trial court struck the juror due to his felony conviction.

The Court of Appeals affirmed in a published opinion.

Held: Affirmed. The Supreme Court simply wrote: "the Court is of the opinion that there is no reversible error in the judgment of the Court of Appeals. Accordingly, the Court affirms the judgment of the Court of Appeals for the reasons stated in *Warren v. Commonwealth*, 76 Va. App. 788 (2023)."

In its ruling, the Court of Appeals had first ruled that under § 8.01-338, the fact of the juror's two felony convictions coupled with the lack of clear evidence that his rights had been subsequently restored supported the trial court's reasonable doubt as to the juror's qualifications to serve as a juror.

Regarding the defense of necessity, the Court of Appeals had ruled that the trial court did not err in requiring the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The Court repeated that the essential elements of this defense include:

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

In this case, the Court of Appeals ruled that the necessity defense failed because the defendant proffered no evidence to support the second element: a lack of other adequate means to avoid the threatened harm. The Court noted that the defendant did not proffer any evidence that he called 911 or anyone else to help his cousin and found them unavailable. The Court also complained that the defendant did not proffer that he called other family members to help his cousin; nor that he attempted to get someone else to drive him to his cousin to avoid his driving under the influence.

The Court of Appeals concluded that the trial court did not abuse its discretion by excluding the defendant's proffered "necessity" evidence because it lacked relevance. The Court observed that the evidence was only relevant to the necessity defense, and such evidence became immaterial to the case when he failed to proffer minimal evidence as to each element of the defense. The Court of Appeals wrote: "We are sympathetic to Warren's desire to be with his fatally wounded cousin. Nevertheless, his claimed unawareness of other adequate means to get aid to his cousin does not satisfy the requirement that no other adequate means were available to aid his cousin."

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230248.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0533221.pdf>

Virginia Court of Appeals -

Published

Northcraft v. Commonwealth: September 26, 2023

78 Va. App. 563, 892 S.E.2d 351 (2023)

Richmond: Defendant appeals his convictions for Larceny, Unlawfully Obtaining Documents from DMV, False Statement to DMV, Money Laundering, and Attempted Money Laundering on Jury Selection, Sufficiency of the Evidence, and Denial of his Defenses of Claim of Right and Reliance on Official Authority.

Facts: The defendant used Virginia’s abandoned vehicle process (“AVP”), §§ 46.2-1200 through -1207, which allows applicants to dispose of an abandoned vehicles left on a highway, public property, or private property, to steal at least five parked cars off the street and sell them at auction. The defendant first completed an online record request application for the five vehicles. The online record request application requires the applicant to state that they are in “possession of [the] motor vehicle” and indicate a reason for their possession. The defendant stated that the vehicles were located on public streets and that his claim was based on “possession of a motor vehicle... that was left unattended on public property for more than 48 hours in violation of a state law or local ordinance.”

The defendant then submitted applications for certificate of title for the vehicles in which he listed himself as the owner of the vehicles. On two occasions, DMV clerks recalled asking the defendant if he worked for a towing company or dealership. The defendant responded that he did not and said that the vehicles had been left on his property. At trial, the defendant objected to their testimony, but the trial court overruled the defendant’s objection.

After obtaining titles, the defendant took the vehicles off the street, in one case obtaining a replacement key for one of the vehicles. The defendant then enlisted a third-party to sell two of the vehicles at auction. At trial, the third-party testified that he entered an agreement to auction vehicles on behalf of the defendant and had an agreement to pay the defendant the money. However, when the owners noticed the vehicles missing, they notified police, who learned of the defendant’s scheme. Police were able to stop one of the two sales from taking place and the defendant did not receive the proceeds of the other sale.

At trial, the owners of the vehicles testified that they did not know the defendant, did not give him possession or ownership of their cars, and instead regularly parked their vehicles themselves during the relevant time.

During voir dire, defense counsel asked potential jurors about whether the number of charges would influence their decision-making. One juror agreed that her initial reaction to the number of charges was that “he must have done something wrong.” She then stated that she would be able to set aside that initial reaction and “would have to listen to the evidence....But it kind of would still be in my head.”

The trial court then gave the juror a clarifying instruction, informing her that she could only find the defendant guilty based on the evidence and could not infer guilt from the fact that he had been charged with an offense. When asked by the court if she could apply that fairly, she stated, “Yes” and further stated, “That is your rule, and I have to do it the way you say do it.” When the trial court told her

that it did not “want to put words in [her] mouth” and wanted her “to understand that that’s the process,” the juror told the court, “I understand.”

The trial court denied the defendant’s motion to strike the juror for cause, rejecting the defendant’s argument that her voir dire demonstrated that she could not set aside the number of charges that the defendant was facing and the implication that this meant he must have done something wrong.

At trial, the defendant argued that the evidence was insufficient to support his convictions under § 46.2-105.2(A) for Unlawfully Obtaining Documents from DMV because there was no evidence in the record that he did not “satisf[y] all legal and procedural requirements” to receive title to the vehicles; he contended that he met all of the requirements set out in the AVP at the time of the offense. The defendant argued that the only sensible interpretation of the statute was that an individual possesses a vehicle under the statute if the person knows where the vehicle is located and also knows that the vehicle was abandoned on the side of the road for more than 48 hours, in violation of a state or local ordinance.

The defendant also argued that the evidence was insufficient regarding False Statement to DMV, noting that, at the time, the application for certificate of title itself did not ask whether the applicant is in possession of the vehicle for which title is sought. The defendant further argued that there was insufficient evidence of the fraudulent intent necessary for his convictions under § 46.2-605.

Regarding the offense of Grand Larceny, the defendant argued that because he took the vehicles after he obtained titles to them, they were not taken without their owners’ permission, as he was their owner after obtaining the titles.

Regarding the Money Laundering offense, the defendant argued that the evidence failed to establish that a financial transaction occurred. The defendant also argued that there was insufficient evidence of an attempt to conceal or disguise the ownership of the property involved under § 18.2-246.2.

Lastly, at trial, the defendant raised two defenses, a good faith claim-of-right defense and a good faith reliance defense. First, the defendant asserted that he had a good faith belief that he was entitled to the vehicles, because he found the AVP, a legitimate process through the DMV, utilized that process, and subsequently received titles to the vehicles from the DMV. The defendant asked the trial court to instruct the jury on a good faith claim-of-right defense in relation to the three grand larceny offenses. His proposed instruction stated, “If you find that [the defendant], in good faith, believed that the [vehicle] belonged to him at the time of the taking then you shall find [the defendant] not guilty of grand larceny.” The trial court refused the instruction.

Second, the defendant also asked the trial court to instruct the jury on the defense of good faith reliance on authority, pursuant to *Miller v. Commonwealth*, 25 Va. App. 727 (1997), for the unlawfully obtaining documents from the DMV charges. The court refused the instruction, noting that it thought “it is misleading of the law in the case” and that “more importantly, there is no affirmative evidence provided in accordance with *Miller*.”

[Note: DMV has since changed the AVP procedure to avoid this situation – EJC].

Held: Affirmed. The Court held that the trial court did not err in failing to strike a juror for cause, in denying the defendant's motions to strike the evidence, or in denying jury instructions on good faith claim-of- right and good faith reasonable reliance.

Regarding jury selection, the Court found that the voir dire, viewed in its entirety, did not demonstrate that the juror's opinion—that the number of charges that the defendant faced was indicative of his guilt—was a fixed opinion. The Court concluded that the juror's own responses, which were not merely "yes" answers to the trial court's questioning, provided evidence that her initial reaction upon hearing the number of charges against the defendant was not fixed. Rather, the Court found that she indicated in her own words that she understood the legal instruction regarding the presumption of innocence after being instructed on it and could set aside her prior opinion. Contrary to the defendant's assertion, the Court ruled that the record demonstrated that the trial court's questioning and instruction of the juror constituted clarification and not improper rehabilitation.

Regarding sufficiency of the offense of Unlawfully Obtaining Documents, the Court first ruled that the statutory scheme clearly sets out that to utilize the AVP, the applicant must be in possession of the abandoned vehicle. The Court then addressed the question of whether the defendant was in possession of the vehicles for which he obtained titles from the DMV.

The Court noted that § 46.2-1200 does not provide a definition for the term "in possession of." The Court concluded that the plain meaning of "possession" in § 46.2-1202(A) is neither ambiguous nor creates absurd results when applied in the context of the statute. Rather, under this definition, the Court found that the evidence established that the defendant did not have possession of the vehicles in question. The Court noted there had been no indication that anyone but the owners had control of or held at their disposal the vehicles prior to the defendant using the AVP to obtain the vehicles' titles. Because the vehicles were not in the defendant's possession, the Court concluded that he was not entitled to use the AVP to obtain their titles. Thus, the Court agreed that the defendant obtained the titles from the DMV without "satisfy[ng] all legal and procedural requirements for the issuance thereof," or "otherwise [being] legally entitled thereto," in violation of § 46.2-105.2(A).

Regarding the offense of False Statement to DMV, the Court noted that, although the application for certificate of title itself does not ask whether the applicant is in possession of the vehicle for which title is sought supporting documentation included his record request receipts and vehicle removal certificates, both documents require an applicant to state who is in possession of the vehicle. In this case, the Court found that the defendant provided the false information that he was in possession of the vehicles on both the online record request applications and the vehicle removal certificates. Because the defendant provided false information on his supporting documentation, while certifying on the applications for certificate of title that his supporting documentation was true and accurate, the Court agreed that the evidence established that he provided false information on his applications for certificate of title.

Regarding the element of intent for False Statement to DMV, the Court found that the defendant's conduct and representations plainly indicated his fraudulent intent in making false statements on his applications for certificate of title in violation of § 46.2-605.13. While the Court acknowledged that the defendant did not attempt to conceal his identity on the applications for certificate of title, the Court explained that this fact alone did not negate the other evidence in the record indicating his fraudulent intent in his use of the AVP.

In a footnote, the Court also found that it was proper to admit the statements that the defendant made to the two DMV employees. The Court concluded that the fact that the defendant lied to two different DMV employees regarding the location of vehicles for which he sought title was relevant to show his fraudulent intent, because it demonstrated his intent to conceal the fact that he was not actually in possession of the vehicles and therefore was using the AVP unlawfully.

Regarding the Grand Larceny offense, the Court concluded that because his titles to the vehicles were procured through his fraudulent actions, they did not convey legal title to him. The Court explained that the defendant's fraudulent use of the AVP to obtain the vehicles' titles was the first part of his larcenous scheme to deprive the rightful owners of their vehicles. The Court observed that the defendant committed an initial larceny in obtaining the titles themselves—he used the AVP to fraudulently take another's property, namely the titles to the vehicles that were issued to him by the DMV, but which legally belonged to the vehicles' true owners. He then committed the charged larcenies of the three vehicles themselves, physically taking the vehicles from the streets and later attempting to sell two of them at auction.

Because the defendant obtained the titles and vehicles through his larcenous actions, at the time he took the vehicles, the Court ruled that the defendant did not have "legal title" to them under § 46.2-100; he merely had the physical certificates of title. Accordingly, the Court ruled that he was not the owner of the vehicles at the time he stole them, and the evidence was sufficient to support his larceny convictions.

Regarding the Money Laundering offenses, the Court first found that the fact that the defendant did not actually receive money from the third-party seller was not dispositive. The Court pointed out that the defendant initiated a financial transaction, made an agreement to sell the vehicles, and the third-party received money in exchange for auctioning the one of the cars. While the defendant did not receive any money as a result of his agreement, the Court found that he did initiate the transaction, thus the Court concluded that the evidence was sufficient to prove that he conducted a financial transaction in this case.

Regarding the "concealment" element of Money Laundering, the Court found the federal cases interpreting the federal money laundering statute to be instructive. In this case, the Court agreed that the evidence was sufficient to establish the defendant's intent to conceal or disguise the source of the property involved. The Court found that, by employing a third party to sell the vehicles at auction, the defendant demonstrated his intent to structure the transaction to conceal the true source of the property involved in the transaction. The Court quoted an 8th Circuit case that "the money laundering statute does not require the jury to find that [accused] did a good job of laundering the proceeds." In this case, the Court ruled that the defendant's use of a third party constituted sufficient evidence to show that the transaction was designed in whole or in part to conceal or disguise the source of the property involved in the transaction.

Regarding the defendant's intent to commit the Money Laundering offense, the Court again found sufficient evidence of intent to commit the offense by his agreement to sell the vehicles, the proceeds of his grand larcenies, at auction via the third party. As far as the conviction for Attempted Money Laundering, the Court also ruled that the defendant signing over the title and giving the vehicle to the third party was the direct act done toward the commission of the offense, one that was only ineffectual because the one of the cars was identified as stolen before the third-party could sell it.

Accordingly, because the evidence established that the defendant conducted a financial transaction designed to conceal the source of one of the vehicles and that he attempted to do so for the other vehicle, the Court concluded that the trial court did not err in finding the evidence sufficient to support both convictions.

Regarding the defendant's Claim of Right defense, the Court found that the defendant did not have a good faith belief that he owned the vehicles at issue because his obtaining of their titles was predicated on his fraudulent statements on the AVP documents that he was in possession of the vehicles. The Court reasoned that he could not have sincerely believed that he was in possession of the vehicles at the time he completed the applications for certificates of title because the vehicles were located on public streets and were regularly parked there by their true owners, and the Court specifically pointed to his false statements to DMV in support of his applications.

Lastly, regarding the defendant's claim of Reliance on Official Authority, the Court concluded that the evidence clearly showed that the defendant failed to receive assurances from DMV employees that his use of the AVP was lawful. The Court warned that the mere acceptance of paperwork and the issuance of the titles does not qualify as an affirmative assurance that the conduct giving rise to his convictions was lawful. In this case, the Court pointed out that the defendant did not receive an affirmative assurance on the lawfulness of his use of the AVP from any DMV employee.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1067212.pdf>

Griffin v. Commonwealth: August 1, 2023

78 Va. App. 116, 890 S.E.2d 619 (2023)

Alexandria: Defendant appeals his conviction for Battery on Fifth Amendment *Garrity* grounds, *Batson* Jury Selection Issues, Jury Instruction Issues, Refusal to Admit Victim Character Evidence, and sufficiency of the evidence.

Facts: While delivering an ECO detainee to the hospital, the defendant, a police officer, moved the detainee to a registration desk. The detainee was in handcuffs at the time. When the detainee began to pull back and resist the officer's control, the officer gave one or two demands to the detainee to "stop resisting." The officer then grabbed the detainee with both hands and used his right leg to sweep the detainee's legs out from under him. The detainee, still handcuffed behind his back, fell face-first onto the hospital floor, sustained facial injuries and broke his kneecap.

At trial, the defendant testified that he thought the detainee "was putting himself in a position where he could assault me." The defendant also admitted, "I didn't react properly" because he had intended to use some technique other than a leg-sweep to bring the detainee to the ground.

The defendant also testified that he was concerned about the detainee, whom he knew suffered from bipolar disorder. He testified that he was also aware that the detainee had "made threats to several government installations and had a previous conviction of arson." The defendant also testified that he had heard that the detainee had assaulted a nurse and a deputy at a mental health hospital in the past and that the detainee "had physically confronted firefighters" in the past. However, the

defendant acknowledged that the detainee had not made any verbal threats toward hospital staff and had not tried to bite or spit at anyone in the hospital.

A police sergeant investigated the case. The sergeant interviewed the defendant as part of the investigation. Before the sergeant spoke with the defendant during the administrative investigation, he gave the defendant a “*Garrity* Form” which stated that the “employee can be compelled to respond and failure to do so is subject to disciplinary action up to and including termination.” The defendant then made several statements. The sergeant then watched the video of the incident and interviewed the witnesses who were on the video.

Prior to trial, the defendant moved to dismiss the prosecution on the grounds that the sergeant violated the defendant’s Fifth Amendment rights under *Garrity*. The sergeant testified that he maintained a wall between both investigations. Furthermore, when he gave his criminal investigation file to the Commonwealth, the sergeant only included information obtained from the witnesses with whom he spoke, including those at the hospital. The sergeant testified that he specifically did not give any of the defendant’s *Garrity*-protected statements to the Commonwealth’s Attorney. The trial court denied the defendant’s motion, concluding that “there’s no evidence before the Court that there was anything” derived from the defendant’s protected statements.

During jury selection, the defendant challenged all four of the Commonwealth’s peremptory strikes under *Batson*, arguing that the Commonwealth had used its peremptory strikes to remove “all white males” from the jury. The prosecutor explained that she struck the first juror from the venire because “he was a neighbor of [another juror] and I didn’t want both of them on the panel.” The prosecutor added that the juror “also rolled his eyes at several attempts of humor to include Your Honor’s at the very end.”

Regarding the other juror, the Commonwealth explained that she struck the second juror because he “didn’t talk at all” and because she “couldn’t see him during most of the selection” process, which she said meant that she did not “know enough about him.” The trial court overruled the defendant’s *Batson* challenge.

At trial, the defendant sought to introduce several pieces of evidence concerning the detainee’s mental health history and aggressive behavior from various sources, including an incident at another hospital in the previous year and several incidents that took place after this incident. The defendant argued that the evidence of the detainee’s mental health history, his history of violence, and of his “history of resentment and hostility against first responders and hospital staff” was admissible under this exception because it was “relevant to the need for the use of force.”

The trial court excluded the defendant’s proffered evidence, but allowed the defendant to testify regarding what he knew about the detainee’s mental health and behavioral history that informed and affected the defendant’s decisions that day.

At trial, the Court gave an instruction on the elements of Battery. The instruction, to which the defendant objected, read as follows:

“The defendant is charged with the crime of assault and battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant willfully touched James Lenzen without legal excuse or justification; and
- (2) That the touching was done in an angry, rude, insulting, or vengeful manner.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of assault and battery.

If you find that the defendant had a legal excuse or justification to touch James Lenzen but that the force used during the touching was excessive, then you shall find the defendant guilty of assault and battery.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the crime as charged, then you shall find the defendant not guilty.”

During jury deliberations, the jury sent a question asking “Do both elements (1 & 2) apply to be found guilty? Paragraph 3 seems to negate Paragraph 1 by stating that the focus of the charge is based on the force used being excessive, is this accurate?” The trial court provided a written response to the jury stating, “Whether the touching was without legal excuse or justification or if there was legal excuse or justification but the force was excessive the Commonwealth, in either event, must prove that the touching was done in an angry, rude, insulting, or vengeful manner.”

Held: Affirmed.

The Court first addressed the defendant’s *Garrity* argument. The Court acknowledged that the Commonwealth bore the burden of proving by a preponderance of the evidence that the sergeant’s administrative investigation did not taint the Commonwealth’s criminal case but cautioned that “the burden of proof imposed by *Kastigar* does not require the prosecution to ‘negate every abstract possibility of taint.’” In this case, the Court found that there was no evidence that the Commonwealth used the defendant’s protected statements in any way to develop its case. The Court wrote: “While it certainly was not advisable or wise for the police department to have Sergeant East conduct both the administrative investigation and the criminal investigation of Griffin (a point Sergeant East made to the then-chief of police), *Garrity* and its progeny did not create a per se rule requiring different investigators for the different investigations.”

Regarding the defendant’s *Batson* challenge, the Court noted that the prosecutor based her reasons for striking the jurors based upon her observations (or lack thereof) of the jurors’ body language. The Court repeated that a juror’s body language or demeanor during voir dire is certainly a gender-neutral and race-neutral reason for striking a juror. The Court refused to find that the trial court erred in crediting the prosecutor’s gender-neutral and race-neutral explanations for striking the jurors.

Regarding the excluded defense evidence, the Court first pointed out that the defendant did not present evidence that the defendant acted in self-defense. The Court then rejected the defendant’s argument that the entirety of the detainee’s mental health history and criminal record were relevant to the question of whether the defendant’s use of force was reasonable. Instead, the Court explained that evidence relevant to the question of whether the use of force was objectively reasonable would have been only circumstances known to him at the time of the incident.

In this case, the Court explained that testimony from others about their own experiences with the detainee and knowledge of his behavior do not bear on the reasonability of the defendant’s decision because the specific details of their experiences did not inform the defendant’s actions on that day. Conversely, the Court noted that the jury was able to hear quite a bit about the defendant’s knowledge

of the detainee's character and how it informed his decision to take the detainee to the ground that day.

Regarding the jury instruction, the Court found that, to the extent that it may have confused the jury as to whether the Commonwealth needed to prove that the defendant touched the detainee in an angry, rude, or insulting manner in addition to proving that the defendant acted with excessive force, the trial court remedied any such issue by the clarifying instruction it issued following the jury's questions. The Court concluded that, in the trial court's clarifying instruction in answer to the jury's question, the trial court clearly and unequivocally instructed the jury that regardless of whether the jury found that the defendant used excessive force, the Commonwealth still "must prove that the touching was done in an angry, rude, insulting, or vengeful manner."

Lastly, regarding the sufficiency of the evidence, the Court repeated that a police officer's use of excessive force is a battery because that touching is not justified or excused and therefore is unlawful. The Court also repeated that the reasonableness of the force is evaluated from the objective perspective of a reasonable police officer on the scene, allowing for officers to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary."

In this case, the Court noted that the detainee, who was handcuffed and in the defendant's custody, had not made any attempts to flee custody and had not made any threatening movements toward any of the hospital staff (or other patients). Furthermore, the Court pointed out that the evidence showed that the detainee had been compliant—at least until the defendant forced him to move a few steps closer to the registration counter.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0485224.pdf>

Virginia Court of Appeals -
Unpublished

Jones v. Commonwealth: May 21, 2024

Charlotte: Defendant appeals his conviction for Possession of a Firearm on *Batson* Jury Selection grounds.

Facts: The defendant possessed a firearm as a convicted felon. At trial, the Commonwealth made four peremptory strikes, including three strikes on potential jurors who were African American. Defense counsel objected to the Commonwealth striking two of the African American potential jurors. The Commonwealth's Attorney explained that his reasons for striking the two jurors were based on his observations of the jurors' body language during voir dire — i.e., one juror's nodding in agreement with defense counsel's statements and the other juror's disinterested "looking down" and "looking away."

The defendant argued that an inference of purposeful racial exclusion could be drawn from the facts that (1) the Commonwealth's use of a disproportionate number of peremptory strikes on African

Americans without meaningful questioning of them and (2) the Commonwealth's use of peremptory strikes changed the racial majority of the venire from African American to Caucasian. However, defense counsel proffered no basis for his assertion that the strikes were racially motivated other than his observation that the Commonwealth's two peremptory strikes at issue in this appeal were used on African American potential jurors.

The trial court overruled his objection. The trial court found that there was "not a prima facie case of a *Batson* issue."

Held: Affirmed. The Court ruled that the defendant failed to establish a prima facie case of purposeful discrimination in the use of peremptory strikes in the jury selection. Furthermore, the Court ruled that the defendant made no showing that the Commonwealth's Attorney's explanations for striking the two African American jurors were pretextual and actually based on race. The Court also found that the prosecutor's explanations also provided the trial court with a sufficient basis to conclude that the proffered reasons for striking these two potential jurors were, in fact, race-neutral and not pretextual in any way. Consequently, the Court did not find that the trial court erred when it rejected the defendant's *Batson* challenge.

The Court repeated that mere exclusion of members of a particular race by using peremptory strikes does not itself establish such a prima facie case under *Batson*. The Court did not find that the trial court erred in ruling that the defendant failed to establish a prima facie case of purposeful discrimination.

However, the Court found that even if the defendant had made a prima facie case of purposeful discrimination, the Commonwealth's Attorney provided race-neutral explanations for striking the two potential jurors, and Jones failed to prove that the Commonwealth's explanations were pretextual and actually based on race. The Court explained that the Court cannot (and should not try to) second-guess the trial judge's decision about the Commonwealth's likely motivation for striking the two potential jurors. On the other hand, the Court complained that defense counsel made no showing that the prosecutor's explanation for striking the jurors was pretextual and based on race.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0842232.pdf>

Bryant v. Commonwealth: May 7, 2024

Orange: Defendant appeals his convictions for Child Sexual Assault on Refusal to Strike a Juror for Cause.

Facts: The defendant repeatedly sexually assaulted an eleven-year-old child. During group voir dire, when the trial court asked whether anyone had "expressed or formed any opinion as to the guilt or innocence of the defendant," a juror responded affirmatively. Even so, all the jurors indicated that they did not have any bias or prejudice for or against either party and they did not acquire any information about the case from the news media or other sources. All jurors indicated that they understood that the defendant was presumed innocent, and that the Commonwealth had to prove the defendant was guilty

beyond a reasonable doubt. When asked whether there was “any reason whatsoever” that the prospective jurors could not “give a fair and impartial trial to both the Commonwealth and the defendant based solely on the evidence,” all jurors indicated there was none.

Continuing with group voir dire, the Commonwealth explained that the charges were sexual in nature and involved a child who was 11 years old at the time of the offenses. When defense counsel asked the venire whether anyone was “so uncomfortable” hearing a case involving an alleged rape that he did not want to sit on the jury, the one juror indicated affirmatively. On individual voir dire, the Commonwealth asked that juror to explain what he meant when he said that he had formed an opinion about the case. The juror responded:

“Just based off of what you guys have said and the charges that you guys read and stuff. It was--it bothers me, and it sits wrong with me. I have a two-year-old daughter, so it kind of puts me like in those shoes and perspective as if that was my kid. So, that’s just where I come from. I also have a daughter that’s due in seven days, so that’s not something that I want my kids to go through.

When defense counsel inquired if the juror was assuming the defendant was guilty based on “the volume and the nature of the charges,” the juror responded, “I’m not necessarily assuming that he’s guilty. I just don’t really want to be a part of it, and I don’t necessarily agree with what was read. I can’t tell you if he’s guilty or not without hearing it, but just all of what I’m saying and what I’ve heard, I don’t want---.” The juror also explained that because his child was due in seven days, he might have to leave the proceedings if the birth occurred early. The juror confirmed with the trial court, however, that besides his discomfort with the nature of the charges, nothing would prevent him from being impartial.

The trial court denied the defendant’s motion to strike the juror for cause.

Held: Affirmed. The Court found that the record supported the circuit court’s conclusion that the juror did not hold preconceived opinions or fixed biases against either party that he could not, or would not, lay aside.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1784222.pdf>

Lewis v. Commonwealth: April 30, 2024

Williamsburg: Defendant appeals his convictions for Sexual Assault, Strangulation, and Battery on Jury Selection issues.

Facts: During an argument, the defendant beat, strangled, and sexually assaulted the victim. During jury selection, a juror stated she had volunteered working with former prostitutes as they were “reintroduced to the world.” The defendant then asked the veniremen whether their experiences would impact their ability to “sit fairly and impartially, [and] listen to the evidence, and render a judgment.” All jurors responded in the negative.

The defendant asked the trial court to strike the juror for cause. He argued that, based on her background and past work, she would not be an “appropriate” juror. The trial court responded that the juror had not indicated whether her experience with reformed prostitutes “ha[d] been good or bad.” It also noted that the juror had affirmed that her work “would not affect her ability to render a fair verdict.” The trial court denied the defendant’s motion to strike the juror.

Held: Affirmed. The Court concluded that the juror’s volunteer work assisting reformed prostitutes did not per se disqualify her from serving as a juror in this case and the record does not disclose the specific nature of the juror’s volunteer work. Moreover, the Court noted, the juror confirmed, without any hesitation or equivocation apparent in the record, that her experience would not impact her ability “to sit fairly and impartially and listen to the evidence and render a judgment.” Given those circumstances, the Court ruled that the trial court did not abuse its discretion by denying the motion to strike the juror for cause.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0161231.pdf>

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim’s brother called 911 and told the dispatcher that the victim had called him and told him that “her boyfriend had shot her and they were trying to kill her.” The brother stated that the victim could barely speak. He also stated that he “d[idn’t] know what to do” because he doesn’t live near the victim. He stated that “she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster.” On the recording, the brother said it sounded like the victim “was hiding” while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver’s seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions

like, “You doing all right man?” and, “you still tired?” The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, “how was your day, though?” to which the officer responded, “It was good, how was yours?” The defendant answered: “It was horrible,” to which the officer reiterated, “horrible day?” The defendant also asked the officer, “you know, I found evidence of her almost burning me?” to which the officer responded, “[b]urning you?”

The defendant also asked the officer “hey, is that Michael Kors bag going to go . . . in my evidence file?” The officer asked, “what’s that?” The defendant clarified, “the Michael Kors bag in the car,” to which the officer responded, “I’m not sure what you’re talking about.” The defendant also asked, “did you guys search the vehicle?” to which the officer responded, “I’ve been with you the entire time.”

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim’s social media. The detective asked, “What’s her Facebook page?” to which the defendant responded. The defendant then talked about the victim cheating on him, saying, “I caught her!” The detective asked, “was it one of your boys?” to which the defendant responded that he doesn’t know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim’s first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that “only recently, on January 20th . . . received a letter from the Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse.” The trial court further stated that there was an “inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen.” The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness “is the father of a former classmate.” Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church “on a personal level.” All three of the jurors indicated that they would not credit the witnesses’ testimony simply based on the jurors’ familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors' assurances that they would not necessarily credit the officers' testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant's objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant's Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant's objection. An officer testified that the gun depicted in the defendant's Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers' questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did violate the defendant's Miranda rights.

Regarding the defendant's request for an expert witness, the Court ruled that the trial court did not err in denying the defendant's motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant's arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that "a number of things" had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court's approval. The Court noted that this delay was not intentional or due to the Commonwealth's negligence. The Court then held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother's statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother's call was to ask for help responding to an ongoing emergency—getting medical care for the victim's gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant's social media posts, the Court reasoned that evidence from the defendant's Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*, the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Phillips v. Commonwealth: April 16, 2024

Prince Edward: Defendant appeals his conviction for Rape on *Batson* Jury Selection grounds and Admission of Expert Testimony

Facts: The defendant raped a woman. At trial, the Commonwealth used peremptory challenges to strike four women from the venire. The defendant objected that the Commonwealth had “intentionally us[ed] sex as a basis to discriminate in picking a jury,” arguing that “the inference would be that a woman on a jury might treat the victim [more] harsh[ly] than a man would.”

The Commonwealth argued that its strikes were not based on sex and provided a gender-neutral reason for each. The defendant accepted the Commonwealth's gender-neutral reasons for two of the strikes but persisted in his objection to the others. For one of the strikes the Commonwealth explained that the potential juror did not pay attention during voir dire, sat in the back corner of the jury

box, reclined in her seat, rested her head on her hand, raised her hand in response to voir dire questions only after everyone else did, and did so “flippantly.”

As to the other strike, the Commonwealth stated that the challenged juror had testified at a bail hearing on behalf of a defendant in a previous sexual assault case and one of the defendant’s counsel had represented that defendant.

The trial court overruled his objections to the strikes.

At trial, the Commonwealth offered testimony from a trauma expert, Aimee Stockenstrom. The trial court recognized her as an expert in how the brain processes trauma and how people experience trauma, over the defendant’s objection that her testimony about how people react to and remember traumatic events falls within the common knowledge of the ordinary person. The trial court rejected the defendant’s argument that her testimony merely provided a “more scientific and elaborate explanation” of what ordinary people already understand— “that people may react in different ways [to trauma] or [may] remember only vague details” about traumatic events.

At trial, the expert testified about the role various parts of the brain play in relation to fear and traumatic events. She explained the function of the amygdala in the activation of the “fight or flight response.” If fighting or fleeing fails to neutralize the perceived threat, the amygdala protects the brain and body activating the body’s “freeze” response, and these responses are involuntary. And, because the amygdala is near the hippocampus—the portion of the brain responsible for memory formation—when a person experiences trauma the hippocampus is impaired, impacting the individual’s formation and communication of memories about the event.

Held: Affirmed. The Court ruled that the trial court’s finding that the Commonwealth did not use its peremptory strikes in a discriminatory manner was not clearly erroneous and that the trial court did not abuse its discretion in admitting the expert’s testimony.

Regarding the strikes, the Court agreed that the Commonwealth’s proffered reasons for striking the two jurors were valid, gender-neutral reasons.

Regarding the Commonwealth’s trauma expert, the Court repeated that testimony about the functioning of the brain does not invade the province of the jury. In this case, the Court ruled that the expert’s testimony about the structure and functioning of the human brain could have assisted the trier of fact in understanding evidence concerning matters that are not within the jury’s ordinary knowledge.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1546222.pdf>

Faust v. Commonwealth: March 5, 2024

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on Jury Selection, Hearsay, and Expert Witness grounds.

Facts: The defendant sexually assaulted an 11-year-old child. The child's father had invited the defendant to live with him, his wife, and their seven children in their home. Thereafter, the defendant assaulted the children.

At trial, during jury selection, one juror disclosed that her father had abused her and her sister when they were young. Following this disclosure, the defendant asked the juror if that experience would "make it hard for [her] to give a fair trial today?" She answered, "No," and explained that her father "did the right thing" after the abuse by getting "help" and by "acknowledg[ing]." The juror also expressed that she had forgiven her father. The trial court denied the defendant's motion to strike the juror for cause based on her statement that her experience would not interfere with her ability to provide a fair trial.

At trial, the Commonwealth asked the child's father "Why did you call the police to the house on that day?" The father responded, "When [the defendant] came back to get the U- Haul, he was packing up, and [the victim] asked me—" At that point, the defendant objected. The Commonwealth explained that it was not offering the testimony for the truth of the matter but rather to explain why the defendant called the police. The trial court overruled the objection.

The father then testified that the child asked if the defendant was leaving "because he touched us." The father further testified that, following this statement by the child, he "brought the girls into the room, and we immediately asked them, questioned them on that." Thereafter, the father called the police.

At trial, over the defendant's objection, social worker Marcella Rustioni testified as an expert in "delayed reporting and the dynamics of child abuse." Rustioni cited several reasons that a child might not disclose sexual abuse right away. She explained the dynamics of child abuse and how children process and articulate that abuse. The trial court overruled the defendant's objections that her testimony was inadmissible because it constituted a direct comment on the victims' veracity and served to bolster their credibility. The trial court also rejected the defendant's claims that her testimony invaded the province of the jury.

Held: Affirmed.

Regarding the juror, the Court ruled that the trial court did not abuse its discretion by refusing to strike the juror for cause. The Court observed that the juror evinced such an ability to lay aside any preconceived views in rendering a verdict.

Regarding the father's testimony about the child's statement, the Court ruled that the trial court did not err by admitting the child's extrajudicial statements to her father. The Court agreed with the trial court that the Commonwealth offered the evidence not for the truth of the matter—i.e., that the defendant touched the child—but rather, to explain what the father did next. The Court explained that the fact that the child made the statement was relevant to explain why the father spoke with her and her cousin about the abuse that day and reported it to the police.

Regarding Marcella Rustioni's expert testimony, the Court ruled that the trial court did not err in admitting Rustioni's testimony. The Court distinguished the *Davison* case, explaining that in this case, the expert testimony cleared a threshold admissibility requirement that the *Davison* child therapist did not. Further, the Court observed, Rustioni did not opine, either directly or indirectly, on a specific witness's veracity or credibility. Instead, her testimony focused generally on the reasons for delayed

reporting by child sexual abuse victims. The Court concluded that the expert testimony did not invade or otherwise impermissibly encroach upon the province of the jury.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1345222.pdf>

Palka v. Commonwealth: February 20, 2024

Waynesboro: Defendant appeals his conviction for DUI Manslaughter on Exclusion of Victim's Intoxication and Pretrial Screening of Voir Dire Questions.

Facts: One evening, the victim and a motorcyclist crashed into one another. After the crash, the victim ran into the road to engage the motorcyclist in an argument in the roadway about the crash. The defendant, who was driving while intoxicated, then struck the victim and the motorcyclist with his car without slowing down or trying to evade the collision. The defendant continued driving and left the scene. The victim died due to her injuries.

Police soon located the defendant, who admitted to drinking approximately 15 minutes prior to the collision. After the defendant failed multiple field sobriety checks, police arrested the defendant driving under the influence of alcohol. His BAC was .20.

Prior to trial, the defendant moved to introduce a certificate of analysis showing that the victim had ethanol (0.082 by volume), amphetamines, tetrahydrocannabinol ("THC"), and THC carboxylic acid in her blood on the night of her death. The defendant's theory was that the victim's intoxication was an "intervening cause" because the victim, while intoxicated, ran in front of the defendant's car without time for him to stop, causing her death independent of any fault by the defendant. The Commonwealth objected arguing that such evidence was irrelevant. The trial court excluded this certificate.

Prior to trial, the defendant objected to the trial court's order that he submit his voir dire questions for advance review by the trial court. He argued that the 2020 legislative amendments to §19.2-262.01 do not permit the trial court to screen these questions because the statute "gives counsel . . . the right to ask any person or juror directly any relevant question . . . but it does not permit the court to intervene." The trial court overruled his objection.

Held: Affirmed.

The Court first ruled that the trial court did not abuse its discretion in excluding the certificate of analysis pertaining to the victim. The Court noted that, at trial, the Commonwealth did not dispute that the victim ran into the road shortly before appellant hit her. Thus, the parties informed the jury of the victim's relevant conduct that formed the crux of the defendant's defense. The Court concluded that the trial court properly held that why the victim ran into the street—whether due to intoxication or something else—was irrelevant to any jury consideration about the legal effect of her actions. The Court distinguished the *Hubbard*, *Williams*, and *Miller* cases.

The Court then addressed the defendant's argument that § 8.01-358, which governs voir dire in civil cases, prohibits the trial court from screening counsel's jury questions before voir dire. The Court

ruled that the trial court did not commit reversible error by requiring the parties to submit their voir dire questions before the trial date. The Court examined the statute and concluded that it permits a trial court to prohibit irrelevant questions. The Court ruled that nothing in § 19.2-262.01 requires that opposing counsel only object during voir dire to any potentially problematic questions. The Court complained that the defendant could not articulate why the trial court's practice of addressing concerns about specific voir dire questions before voir dire impaired his rights more than if the trial court addressed these same concerns during voir dire.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1716223.pdf>

Herrmann v. Commonwealth: January 30, 2024

Chesterfield: Defendant appeals his conviction for Robbery on Refusal to Strike a Juror for Cause.

Facts: The defendant robbed a convenience store using a knife. At trial, during a recess, a juror approached a bailiff and advised that he may know one of the Commonwealth's witnesses, a police officer. Outside the presence of the jury, the juror advised the trial judge that he and the officer grew up together and played football for the same team in school.

The trial court permitted the parties to engage in additional voir dire of the juror to determine whether he could be a fair and impartial juror given the nature of the previous relationship. The juror explained that while he and the officer grew up together and played football for the same team in school, they were never close, and they had not seen each other for many years. The juror and the officer did not socialize, and the juror repeatedly stated that his prior relationship with the officer would not cause him to be biased against either the defendant or the Commonwealth. The juror also said he did not consider the officer to be more trustworthy or honest than anyone else. He also insisted that he could be fair, listen to the evidence, and follow the court's instructions regarding the law and its application to the facts.

Finding that the prior relationship between the juror and the officer did not reach the level that would require the court to dismiss the juror, the trial court denied the motion to strike the juror for cause.

Held: Affirmed. The Court agreed that nothing in the record supported the assertion that the juror was "sensible of any bias or prejudice" that might affect his ability to perform his duties as a juror per §8.01-358. Thus, the trial court did not abuse its discretion in refusing to strike the juror.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1714222.pdf>

Jones v. Commonwealth: December 19, 2023

Newport News: Defendant appeals his conviction for Murder on Jury Selection issues.

Facts: The defendant shot a man in the back repeatedly, killing him. Home surveillance cameras captured the incident on video. At trial, during jury selection, one of the potential jurors disclosed that she had been a victim of a shooting and had been a witness in that case. The juror stated that she could be fair and impartial. Defense counsel then asked if it “would make it hard for [her] to be fair and impartial.” She answered, “I don’t think so. I can’t be 100 percent sure, but I could -- I would do my best to be impartial.” Finally, defense counsel asked if she had “a doubt that [she] could be fair and impartial” and she answered, “Not 100 percent sure.”

Neither counsel nor the court questioned the juror further. The defendant moved to strike the juror for cause, arguing that her responses disqualified her from the jury because she was not 100% percent sure she could be fair and impartial. The trial court denied the motion, reasoning “I’m not sure if it’s 99.9 percent sure or what,” but that the trial court was satisfied that she could be fair and impartial.

Held: Affirmed.

The Court examined the record and noted that although the juror expressed some uncertainty about how her experience as a victim might affect her ability to be impartial, the court found that her responses were indicative of her honesty and not of a bias or inability to be impartial. Considering her voir dire as a whole and giving due deference to the trial court’s observations of the juror’s “sincerity . . . and demeanor,” the Court found no manifest error in the court’s refusal to strike her for cause.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1386221.pdf>

Gardner v. Commonwealth: December 19, 2023

Augusta: Defendant appeals his conviction for Aggravated Malicious Wounding on Jury Selection issues.

Facts: Angry about being evicted from a trailer, the defendant beat the victim savagely for almost five minutes, using his fists to smash numerous bones in the victim’s face. The victim now has metal plates in his face and will suffer lifelong pain and disability.

During voir dire, the defendant sought to ask the jury a series of questions on several topics: race, gun violence, and the right of a defendant not to testify. First, he sought to probe the potential jurors’ understanding of a criminal defendant’s constitutional privilege against self-incrimination and concomitant right not to testify. He argued that he should be allowed to ask these questions to reveal and clarify any misconceptions by jurors about his right not to testify.

Second, he sought to ask questions about the venirepersons’ experience with gun violence and probe whether any of the prospective jurors had “strong feelings” about firearms, because he thought that one witness might testify that the victim had a gun during the incident. As it turned out, no witness at trial said anything about any gun.

Third, the defendant requested to ask the venire a battery of questions relating to potential racial bias, reasoning that “If a juror agreed that black men are more impulsive and undisciplined than other men, such racial bias may prevent that juror from deciding with fairness and impartiality whether the Defendant’s reaction was reasonable.”

The trial court refused to permit the defendant to ask these questions. Regarding the defendant’s right not to testify, the trial court only permitted the defendant to ask “[D]oes everyone here understand and agree that Mr. Gardner is presumed innocent unless and until the Commonwealth proves him guilty beyond a reasonable doubt?” No member of the venire voiced any disagreement. Regarding the racial bias issue, the trial court simply asked the venire: “one or more of the parties to the case and witnesses in the case may appear to come from a particular nationality, racial or religious group.” The court then asked, “Would that fact alone affect your judgment on the issues or your approach to the weight and credibility that you would give to his or her testimony?” No venireperson suggested any difficulty.

Held: Affirmed.

The Court examined § 19.2-262.01 and found that if an answer to a question would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice, it must be permitted. However, the Court repeated that the trial judge retains discretion as to the form and number of questions on the subject.

Regarding the first set of questions, concerning the defendant’s right not to testify, the Court pointed out that courts in other jurisdictions are divided about the extent to which a criminal defendant has a constitutional or statutory right to question potential jurors in voir dire about their understanding of the defendant’s privilege against self-incrimination and right not to testify. In this case, however, the Court found that the trial court could reasonably find that the issue was adequately covered by the question the defendant was permitted to ask and that there was nothing to suggest that any venireperson misunderstood the defendant’s right not to testify.

Regarding the second set of questions, concerning firearms, given that no witness testified at trial that any firearm was involved, the Court ruled that it was not an abuse of discretion to bar the defendant from asking firearms-related questions.

Regarding the last set of questions, concerning racial bias, the Court acknowledged that several federal and Virginia cases have addressed whether and when a defendant in a criminal case may have a constitutional right to ask about the potential racial bias of venirepersons. However, in this case, the Court concluded that the defendant had defaulted that argument. The Court then found that the trial court acted within its discretion in allowing its questions to suffice on the issue of racial bias given the absence of venire response.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1036223.pdf>

Hernandez v. Commonwealth: December 12, 2023

Prince William: Defendant appeals his convictions for Murder, Conspiracy, Stabbing in Commission of a Felony, and Gang Participation on Jury Selection, Brady, and Double Jeopardy grounds.

Facts: The defendant and another man, both MS-13 gang members, decided to ambush a rival gang member outside a restaurant. The defendant repeatedly stabbed the victim while his confederate repeatedly shot the man, killing him. Video surveillance captured the murder and police found the murder weapons at the defendant's residence, along with MS-13 paraphernalia. Later, the defendant admitted his involvement to his girlfriend at the time and asked her to lie to create a false alibi.

During jury selection, a juror disclosed that he had been the victim of a violent assault by a group in which he was struck with a wine bottle while on a bus, causing an injury to his head requiring stitches. When asked if he could be fair and objective in reviewing the evidence, the juror stated, "It was a minority that attacked me. I'm going to try but I'm just saying I had the top of my head taken off, I had a reverse mohawk, I had it sewn back on." The juror stated he would do his best to be impartial and denied believing the defendant more likely to be guilty as a minority. The defendant made no motion to strike the juror for cause, instead eliminating the juror with a peremptory strike.

At trial, another gang member testified for the Commonwealth. The witness testified that the defendant not only stabbed the victim, but also shot him. The witness admitted to having pending unrelated charges but denied that he was promised anything in exchange for his testimony. When asked why he was testifying, the witness stated that he wanted out of the gang and that the defendant wanted to blame him for the murder. On cross-examination, when asked what benefit he was getting for his testimony, the witness stated "None for right now. I'm not getting anything. I'm not receiving any kind of benefit."

After trial, the defendant learned that prosecutors, during several meetings, told the witness that they could not make specific promises to him about what impact his cooperation would have in his own case, and the witness admitted that he was cooperating to avoid jail time. The defendant moved for a new trial, arguing that the Commonwealth's failure to turn over the audio recording before trial was a violation of its obligations under *Brady* and that the Commonwealth's failure to correct the witness' testimony about why he was testifying and the number of times he met with the Commonwealth violated *Napue*.

The trial court denied the motion. The trial court found that the prosecutor under *Napue* "probably should have corrected" the witness' statement at trial that he was testifying only because he wanted to get out of the gang, and the witness' recorded admission of hope for limiting his incarceration was impeachment evidence that the Commonwealth should have disclosed under *Brady*. However, the trial court ultimately found that due to the overwhelming evidence establishing the defendant's guilt, these failures did not likely impact the jury's judgment.

After trial, the defendant also moved for a new trial, arguing that the trial court erred by failing to strike, sua sponte, the juror for cause due to bias. The trial court denied that motion as well.

Lastly, the defendant argued his three sentences for gang participation under § 18.2-46.2 violated double jeopardy. The trial court rejected the argument.

Held: Affirmed.

Regarding the *Brady* issue, the Court agreed that the record demonstrated that the Commonwealth made the witness no promises of any kind in return for his testimony. Thus, the Commonwealth was not obligated to correct the witness' testimony that no promises were made in exchange for his testimony, especially given the witness' admission at trial that he was given no promises "for right now." Assuming without deciding that this evidence should have been disclosed pre-trial and corrected at trial, the Court found that the record supported the trial court's finding that there was no impact upon the verdict.

The Court pointed out that, giving the overwhelming evidence in this case, the only charge that would have rested entirely on the witness' testimony was the felonious use of a firearm, as the other witness testified that the defendant was not armed with a gun. However, the jury acquitted the defendant of that offense.

Regarding the juror, the Court repeated that objections related to the selection of the jury must be raised either during voir dire or before the jury is empaneled. Although Rule 3A:14(b) permits a trial court to strike a juror on its own motion, a defendant is still required to timely object to preserve the argument under Rule 5A:18. While § 8.01-352 permits a litigant to make a post-trial juror motion with leave of court, the Court emphasized that for the defendant to succeed on appeal by way of his post-trial motion, he must show that the juror's "disability be such as to probably cause injustice" in his case, per § 8.01-352(B). In this case, the Court concluded that the defendant failed to establish what, if anything, would have differed in the empaneled jury as a result of his using a peremptory strike against the juror. Thus, the Court ruled that he did not prove that his use of a peremptory strike "probably cause[d] injustice."

Lastly, regarding the defendant's double jeopardy argument, the Court noted that, under § 19.2-297.1, both first-degree murder and conspiracy to commit first-degree murder are "acts of violence." Thus, each of the defendant's three underlying convictions were criminal acts that may serve as the "predicate" for a conviction under § 18.2-46.2. The Court reasoned that if the legislature had intended for only one punishment of gang activity for multiple predicate criminal acts, it would have used "one or more predicate criminal acts" in lieu of "any predicate criminal act." The Court ruled that the trial court did not err in rejecting the defendant's claim that sentencing him upon more than one conviction for criminal gang participation violated double jeopardy principles.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1221224.pdf>

Harris v. Commonwealth: November 28, 2023

Virginia Beach: Defendant appeals his convictions for Child Sexual Assault on Refusal to Strike a Juror for Cause and *Brady* grounds.

Facts: The defendant sexually assaulted a child repeatedly. A detective interviewed the defendant, who denied the assaults but made certain admissions. The Commonwealth played the video of the interview at trial.

At trial, during jury selection, the defendant asked prospective jurors “Do you believe that a child would probably not lie about a sexual assault occurring?” A juror responded, “I don’t know, but I -- I mean, without having the facts and without hearing it right now, I would have a tendency to think that I would believe a child.” However, she then went on to affirm her ability to impartially consider all the evidence and said she would not “just stick with that premise[.]”

The same juror also said she would want to hear from the defendant and would have a “lingering question” if he did not testify. But neither she nor the rest of the venire said they would hold it against the defendant or “feel that he is hiding or that he is probably guilty” if he did not testify. Lastly, the juror stated that she found child sexual assault upsetting, was sympathetic to children, and that she believed that children are vulnerable. However, she stated that she “wouldn’t pass judgment on a particular case or incident without hearing all the components, all the factors involved.” She then affirmed her ability to impartially consider the evidence and follow the law, even if she did not agree with the law.

The defendant moved to strike the juror for cause, but the trial court denied the motion.

After trial, the defendant moved to set aside the verdict. He argued that investigations by the Attorney General and Virginia Beach police concluded that, in other cases, the detective used false certificates of analysis to obtain evidence against suspects. These investigations revealed five instances of Virginia Beach police allegedly using those certificates to obtain confessions. The defendant further asserted that, several months after his interview with the detective, she used a falsified certificate to question a suspect in another case. The defendant argued that the Commonwealth violated *Brady* by failing to disclose this practice, which impaired his ability to impeach the detective at trial. However, the defendant did not contend and produced no evidence indicating that the detective used a false certificate when interviewing him.

The trial court denied the defendant’s motion.

Held: Affirmed.

Regarding the juror, the Court ruled that, considering her voir dire as a whole, the record showed that the juror could decide the case based on the law and evidence introduced at trial.

Regarding the *Brady* issue, the Court ruled that the Commonwealth’s failure to disclose that the detective used false information in unrelated cases did not deprive the defendant of a fair trial. The Court noted that the record did not show, and the defendant did not argue, that the detective or anyone else used falsified certificates while investigating him in this case. Thus, the Court concluded that the failure to disclose the investigations of the detective’s interrogation tactics in other cases was not a *Brady* violation.

The Court ruled that the defendant failed to satisfy his burden to show that he was prejudiced at trial by the Commonwealth’s failure to disclose the investigations against the detective. The Court pointed out that, at trial, the defendant cross-examined the detective on her investigation tactics, including her admissions that she falsely told the defendant that the victim’s diary implicated him and that she insinuated that the victim instigated the sexual touching, and the jury observed and heard those tactics when it saw the video of her interview.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0746221.pdf>

Mitchell v. Commonwealth: October 24, 2023

Portsmouth: Defendant appeals his conviction for Manslaughter on Denial of Voir Dire Questions and Denial of Jury Instructions.

Facts: The defendant confronted, shot, and killed the current boyfriend of his child's mother. When police arrived, the defendant admitted that he he had been angry and intended to kill the victim. At trial, however, the defendant testified that he believed the victim was reaching for a weapon.

During voir dire, the defendant requested to ask the following voir dire question: "Does anyone here believe that no one other than a police officer should be allowed to carry firearms out in the open in public? If yes, would you hold a person who did responsible for anything bad that happened with the firearm regardless of the circumstance?" The trial court refused that question, but did permit the defendant to ask: "If there would be evidence presented that the defendant essentially always carries a firearm; so asking that, with that in mind, is there anyone here who has a strong feeling about firearms and guns that you think would make it difficult for you to be fair and impartial here today?"

At the end of the trial, the defendant asked the trial court to give two instructions, in addition to the standard self-defense instructions. The first read: "It does not matter if the belief later turns out to be erroneous that the defendant was in any real danger. As long as the defendant has reasonable grounds for believing that he was in danger of death or serious bodily harm, the killing is justifiable."

The defendant's second proposed instruction stated: "If a person stays at the place where a crime was committed, this creates no presumption that the person is innocent of having committed the crime. However, it is a circumstance which you may consider along with the other evidence."

The trial court refused those instructions.

Held: Affirmed.

Regarding the voir dire question, the Court ruled that the trial court did not abuse its discretion in denying the defendant's proposed voir dire question, particularly where another permitted question covered similar ground.

Regarding the defendant's jury instructions, the Court ruled that the defendant's proposed instructions improperly sought to focus the jury on specific evidence. Although the defendant was free to argue his reading of the facts to the jury in closing, the Court ruled that the trial court did not err in refusing to permit the instructions to focus on isolated facts.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0879221.pdf>

Wilson v. Commonwealth: October 10, 2023

Spotsylvania: Defendant appeals his convictions for Murder, Abduction, Child Cruelty, and related charges on Denial of a Continuance, Refusal to Strike Jurors for Cause, and Denial of a Mistrial based on Juror Misconduct.

Facts: The defendant and his confederates conspired to rob a man for drugs and money. The defendants then attacked the man and a woman, tying them up in their residence before slitting their throats and also murdering a fourteen-year-old child. They then abandoned a seventeen-month-old toddler and one-month-old infant alone with the three dead victims for multiple days without anyone to care for them in the residence. The two surviving children suffered significant injuries and suffered dehydration until they were finally discovered three days later.

On the first day of trial, only 51 of the 114 prospective jurors summoned for jury duty appeared for jury selection due to inclement weather. The defendant objected to going forward because “essentially half of the jurors ha[d] chosen not to appear.” The defendant argued that the 51 prospective jurors did not represent a fair cross-section of the community because they comprised only people who “want[ed] to be [t]here.” The defendant asserted that when he objected to the composition of the venire, the trial court failed to assess the prospective jurors’ “gender or racial makeup” and conduct an inquiry to determine whether they “lived, primarily or exclusively, close to the courthouse (thereby only representing a small geographic portion of the county) or had access to transportation (indicative of a possible class disparity).” The trial court denied the motion.

During voir dire, the trial court then asked whether anyone had read a newspaper article about this case that was published the previous week. Several jurors raised their hands, including two particular jurors. The prosecutor asked those jurors whether they had “any preconceived notions” regarding the defendant’s and his co-defendants’ guilt or innocence. The two jurors replied, “Not really,” and, “No, sir.” Neither the defendant nor his co-defendants questioned either juror regarding the article or their understanding of it.

The defendant then moved to strike the two jurors for cause. He proffered that the article disclosed that two other defendants had accepted “plea deal[s]” and had pleaded guilty to their charges. Acknowledging that he did not question either juror regarding “the content” of the article, the defendant nevertheless maintained that they may have learned that the co-defendants had pleaded guilty and, thus, acquired “information” that the trial court had ruled was inadmissible. The defendant asserted that the “information” was “so prejudicial” that the jurors could not be impartial. The trial court refused to strike the jurors for cause.

On the third day of trial, defense counsel proffered that the defendant was “feverish,” had a headache, and was “unable to focus.” Additionally, he stated that the defendant had not been “feeling well” the previous day, counsel reported, and seemed “distracted and uncomfortable.” The defendant had vomited before court the previous morning and had requested medical attention at the jail but had not “received any actual attention or treatment.” Therefore, the defendant requested a one-day continuance. Alternatively, the defendant asked the trial court to “pause the proceedings briefly to allow him to recuperate” and to instruct the jury that he might need to “close his eyes or put his head in his hand” during trial.

The trial court found that the defendant did not appear ill and had “seemed very engaged” during trial. There was also no “medical report” or other evidence demonstrating that the defendant

was sick. Accordingly, the trial court denied the continuance but stated, “[w]e’re going to proceed this morning, unless it becomes apparent that we can’t.” During trial, the defendant raised no further objection and did not renew his continuance request.

On the fourth day of trial, during a lunch recess, the trial court notified the parties that it had received a letter from a juror. The letter stated, “it has come to my attention that the victim in this case has some family ties to my family which [I] did not know at the start of this trial.” Additionally, the letter stated that serving as a juror was causing the juror financial hardship.

Outside the presence of the other jurors, the trial court placed the juror under oath and permitted the parties to question him regarding his letter. The juror stated that he was not related to any of the victims, but his family had “ties” to them. The juror confirmed that he had not communicated those family ties to anybody else on the jury. The juror also acknowledged that he had “a number of financial concerns,” but did not specify what those concerns were. The trial court then excused the juror without objection.

After trial but before sentencing, the defendant moved for a mistrial, arguing that the juror’s purported dishonesty during voir dire denied him an impartial jury. The defendant argued that he was entitled to a mistrial because the juror failed to answer honestly a material question on voir dire by deliberately failing to disclose his “family ties” when a truthful answer would have provided a valid basis for a challenge for cause. In addition, the defendant argued that the juror “must have” discovered his “family ties” through independent investigation or speaking with someone about his jury service, thus ignoring the trial court’s directive not to do so. The defendant contended that the juror was biased against him, and the trial court was required to order a new trial. The trial court denied the motion.

[Note: The defendant was tried alongside the defendants in the Bailey and Green cases, decided today as well – EJC]

Held: Affirmed.

Regarding the defendant’s “fair cross section” argument, the Court pointed out that the defendant bore the burden to establish a prima facie fair cross-section claim; it was not the trial court’s responsibility to sua sponte investigate the matter. In this case, the Court complained that the defendant did not demonstrate that the trial court’s jury selection process systemically excluded members of that group from jury venires or that there was a policy or other effort to exclude them. Therefore, the Court ruled that the defendant failed to establish a prima facie fair cross-section claim.

Regarding the two jurors who had seen the article before trial, the Court found that the record demonstrated that the jurors acknowledged that they understood that the defendant was presumed innocent and maintained that they did not have any “preconceived notions” regarding his guilt or innocence after reading the article. The Court noted that the jurors had confirmed that they could “give a fair and impartial trial” to the defendant “based solely on the evidence” presented. The Court concluded that the defendant did not establish that the jurors were subject to strikes for cause.

Regarding the defendant’s request for a continuance due to illness, the Court repeated that prejudice may not be presumed; it must appear from the record. In this case, the Court examined the record and found that it demonstrated that despite the defendant’s purported illness, he ably testified and presented his version of events. Therefore, the Court found no evidence of prejudice from the denied continuance.

Regarding the defendant's claim of the juror's bias, the Court ruled that the defendant failed to demonstrate that the juror intentionally failed to disclose his "family ties" to the victims during voir dire or that the juror had actual bias against the defendant. The Court first repeated that to succeed on an implied bias claim, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. On the other hand, the Court noted, to succeed on an actual bias claim, a party must demonstrate at a hearing that the juror had "actual bias" against him.

In this case, the Court found that the defendant had not demonstrated that the juror's failure to disclose his "family ties" to the victims during voir dire was intentional. The Court noted that the evidence demonstrated that he was unaware that his family was related to any of the victims until the final day of trial, whereupon he promptly notified the trial court. In addition, the Court found that the defendant had failed to demonstrate that the juror had actual bias against him.

The Court concluded that the defendant's assertion that the juror must have learned about his relatives' association with the victims "through independent investigation" or discussing the case with his family was speculative. The Court also pointed out that the juror had previously testified during voir dire that he did not have any "preconceived notions" regarding the defendant's guilt or innocence and would "give a fair and impartial trial" to the parties "based solely on the evidence."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0780222.pdf>

Zimmerman v. Commonwealth: August 15, 2023

Page: Defendant appeals his convictions for Murder and Child Abuse on Voir Dire, Witness Testimony, Denial of Character Evidence, and Expert Testimony issues.

Facts: The defendant killed his girlfriend's ten-month old child through abusive head trauma.

At a pretrial hearing, the court granted the Commonwealth's motion in limine to preclude the defendant from eliciting specific instances of conduct from his character witnesses to show that he was not a violent person, including any "reference to [the defendant's] specific interaction with children or actions not on the date of the offense." The trial court rejected his argument that Rule 2:405(b) permitted him to introduce specific instances of conduct to establish his character for non-violence.

The court also considered the parties' proposed voir dire questions. The defendant objected to three questions proposed by the Commonwealth.

1. The defendant argued that the first proposed question—"Do you understand that reasonable doubt does not require proof beyond all possible doubt[,] nor is the Commonwealth required to disprove every conceivable circumstance of innocence?"—was argumentative and incorrectly instructed the jury that the Commonwealth could "prove the case with some doubt in [the jury's] minds."
2. The defendant argued that the second proposed question—"[I]f you hear two expert witnesses testify in [c]ourt and they give contradictory opinions[,] [i]s there anyone that

would automatically not feel comfortable deciding to believe one over the other regardless of the evidence?”—improperly gave jurors the impression that they had “to make a decision[,] when the jury doesn’t have to make a decision between two experts.”

3. The defendant argued that the third proposed question—“Are any of you uncomfortable about accepting the responsibility to determine who is telling the truth?”—failed to capture instances where “both people are telling . . . slightly different stories but they’re both telling the truth.” The court overruled the objection.

The trial court overruled the defendant’s objections.

During voir dire, a juror who was a former police officer, advised that the assistant Commonwealth’s attorney had prosecuted cases in which he had been involved, and he also had “called [the prosecutor] like two years ago on a civil case.” The juror asserted that his previous interaction with the prosecutor would not affect his “ability to impartially decide [the] case based solely on the law and the evidence.” The juror also stated that he currently works at a medical facility, which would not affect his ability to be impartial.

The defendant asked to strike the former police officer for cause, arguing that because the former police officer had worked on cases with the prosecutor, that made him the prosecutor’s “client.” He contended that denying his motion to strike “creat[ed] a lack of confidence by the public in the integrity of the process.” The trial court refused to strike the juror.

During voir dire, the defendant raised a *Batson* challenge to the Commonwealth’s peremptory strikes eliminating all four prospective jurors under the age of 40 and striking the only Hispanic individual in the venire. The Commonwealth responded that age is not a “valid challenge” under *Batson* but explained its reasons for striking the four jurors. The Commonwealth also explained that the Hispanic juror made “vulgar statements on social media” and had a “large [collection] of traffic tickets,” which could influence his attitude toward law enforcement. The trial court overruled the challenges, finding that the Commonwealth had offered “appropriate reason[s]” for the strikes.

At trial, several Commonwealth witnesses testified that the injuries were “consistent with abusive head trauma” and were not consistent with a 17-inch fall, pneumonia, or a stroke, as the defendant’s experts opined. The defendant objected to the Commonwealth’s witness’ statements that the victim suffered abusive head trauma, arguing that this testimony established the “ultimate issue” in the case and therefore invaded the province of the jury. The trial court overruled his objection.

At trial, the Commonwealth elicited testimony from a doctor that the victim’s injuries were “highly suspicious for non-accidental trauma,” not consistent with falling from a couch, not consistent with a child his age, and “highly concerning for child abuse.” The doctor testified as a fact witness for the prosecution regarding her examination and assessment of victim’s injuries and the photographs she took. The doctor also explained that her team’s “NAT protocols” referred to “non-accidental trauma” protocols “that need to be completed when there’s a suspicion of non-accidental trauma.” On cross-examination, the trial court precluded the defendant from qualifying the doctor as an expert on cross-examination, over the defendant’s objection.

Held: Affirmed. The Court held that the court did not err by denying the defendant’s *Batson* challenges or by overruling the defendant’s objections to the Commonwealth’s voir dire questions. As for the evidentiary issues, the Court ruled that the trial court did not err by allowing witnesses to testify

to conclusions about the victim's injuries, by excluding "specific instances" of the defendant's nonviolent character, or by not designating the Commonwealth's lay witness as an expert on child abuse during cross-examination.

Regarding the defendant's proffered character evidence, the Court agreed that a defendant may introduce evidence of his reputation for pertinent character traits on the theory that it is improbable that a person who has a good reputation for such traits would be likely to commit the crime charged against him. However, the Court explained, a defendant, in order to establish good character, is not permitted to prove specific acts, custom, or course of conduct.

In this case, the Court noted that the defendant's character was not an "essential element" of a charge, claim, or defense. Further, the trial court allowed the defendant to present evidence that he had a reputation not only for truthfulness and peacefulness, but also for practicing good childcare—a character trait directly related to the charges against him. In this case, because having a violent character was not an "essential element" of the charges against him, the Court ruled that the trial court did not abuse its discretion in precluding evidence of "specific instances of conduct" under Rule 2:405(b).

Regarding the former police officer potential juror, the Court accepted the trial court's determination that the juror could be fair and impartial. Additionally, the Court explained that "a police officer is not a "client" of the Commonwealth Attorney's office; there is no attorney-client relationship between the officer and a prosecutor in a criminal case. The prosecutor represents the Commonwealth, not the officer."

Regarding the defendant's *Batson* challenge, the Court refused to extend *Batson* to age-discrimination claims, noting that the Court has long-allowed age-based peremptory strikes. The Court then held that the court did not err by accepting the Commonwealth's race-neutral explanation for the peremptory strike of the one Hispanic juror.

Regarding the three voir dire questions, the Court held that the questions were proper under § 19.2-262.01, and the court did not abuse its discretion in allowing the three challenged questions. The Court observed that the questions tracked common legal principles. The Court pointed out that the first challenged question, addressing reasonable doubt mirrors language in Model Jury Instruction 2.100.3. The Court agreed that this question was relevant because it would "disclose or clearly lead to the disclosure" of a juror's opinion or bias against the reasonable-doubt standard.

Turning to the expert-witness question, the Court ruled that the question did not foreclose a juror's option to decide not to believe either expert. Instead, it sought to reveal whether any juror would automatically view evidentiary conflicts as inconsistent with guilt. Lastly, the Court concluded that the third challenged question assessed the jurors' willingness to determine witness credibility and that the question was designed to reveal whether prospective jurors had any resistance to their factfinding role.

Regarding the Commonwealth's witness' testimony, the Court ruled that the lay and expert testimony that the victim's injuries were consistent with abusive head trauma did not invade the province of the jury. The Court noted that the witnesses did not identify the defendant as the criminal agent, and their testimony merely tended to show that the child was intentionally, rather than accidentally, injured. Furthermore, the Court noted that the Commonwealth's opinion evidence contradicted the defendant's defense that the victim died from pneumonia or a stroke, not from abusive

head trauma. In other words, the purpose of the opinion evidence was to prove an element of the offense and eliminate other theories about the cause of death. The Court repeated that the mere fact that a witness's opinion provides proof of an ultimate issue of fact does not preclude the evidence.

For example, the Court pointed to the Commonwealth's forensic physician's testimony at trial, which never identified the defendant as the criminal agent; instead, the Court noted that it was evidence that the child was intentionally injured, making the defendant's defense that pneumonia or stroke caused the child's death less probable.

Lastly, regarding the doctor that the defendant wanted to qualify as an expert, the Court noted that the doctor's testimony was within the doctor's realm of direct and personal knowledge as a member of the UVA forensics team that documented the victim's injuries. The Court did not find that the trial court abused its discretion by denying the defendant's request to designate the doctor as an expert witness for cross-examination purposes.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0507224.pdf>

Hicks v. Commonwealth: August 15, 2023

Arlington: Defendant appeals his conviction for Rape, 2nd offense, on Refusal to Strike a Juror for Cause.

Facts: The defendant, who had a previous conviction for a similar offense, raped a woman during a massage appointment. At trial, he presented a consent defense.

During jury selection, the parties asked a potential juror, if someone reported to have been raped, "are they more likely to be telling the truth?" The potential juror replied "to me, yes, because I don't understand why someone would put themselves through this if it wasn't – if that didn't actually happen." After re-affirming his "bias," as the juror put it, the defendant asked: "So, entering into this, you think it would be difficult for you to un-feel that bias that you're entering in with?"

The juror replied: "I would give my best try to set that aside, but there is a bias in that regard, yes." The Commonwealth then asked: "Do you think you could make a decision in this case based solely on the evidence before you? Even if you come into it thinking, if a woman is willing to go through all this, it must be true, are you willing to acknowledge that if you didn't think the evidence was sufficient or, for whatever reason, you didn't believe her, that you would factor that in versus just saying, well, I automatically believe women?"

The juror replied: "Yes. No. So, do I believe if she came forward and she says she was raped, that she was raped? Yes. Does that mean that the Defendant is guilty? No. Because we don't know any of the facts. I don't know that she actually named the Defendant. We don't know any of those things. But the question was, would I believe that someone who said they were raped is more believable? More believable, yes, but that doesn't mean that they actually – that I have to take a step forward and say the Defendant is guilty, if that makes sense."

The defendant moved to strike the juror for cause, but the trial court refused. The defendant used a peremptory strike instead.

Held: Reversed. The Court found that the trial court erred by denying the defendant's motion to strike the juror for cause. The Court ruled that the juror's responses created reasonable doubt about his qualifications to serve on a jury. The Court noted that the juror was never asked whether he could presume the defendant innocent until proven guilty after he gave responses inconsistent with this principle of law.

The Court explained that the Commonwealth's rehabilitative question did not address the juror's bias because it embodied two separate inquiries and failed to address whether the juror's viewpoints or biases were firmly held or were merely misconceptions that would not prevent the juror from applying the law. The Court wrote that the juror's statement about proving the rapist's identity in and of itself required rehabilitation, as it indicated an unwillingness or inability to consider the defendant's consent defense and implied that such testimony by the complaining witness would automatically establish the corpus delicti.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0659224.pdf>

Chavez v. Commonwealth: July 12, 2023

Loudoun: Defendant appeals his convictions for Child Sexual Assault on Refusal to Strike a Juror and Refusal to Admit Defense Evidence.

Facts: The defendant repeatedly sexually assaulted a child. Prior to trial, the defendant requested a hearing pursuant to § 18.2-67.7, the rape shield statute. The defendant sought to admit the following:

(a) The victim's statements that she self-harmed in the past with a knife because her mother would not let her have a boyfriend;

(b) The victim's statements that she believed she was pregnant;

(c) Statements from the victim's classmate that the victim discussed a boyfriend in the same conversation during which she reported the defendant's abuse; and

(d) Printouts of two photographs from the victim's Facebook account, posted during the period of abuse, showing an unknown couple kissing with "heart balloons" in the background and an unknown couple on a beach with the quote "I was born to love you."

The defendant argued that this evidence would demonstrate that the victim had a motive to fabricate. The trial court denied the defendant's motion.

During voir dire, the Commonwealth asked the venire if anyone had been a victim or had a friend or family member who had been the victim of sexual abuse. One juror revealed that his wife was sexually abused as a child. He stated that he thought he could be unbiased, but that he "just ha[d] some doubt." However, he did acknowledge that "something" in the case could "trigger" a response from him related to his wife's abuse. The prosecutor asked if he had already determined the defendant's guilt

because of his own experience, and the juror responded “no.” When asked if he could determine the case based on the evidence presented and not on his own experience, the juror stated, “I think I can.”

The defendant moved to strike the juror for cause. In denying the motion, the court noted that it observed the juror’s body language, his facial gestures, and his vocal intonation and believed him when he said he could be impartial.

Held: Affirmed. The Court ruled that the court did not abuse its discretion when it denied the defendant’s motion to introduce certain proffered testimony and exhibits, and when it denied the defendant’s motion to strike the juror from the jury for cause.

Regarding the defendant’s proffered evidence, the Court noted that § 18.2-67.7(B) provides that “[n]othing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused.” However, in this case, the Court found that the defendant did not establish a pattern of behavior with a sufficient nexus to the crime for which he was on trial. The Court pointed out that the defendant did not proffer the details of the statements, any claimed prior sexual activity, or the existence of a boyfriend. The Court therefore ruled that the trial court did not abuse its discretion when it denied the defendant’s motion to introduce the victim’s statement suggesting a belief that she was pregnant.

The Court also complained that the defendant failed to establish how the victim’s alleged self-harm tended to prove a motive to fabricate. Second, the Court explained that the bare fact of the victim mentioning a boyfriend is too attenuated from any evidence supporting a motive to fabricate. Lastly, the Court agreed with the trial court’s conclusion that the photographs from the victim’s Facebook page were irrelevant to prove any issue in the case and merely invited speculation. The Court noted that these images simply portrayed an unknown couple and did not make the existence of a potential boyfriend more probable and produced only an attenuated, speculative inference.

Regarding the juror, the Court found that the record did not establish that the juror held firm opinions of such “fixed character which repel[] the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already.” The Court noted that the trial court found that the juror was honest about his ability to be impartial and specifically noted that it came to this conclusion based on the juror’s body language, facial gestures, and vocal intonation. Considering the entire voir dire, the Court ruled that the record supported the court’s determination that the juror could serve as an impartial juror.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0793224.pdf>

Romero v. Commonwealth: June 13, 2023

Prince William: Defendant appeals his conviction for Rape of a Child on Refusal to Strike a Juror for Cause and Admission of Prior Bad Acts

Facts: The defendant raped an eleven-year-old child. At jury selection, all of the prospective jurors indicated that they had no personal interest in the outcome of the trial, that they had not obtained any information about the alleged offense from outside sources, that they had no opinion about the defendant's guilt or innocence, and that they had no awareness of any biases or prejudices against the defendant.

One juror indicated that both she and a good friend had previously been victims of a sexual assault many years earlier. When asked whether her experience would impact her ability to listen to this case fair and impartially, she responded, "No." She further affirmed that she would be able to form an opinion in the case based solely upon the evidence presented at trial. Defense Counsel asked, "Could it possibly affect your ability to be impartial when you hear the evidence and it could perhaps bring up some past experiences?" The juror responded, "Maybe, yeah. I can't tell. Possibly."

However, after the trial judge explained to her the role of a juror in deciding the case and asked her if her experience would compromise her ability to be impartial in deciding the case, the juror affirmed that she could indeed be impartial. Consequently, the trial court denied the defendant's motion to strike the juror for cause.

During trial, the victim testified as to how the defendant's sexual advances toward her had begun shortly before his rape of her on the night of the offense. Over the defendant's objection, the victim testified to three prior occasions when the defendant touched her sexually. The trial court, however, gave the jury an instruction limiting the jury from considering any evidence of prior bad acts for propensity purposes.

Held: Affirmed. The Court held that the trial court did not abuse its discretion when it denied the defendant's motion to strike the juror and when it allowed the victim to testify about the defendant's prior sexual assaults against her.

Regarding the juror, the Court found that, although she briefly indicated that her past experiences could possibly affect her, the juror's statement was an outlier when viewed in context of the entire voir dire. Furthermore, following her very brief exchange with defense counsel, the Court noted that the juror reassured the trial court that her past experiences would not compromise her ability to fairly and impartially decide this case based on the evidence. Consequently, the Court ruled that the trial court did not commit manifest error by denying the defendant's motion to strike the juror for cause.

Regarding the defendant's prior bad acts, the Court reasoned that the fact that the defendant touched the victim sexually on at least three separate occasions before the offense "certainly constitutes evidence of the relationship" that the defendant had with the victim and of his conduct and attitude toward her. Specifically, the Court found that the defendant's repeated sexual advances toward the victim show that he sexually desired her. Furthermore, the Court also contended that the victim's testimony showed that she did not misunderstand what was happening to her, because the defendant had touched her vagina before when they were "play fighting" and had even inserted his penis in her vagina at least once before when they were in a bedroom of the home. Consequently, the Court ruled that the victim's testimony concerning the defendant's prior sexual acts committed against her has legitimate probative value under Va. R. Evid. 2:404(b).

The Court also found that the probative value of the defendant's prior sexual advances toward the victim simply outweighed any incidental prejudice that might arise. The Court also noted that the trial court gave a limiting instruction in this case.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0847224.pdf>

Soung Lee v. Commonwealth: June 6, 2023

Fairfax: Defendant appeals his conviction for Rape on Refusal to Strike a Juror for Cause.

Facts: The defendant raped a woman. At trial, during voir dire, the trial court asked the venire if anyone had been a victim of sexual assault or if a close family member had been sexually assaulted. A potential juror stated that a babysitter had sexually assaulted her sister and that the abuse was not revealed until years later. The trial court asked the juror if that experience would impair her ability to be impartial. The juror stated she did not think it would affect her "personal bias to convict or not to convict." She noted, however, it would affect her personally, explaining: "I think I have some sort of PTSD from it and I get triggered very easily when I think about him and what my sister has had to deal with." When asked if some evidence might trigger her PTSD and interfere with her ability to be a juror, the juror noted she came "to this with a clear head and a clear mind." She continued, "I also think that at the end of the day I might go home, and I might think about it too much and it might upset me. But I don't think it would affect my ability to be impartial."

The defendant asked that the trial court strike the juror, but trial court refused, noting that, given the nature of the case, "the consequence of sitting would be difficult."

Held: Affirmed. Because the record supported the trial court's determination that the juror could serve as an impartial juror, the Court refused to reverse the trial court's denial of the motion to strike the juror for cause.

The Court found that the record did not establish that the juror held firm opinions of such "fixed character which repel the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already." Considering the entire voir dire, the Court noted that the juror conveyed she could be fair and impartial, was unaware of any bias or prejudices she may have, and knew of no personal, religious, or moral reasons that prevented her from serving on the jury.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0842224.pdf>

Juror Misconduct

Virginia Court of Appeals –
Published

Clark v. Commonwealth: October 17, 2023

Richmond: Defendant appeals his conviction for Murder, Rape, and Abduction on Amending the Indictment and Juror Misconduct.

Facts: The defendant attacked the victim, raped her, and strangled her to death. After killing the victim, the defendant submerged her in a bathtub in an ineffectual attempt to destroy his semen that was inside her body. Later while incarcerated pending trial, the defendant told his ex-wife that police could not have discovered his DNA at the crime scene because the victim had been “soaked in hot water.” Prior to trial, the Commonwealth notified the defendant before trial that the medical examiner determined that the victim died within a 48-hour “window.”

Prior to trial, the trial court permitted the Commonwealth to amend the indictments to reflect that the offenses occurred “between May 8, 2019, and May 9, 2019,” rather than “on or about” May 9, 2019, over the defendant’s objection that doing so violated his due process right to present an alibi defense.

After trial but before sentencing, the trial court discovered that one juror, who had served on the jury, was not a resident of the City of Richmond. The trial court found that he had failed to provide truthful answers about his residency during voir dire, held the juror in contempt and sentenced him to ten days in jail, all suspended, and a fine of \$250.

The defendant moved for a mistrial on grounds that seating the juror violated his right to an impartial jury under the federal and Virginia constitutions and required setting aside the verdicts and granting a new trial under § 8.01-352 because the juror was not a Richmond resident. After trial, the defendant argued that seating the juror violated the vicinage clause in Article 1, section 8 of the Virginia Constitution, which states that “in criminal prosecutions a man . . . shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.” The defendant also argued that the juror’s dishonesty suggested that he was not impartial and may have disregarded the trial court’s jury instructions during deliberations.

Held: Affirmed.

Regarding the amendment to the indictment, the Court found no due process violation. The Court first repeated that because due process requires an indictment to provide the accused notice of the charges against him, amendments under §19.2-231 are permissible only if they do not alter “the nature or character” of the accusations. Nonetheless, where the date of the offense is “not of the essence of the offense,” nor shown to be significant, the Court also repeated that the Commonwealth is not required to charge that it occurred on a specific date, and the Commonwealth may even prove that the offense occurred on a date other than that alleged in the charging instrument.

In this case, the Court noted that time was not an element for any of the charged offenses. The Court also pointed out that the defendant had knowledge that the Commonwealth would attempt to prove that the crimes may have occurred on May 8, 2019. The Court also pointed out that the

amendments occurred before the defendant presented his alibi witness. Lastly, the Court concluded that the defendant's failure to move for a bill of particulars to clarify the offense date before trial or request a continuance after the amendment to seek additional alibi witnesses undercuts his claim that he did not have adequate notice to prepare an alibi defense.

Regarding the juror who lied about his residence, the Court explained that, to demonstrate "cause" for setting aside the jury's verdicts and granting a new trial under § 8.01-352, the defendant had the burden of establishing either that (1) the juror had a legal "disability" that "probably cause[d] injustice" to him or (2) the juror's misconduct during jury selection caused an "irregularity" in impaneling the jury that was either "intentional" or "probably cause[d] injustice" to him. The Court explained that an "irregularity" is "intentional" under § 8.01-352 only if the trial court clerk or trial judge intentionally committed an act or adopted a practice that varies from the normal conduct of an action in making the "list or lists of jurors" or in "drawing, summoning, returning or impaneling" jurors or "in copying or signing or failing to sign the list."

On the other hand, the Court agreed that juror misconduct during jury selection may cause an unintentional irregularity in summoning or impaneling a jury under § 8.01-352. In this case, the Court found the juror's non-residency was a legal disability and his dishonesty regarding that fact on voir dire caused an unintentional irregularity in impaneling the jury. The Court then explained that it was the defendant's burden to establish that the defects "probably cause[d] injustice" to him.

In this case, the Court concluded that the defendant failed to establish that the juror harbored an actual bias against him. The Court found the defendant's claim that the juror harbored actual bias against him or disregarded the trial court's instructions to be speculative. Regarding the defendant's vicinage argument, the Court simply ruled that the defendant failed to raise a timely challenge to seating the juror based on Virginia's vicinage clause.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0620222.pdf>

Virginia Court of Appeals -
Unpublished

Ingram v. Commonwealth: May 7, 2024

Williamsburg: Defendant appeals his conviction for Rape alleging Juror Misconduct.

Facts: The defendant raped the victim. The jury convicted the defendant, and the trial court polled the jurors. Each juror confirmed their guilty vote. Prior to sentencing, however, one of the jurors notified the trial court clerk that she did not agree with the verdict and had felt pressured to find the defendant guilty. The defendant filed a motion to set aside the verdict and declare a mistrial, contending that the verdict was not unanimous or the product of free deliberation and was instead the product of force, threat, or intimidation.

At the hearing on the defendant's motions, the trial court placed the juror at issue under oath

and questioned her about the jury's deliberations pursuant to Virginia Rule of Evidence 2:606(b). She denied that any outside evidence, influences, entities, or persons had influenced the jury's deliberations or that any juror had expressed a racial or national origin bias that would cast doubt on the verdict. She also confirmed that during deliberations, she had been given the opportunity to participate and discuss anything she wanted to contribute and had been allowed to say what she thought. She denied there had been any mistake on the jury's verdict form when it was submitted to the court. The juror nevertheless maintained that during deliberations, she had felt the other jurors were not "hearing" or understanding her and that she "couldn't explain [her]self right."

The trial court denied the defendant's motions.

Held: Affirmed. The Court agreed that the record demonstrated that although the juror testified that she felt pressured by other jurors to find the defendant guilty, she did not express dissent when the trial court polled the jury after it returned its verdict. To the contrary, she and her fellow jurors confirmed their guilty verdict finding. Moreover, the Court noted that the juror confirmed that she fully expressed her opposing views and participated in discussing the issues during deliberations. The Court also pointed out that the juror also denied that any extraneous evidence or influences affected the jury's verdict or that any juror had expressed a "national origin or racial bias such that the verdict should be in doubt" under Va. R. Evid. 2:606. The Court found that the above circumstances did not establish "a probability of prejudice" to the defendant and accordingly, the Court ruled that the trial court did not abuse its discretion by denying the defendant's motion for a mistrial.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1960221.pdf>

Wilson v. Commonwealth: October 10, 2023

Spotsylvania: Defendant appeals his convictions for Murder, Abduction, Child Cruelty, and related charges on Denial of a Continuance, Refusal to Strike Jurors for Cause, and Denial of a Mistrial based on Juror Misconduct.

Facts: The defendant and his confederates conspired to rob a man for drugs and money. The defendants then attacked the man and a woman, tying them up in their residence before slitting their throats and also murdering a fourteen-year-old child. They then abandoned a seventeen-month-old toddler and one-month-old infant alone with the three dead victims for multiple days without anyone to care for them in the residence. The two surviving children suffered significant injuries and suffered dehydration until they were finally discovered three days later.

On the first day of trial, only 51 of the 114 prospective jurors summoned for jury duty appeared for jury selection due to inclement weather. The defendant objected to going forward because "essentially half of the jurors ha[d] chosen not to appear." The defendant argued that the 51 prospective jurors did not represent a fair cross-section of the community because they comprised only people who "want[ed] to be [t]here." The defendant asserted that when he objected to the composition

of the venire, the trial court failed to assess the prospective jurors' "gender or racial makeup" and conduct an inquiry to determine whether they "lived, primarily or exclusively, close to the courthouse (thereby only representing a small geographic portion of the county) or had access to transportation (indicative of a possible class disparity)." The trial court denied the motion.

During voir dire, the trial court then asked whether anyone had read a newspaper article about this case that was published the previous week. Several jurors raised their hands, including two particular jurors. The prosecutor asked those jurors whether they had "any preconceived notions" regarding the defendant's and his co-defendants' guilt or innocence. The two jurors replied, "Not really," and, "No, sir." Neither the defendant nor his co-defendants questioned either juror regarding the article or their understanding of it.

The defendant then moved to strike the two jurors for cause. He proffered that the article disclosed that two other defendants had accepted "plea deal[s]" and had pleaded guilty to their charges. Acknowledging that he did not question either juror regarding "the content" of the article, the defendant nevertheless maintained that they may have learned that the co-defendants had pleaded guilty and, thus, acquired "information" that the trial court had ruled was inadmissible. The defendant asserted that the "information" was "so prejudicial" that the jurors could not be impartial. The trial court refused to strike the jurors for cause.

On the third day of trial, defense counsel proffered that the defendant was "feverish," had a headache, and was "unable to focus." Additionally, he stated that the defendant had not been "feeling well" the previous day, counsel reported, and seemed "distracted and uncomfortable." The defendant had vomited before court the previous morning and had requested medical attention at the jail but had not "received any actual attention or treatment." Therefore, the defendant requested a one-day continuance. Alternatively, the defendant asked the trial court to "pause the proceedings briefly to allow him to recuperate" and to instruct the jury that he might need to "close his eyes or put his head in his hand" during trial.

The trial court found that the defendant did not appear ill and had "seemed very engaged" during trial. There was also no "medical report" or other evidence demonstrating that the defendant was sick. Accordingly, the trial court denied the continuance but stated, "[w]e're going to proceed this morning, unless it becomes apparent that we can't." During trial, the defendant raised no further objection and did not renew his continuance request.

On the fourth day of trial, during a lunch recess, the trial court notified the parties that it had received a letter from a juror. The letter stated, "it has come to my attention that the victim in this case has some family ties to my family which [I] did not know at the start of this trial." Additionally, the letter stated that serving as a juror was causing the juror financial hardship.

Outside the presence of the other jurors, the trial court placed the juror under oath and permitted the parties to question him regarding his letter. The juror stated that he was not related to any of the victims, but his family had "ties" to them. The juror confirmed that he had not communicated those family ties to anybody else on the jury. The juror also acknowledged that he had "a number of financial concerns," but did not specify what those concerns were. The trial court then excused the juror without objection.

After trial but before sentencing, the defendant moved for a mistrial, arguing that the juror's purported dishonesty during voir dire denied him an impartial jury. The defendant argued that he was

entitled to a mistrial because the juror failed to answer honestly a material question on voir dire by deliberately failing to disclose his “family ties” when a truthful answer would have provided a valid basis for a challenge for cause. In addition, the defendant argued that the juror “must have” discovered his “family ties” through independent investigation or speaking with someone about his jury service, thus ignoring the trial court’s directive not to do so. The defendant contended that the juror was biased against him, and the trial court was required to order a new trial. The trial court denied the motion.

[Note: The defendant was tried alongside the defendants in the Bailey and Green cases, decided today as well – EJC]

Held: Affirmed.

Regarding the defendant’s “fair cross section” argument, the Court pointed out that the defendant bore the burden to establish a prima facie fair cross-section claim; it was not the trial court’s responsibility to sua sponte investigate the matter. In this case, the Court complained that the defendant did not demonstrate that the trial court’s jury selection process systemically excluded members of that group from jury venires or that there was a policy or other effort to exclude them. Therefore, the Court ruled that the defendant failed to establish a prima facie fair cross-section claim.

Regarding the two jurors who had seen the article before trial, the Court found that the record demonstrated that the jurors acknowledged that they understood that the defendant was presumed innocent and maintained that they did not have any “preconceived notions” regarding his guilt or innocence after reading the article. The Court noted that the jurors had confirmed that they could “give a fair and impartial trial” to the defendant “based solely on the evidence” presented. The Court concluded that the defendant did not establish that the jurors were subject to strikes for cause.

Regarding the defendant’s request for a continuance due to illness, the Court repeated that prejudice may not be presumed; it must appear from the record. In this case, the Court examined the record and found that it demonstrated that despite the defendant’s purported illness, he ably testified and presented his version of events. Therefore, the Court found no evidence of prejudice from the denied continuance.

Regarding the defendant’s claim of the juror’s bias, the Court ruled that the defendant failed to demonstrate that the juror intentionally failed to disclose his “family ties” to the victims during voir dire or that the juror had actual bias against the defendant. The Court first repeated that to succeed on an implied bias claim, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. On the other hand, the Court noted, to succeed on an actual bias claim, a party must demonstrate at a hearing that the juror had “actual bias” against him.

In this case, the Court found that the defendant had not demonstrated that the juror’s failure to disclose his “family ties” to the victims during voir dire was intentional. The Court noted that the evidence demonstrated that he was unaware that his family was related to any of the victims until the final day of trial, whereupon he promptly notified the trial court. In addition, the Court found that the defendant had failed to demonstrate that the juror had actual bias against him.

The Court concluded that the defendant’s assertion that the juror must have learned about his relatives’ association with the victims “through independent investigation” or discussing the case with his family was speculative. The Court also pointed out that the juror had previously testified during voir

dire that he did not have any “preconceived notions” regarding the defendant’s guilt or innocence and would “give a fair and impartial trial” to the parties “based solely on the evidence.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0780222.pdf>

Juveniles

Virginia Court of Appeals – Published

Cornelius v. Commonwealth: February 13, 2024.

Highland: Defendant appeals the refusal to Reduce his Sentence during a Serious Offender Review.

Facts: The defendant, as a juvenile, shot his grandmother in the back of the head with a rifle from over 100 feet away while she was sewing at the dining table. The trial court sentenced the defendant to 10 years of incarceration, along with additional time suspended. The trial court committed the defendant to DJJ to serve a portion of this sentence as a serious juvenile offender under § 16.1-285.1 and ordered the defendant to serve the remainder of his sentence as an adult in DOC. Between 2021 and 2022, the trial court conducted three review hearings of the defendant’s custodial status in accordance with the provisions of §§ 16.1-285.1 and -285.2.

In 2023, after his third review hearing, the trial court ordered that the defendant be transferred from DJJ to DOC to serve the remainder of his sentence as an adult. The trial court overruled the defendant’s argument that it should have granted him parole. The defendant argued that the court’s transfer decision was unreasonable and demonstrated an abuse of discretion for failure to “meaningfully consider” all relevant factors and mitigating evidence.

The trial court also rejected the defendant’s argument that the transfer order lengthened his time to serve in the adult penitentiary from what was ordered by the original sentencing judge, deprived him of future opportunities for release and of resources provided to youthful offenders, and denied him “meaningful opportunity for review and release based on demonstrated maturity and rehabilitation,” in contravention of “the rehabilitative aims of [the] juvenile sentencing” statutes.

Held: Affirmed. The Court held that § 16.1-285.2 grants the trial court discretion to order a juvenile offender’s transfer from DJJ to DOC following a review hearing. The Court held that the record did not show that the trial court abused its discretion by choosing that option, as opposed to sending the defendant back to DJJ or releasing him to parole, despite the uncontradicted evidence that the defendant presented at his 2022 review hearing.

The Court concluded that the defendant had not been deprived of any rights for which he can claim recompense. The Court also ruled that, although a trial court’s choice to transfer a juvenile

offender to DOC sooner than originally ordered may seem harsh, it is nevertheless permitted by statute under § 16.1-285.2(E)

The Court examined § 16.1-285.2 and explained that the statute does not create a formula, or even a set of guidelines, for the court to follow in determining which of the four sentencing options enumerated in subsection (E) it should select in any particular case. Instead, that decision is left in the sole discretion of the trial court. Under the Code's sentencing framework, the Court agreed that a juvenile offender can receive the benefit of early release to parole or suspension of their adult sentence. However, the Court emphasized, such decisions are at the sole discretion of the trial court.

In this case, the Court concluded that the record did not demonstrate that the trial court failed to "meaningfully consider" any of the specific facts or evidence presented at the review hearing. In a footnote, the Court also observed that although the trial court can consider a juvenile offender's "maturity and rehabilitation" during each review hearing, it is not required to do so nor is its decision under Code § 16.1-285.2(E) limited to such consideration.

The Court also pointed out that a juvenile offender whose adult sentence remains unsuspended will eventually end up in DOC regardless of whether the trial court exercises its discretion to issue a transfer order pursuant to Code § 16.1-285.2. Thus, in this case, even if the trial court here had sent the defendant back to DJJ, the defendant would have eventually aged out and been automatically transferred to DOC, thereby ending the trial court's discretionary authority under the provisions of § 16.1-285.2.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0187233.pdf>

Virginia Court of Appeals –
Unpublished

Jenkins v. Commonwealth: October 10, 2023

Arlington: Defendant appeals her Juvenile Adjudication for Assault on Law Enforcement on Refusal to Admit Video Evidence, Refusal of Jury Instructions, and Revocation of her Deferred Disposition.

Facts: Officers stopped the defendant, then a juvenile, for a metro fare evasion. The officers sought to advise her of the offense, identify her and her parents, and then release her. However, the defendant refused to cooperate and pushed the officer away. The officer continued to try to reason with the defendant for several minutes. Soon, however, the defendant balled up her fist and lunged at one of the officers. The defendant then bit an officer on his arm and spit on him.

At trial, the defendant moved to strike the evidence, challenging the lawfulness of her arrest and arguing that she bit and spat on the officer in self-defense. The trial court denied the motion, finding that the defendant was lawfully arrested because the officer had probable cause to arrest her after she pushed him.

The defendant then offered a video her friend recorded showing a portion of the physical struggle with the three officers on the train platform while handcuffing the defendant. In response to the Commonwealth's relevance objection, the defendant argued that the video contradicted the officers' testimony regarding the number of bites and when exactly they occurred. The trial court excluded the video, holding that it was not relevant as impeachment of the officers' testimony because the record was ambiguous on the purported point of impeachment—whether the officer stated that the defendant had bit him, and if so, how many times. The trial court found that any "possible" impeachment value was "speculative" and that the narrated video contained inadmissible hearsay.

Before submitting the case to the jury, the trial court rejected two jury instructions that the defendant offered to explain her defense of justification. The first proposed instruction read:

"A person has a common law right to use reasonable force to resist arrest, if the arresting officer does not have probable cause for the arrest."

The second proposed instruction read:

"Where an officer attempts an unlawful arrest, the officer is the aggressor which gives the arrestee the right to use self-defense to resist so long as the force used is reasonable. The amount of force used must be reasonable in relation to the harm threatened."

The trial court refused both instructions, finding that its earlier ruling that the arrest was lawful rendered the instructions irrelevant.

The jury found the defendant guilty of assault and battery of a law enforcement officer, but the trial court deferred the finding and ordered the defendant to comply with probation until her eighteenth birthday. Over the next three years, the trial court held numerous review hearings to follow the defendant's progress pursuant to her deferred disposition. However, the defendant's noncompliance with the terms of her supervision lasted several years and culminated in defiant statements at her dispositional hearing. Finally, the trial court found that the defendant had been noncompliant with the terms of her deferred disposition and formally entered the felony adjudication.

Held: Affirmed. The Court held that the trial court did not err in excluding the defendant's proposed video evidence or jury instructions, nor in entering a felony adjudication.

Regarding the video, the Court first pointed out that the trial court had already ruled that the officer had probable cause to arrest the defendant before the events recorded on the video transpired. The Court repeated that if an officer has probable cause to arrest a suspect, that person has no legal right to resist the arrest. Viewed in the context of the trial court's probable cause ruling settling that the defendant's arrest was lawful, the Court ruled that the defendant's claim of unlawful arrest was no longer properly at issue in the case; therefore, the trial court properly excluded the video so far as it was offered to prove the claim of unlawful arrest.

The Court also rejected the defendant's argument that the video contradicted the officer's testimony concerning whether she bit him and therefore was admissible to generally question his credibility. Because the video did not capture the beginning of the physical struggle between the officers and the defendant, the Court noted that it did not reveal what was said or done prior to the start of the recording. Also, the Court found that from the vantage point of the recording it did not show the defendant's face or the officer's hands leading up to the point when he stated, "she bit me." Therefore,

the Court ruled, the video was not clarifying on the points of alleged inconsistency and there was nothing in the video that appeared to impeach the officer's testimony.

Regarding the defendant's jury instructions, the Court again noted that the trial court's uncontested probable cause ruling rendered the defendant's proffered instructions inapplicable as a matter of law. The Court confirmed that it was the court's prerogative to rule on the legal question of probable cause, and if probable cause existed, the defendant had no legal right to resist the lawful arrest. The Court reasoned that accepting the proposed instructions would have wrongly invited the jury to address questions of law disposed of by the court and not challenged.

Lastly, regarding the trial court's revocation of her deferred disposition, the Court agreed that the defendant's defiant statements at her dispositional hearing were consistent with the well-documented history of her noncompliance with supervision and supported the trial court's finding that she had violated the conditions of the deferred disposition order.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1110224.pdf>

Mistrial

Virginia Court of Appeals - Unpublished

Gushwa v. Commonwealth: April 23, 2024

Orange: Defendant appeals his conviction for Rape on Rape Shield and Denial of Mistrial grounds.

Facts: The defendant raped the victim. Police investigated and spoke to the victim. During the investigation, the victim explained to police that when she reported a prior rape allegation to her sister, her sister responded, "well... I know how you get when you get depressed, are you sure that you just didn't regret it afterwards." The victim responded, "why the f--- would the police believe me if my own family can't."

Prior to trial, the defendant moved to admit the statements that the victim made to the investigating officer regarding the prior rape allegation and her sister's response to it. He asserted that the statements that the victim made to the investigator were admissible "for impeachment purposes" to show that the victim "makes false statements concerning sexual behavior." The trial court conducted an evidentiary hearing and ruled that the statements that the victim made to police were protected by the rape shield statute and did not fall under the "motive to fabricate" exception to it in § 18.2-67.7(B).

At trial, after the Commonwealth rested and before the defense presented its case, the trial court learned that the investigating officer had remained in the courtroom during argument on the defendant's motion to strike. After the defendant reminded the trial court that it had excluded the witnesses, the Commonwealth stated that it had no expectation of calling the officer as a rebuttal

witness. The defendant moved for a mistrial. He argued that after realizing the officer remained in the courtroom during the motion to strike, he was left with “scant choices” on whether to call her to testify during his case-in-chief. He argued that “if he had any choice at all . . . it was a Hobson’s choice.” That is, if he called her to testify, he risked the possibility of tainted testimony.

The trial court denied the motion for a mistrial.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in refusing to admit the victim’s statements concerning an alleged prior rape and her sister’s supposed disbelief about it and that the trial court did not abuse its discretion in refusing to grant the defendant’s motion for a mistrial.

Regarding the victim’s statements, the Court assumed without deciding that the trial court erred in finding that the victim’s statements referred to conduct for purposes of the rape shield statute. The Court repeated that, under *Clinebell*, false statements about sexual abuse do not qualify as conduct under the rape shield statute. Nevertheless, the Court found that the trial court properly excluded the statements. The Court held that the trial court’s denial of the defendant’s motion was not plainly wrong in the refusal to admit the victim’s statements.

The Court explained that, unlike the defendant in *Clinebell*, the defendant here failed to present any evidence or proffer any information proving that the victim’s assertion that she was raped before was false. Rather, as the trial court found, the Court reasoned that the victim’s statement only concerned a general allegation of a prior unreported rape that was not shown to be false—or even that a reasonable probability of falsehood existed. The Court concluded that the statement was therefore irrelevant and inadmissible, as it had no probative importance to the question of whether the defendant raped the victim.

In a footnote, the Court explained that, because the Court had found that the victim’s statements were not protected by the rape shield statute, the Court was not going to address whether they were admissible under the “motive to fabricate” exception to the general rule. However, the Court then explained that the motive to fabricate exception also would not apply because one accusation, not proven to be false, would not rise to the level of a “pattern of behavior” that directly correlates to the issue.

Regarding the defendant’s motion for a mistrial, the Court ruled that the trial court did not abuse its discretion by denying the motion for mistrial because there was no showing of prejudice and no proffer of what the testimony would have included.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1610222.pdf>

Horton v. Commonwealth: February 13, 2024

Albemarle: Defendant appeals his conviction for Murder and related offenses on Joinder, Admission of Bad Acts Evidence, and Refusal to Declare a Mistrial grounds.

Facts: The defendant and his co-defendant shot and killed a man during a robbery. During the robbery, the defendant dropped his phone. Police recovered the phone and subjected it to forensic analysis. Later, police executed a search warrant at the defendant's mother's house, arresting the defendant, his confederate, and locating a box of ammunition of the same brand and type recovered from the crime scene. The trial court agreed to join the defendant's trial with his co-defendant's trial, over the defendant's objection. The defendant did not testify at trial, nor did the Commonwealth introduce any statements by the co-defendant.

At trial, over the defendant's objection, the Commonwealth introduced photographs extracted from the defendant's phone, including some that depicted the defendant and others that depicted a hand holding a black handgun consistent with the murder weapon. The Commonwealth also introduced the ammunition, again over the defendant's objection.

During jury deliberations, one of the jurors sent the court a note, reading: "Dear, Your Honor, English is my second language[.] I am not sure that all the things were understood correctly. I'm very afraid for that. So, can you please release me from this case?" The defendant expressly objected to the court releasing the juror and made no other motions concerning that juror. The court declined the juror's request to be released.

Held: Affirmed.

Regarding the joinder issue, the Court noted that, since the defendant did not testify at trial, nor did the Commonwealth introduce any statements by the co-defendant, the defendant could not show any actual prejudice. Since the defendant could not point to any evidence admitted against him that would not have been admitted had the Commonwealth tried him and the co-defendant separately, the Court agreed that the trial court did not abuse its discretion by granting the Commonwealth's joinder motion.

Regarding the admission of the photographs and the ammunition, the Court pointed out that the evidence pertained to whether the defendant would have had the means to complete the elements of the offense, which is not the type of unfair prejudice contemplated by Va. R. Evid. 2:403(a)(i)

Lastly, regarding the juror, because the defendant did not ask for a mistrial and in fact told the court that he wanted the juror to remain on the panel, the Court ruled that it was barred from reaching the merits of the defendant's argument.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0870222.pdf>

Wilson v. Commonwealth: October 10, 2023

Spotsylvania: Defendant appeals his convictions for Murder, Abduction, Child Cruelty, and related charges on Denial of a Continuance, Refusal to Strike Jurors for Cause, and Denial of a Mistrial based on Juror Misconduct.

Facts: The defendant and his confederates conspired to rob a man for drugs and money. The defendants then attacked the man and a woman, tying them up in their residence before slitting their throats and also murdering a fourteen-year-old child. They then abandoned a seventeen-month-old toddler and one-month-old infant alone with the three dead victims for multiple days without anyone to care for them in the residence. The two surviving children suffered significant injuries and suffered dehydration until they were finally discovered three days later.

On the first day of trial, only 51 of the 114 prospective jurors summoned for jury duty appeared for jury selection due to inclement weather. The defendant objected to going forward because “essentially half of the jurors ha[d] chosen not to appear.” The defendant argued that the 51 prospective jurors did not represent a fair cross-section of the community because they comprised only people who “want[ed] to be [t]here.” The defendant asserted that when he objected to the composition of the venire, the trial court failed to assess the prospective jurors’ “gender or racial makeup” and conduct an inquiry to determine whether they “lived, primarily or exclusively, close to the courthouse (thereby only representing a small geographic portion of the county) or had access to transportation (indicative of a possible class disparity).” The trial court denied the motion.

During voir dire, the trial court then asked whether anyone had read a newspaper article about this case that was published the previous week. Several jurors raised their hands, including two particular jurors. The prosecutor asked those jurors whether they had “any preconceived notions” regarding the defendant’s and his co-defendants’ guilt or innocence. The two jurors replied, “Not really,” and, “No, sir.” Neither the defendant nor his co-defendants questioned either juror regarding the article or their understanding of it.

The defendant then moved to strike the two jurors for cause. He proffered that the article disclosed that two other defendants had accepted “plea deal[s]” and had pleaded guilty to their charges. Acknowledging that he did not question either juror regarding “the content” of the article, the defendant nevertheless maintained that they may have learned that the co-defendants had pleaded guilty and, thus, acquired “information” that the trial court had ruled was inadmissible. The defendant asserted that the “information” was “so prejudicial” that the jurors could not be impartial. The trial court refused to strike the jurors for cause.

On the third day of trial, defense counsel proffered that the defendant was “feverish,” had a headache, and was “unable to focus.” Additionally, he stated that the defendant had not been “feeling well” the previous day, counsel reported, and seemed “distracted and uncomfortable.” The defendant had vomited before court the previous morning and had requested medical attention at the jail but had not “received any actual attention or treatment.” Therefore, the defendant requested a one-day continuance. Alternatively, the defendant asked the trial court to “pause the proceedings briefly to allow him to recuperate” and to instruct the jury that he might need to “close his eyes or put his head in his hand” during trial.

The trial court found that the defendant did not appear ill and had “seemed very engaged” during trial. There was also no “medical report” or other evidence demonstrating that the defendant was sick. Accordingly, the trial court denied the continuance but stated, “[w]e’re going to proceed this morning, unless it becomes apparent that we can’t.” During trial, the defendant raised no further objection and did not renew his continuance request.

On the fourth day of trial, during a lunch recess, the trial court notified the parties that it had received a letter from a juror. The letter stated, “it has come to my attention that the victim in this case has some family ties to my family which [I] did not know at the start of this trial.” Additionally, the letter stated that serving as a juror was causing the juror financial hardship.

Outside the presence of the other jurors, the trial court placed the juror under oath and permitted the parties to question him regarding his letter. The juror stated that he was not related to any of the victims, but his family had “ties” to them. The juror confirmed that he had not communicated those family ties to anybody else on the jury. The juror also acknowledged that he had “a number of financial concerns,” but did not specify what those concerns were. The trial court then excused the juror without objection.

After trial but before sentencing, the defendant moved for a mistrial, arguing that the juror’s purported dishonesty during voir dire denied him an impartial jury. The defendant argued that he was entitled to a mistrial because the juror failed to answer honestly a material question on voir dire by deliberately failing to disclose his “family ties” when a truthful answer would have provided a valid basis for a challenge for cause. In addition, the defendant argued that the juror “must have” discovered his “family ties” through independent investigation or speaking with someone about his jury service, thus ignoring the trial court’s directive not to do so. The defendant contended that the juror was biased against him, and the trial court was required to order a new trial. The trial court denied the motion.

[Note: The defendant was tried alongside the defendants in the Bailey and Green cases, decided today as well – EJC]

Held: Affirmed.

Regarding the defendant’s “fair cross section” argument, the Court pointed out that the defendant bore the burden to establish a prima facie fair cross-section claim; it was not the trial court’s responsibility to sua sponte investigate the matter. In this case, the Court complained that the defendant did not demonstrate that the trial court’s jury selection process systemically excluded members of that group from jury venires or that there was a policy or other effort to exclude them. Therefore, the Court ruled that the defendant failed to establish a prima facie fair cross-section claim.

Regarding the two jurors who had seen the article before trial, the Court found that the record demonstrated that the jurors acknowledged that they understood that the defendant was presumed innocent and maintained that they did not have any “preconceived notions” regarding his guilt or innocence after reading the article. The Court noted that the jurors had confirmed that they could “give a fair and impartial trial” to the defendant “based solely on the evidence” presented. The Court concluded that the defendant did not establish that the jurors were subject to strikes for cause.

Regarding the defendant’s request for a continuance due to illness, the Court repeated that prejudice may not be presumed; it must appear from the record. In this case, the Court examined the record and found that it demonstrated that despite the defendant’s purported illness, he ably testified and presented his version of events. Therefore, the Court found no evidence of prejudice from the denied continuance.

Regarding the defendant’s claim of the juror’s bias, the Court ruled that the defendant failed to demonstrate that the juror intentionally failed to disclose his “family ties” to the victims during voir dire or that the juror had actual bias against the defendant. The Court first repeated that to succeed on an

implied bias claim, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. On the other hand, the Court noted, to succeed on an actual bias claim, a party must demonstrate at a hearing that the juror had “actual bias” against him.

In this case, the Court found that the defendant had not demonstrated that the juror’s failure to disclose his “family ties” to the victims during voir dire was intentional. The Court noted that the evidence demonstrated that he was unaware that his family was related to any of the victims until the final day of trial, whereupon he promptly notified the trial court. In addition, the Court found that the defendant had failed to demonstrate that the juror had actual bias against him.

The Court concluded that the defendant’s assertion that the juror must have learned about his relatives’ association with the victims “through independent investigation” or discussing the case with his family was speculative. The Court also pointed out that the juror had previously testified during voir dire that he did not have any “preconceived notions” regarding the defendant’s guilt or innocence and would “give a fair and impartial trial” to the parties “based solely on the evidence.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0780222.pdf>

Nolle Prosequi

Virginia Court of Appeals - Published

Griffin v. Commonwealth: February 13, 2024

Winchester: Defendant appeals his convictions for Murder, Solicitation for Murder, and related offenses on Nolle Prosequi of Charges and Venue grounds.

Facts: The defendant ambushed, shot, and killed a man after an argument outside of the victim’s home. A witness saw the shooting. After his arrest, the defendant solicited a fellow gang member with whom he was incarcerated to kill the witness.

A multi-jurisdictional grand jury (MJGJ) indicted the defendant on the charges of first-degree murder, use of a firearm in the commission of a felony, and possession of a firearm by a violent convicted felon. A regular Grand Jury separately indicted the defendant on the charge of solicitation of murder.

The defendant moved to dismiss the three MJGJ indictments without prejudice, asserting that the MJGJ “that handed down the indictments lacked impartiality, and there is grave doubt that the decision to indict was free from influences that rendered the MJGJ impartial.” The trial court denied the motion, but afterward, the Commonwealth then moved to nolle prosequi the three MJGJ indictments.

Although the Commonwealth denied any impropriety by the MJGJ, it moved to nolle prosequi the three MJGJ indictments “in an abundance of caution.”

The Commonwealth noted that a nolle prosequi would provide the defendant with the relief he sought in his motion to dismiss. In addition, the Commonwealth emphasized that the defendant would not be prejudiced by the motion to nolle prosequi because he was being held without bond on the solicitation of murder charge that had been handed down separately by the regular grand jury.

The trial court granted the Commonwealth’s motion over the defendant’s objection. The Commonwealth sought new indictments for the same three charges from a different grand jury that same day, thereby enabling the parties to keep their previously set trial dates. Later that same day, a regular grand jury indicted the defendant on the same three charges that had been nolle prosequied. The trial court also ordered that, per § 53.1-187, the defendant would receive credit for the time he had served awaiting trial on the original charges.

After the re-indictment, the defendant and his fellow gang member spoke again about killing the witness. At this point, the fellow gang member had moved from the defendant’s jail. To arrange the killing, the defendant and the gang member communicated using a woman as an intermediary. The woman who handled the communications lived in Winchester. At trial, over the defendant’s objection, the court concluded that venue for the solicitation offense was proper in Winchester.

Held: Affirmed.

Regarding the Commonwealth’s nolle prosequi, the Court held that the trial court did not err by granting the Commonwealth’s motion to nolle prosequi the three MJGJ indictments as there was no evidence in the record of prosecutorial vindictiveness or prejudice to the defendant. The Court noted that the Commonwealth’s decision to nolle prosequi the three MJGJ indictments resulted in the dismissal of the original charges without prejudice — the same relief that the defendant had sought in his motion to dismiss — and the defendant received credit for his time served while awaiting trial on the original charges. The Court found no evidence of prosecutorial vindictiveness as the Commonwealth reindicted the defendant on new charges that were identical to those that had been nolle prosequied.

Regarding venue, the Court held that the evidence was sufficient to give rise to a strong presumption that the defendant’s solicitation of murder offense was committed within the jurisdiction of Winchester. The Court agreed that the facts showed that the solicitation to murder a witness consisted of a course of conduct that continued over an extended period and was only confirmed through the woman as the intermediary between the defendant and his fellow gang member — all while the woman was at her home in Winchester.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0042234.pdf>

Virginia Court of Appeals –
Unpublished

Jones v. Commonwealth: April 16, 2024

Henrico: Defendant appeals his conviction for Unlawful Wounding on Jury Instruction, Mistrial, and sufficiency grounds.

Facts: While obtaining marijuana from the victim, the defendant shot him. The defendant brought the firearm with him to purchase marijuana well after midnight. During the transaction, he phoned his cousin, who appeared to be waiting outside. He then brandished his firearm and instructed the victim to be quiet and get on the ground. When the victim lunged at him, the gun fired and the defendant shot the victim, resulting in serious injuries.

The defendant made statements to a police officer after the incident. The defendant also admitted to shooting the victim on recorded jail calls, calls that the Commonwealth admitted into evidence. At trial, the defendant claimed that someone else shot the victim.

During the jail phone calls, the defendant and the victim spoke to one another. Both referenced the fact that the defendant was in jail. The defendant discussed being released and “com[ing] back out there” “on the streets.” At one point, the victim said to the defendant, “you’re on a f&*ing jail call.” The defendant also told the victim that he was not “trying to jail talk” with a man because he had women to do that with. The defendant talked about being “in here” and, trying to convince the victim not to testify, said that if he did not appear in court “they gotta let [him] up out of this” facility.

At trial, the Commonwealth sought to instruct the jury that if it believed that the defendant previously made a statement that was inconsistent with his testimony at trial, his prior statement could be considered as proof that what he previously said was true. The defendant objected and asserted that the evidence failed to show he made an inconsistent statement. He argued that his testimony at trial was entirely consistent with the statements he made to the officer.

During closing arguments, the Commonwealth referred to the defendant’s “jail calls.” The defendant objected and moved for a mistrial. The trial court denied the motion.

Held: Affirmed.

Regarding the jury instruction, the Court agreed that the statements that the defendant made in the jail calls were inconsistent with his trial testimony. Therefore, the evidence supported the jury instruction.

Regarding the defendant’s motion for a mistrial, considering the “innocuous nature” of the prosecutor’s comment in light of all of the facts and circumstances of this case, and that the calls themselves—even without the prosecutor’s comment—indicated that they were made when the defendant was in jail, the Court concluded that the prosecutor’s reference to “jail[call]s” in closing in no way interfered with the defendant’s right to a fair trial. Accordingly, the Court ruled that the trial court did not abuse its discretion in refusing to grant the defendant’s motion for a mistrial.

Lastly, regarding sufficiency, the Court found it entirely foreseeable that a shooting might occur when brandishing a loaded firearm.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1412222.pdf>

Pretrial Identification

Virginia Supreme Court

Sample v. Commonwealth: February 8, 2024

Aff'd Panel Ruling of June 28, 2022

Northampton: Defendant appeals his conviction for Attempted Robbery on Admission of an Out-of-Court and In-Court Identification.

Facts: The defendant attempted to rob the victim at gunpoint, but the victim resisted and fought off the defendant after a struggle. During the struggle, victim was “face-to-face” with the defendant, although the defendant wore a mask over his nose and mouth. Although it was nighttime, the area was well-lit. When police responded, the victim described the defendant in great detail and provided his direction of travel.

The description that the victim provided matched the defendant almost exactly and he lived in the direction of travel that the victim described. The officer recognized the defendant from the victim’s description and retrieved a photo of the defendant. The victim’s description of the defendant was accurate to within an inch of the defendant’s actual height, within several pounds of his actual weight, and within a year of his actual age. While the victim incorrectly said that he thought the defendant was white, the defendant is of mixed race and the officer described him as “pale-ish.”

Within an hour of the attack, the officer showed the single photo to the victim, stating, “I have a picture of somebody that I was thinking about, but I don’t know if, you said you just saw their eyes.” He then showed the victim a photo of the defendant on his phone, and the victim immediately said, “Yep.” The officer then asked, “That’s him?” The victim replied, “Yep.” The officer then asked again, “You think that’s definitely him?” The victim reiterated, “Yeah, those big brown eyes, yep.” The victim then said that the defendant was “light complected like that.” The officer then asked, “kind of like pale-ish?” The victim replied, “Yeah.”

Police recovered the gun, a BB gun, from the crime scene. DFS located the defendant’s DNA on 3 places on the gun, including the trigger.

Prior to trial, the defendant moved to exclude the victim’s identification, but the trial court denied the motion. The Court of Appeals affirmed. The Court noted that the defendant had the opportunity to view the victim and explained clearly how he displayed a high degree of attention during the time of the attempted robbery. Most importantly, the Court explained, the victim stated three times that he was certain that the defendant was his assailant when he viewed a photo of him within less than an hour of the attempted robbery.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress the identification arising from a single photo showup or in denying his motion to strike the evidence for a lack of evidentiary sufficiency.

The Court ruled that, in this case, the officer's comments did not create circumstances which induced the victim to inevitably identify the defendant. The Court reasoned that the officer's comments could not be said to be impermissibly suggestive and were at most, harmless in their effect. The Court agreed that the single photo showup, including the officer's comment, "I have a picture of somebody that I was thinking about," did not run afoul of the defendant's due process protections and that the out-of-court identification was constitutionally reliable.

The Court explained that due process did not require any further finding of the identification's reliability because it was not procured by impermissibly suggestive methods. Nevertheless, the Court then applied the *Neil v. Biggers* factors in this case. In a footnote, the Court explained that, while it did not find the identification procedure used in this case was impermissibly suggestive, the Court would still review the *Biggers* factors to emphasize that, even if it had found a constitutional problem with the process used, the identification was nonetheless constitutionally sound.

Regarding the opportunity of the witness to view the criminal at the time of the crime, the Court concluded that this factor weighed in favor of finding the victim's identification reliable. Regarding the witness' degree of attention, the Court found that was clear that the victim's attention to both the gun and the defendant's appearance was "more than ordinarily thorough" and that he was not merely a casual observer in this situation.

Examining the accuracy of the witness' prior description, the Court concluded that it was not unreasonable for the victim to describe the defendant as Caucasian. Given the detail that the victim provided and the consistency of those details, the Court ruled that this factor weighed in favor of finding the identification reliable. The Court then weighed the level of certainty demonstrated by the witness at the confrontation and found that this factor also weighed in favor of reliability.

Lastly, regarding the length of time between the crime and the identification, the Court reasoned that based on the certainty of the victim's identification and all the other facts and circumstances described herein, the length of time between the crime and the confrontation was a nominal consideration, and, under any circumstances, weighs in favor of concluding that the identification was reliable.

Like the Court of Appeals, the Supreme Court also emphasized that an identification analysis does not address the sufficiency of the evidence. Rather, that analysis focuses upon due process considerations. The Court elucidated that "if there are no due process concerns, the trier of fact may consider the evidence, but that is a very different thing than evaluating the identification within a sufficiency matrix."

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220445.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0161211.pdf>

Prosecutorial Misconduct

Fourth Circuit Court of Appeals

U.S. v. Escamilla Villa: June 13, 2023

70 F.4th 704 (2023)

NC: Defendant appeals his conviction for Aggravated Re-Entry on Prosecutorial Vindictiveness and Fourth Amendment grounds.

Facts: Police stopped the defendant in a traffic stop and obtained consent to search his home, where they found a firearm and ammunition. The defendant does not have lawful status in the US. The Government charged the defendant with Possession of a Firearm by an Illegal Alien in violation of 18 U.S.C. § 922(g)(5) and Illegal Entry in violation of 8 U.S.C. § 1325(a). The defendant moved to suppress the evidence. In the meantime, the Government requested that DHS examine the ICE database to gather evidence about the defendant's immigration history.

After a hearing, the magistrate judge recommended that the district court suppress the evidence underlying the firearm possession offense. At almost the same time, the Government discovered that the defendant had been previously removed from the US under an alias, under which he had also been convicted of two felonies. The government obtained a new indictment charging the defendant with Illegal Reentry after Conviction for an Aggravated Felony in violation of 8 U.S.C. § 1326(a), (b)(2), an offense which carried a penalty that was twice the penalty for Possession of a Firearm.

The defendant moved to dismiss the new charges based on Prosecutorial Vindictiveness, contending that between the prosecutor and various federal agencies, "the government" collectively had all the information needed to discover his aggravated reentry, and the decision not to follow those leads earlier should raise a presumption of vindictiveness. The trial court denied his motion.

The defendant also sought to suppress his fingerprint records and the criminal and immigration records obtained thereby as the product of unlawful police activity under the Fourth Amendment, but the trial court denied his motion. The trial court found "no indication in the record that [the defendant's] fingerprints were taken for investigative purposes, such as to compare them to unidentified prints taken from a crime scene" or "for any reason other than the normal, administrative booking process."

Held: Affirmed.

Regarding the allegation of prosecutorial vindictiveness, the Court repeated that, when a prosecutor adds a new charge based on a new set of facts after a pretrial suppression ruling forecloses prosecution on the initial charge, it is at least as likely, or even more likely, that the decision was based on an assessment that the defendant posed a threat to public safety. The Court distinguished this case from the *LaDeau* case, finding that this is not a case where the prosecutor, in response to an adverse suppression ruling, obtained a more serious charge based on the same conduct that animated the original indictment. In this case, the Court pointed out that, although both charges included the defendant's unlawful presence in the United States as an element, they targeted different conduct—possession of firearms and ammunition in one and illegal reentry in the other.

The Court also found it significant that it was not until after the magistrate judge recommended granting in part the defendant's motion to suppress did the prosecutor learn that the defendant, under a different name, had previously been removed from the country. The Court concluded that the defendant failed to demonstrate that the presumption of vindictiveness applies. Therefore, the Court ruled, the presumption of regularity that attends a prosecutor's pretrial charging decision therefore remains in place.

The Court contended that to "find vindictiveness in these kinds of routine pretrial developments would be an ill fit with both Supreme Court precedent and our caselaw concerning vindictive-prosecution claims. And the construct of collective knowledge is out of place in a search for vindictiveness, which is a motive personal to the prosecutor who pursues the heightened charges."

Regarding the defendant's motion to suppress the results of his fingerprinting, the Court repeated that when police fingerprint an individual after an unlawful arrest, the fingerprint records and evidence obtained with them "are not automatically suppressible simply because they would not have been obtained but for illegal police activity;" rather, the critical question is whether the evidence was obtained by exploiting the illegal police activity.

The Court cited the U.S. Supreme Court's rulings in *Hayes v. Florida*, and *Davis v. Mississippi* as cases where the police, without probable cause, detained and then fingerprinted a person they suspected had committed a certain crime for the "clear investigative purpose" of using the fingerprints to tie the suspect to the crime. The Court explained that when police officers use an illegal arrest as an investigatory device in a criminal case for the purpose of obtaining fingerprints without a warrant or probable cause, then the fingerprints are inadmissible under the exclusionary rule as fruit of the illegal detention.

On the other hand, the Court explained, when fingerprints are administratively taken for the purpose of simply ascertaining the identity or immigration status of the person arrested, they are sufficiently unrelated to the unlawful arrest that they are not suppressible. The Court found that these principles dictate the outcome here and supported the district court's ruling. Even assuming that the arrest violated the Fourth Amendment, the Court found that the officers did not "purposefully exploit" an unlawful arrest in order to obtain his fingerprints.

The Court also rejected the defendant's argument that suppression was warranted because the fingerprints were later revealed to have investigatory value to law enforcement.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/204297.P.pdf>

Restitution

Virginia Supreme Court

Commonwealth v. Puckett: November 22, 2023

Rev'd Court of Appeals Panel Ruling of August 9, 2022

Patrick: Defendant appeals his sentence for Malicious Wounding on the Restitution Award.

Facts: The defendant attacked and stabbed the victim repeatedly from behind as he was walking away, declaring that he was “killing” the victim. The victim suffered serious injury as a result. After convicting the defendant, the trial court ordered the defendant to pay restitution pursuant to § 19.2-305.1(B) as a condition of his probation and suspended sentence. The trial court ordered the defendant to pay \$22,691.01 in restitution to the Virginia Department of Medical Assistance Services (“DMAS”), which had paid the medical bills for injuries suffered by the victim. The restitution order below did not award the actual victim of the malicious wounding any restitution.

The Court of Appeals panel reversed the restitution award. The Court of Appeals rejected the Commonwealth’s argument that any party suffering an economic loss is a victim for purposes of § 19.2-305.1(B). The Court contrasted that statute with § 19.2-305 and reasoned that “victims” and “aggrieved parties” are not synonymous. Thus, the Court concluded that §§ 19.2-303 and 19.2-305 allow restitution to an “aggrieved party,” which can include an individual who is not necessarily the direct subject of the crime. However, with respect to medical expenses, the victim who has incurred these expenses would be the proper recipient of the award pursuant to § 19.2-305.1(B).

The Court of Appeals found that DMAS was not a “victim” in this case under § 19.2-305.1(B) and that it was not established that these medical expenses were “incurred by the victim” of the defendant’s malicious wounding. The Court thus ruled that the trial court erred in concluding that it was required to make a restitution award to DMAS. The Court remanded the case to the trial court for the limited purposes of determining whether, consistent with § 19.2-305.1(B), the evidence supported an award of restitution to the victim for any “medical expenses . . . incurred by the victim . . . as a result of the crime.” On remand, the Court also explained that the trial court may also consider, in its discretion, whether to award restitution to “an aggrieved party” (such as DMAS) under §19.2-305, rather than 19.2-305.1(B).

Held: Court of Appeals Reversed, Restitution Award Reinstated. Examining § 19.2-305.1(B) and the scope of its restitution remedies, the Court pointed out that the statute does not say that the restitution must be paid to the victim; It only requires that the expense be “incurred by the victim.” The Court held that the victim “incurred” the medical expenses for the treatments that he received as a result of the defendant’s attack. The Court explained that the fact that DMAS paid for some of these expenses through an agreement with the medical providers does not undermine this premise, just as the payments by private insurers or a contractual indemnitor do not change the fact that expenses had been incurred. The Court therefore held that the statute authorized the trial court to order restitution as a condition of the defendant’s probation and suspended sentence and to order payment of that restitution to DMAS for the portion of the medical expenses incurred by the defendant that DMAS had paid.

The Court took it as a given that the victim, not DMAS, was the actual “victim” of the defendant’s stabbing. The Court saw no need to treat DMAS as a constructive victim, writing: “To us, this victim vel non debate strays off the main topic.” Instead, for purposes of § 19.2-305.1(B), the Court found that a medical expense is “incurred” by a victim when he either pays it or incurs an express or implied obligation to pay it. The Court explained that an incurred medical expense does not become un-

incurred simply because a medical provider waives its right to seek full payment from an indigent individual in hopes of recovering partial payment from a solvent entity, such as a private or public insurer.

In a footnote, the Court examined what impact the language of the restitution form had in this case. The Court concluded that, read in context, the “Victim 1” box on the form order appeared to merely ensure that the clerk disburse the restitution funds to DMAS — not “on behalf of” DMAS. “Though awkwardly worded, the form order seeks to effectuate the court’s authority under Code § 19.2-305.1(D) to “disburse such [restitution] sums as the court may, by order, direct.” The Court found that this understanding parallels the statutory requirement that restitution orders “shall be docketed, in the name of the Commonwealth, or a locality if applicable, on behalf of the victim, as provided in § 8.01-446 when so ordered by the court, unless the victim named in the order of restitution requests in writing that the order be docketed in the name of the victim” in § 19.2-305.2(B). the Court explained that this practice enables the “victim named in the order” to enforce it “in the same manner as a judgment in a civil action.”

The Court expounded that “If criminals have no empathy for their victims and no desire to atone even in some small way for their wrongdoing, any claim they make of being rehabilitated should not be taken seriously.”

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220596.pdf>

Original Court of Appeals Opinion At:

<https://www.vacourts.gov/opinions/opncavwp/1002213.pdf>

Recusal

Virginia Court of Appeals – Unpublished

Moore v. Commonwealth: June 20, 2023

Pittsylvania: Defendant appeals his conviction for Strangulation on the Judge’s Refusal to Recuse, Refusal to Disqualify the Prosecutor, Admission of Other Bad Acts, and Admission of Expert Testimony

Facts: In 2016, the defendant attacked and strangled his wife. The victim did not report this incident to the police until May 2020. At the time of the trial in 2022, the defendant and the victim were separated, and the victim was seeking a divorce.

The defendant moved for the judge in the matter to recuse herself. The defendant asserted that until recently, the judge’s former law firm bore her name; the firm was founded by the judge’s father, and the judge was married to a named partner. Until his death many years earlier, a partner in the firm had been representing the victim in the divorce proceedings against the defendant. The defendant

alleged that the judge's son, a law school student, had interned with the firm, where the judge's brother also practiced. Commenting upon a jury's prior acquittal of the defendant of strangulation from an incident that occurred with the victim in 2019, the victim's father had told the prosecutor that they needed a "win" in the present case to strengthen her position in the divorce. The defendant maintained that the judge should recuse herself because of her close ties with the law firm, as well as the victim's parents' beliefs that the civil and criminal matters were intertwined.

The trial court denied the motion to recuse herself. At the time of the ruling, it had been almost nineteen years since the judge had practiced at the firm. The judge noted that the victim's civil attorney was not involved in the criminal matter, the firm was not named for her, and there was no conflict of interest.

The defendant also moved to recuse the entire Office of the Commonwealth's Attorney because members of the office were potential fact witnesses to the victim's father's statement about needing a "win." The Commonwealth offered to stipulate to the statement at trial. The trial court found that no conflict of interest then existed and denied the motion to recuse the Commonwealth's Attorney's office.

At trial, over the defendant's objection, the trial court admitted evidence of other incidents of alleged domestic violence occurring in March 2019, January 2020, and May 2020, ruling at a pretrial motion in limine that evidence of those other assaults would be admissible "for explaining timeline and context" so long as the Commonwealth laid a proper foundation for the evidence. The defendant had been acquitted of some of these charges in a previous trial.

During trial, the court restricted the March 2019 evidence to show the timing of the victim's reporting of the abuse to her family. The court allowed the victim to testify regarding the January 2020 incident, finding that it was "admissible and relevant with regard to state of mind," and instructed the jury to consider that testimony only "with regard to state of mind." The Commonwealth introduced photographs of the victim's injuries from the January 2020 incident, and the court admitted them "with regard to just the effect on her mindset at that time." The victim also testified regarding the May 2020 incident, and the Commonwealth introduced photographs of her injuries from that incident over the defendant's objection. The court admitted those photographs "with regard to state of mind."

The Court also admitted, over the defendant's objection, an audio recording of the victim speaking to her brother after the May 2020 incident. The recording, of which the victim was unaware at the time, contained her detailed description of the defendant's assault that night. The victim also spoke about how difficult it would be to leave the defendant since the couple shared three children, and she cited her religious beliefs as one reason she had not left the relationship. Again, the trial court instructed the jury to consider the recording only insofar as it showed the victim's state of mind as to why she did not report the defendant's abuse or leave the marriage.

In addition, the Court admitted photographs from the January 2020 incident, over the defendant's objection, and allowed the victim to testify about the injuries depicted in those photos "with regard to just the effect on her mindset at that time." Similarly, the trial court admitted the photographs from the May 2020 incident "as noted previously with regard to state of mind and circumstantial evidence" over the defendant's objection.

At trial, the Commonwealth also called Sandy Dawson, an outreach prevention specialist at the Southside Survivor Response Center with fourteen years of experience in counseling victims of domestic violence, to testify as an expert witness in "victimology" and the pattern of "female victim responses to

domestic assault and abuse.” The defendant objected to Dawson’s qualification as an expert witness, arguing that she was not “licensed” or “certified” and that Dawson had not spoken with the victim and was “just being asked to make generalized statements based upon her training and experience.” The trial court overruled this objection, finding that Dawson had specialized knowledge that would assist the trier of fact.

Dawson opined that it was uncommon for a female victim of domestic violence to leave the relationship after the first instance of abuse. She stated that many victims blame themselves for the abuse and do not flee because they believe that the situation will improve. Dawson further stated that victims who had minor children with their abusers tended to remain in the relationship.

[Note: Sandy Dawson has since passed away – EJC].

[Great job to CA Bryan Haskins and ACA Mary Katherine Pendleton in this case – EJC].

Held: Affirmed.

First, regarding recusal of the judge, the Court found that the defendant failed to show that the trial judge had a personal bias or prejudice in this case. The Court also found that the defendant did not show that the civil attorney “personally and substantially participated in the matter as a lawyer while associated with the judge.” The Court pointed out that even the defendant had agreed that the trial judge could, after 19 years on the bench, hear a case that the civil attorney was handling.

Next, regarding the recusal of the prosecutor, the Court noted that the Commonwealth agreed to stipulate that the comments had been made, thus negating the need to call the prosecutors as witnesses. The Court ruled that the defendant had failed to make a showing that disqualification of the prosecutor or the Commonwealth’s Attorney’s office would have been required under Rule 3.7 of the Rules of Professional Conduct.

Third, regarding the other bad acts evidence, the Court found that, given the limiting instructions to the jury and our presumption that the jury followed those instructions, the admission of this other bad acts evidence was not an abuse of discretion. The Court concluded that the defendant’s violent behavior toward the victim in 2019 and 2020 was admissible. The Court reasoned that it was relevant under Rule 2:404(b) to show the relationship between the parties and to explain the victim’s long delay in reporting the December 2016 incident. The Court found that the victim’s state of mind and her delay in reporting were made relevant by the defendant’s arguments that the delay made the victim’s testimony less credible. The Court also noted that the trial court properly limited the jury’s consideration of this evidence only to show the victim’s state of mind during this time period, thus avoiding exclusion under Rule 2:403.

Regarding the recording in particular, the Court pointed out that the audio recording was not offered for the truth of the matter asserted. Instead, the Court agreed that the recording was relevant to explain the delay in the victim’s reporting of the abuse and ruled that it was not error to admit it into evidence.

Regarding the photographs, the Court also ruled that the trial court did not abuse its discretion in ruling that the photos were relevant, and therefore admissible under Rules 2:401 and 2:402, to show why the victim was reluctant to report the defendant’s abuse, as well as the reasons for her ultimately deciding to come forward. The Court agreed that the photos were consistent with and relevant to the Commonwealth’s position that her delay related to her desire to preserve her marriage and to avoid

legal trouble for her husband—until she reached a breaking point when the incidents continued and escalated.

Lastly, regarding the Commonwealth’s DV expert, the Court noted that the trial court found that the expert had “specialized knowledge” that would “assist the trier of fact.” The court also found that the expert’s knowledge was in “a specialized area in which not the average individual would know.” While the expert was not licensed by the state as a counselor, nor did she testify to having any other state licensures, the Court pointed out that no such license is required by Rule 2:702. The Court agreed that the expert had knowledge and experience in a specialized field, and the trial court did not abuse its discretion in qualifying her as an expert witness.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0724223.pdf>

Sanity

Virginia Court of Appeals – Published

Walker v. Commonwealth: July 18, 2023

78 Va. App. 52, 889 S.E.2d 653 (2023)

Richmond: Defendant appeals the refusal to Modify his Conditional Release Plan after his NGRI finding for First-Degree Murder.

Facts: In April 2016, the defendant killed his former girlfriend’s father without provocation by choking him and stabbing him in the neck with a knife. At the time, the defendant already had a criminal history in Georgia. The defendant had been on psychiatric medications but had ceased taking them prior to the murder. He was charged with first-degree murder and use of a weapon in the commission of a felony. In January 2017, following a sanity evaluation, the trial court accepted his plea of not guilty by reason of insanity (NGRI) and ordered him committed to Central State Hospital. Upon yearly review, his commitment was renewed in 2018 and 2019.

In March 2020, Central State Hospital and the Richmond Behavioral Health Authority (RBHA) developed a conditional release plan for the defendant that involved his moving to a transitional living facility. The plan included frequent psychiatric monitoring, substance abuse screening, and therapy. It also provided that the defendant’s daily mental health medications would be dispensed by facility staff. Following an October 2020 hearing, the trial court approved the plan permitting the defendant to reside at the facility, but at the request of the Commonwealth’s Attorney, it prohibited him from leaving the premises unless accompanied by a staff member.

In January 2022, following the defendant’s successful return from a furlough, the RBHA issued a new report recommending that the defendant be permitted to live independently in an apartment in the community. At a hearing on the recommendation, the Commonwealth objected and relied on the

evidence in the record and cross-examined the witnesses called by the defendant. The licensed clinical psychologist who examined the defendant before his conditional release noted that his “psychiatric instability” had “significantly contribute[d] to” his criminal behavior. Two social workers testified that they supported the defendant’s desire to live independently in the community but admitted they could not guarantee he would not stop his medications, as he had done in the past.

The trial court denied the defendant’s request to live independently. The trial court stated that it did not “discount anything” it heard from any of the witnesses, including the defendant. Nevertheless, it noted that the defendant had committed an “unprovoked” killing and it was compelled to consider community safety. The court also expressed concern that the defendant could reoffend.

Held: Affirmed. The Court held that the trial court did not abuse its discretion by refusing to modify the defendant’s conditional release plan to permit him to live independently. The Court ruled that, in light of the conflicting evidence in the record, including the evidence regarding the defendant’s mental health history and the circumstances surrounding the killing, the trial court did not err by reaching the conclusion that modification was appropriate at the time.

The Court explained that the trial court was statutorily required to determine whether the defendant needed inpatient hospitalization, as well as to conduct periodic review of that hospitalization and his subsequent conditional release. The Court made clear that the trial court was not limited to the testimony of the defendant and his witnesses. The Court explained that the trial court was required to determine, after weighing all the evidence, what it deemed would best meet the acquittee’s need for treatment and supervision and best serve the interests of justice and society.

In this case, the Court found that the evidence in the entire record, viewed under the proper standard, supported the court’s specific factual findings and the trial court’s refusal to allow him to live independently at that time. The Court pointed out that if the defendant had mental health problems while living in the community, he would have to seek assistance for himself, something he had been reluctant to do in the past. The Court also noted that the psychiatrist testified at a prior review hearing in 2020 that he could not predict when the defendant would “decompensat[e]” if he stopped taking his medication. Based on the evidence in the record, the Court observed that the defendant had not previously been medication compliant because he did not like how it made him feel.

Finally, despite the defendant’s stated intention to keep taking his medications, the Court found that the evidence established that he had not been medication compliant at various times both before and after killing the victim because he did not like how the medication made him feel. It also established that he denied any homicidal ideation just days before he killed the victim. The Court observed that the evidence showed just how difficult it was to monitor the defendant’s mental health when his medication was not dispensed to him by others.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0464222.pdf>

Virginia Court of Appeals -
Unpublished

Wesley v. Commonwealth: August 22, 2023

Fairfax: Defendant appeals his convictions for Aggravated Malicious Wounding and Strangulation on denial of his Insanity Defense and sufficiency of the evidence.

Facts: The defendant randomly attacked a woman who was walking one morning on a bike path in a residential neighborhood. The defendant repeatedly struck her with a blunt object on the head and face, screaming at her to “shut up.” The defendant then stood up, apologized, and fled.

The defendant had called in absent from work the morning of the attack. He drove to a nearby parking lot and left his keys in the ignition of his vehicle. He brought gloves with him, which he dropped after the attack. The first time the defendant passed his victim, he kept his head down so she would not see his face. The defendant wore a medical mask, which further obstructed the view of his face. He had allowed the victim to pass him, before following her to a more remote location, a fitness loop. The defendant then waited for her to exit the loop before he ambushed her.

The defendant struck the victim at least five times in the head, and she suffered more blows to the face and other places and sustained a concussion. She had a laceration on the top of her head, injuries to her mouth, and her head was swollen to about twice its normal size. The injuries on her neck were consistent with strangulation. Her medical treatment for her head wounds included twenty-eight staples in her head and stitches in her mouth and forehead. The victim suffered black eyes and a “significantly bruised” nose. She also had scrapes and bruises on her legs and elbows. The victim suffered nerve damage in her right hand that took six to eight months to resolve. At trial, the victim exhibited the scar she sustained to her forehead and indicated her other scars in her hairline that remained sensitive to the touch.

At trial, the defendant argued that the Commonwealth had failed to prove that the victim’s injury was “permanent and significant” as required by § 18.2-51.2, but the trial court found otherwise.

After the attack, the defendant removed some of his outer garments. Police soon responded. When the defendant encountered law enforcement, he sought to avoid them and then lied about why he was in the area. Ultimately, police captured him. During recorded jail calls, the defendant called himself “stupid” for the way he got caught and lamented that he had been outside the police “perimeter” and then was spotted when he returned.

At trial, the defendant presented an insanity defense. He introduced testimony from a psychiatrist, who testified that the defendant suffered from a mental disease involving psychosis and severe mood symptoms. The psychiatrist opined that the defendant had an acute episode of psychosis and mood symptoms at the time of the offenses and that the episode then dissipated; she claimed that the defendant was too “disorganized” to have the ability to make the choice to attack the victim.

The defendant also contended that because he “established by a preponderance of the evidence that he was insane at the time of the offense,” the trial court erred in denying his motions to strike the two charges.

Held: Affirmed.

The Court first ruled that a reasonable finder of fact could conclude beyond a reasonable doubt that the victim sustained a permanent and significant injury to support the conviction for aggravated malicious wounding.

The Court then ruled that a reasonable fact finder, based on the evidence presented by the Commonwealth of the defendant's planning and concealment, could have rejected the insanity defense. The Court found that a reasonable fact finder could have concluded that the defendant possessed the ability to resist the impulse to attack the victim, but instead chose to commit the crimes he did of his own volition. The Court pointed to the evidence that the Commonwealth presented of the defendant's substantial planning and preparation. The Court also pointed out that the defendant engaged in behavior after the attack that indicated an effort to conceal his crimes.

In a footnote, the Court also considered whether the defendant's evidence would have implicated 19.2-271.6. The Court noted that, in *Calokoh*, the Court had found that 19.2-271.6 does not provide individuals with a qualifying mental condition "an excuse or justification for what would otherwise be criminal conduct." Instead, presenting evidence of a qualifying mental condition under the statute may constitute a denial of an essential element of the offense. With this new evidentiary rule abrogating the common law rule that precluded all evidence of a defendant's mental state unless the defendant raised an insanity defense, a defendant may now raise an insanity defense, or, short of that, satisfy the requirements of § 19.2-271.6. Thus, the Court explained, a defense of insanity is distinct from a claim that there was proof that a defendant lacked criminal intent based upon evidence admitted under § 19.2-271.6.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1694224.pdf>

Sixth Amendment: Ineffective Assistance

Virginia Supreme Court

Schmuhl v. Commonwealth: December 14, 2023

Original Va. Supreme Court Ruling November 7, 2019 (Unpublished)

Affirming Court of Appeals Ruling of September 11, 2018

Fairfax: Defendant seeks Habeas Relief from his convictions for offenses of Abduction, Malicious Wounding, and related offenses on Ineffective Assistance of Counsel grounds.

Facts: The defendant and his wife, both attorneys, forced their way into a home belonging to the wife's former managing partner. Using a taser and a firearm, the defendant bound and restrained the partner and his wife, interrogated them about many strange and unrelated topics, and searched the partner's emails. The defendant then cut the man's throat and shot his wife in the head. After stabbing both the victims, the defendant left them for dead and poured gasoline on the floor. However, the victims were able to alert 911 and police responded. The defendant and his wife escaped briefly before police captured them.

Prior to trial, the defendant indicated that he intended to show that he was suffering from “a medication-induced delirium,” in order to argue “temporary insanity.” The defendant insisted that his notice was “an involuntary intoxication notice . . . not an insanity notice.” The defendant also argued that he was raising an “unconsciousness defense,” which “does not question whether a defendant understands his actions or knows that they were wrong, but it rather precludes mens rea entirely.” According to the defendant, “[b]y precluding mens rea entirely, psychiatric testimony offered in support of an unconsciousness defense is not prohibited by [Stamper].” The defendant insisted “that delirium is an acknowledged predicate for the unconsciousness defense” and, therefore, they should be permitted to present expert psychiatric testimony to establish that the defendant was unconscious during the home invasion.

The trial court, however, ruled that such evidence was not admissible under the defendant’s proposed “involuntary intoxication” defense because the defendant did not argue that he was insane and had not complied with the statutory requirements for an insanity plea.

In particular, the trial court did not allow the defendant’s expert witness to use words like “delirium,” “psychosis,” “dissociation,” and “delusions.” The trial court also redacted statements relating to the defendant’s psychiatric history from the defendant’s medical records, which were admitted at trial. During argument on jury instructions, the trial court refused the defendant’s jury instruction defining and describing “unconsciousness,” finding that the instruction on involuntary intoxication adequately covered the defense of unconsciousness. The trial court also refused the defendant’s jury instruction defining “intoxication,” which the court found to be a word of common usage, and instead permitted the parties to argue the meaning of the word “intoxication” before the jury.

The Virginia Supreme Court and the Court of Appeals both affirmed the judgment, reaffirming that the Commonwealth’s common law history as a *M’Naghten* jurisdiction and the Supreme Court’s holding in *Stamper* prevent a defendant from offering evidence of his mental state to negate mens rea for an involuntary intoxication defense, unless the defendant properly notifies the Court, as required by statute, that his involuntary intoxication caused him to cross the legal threshold to insanity at the time he committed the offense. In this case, the Court of Appeals had agreed that the defendant was actually offering an insanity defense, despite not following the required statutory procedures for doing so under the Code and despite the defendant’s protests to the contrary, when the defendant intended to rely on expert evidence to show his mental state at the time he committed the charged offenses.

The Court also had agreed that it was not error to exclude the defendant’s proposed jury instruction on “unconsciousness” because the instruction on unconsciousness was an inaccurate statement of the law. For example, it did not indicate that unconsciousness cannot be self-induced by voluntarily taking drugs or medication and it failed to state that unconsciousness is caused by “some voluntary or involuntary agency rendering persons unaware of their acts.”

Finally, the Court affirmed the trial court’s exclusion of the defendant’s proposed jury instruction on the word “intoxication” (and in simply allowing both counsel to argue the meaning of the word before the jury) because “intoxication” is a word of common usage and there is neither a model jury instruction nor a statute defining the term.

The defendant then sought *Habeas* relief, arguing that his trial counsel was ineffective due to their misunderstanding of the law regarding the admissibility of mental state evidence which resulted in his inability to present crucial expert testimony regarding his sanity at the time that he committed his

crimes. Both of his trial counsel filed affidavits stating that they “missapprehended the law” and “did not believe the law required [them] to comply with the insanity statutes.” Both counsel denied that they were making strategic decisions, but simply stated that they believed, incorrectly, that their understanding of the law was correct.

The trial court denied the defendant’s *Habeas* petition.

Held: Affirmed. The Court determined that the defendant failed to establish that his trial counsel’s performance was deficient as measured under the *Strickland* test. The Court concluded that trial counsel’s actions in this case “amounted to an unsuccessful attempt to extend the existing law to their client’s benefit. ... they chose a course of action that they believed had the best chance of success. This is precisely the type of representation that is expected from competent attorneys.”

The Court reviewed the history of *Stamper* and the defense of involuntary intoxication in detail and acknowledged that, at the time of trial, the state of the law regarding the interplay between *Stamper* and the defenses of involuntary intoxication and unconsciousness was not well established. The Court pointed out that, if the defendant’s argument had been successful, he would have entirely avoided the requirements of the insanity defense and, if acquitted, would simply have walked away as a free man, rather than face civil commitment.

In a footnote, the Court pointed out that if it were to rule that trial counsel’s performance was deficient in this case, “it would set a precedent under which any unsuccessful defense involving a novel legal argument in a difficult case would be grounds for habeas relief. As the United States Supreme Court explained, such a result is untenable.”

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1211114.pdf>

Original Va. Supreme Court Ruling At:

<http://www.courts.state.va.us/opinions/opnscvwp/1181596.pdf>

Original Court of Appeals Opinion At:

<http://www.courts.state.va.us/opinions/opncavwp/1572164.pdf>

Virginia Court of Appeals -
Unpublished

Smith v. Commonwealth: October 24, 2023

Norfolk: Defendant appeals his convictions for Murder, Robbery, and Use of a Firearm on Ineffective Assistance of Counsel and *Brady* Discovery grounds.

Facts: The defendant shot and killed two people who had been sitting in a car. Police found the defendant at the scene. Later, the defendant made contradictory statements about his knowledge and involvement. At trial, several people testified that the defendant confessed to the murders. Two of those witnesses were incarcerated at the time of trial. The witnesses testified that they did not expect

anything in exchange for their testimony. After the trial, those witnesses were resentenced favorably at the Commonwealth's initiative.

After trial, the defendant moved to set aside the verdict, contending that the Commonwealth knew or should have known that the witnesses had specific arrangements with their prosecutors to benefit from their testimony and that the Commonwealth's failure to correct the record when they testified had constituted *Brady* violations. The defendant also moved to set aside the verdict on the grounds of ineffective assistance of counsel.

The trial court denied the defendant's motions to set aside the verdict. Regarding the defendant's *Brady* motion, the trial court resolved those claims by treating them as a motion for a new trial based on alleged newly acquired evidence.

Held: Affirmed in Part, Reversed in Part.

The Court first repeated that claims of ineffective assistance of counsel are not properly raised on direct appeal and must be raised in a separate habeas petition to the appellate Court or the circuit court. Therefore, the Court ruled that the trial court committed no error when it held that the defendant's ineffective assistance of counsel claim was not properly before the court.

Regarding the defendant's *Brady* claims, the Court repeated that there are three components of a violation of the rule of disclosure first enunciated in *Brady*:

- (1) The evidence not disclosed to the accused must be favorable to the accused, either because it is exculpatory or because it may be used for impeachment.
- (2) The Commonwealth must have withheld the evidence, without regard to whether it did so willfully or inadvertently.
- (3) The evidence must be "material" under *Brady*, meaning there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

In this case, the Court ruled that because the trial court applied the wrong legal test in addressing and resolving the defendant's *Brady* claims, it erred as a matter of law, and thus abused its discretion.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1912221.pdf>

Sixth Amendment: Right to Counsel

Fourth Circuit Court of Appeals

Herrington v. Dotson: April 30, 2024

Stafford: Defendant seeks a writ of Habeas Corpus on Ineffective Assistance and Jury Instruction grounds.

Facts: While facing trial for various drug offenses, the defendant applied for and obtained court-appointed counsel. After investigating the facts regarding that application, the Commonwealth charged the defendant with five counts of perjury, three counts of obtaining money by false pretenses, three counts of filing false or fraudulent income tax returns, two counts of failure to file an income tax return, and two counts of drug possession. The perjury counts all related to the defendant's failure to disclose certain rental income in the indigency forms that he filled out to receive appointed counsel for his original charges.

The defendant initially stated that he would hire his own attorney, but later decided to represent himself. The court offered to appoint the defendant counsel regardless of his financial situation. The trial court reviewed the severity of his charges and the potential punishments, repeating that information in detail at least three separate times. The trial court repeatedly warned the defendant of the dangers of self-representation and emphasized that self-representation was "a big risk" and the court needed to ensure that the defendant "underst[ood] the consequences." The defendant repeated at least nine times, however, that he wanted to represent himself at trial. The trial court permitted him to do so.

At trial, the jury acquitted the defendant of the two drug possession charges and one perjury charge; convicted him of three counts of the lesser included offense of attempting to obtain money by false pretenses (acquitting him of the related completed offense); and convicted him of the remaining charges.

At trial, regarding the defendant's failure to file a tax return, the jury was instructed that an individual is required to file a state tax return if that person's income is over \$11,250. The evidence showed that, in 2009, the defendant received \$16,736 in unemployment income and \$9,543 in rental income. Applying the instruction, the jury convicted the defendant of failing to file a tax return in 2009.

The defendant's appeals were unsuccessful. The defendant sought habeas relief. He argued (1) that the state trial court violated his Sixth Amendment right to counsel by requiring him to choose between his Fifth and Sixth Amendment rights. and (2) that his appellate counsel was ineffective for failing to bring two meritorious arguments on direct appeal, a Sixth Amendment claim and an erroneous jury instruction claim. The defendant's erroneous jury instruction claim was that the jury was erroneously instructed on the requirements for a conviction for failure to file a tax return. The district court rejected both arguments and denied the petition.

However, the parties now agree that the jury was improperly instructed. The Commonwealth now concedes that a state tax return was required in 2009 only if a person's adjusted gross income was over \$11,250 and that adjusted gross income does not include unemployment income. Excluding his unemployment income, the defendant received only \$9,543 in 2009, less than the amount mandating a tax return. The parties agree that the defendant is actually innocent of the crime of failing to file a state tax return in 2009.

Held: Habeas Petition granted. The Court concluded that the defendant clearly, unequivocally, and knowingly waived his right to counsel. The Court also agreed with the district court regarding the defendant's ineffective assistance of counsel argument. However, the Court agreed with the Commonwealth that the defendant met the standard for ineffective assistance of counsel for his jury

instruction argument, and therefore reversed and remanded with instructions to issue a writ of habeas corpus.

The Court first addressed the defendant's argument that if he filled out the indigency forms necessary to receive appointed counsel, he would have provided the prosecutor with incriminating evidence of his underlying tax evasion charges in violation of his Fifth Amendment rights. In this case, the Court found nothing in the record suggesting that the defendant chose not to apply for court-appointed counsel due to a fear of providing the Commonwealth with incriminating evidence regarding his then-pending charges. The Court observed that he instead expressed only a fear of his financial information being used against him to support future perjury charges. Since, in this case, the defendant refused the trial court's offer of a free attorney, the Court ruled that the defendant cannot now genuinely complain that he was forced to choose between his Fifth and Sixth Amendment rights.

The Court then examined the defendant's waiver of counsel in detail. The Court repeated that the trial court was not required to detail every risk or explain every potential defense or lesser included offense of a particular charge. The Court concluded that the defendant knowingly waived his right to counsel and "accepted the risks accompanying that decision with open eyes." In a footnote, the Court repeated that a trial court need not perform such a "searching or formal inquiry" of the defendant's knowledge before concluding that a defendant's waiver is knowing and intelligent. Instead, the defendant simply must be informed of the charges and possible punishments and "made aware that he will be on his own in a complex area where experience and professional training are greatly to be desired."

Regarding the Jury Instruction issue, the Court ruled that when a § 2254 petitioner brings a successful claim for ineffective assistance of appellate counsel, the petitioner is entitled only to have the opportunity for the state courts to review the merits of the claims that appellate counsel failed to raise. Therefore, the Court reversed this aspect of the district court's decision and remanded with directions to issue a writ of habeas corpus unless, within a reasonable period of time set by the district court, the defendant is afforded a new appeal in Virginia in which he may raise his erroneous jury instruction argument omitted from his original appeal.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/226272.P.pdf>

U.S. v. Taylor: March 11, 2024

N.C.: Defendant appeals his conviction for Possession of a Firearm on Sixth Amendment Self-Representation grounds.

Facts: The defendant, a convicted felon, possessed a firearm. Prior to trial, he informed the trial court that he wished to represent himself. The magistrate judge advised the defendant of his right to an attorney and impressed upon him the charge he faced as well as the maximum penalties for that charge. The defendant stated he understood the charges against him, understood his right to an attorney, and understood that several rules with which he was not familiar would govern the proceedings, including

the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. The magistrate judge further admonished the defendant that it would be unwise to represent himself and that a trained lawyer could represent the defendant far better than he could represent himself.

Nonetheless, the defendant insisted that he represent himself. The magistrate judge inquired if that decision was “entirely voluntary,” and the defendant relied, “Yes.” The court finally determined that, notwithstanding its admonition, the defendant had knowingly and voluntarily waived his right to counsel. The court then appointed the federal public defender as standby counsel. The defendant objected to that decision.

At arraignment, the defendant agreed to accept the public defender as counsel, but soon the defendant again requested to represent himself. The trial court again engaged in an extensive colloquy with the defendant about his waiver of counsel. The trial court concluded that the defendant’s waiver of his right to counsel was knowing and voluntary.

Held: Affirmed. The Court held that the defendant’s waiver was knowing and voluntary. The Court examined the three extensive colloquies that the court conducted with the defendant and concluded that “The magistrate judge did everything possible to ensure this decision was knowing and voluntary, short of forcing Appellant to accept counsel. That was more than enough.” The Court also pointed out that the defendant had previously been convicted of crimes, and so he had some familiarity with the court system.

Examining the questioning by the trial court in detail, the Court found that its inquiry satisfied what is required of judges in such situations, where even someone who is mentally ill may be determined by a district court competent to waive the right to counsel. The Court rejected the defendant’s argument on appeal that he did not understand the judicial process. The Court ruled that his failure to understand the process did not equate to error on the part of the magistrate judge. The Court noted that the magistrate judge made clear to the defendant several times that rules would govern the proceedings of which the defendant had no knowledge, and that accepting representation would give him the benefit of counsel that understood the rules.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214601.U.pdf>

Virginia Supreme Court

Smith v. Commonwealth: February 29, 2024

Rev’d Unpublished Ct. of App. Ruling of May 17, 2022

Richmond: Defendant appeals his convictions for Rape and Sexual Assault of a Child on Denial of Expert Testimony, Prosecutorial Misconduct, and Eighth Amendment grounds.

Facts: For several years, the defendant raped and sexually assaulted a child under the age of 13. He later confessed to law enforcement. Prior to trial, the defendant requested expert funds for two

experts. The first expert was for a neuropsychological evaluation, alleging that he may be suffering from HIV-Associated Neurocognitive Disorder (“HAND”). The defendant proffered evidence, including that his longtime HIV doctor believed he “fit the profile” for HAND, that “half of all treated HIV patients have cognitive impairment,” and that cognitive impairments caused by HAND “cannot be reversed” by “antiretroviral therapy.”

The second expert he sought was an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. He proffered that he wanted to inform the jury as to the intrinsic (personal) and extrinsic (circumstantial) factors that render an individual particularly susceptible to falsely confess under the pressure of interrogation techniques. The trial court denied the motion for both experts.

The defendant also requested funds for an expert in the police “Reid Technique” and a “police interrogation expert.” The trial court denied those requests as well. The trial court excluded testimony from the defendant’s proposed interrogation expert on “the surprising frequency of false confessions” because the science of false confession work was not sufficiently reliable and because the proposed expert had insufficient experience.

While the defendant was incarcerated, the jail recorded his phone calls and video recorded his movements in the jail. The video system’s software automatically recorded all audio and video calls, including with counsel but the deputies could change a setting to indicate the visit was professional and thereby prevent the video call from being recorded. Later, however, the Commonwealth provided discovery that included a disc containing recordings of the defendant’s phone calls and video visits, including privileged videos of two meetings with his own attorneys.

Although several police recruits listened to some of the phone calls for training purposes, no investigator, police officer, or prosecutor listened to or watched privileged materials, including the video recordings of the trial strategy meetings. The defendant moved to dismiss the indictments or, in the alternative, exclude at trial all recordings of his communications from the jail. The trial court denied the motion.

The jury convicted the defendant of two counts of raping a child under the age of 13, as well as object sexual penetration of a child under the age of 13, and he received a life sentence on each of his three convictions. The defendant filed a post-trial motion in which he argued that his mandatory life sentence was unconstitutional. The trial court denied the motion.

The Court of Appeals Reversed and Remanded. The Court first found that the trial court erred in denying the defendant’s request for funds for an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. The Court found that the defendant’s “many proffers of proposed expert testimony made clear that mental illness and cognitive impairment, among other things, render a person more susceptible to interrogation techniques.”

Regarding the HAND expert, the Court noted that the defendant’s evidence was that he suffered from major depression and anxiety and had not been taking his anxiety medications for some time before the interrogation. The Court concluded that the defendant was therefore entitled to present expert testimony from a qualified expert on the susceptibility of a person suffering from major depression and unmedicated anxiety to making a false confession.

The Court agreed, however, that the trial court properly denied the defendant's requests for experts in the "Reid Technique" and police interrogation. The Court found that the defendant's expert's proposed testimony on the "false confessions" was unreliable under *Spencer*. The Court wrote that "Simply watching many interrogations does not give a person experience in understanding whether those confessions are false in the same way that arresting drug users and distributors teaches a police officer what quantities are kept for personal use and what quantities are kept for distribution, or in the same way that working with tracking dogs for years makes a person aware of how accurate those dogs are at tracking."

The Court continued, "The science or field of false confessions work is narrow in scope and is still in the early stages of development. The peculiar difficulties of verifying the truth or falsity of confessions have not yet been resolved in any way that allows observers in the field of false confessions to gather sufficient samples of empirical data from which to draw sufficiently reliable conclusions about how likely the Reid Technique is, in general, to produce a false confession in the context of an accusation of a serious crime such as murder or child abuse." "An additional empirical problem arises from the need to compare false confessions to the total number of confessions, and to then compare true and false confessions secured by interrogation techniques to those secured by purely investigative techniques. In light of these uncertainties in a developing field of knowledge, we cannot say that no reasonable jurist could have reached the same conclusion as the trial court on this point."

Regarding the jail recordings, the Court explained that *Gheorghiu* required the defendant to show that the recording and disclosure of his privileged trial strategy meetings harmed him during the criminal proceedings. In this case, just as in *Weatherford*, prosecutors and investigators never learned or used any confidential information. The Court concluded, "Even if we were to hold that Smith's Sixth Amendment right to counsel had been violated, we would still conclude that he is not entitled to any remedy because he failed to show that he was prejudiced."

Lastly, the Court of Appeals rejected the defendant's contention that his sentence violated the Eighth Amendment.

Held: Conviction Affirmed. Court of Appeals Ruling Affirmed in Part, Reversed in Part.

The Court concluded that the trial court did not abuse its discretion in the manner in which it addressed the defendant's multiple requests for expert assistance and, accordingly, the Court reversed the judgment of the Court of Appeals on those holdings. The Court affirmed the Court of Appeals' refusal to dismiss the defendant's indictment on the basis of the inadvertently recorded video conferences between the defendant and his counsel because the record establishes that the defendant suffered no prejudice. Finally, the Court concluded that the defendant's mandatory life sentence for the rape of a young child did not infringe the Eighth Amendment.

Regarding the defendant's request for a HAND expert, the Court reversed the Court of Appeals' holding that the trial court abused its discretion in refusing to permit expert testimony to challenge the defendant's confession on the basis of his major depression and failure to take medication before his interrogation. The Court complained that the defendant had not contended in the Court of Appeals that the trial court erred in failing to provide funds for an expert to testify concerning the effects of "major" depression and "unmedicated" anxiety on his interrogation. Instead, his argument had centered around a potential HAND diagnosis and the use of the Reid method.

The Court then noted that the trial court had repeatedly indicated that it was open to allocating funds for an expert if the defendant found a qualified expert who could reach a diagnosis of HAND or demonstrate a specific diagnosis beyond the understanding of the jury, and who could then “connect the dots” to demonstrate a link between the defendant’s mental condition and the possibility of a false confession. The Court pointed out that the trial court granted the defendant funds to hire an expert, Dr. Jeffrey Aaron, and determine whether his testimony was admissible during a pretrial hearing. The Court wrote: “Strikingly, Dr. Aaron did not appear, either to testify outright or proffer what his evaluation or testimony may have been.”

The Court concluded that the trial court’s rulings on the defense motions for expert assistance, whether for evaluation or potential trial testimony, did not constitute an abuse of discretion. The Court agreed that the trial court could sensibly conclude that allegations of a potential diagnosis of HAND, combined with commonly experienced circumstances such as depression and anxiety, did not rise to the level of a particularized need under *Husske*. The Court found that the trial court’s insistence on an expert or experts who were qualified to make a complex diagnosis, and who could then relate that diagnosis to the potential for making a false confession, were within the bounds of the circuit court’s discretion.

Regarding the defendant’s “false confession” expert, the Court agreed with the trial court that empirical data did not support the conclusion about the “surprising frequency of false confessions.” The agreed with the trial court’s statement that “regardless of whether I used the Spencer or the Daubert, or the 2:702 standard, I just don’t think it meets the test for that based on this proffer.”

The Court ruled that the trial court did not abuse its discretion in declining to allow expert testimony on the “false confession” aspect of the expert’s testimony because the jury could see for itself how the police interrogated the defendant. The Court pointed out that the trial court admitted a great deal of evidence of the defendant’s potential susceptibility to manipulation. For example, the jury heard evidence that the defendant suffered from anxiety and depression, had some memory problems, and heard from his daughter about his difficulties in handling bills and stressful situations. The trial court also admitted the defendant’s medical records into evidence. Lastly, the jury also saw the interrogation itself.

Regarding the inadvertent recordings of attorney-client communications, the Court agreed with the Court of Appeals that there was no evidence the recordings caused the defendant any prejudice and affirmed the Court of Appeals’ ruling on this issue.

Lastly, regarding the defendant’s Eighth Amendment challenge, the Court concluded that the life sentence imposed did not violate the Eighth Amendment’s prohibition on cruel and unusual punishment. The Court repeated that under the Eighth Amendment, there are two paths to review a sentence as cruel and unusual and, therefore, “grossly disproportionate” to the convicted offense. First, a court “considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.” On that question, the Court explained that it had no difficulty in concluding that the sentence imposed did not lead to an inference of gross disproportionality.

The second approach is to look at “categorical” rules to define Eighth Amendment standards. In determining whether a sentence is unconstitutional, a Court first considers “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” to determine whether there is a national consensus against the sentencing practice at issue. The court must then determine in the exercise of its own independent judgment whether the punishment in question violates the

Constitution. Here, the Court acknowledged that few States impose a mandatory life sentence for the rape of a young child. However, the Court stated that it does not understand the Eighth Amendment to require uniformity in punishment, nor could such uniformity be expected in a union of sovereign States.

The Court examined the statutes of our other States that involve a crime analogous to § 18.2-61(B)(2), writing “The most salient fact is that many of our sister States punish the rape of a young child by an older adult with great severity.” The Court was unable to conclude that objective indicia establish a national consensus against a severe punishment for the rape of a young child by an older adult.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220382.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0680212.pdf>

Virginia Court of Appeals – Unpublished

Whitney v. Commonwealth: February 20, 2024

Virginia Beach: Defendant appeals his convictions for Child Sexual Assault Offenses on Fifth Amendment *Miranda*, Sixth Amendment Right to Counsel, and Eighth Amendment proportionality grounds.

Facts: While on probation for a previous sexual offense, the defendant sexually assaulted a 14-year-old developmentally delayed child. During the investigation, the defendant voluntarily drove to the police station to speak to the investigator. There was only officer present during the interrogation and he did not physically restrain the defendant and did not make physical contact with him. The officer expressly told the defendant that the door was not locked and that he was “there on his own free will” and could “leave on his own free will.” The officer did not provide *Miranda* warnings.

The defendant later moved to suppress his statements to the officer. The defendant argued that the officer restrained the defendant by interviewing him in a small room, closing the door, and directing him to sit in a particular chair. The defendant argued that he therefore was in “custody” and that the officer was required to provide him with *Miranda* warnings. The trial court denied the motion.

The defendant then requested that the trial court replace his court-appointed attorney. The defendant’s discontent arose from counsel’s refusal to seek reconsideration of the motion to suppress. The trial court inquired about the basis for reconsideration and, finding none, explained to the defendant that he was “not entitled to a second suppression hearing on the same issues.” The trial court concluded that counsel’s refusal to move for reconsideration, absent a colorable basis to do so, was not good cause for the defendant to seek a different appointed attorney.

The defendant entered a conditional guilty plea. The trial court sentenced the defendant above the sentencing guidelines. The defendant contended that the trial court erred by imposing a sentence that exceeded the sentencing guidelines and that was excessive and disproportionate to the circumstances.

Held: Affirmed.

The Court first ruled that the trial court did not err in finding, under the totality of the circumstances, that the defendant was not in custody when he made the challenged statements to the police. The Court agreed that the relaxed nature of the conversation mitigates against length as an indication of a degree of coercion commensurate with formal arrest. The Court ruled that the trial court did not err in finding that the challenged statements made to the officer were voluntary and did not require *Miranda* warnings.

Regarding the defendant's complaint about his sentence, the Court again declined to engage in a proportionality review in this case, which did not involve a life sentence without the possibility of parole.

Regarding the defendant's request for new counsel, the Court repeated that an indigent defendant cannot have his original attorney replaced unless he shows good cause. Moreover, a defendant's dissatisfaction with and failure to cooperate with counsel does not constitute good cause. The Court found no abuse of discretion in the trial court's denial of the defendant's request for new counsel.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1408221.pdf>

Jackson v. Commonwealth: September 26, 2023

New Kent: Defendant appeals his convictions for Domestic Battery on Sixth Amendment Right to Counsel grounds.

Facts: The district court convicted the defendant of two counts of domestic battery. During those proceedings, the defendant had been found indigent but ultimately waived his right to counsel. The defendant appealed his conviction and appeared in November for the setting of a trial date, where he requested the opportunity to retain counsel. At a status hearing in early January, the defendant stated that he had not been able to raise sufficient funds and asked to apply for court-appointed counsel. The trial court concluded that the defendant did not qualify for court-appointed counsel at that time, but used the defendant's gross income, rather than his net income, to determine that.

The trial judge then told the defendant, "I'm going to continue this matter one more time to the 31st of January and I'm going to note on here if you don't have counsel at that point in time, then it's going to be constituted as a waiver." However, at that next hearing, the defendant again stated that he had not been able to raise the funds for an attorney. The defendant asked for an additional month and a half to raise the funds. The defendant asked if the court would force him to go to trial without an attorney if he appeared for trial without one. The trial judge responded, "Yes, sir."

The trial took place in June. When the defendant appeared, the defendant again stated that he did not have the funds to hire an attorney and again asked for a court-appointed attorney. The defendant stated that he had had a change in circumstances and was now homeless and living in his

vehicle. The defendant also asked if the trial court had considered his gross or net income in January in determining his indigence, and the trial court stated it had used gross income. Nevertheless, the trial court denied the defendant's request and stated that he had given the defendant ample opportunity to hire an attorney and that "[t]he trial is going forward today."

The jury convicted the defendant of both charges. Nine days after trial, the trial judge entered an order then finding the defendant indigent and appointing counsel to represent him on appeal.

Held: Reversed. The Court held that the trial court erred in denying the defendant's request for court-appointed counsel at his trial and in requiring him to go through his trial without an attorney. The Court found that the defendant had to go to trial without an attorney even though he had consistently told the trial court that he wanted to retain an attorney or wanted a court-appointed attorney if he could not afford to pay for one. The Court ruled that the defendant's actions did not amount to a de facto waiver of his right to counsel.

The Court refused to find a de facto waiver of the right to counsel in this case. The Court repeated that, under *McNair*, in order to establish a de facto waiver of counsel by conduct, the record should demonstrate adequate procedural safeguards. In this case, the Court complained that there was no evidence in the record that the trial court ever made the defendant aware of the dangers and disadvantages of waiving his right to counsel. The Court also noted that the trial court did not even inform the defendant of the dangers and disadvantages of pro se representation associated with jury trials. Thus, the Court found that the defendant did not knowingly and intelligently waive his right to counsel when he appeared without counsel at trial.

In this case, the Court also complained that the trial court denied the defendant's request for court-appointed counsel without considering the changes in the defendant's financial circumstances that could have affected whether he was deemed to be indigent under § 19.2-159 and, thus, constitutionally entitled to a court-appointed attorney to represent him at trial.

The Court also pointed out that the trial court had erred in January by considering the defendant's gross, instead of net, income. The Court noted that under § 19.2-159(B)(1), the court is to consider "[t]he net income of the accused" when determining whether a defendant is indigent.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0906222.pdf>

Nguyen v. Commonwealth: June 27, 2023

Alexandria: Defendant appeals his conviction for Contempt on Waiver of his Right to Counsel and sufficiency of the evidence.

Facts: The defendant posted bond as a surety bail bondsman for the release of a man who was being held on several charges committed against the victim, including rape, strangulation, abduction, burglary, forcible sodomy, and malicious wounding. In doing so, the defendant signed a recognizance

agreeing he would “obey all of the terms and conditions” on the recognizance form. One such term was that the man was to remain at the man’s parents’ home.

During the next couple of months, the defendant repeatedly invited the man to leave his parents’ home to come to work with the defendant as a bail bondsman and hang out as friends. The defendant eventually invited the man to stay at the defendant’s home while the defendant was on vacation. Before the man arrived, the defendant hid his firearm under towels. While the defendant was out of town, the man stole his gun and car and murdered the victim.

The Commonwealth charged the defendant with Contempt in violation of § 18.2-456(A)(5),

The defendant hired his own attorney. At trial, during the defendant’s case, the defendant moved for a new attorney, asking for a public defender. The court replied that it would be “too late in the game.” The defendant responded, “I can represent myself, sir, I can do it.”

The trial court conducted an extensive colloquy with the defendant about self-representation. The trial court explained the consequences of self-representation and a potential guilty verdict; that the defendant would be bound by the rules of evidence, that the defendant could not change his mind if the court allowed him to proceed pro se, that the defendant would have a right to appeal, and that the defendant need not testify in his own defense. The trial court asked the defendant, “You feel able, and competent, given all the testimony you’ve heard, and whatever there is to come . . . to present the rest of the case as you see fit, is that correct?” The defendant replied, “Yes, I’m very competent.” The trial court concluded the defendant was making his decision competently and permitted him to represent himself for the remainder of the trial.

On appeal, the defendant argued that his waiver of his Sixth Amendment right to counsel was not (1) timely, clear, and unequivocal; or (2) knowingly, intelligent, and voluntary. He argued that he simply wanted a new attorney, not to represent himself.

Held: Affirmed.

Regarding waiver of the right to counsel, the Court repeated that even if a defendant does timely, clearly, and unequivocally waive his right to counsel, such waiver is valid only if done knowingly, intelligently, and voluntarily. However, the Court also explained that no specific instruction or form of questioning is required. The Court also pointed out that the defendant consistently made clear that if he could not have a public defender appointed mid-trial, he wanted to represent himself.

The Court concluded that the defendant’s waiver of his right to counsel and exercise of his right to self-representation were knowing and intelligent. The Court refused to find that the trial court erred in telling the defendant it was “too late in the game” to replace his counsel.

Regarding sufficiency, the Court examined § 18.2-456, repeating that the Virginia contempt statutes do not limit the court’s power where it exercises its inherent common law power to punish for indirect contempt. However, since the parties proceeded to trial under § 18.2-456(A)(5), the Court also limited its examination to that code section.

The Court explained that a court may order a defendant’s release on bail conditioned on the posting of a bond as well as other terms, and the recognizance memorializes those conditions and provides notice and an enforcement mechanism for revoking bail if terms are violated. The Court then ruled that a recognizance is part of the court’s bail “process,” and so long as that process is “lawful,”

disobedience of or resistance to the obligations of the recognizance can support a contempt conviction under the language of § 18.2-456(A)(5).

The Court ruled that the trial court did not err in finding that the defendant had notice of the recognizance's terms. However, while the Court agreed with the trial court that the defendant's actions qualified as contempt under § 18.2-456(A)(5), the Court disagreed that a bail bondsman is personally liable for the monitoring of the conditions of bond and ensuring that all the items indicated in the bond instrument are complied with.

The Court noted that the statutes governing bail bondsmen impose a financial obligation on a bail bondsman and permit the bondsman to arrest the defendant for violating terms or conditions of a bond, but agreed with the defendant that no statute requires a bondsman to make such an arrest. The Court noted that conditions of bond are individualized and personal, frequently limiting who a defendant may have contact with and when, or what a defendant may do within his own home (e.g., restricting the consumption of alcohol or use of the internet).

The Court contended that requiring a bondsman to ensure that a defendant is complying with every bond condition or be held in contempt of court would be both invasive for defendants and unworkable for bondsmen. The Court wrote: "In the ordinary course, if a bondsman is certain a defendant is in violation of a bond condition, he has a financial incentive to arrest the defendant, and surrender him to the court to end the contractual obligation early and ensure full payment. But that incentive is only financial." Therefore, the Court disagreed with the trial court that the surety bail bondsman "is required not only by law, but by the terms of the bonding instrument . . . to assure compliance with all the other issues on the bond document."

However, the Court agreed with the trial court that the defendant was "personally involved" in "willful" violations of the recognizance and that this disobedience to lawful process qualified as contempt under § 18.2-456(A)(5). In this case, the Court noted that the defendant pledged as surety bail bondsman to obey all of the terms and conditions of the recognizance, including the condition that the man remain at a specific address. Instead, the defendant showed a "deliberate and studied effort to disobey" the recognizance and bond conditions by creating opportunities for the man to be in locations other than his parents' home and encouraging the man to do so. Thus, the Court ruled that the evidence was sufficient to convict the defendant of criminal contempt for disobeying the court's order.

The Court wrote: "Rarely will a court's bond order or recognizance put any person in the position where his own affirmative conduct would itself constitute a criminal violation of a recognizance written for another person's release. But the unique circumstance of this case is that Nguyen invited the peril of criminal contempt by actively, affirmatively, and directly violating the recognizance and his obligation in the bail process. To sum up, we do not hold that the language in this recognizance obliged Nguyen to monitor Bouaichi's compliance with its terms or report any non-compliance he learned about. Instead, we hold the court was not plainly wrong to find that Nguyen's affirmative actions to encourage and facilitate Bouaichi regularly leaving his parents' home constituted disobedience of the court's order, in violation of Code § 18.2-456(A)(5)."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0517224.pdf>

Speedy Trial

Virginia Court of Appeals - Published

Welsh v. Commonwealth: August 15, 2023

78 Va. App. 287, 890 S.E.2d 845 (2023)

Loudoun: Defendant appeals his convictions for Murder, Use of a Firearm, and related charges on Admission of Expert Testimony, Limitation of Cross-Examination, and Speedy Trial grounds.

Facts: The defendant murdered a man and the man's mother in their home, shooting them both in the head repeatedly. During a forensic examination, Cara McCarthy of DFS was able to determine with "a very high level of certainty" that the defendant's handgun was the firearm that was used to kill the victims.

Prior to trial, the defendant moved to exclude McCarthy's testimony at a pretrial hearing and argued that her methodology was not sound. At a pretrial hearing, the defendant questioned McCarthy on two studies, the National Academy of Forensic Science Report ("NAS report") and the President's Council of Advisors on Science and Technology Report ("PCAST report"). McCarthy critiqued both reports and specifically stated that "numerous organizations and agencies have discredited the PCAST report on the grounds that they have statistical errors in their report." Ultimately, the trial court denied the defendant's motion to exclude McCarthy's expert testimony.

At trial, the defendant again attempted to question McCarthy on the NAS report and the PCAST report that she critiqued at the pretrial hearing, but the trial judge prevented this line of questioning because McCarthy "does not recognize the PCAST report or the NAS." Outside the presence of the jury, the defendant asked McCarthy about both reports, and she stated the studies were not standard authorities in the field of firearm and toolmark identification. McCarthy specifically stated that the PCAST report was rejected by the Department of Justice, AFTE, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").

After sentencing, the defendant moved to dismiss the proceedings on speedy trial grounds, but the trial court denied the motion.

Held: Affirmed.

Regarding the Commonwealth's expert testimony, the Court repeated that the Supreme Court has long recognized firearm and ballistics testing as a reliable method used by expert witnesses to explain how a particular firearm can leave individualized markings on discarded ammunition shell casings. The Court ruled that the trial court did not err when it prohibited the defendant from cross-examining McCarthy on the NAS report and the PCAST report, given that she never acknowledged either study as a standard authority in her field. The Court applied Virginia Rule of Evidence 2:706(b), and found that, given that the expert rejected both the NAS report and the PCAST report as standard

authorities in the field of firearm identification, the trial court properly limited cross-examination under Rule 2:706(b).

Regarding the defendant's speedy trial motion, the Court noted that § 19.2-266.2 requires defendants – absent good cause – to make motions for dismissal of charges for constitutional and statutory speedy trial violations in writing within the later of seven days before trial or as soon as the grounds for the motion arise prior to trial, and Rule 3A:9 dictates that a motion that “raises speedy trial” must be made at least 7 days before the day fixed for trial, or at such time prior to trial as the grounds for the motion or objection shall arise, whichever occurs last.” The Court found that the defendant failed to comply with those rules.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0860214.pdf>

Virginia Court of Appeals -
Unpublished

Murphy v. Commonwealth; May 28, 2024

Aff'd Panel Ruling of August 10, 2021

Chesterfield: Defendant appeals his convictions for Malicious Wounding and Use of a Firearm on Speedy Trial grounds.

Facts: The defendant shot and wounded the victim. After arrest, the defendant waived preliminary hearing. On March 16, 2020, the day the grand jury was scheduled to act on the charges, the Supreme Court of Virginia issued its first judicial emergency order in response to the COVID-19 pandemic. That order restricted trials and non-emergency proceedings due to the pandemic, and the meeting of the grand jury was postponed. In the months that followed, the Supreme Court issued additional emergency orders that suspended jury trials entirely for a period of about eight weeks.

In May 2020, around the time that jury trials were suspended, the defendant, through court-appointed counsel, stated his intent to enter a guilty plea. However, in June, when the defendant appeared in court for entry of the plea, he demanded a jury trial and requested new counsel. The court appointed new counsel and scheduled a jury trial for September.

By mid-September, the defendant's second attorney withdrew as counsel due to a conflict, and the court appointed a third attorney for the defendant. The trial court obtained approval to resume jury trials in early November, and the defendant's jury trial was scheduled for January 2021.

As of January 4, 2021, however, the jail pod that housed the defendant was under quarantine, and pursuant to the judicial emergency orders of the Supreme Court, the defendant could not be transported or allowed to enter the courthouse. Consequently, his jury trial was reset for February 26, 2021. In mid-January, he was released on bail, and on February 22, he filed a motion to dismiss on constitutional speedy trial grounds.

In his motion to dismiss, the defendant claimed that he had learned through the initial prosecution's discovery responses that two witnesses had identified him by as knowing the location of the firearm used to commit the malicious wounding. The defendant stated, however, that these two individuals discussed a third witness' possession of the firearm in a recorded jail call. The defendant further asserted that the firearm was crucial evidence and that due to the witness' death in November 2020, he was deprived both the witness' testimony and any ability to locate the firearm. The defendant suggested that if he had obtained the firearm, he "could get prints and other [unspecified exonerating] evidence" from it.

The trial court granted the motion to dismiss on constitutional speedy trial grounds, and it later denied the Commonwealth's motion to reconsider. The Commonwealth noted an appeal.

In 2021, the Court of Appeals reversed the trial court's dismissal and reinstated the case. The Court held that the trial court erred in ruling that the defendant's constitutional right to a speedy trial was violated.

Held: Affirmed. The Court affirmed its reasoning from its ruling in 2021.

In its 2021 ruling, in analyzing the defendant's constitutional right to speedy trial, the Court applied the test from *Barker v. Wingo*, which requires balancing four main factors—the length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. The Court concluded that, although the overall length of the delay was presumptively prejudicial, the reason for much of it was attributable to the defendant and the pandemic.

The Court first analyzed the length of the delay. The Court made clear that delays due to the defendant's change in plea and changes in counsel counted against him for speedy trial purposes. Thus, the delay between the date scheduled for his guilty plea and the new date scheduled for trial was attributable to him for speedy trial purposes. In addition, the Court also attributed the delay that occurred when his second attorney withdrew due to a conflict to the defendant.

In its 2021 ruling, of the almost fourteen months between his arrest and the dismissal of the charges, the Court concluded that a period of a little over three months was attributable to the defendant due to his decision to request a jury trial rather than plead guilty. Of the remaining time, the Court found that just under five months were attributable to the pandemic, and about six months were attributable to the Commonwealth. The Court explained that the portion of the delay caused by the pandemic was an appropriate, justifiable delay and did not count against the Commonwealth. Because the Commonwealth was not at fault in any way in causing the delay due to the pandemic, the Court found that the time attributable to the Commonwealth was only 181 days or approximately six months.

Regarding the reason for the delay, the Court held that the trial court erred when it weighed the reason for the pandemic-related delay "significantly in the defendant's favor." Instead, the Court found that the trial court should have classified the cause for the delay attributable to the pandemic as valid and unavoidable because it was outside the Commonwealth's control. The Court examined the history of the pandemic and concluded that the pandemic was "a valid reason" that "justified appropriate delay." The Court wrote: "The ongoing nature of the global pandemic supported the continuation of restrictions until such time as circumstances permitted the resumption of jury trials in a manner that protected both the health and safety of all participants and the constitutional rights of criminal

defendants.” In a footnote, the Court cited many cases from other jurisdictions that reached the same conclusion.

Regarding the defendant’s assertion of his rights, the Court acknowledged that the defendant made repeated requests for a jury trial, but explained that, as a matter of law, requesting a jury trial is qualitatively different from asserting one’s right to a speedy trial.

Lastly, regarding prejudice, In its 2021 ruling the Court explained that, because the delay was due to the pandemic, the defendant could establish a constitutional speedy trial violation only if he proved specific prejudice. The Court acknowledged that, if witnesses die or disappear during a delay, or are unable to recall “distant” events accurately, the prejudice is “obvious.” However, in this case, regarding the dead witness, the Court held that the defendant’s proffer amounted to no more than speculation and was insufficient to establish specific prejudice. The Court found that the defendant’s assertion of such prejudice failed because his allegations regarding how the testimony of the deceased witness, or any evidence the defendant might have obtained from the firearm believed to be in that potential witness’ possession, would have aided him in his defense were speculative at best.

Regarding the now-deceased witness, the Court observed that, while the witness was alive, the defendant and his attorneys either did not believe the witness was a material witness or did not know how to find him. The court wrote: “If they could not find him prior to his death to question him or subpoena him for either trial, it was this inability to locate him that caused any potential prejudice, not the delay in the defendant’s trial.” In a footnote, the Court pointed out that the defendant had never subpoenaed the now-deceased witness.

Further, In its 2021 ruling, the Court complained that the defendant did not allege that the deceased witness was a witness to any relevant events, only that he knew where the gun was located. The Court also complained that the defendant could not articulate how fingerprint or DNA evidence obtained after that length of time, during which the gun had been in the possession of the deceased witness and perhaps others, was likely to exonerate him.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1774222.pdf>

Original Court of Appeals Ruling At:

<http://www.courts.state.va.us/opinions/opncavwp/0197212.pdf>

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim's brother called 911 and told the dispatcher that the victim had called him and told him that "her boyfriend had shot her and they were trying to kill her." The brother stated that the victim could barely speak. He also stated that he "d[idn't] know what to do" because he doesn't live near the victim. He stated that "she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster." On the recording, the brother said it sounded like the victim "was hiding" while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver's seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions like, "You doing all right man?" and, "you still tired?" The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, "how was your day, though?" to which the officer responded, "It was good, how was yours?" The defendant answered: "It was horrible," to which the officer reiterated, "horrible day?" The defendant also asked the officer, "you know, I found evidence of her almost burning me?" to which the officer responded, "[b]urning you?"

The defendant also asked the officer "hey, is that Michael Kors bag going to go . . . in my evidence file?" The officer asked, "what's that?" The defendant clarified, "the Michael Kors bag in the car," to which the officer responded, "I'm not sure what you're talking about." The defendant also asked, "did you guys search the vehicle?" to which the officer responded, "I've been with you the entire time."

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim's social media. The detective asked, "What's her Facebook page?" to which the defendant responded. The defendant then talked about the victim cheating on him, saying, "I caught her!" The detective asked, "was it one of your boys?" to which the defendant responded that he doesn't know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim's first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a

speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that “only recently, on January 20th . . . received a letter from the Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse.” The trial court further stated that there was an “inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen.” The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness “is the father of a former classmate.” Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church “on a personal level.” All three of the jurors indicated that they would not credit the witnesses’ testimony simply based on the jurors’ familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors’ assurances that they would not necessarily credit the officers’ testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant’s objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant’s Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant’s objection. An officer testified that the gun depicted in the defendant’s Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers’ questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did not violate the defendant’s Miranda rights.

Regarding the defendant’s request for an expert witness, the Court ruled that the trial court did not err in denying the defendant’s motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant’s arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that “a number of things” had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court’s approval. The Court noted that this delay was not intentional or due to the Commonwealth’s negligence. The Court then held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother’s statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother’s call was to ask for help responding to an ongoing emergency—getting medical care for the victim’s gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant’s social media posts, the Court reasoned that evidence from the defendant’s Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*, the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Ward v. Commonwealth: April 8, 2024

Washington: Defendant appeals his conviction for Drug Distribution on Speedy Trial and Chain of Custody issues.

Facts: The defendant twice sold cocaine to a police informant. The defendant was arrested in February 2021, on both counts. The defendant was held in jail continuously until the trial in August 2022. The initial trial date was in May 2021, but the defendant requested a continuance where he agreed to waive his statutory and constitutional rights to a speedy trial. Trial was then set to August 2021, but just before trial the defendant again requested a continuance to request a jury trial; the defendant again waived his statutory and constitutional speedy trial rights. The trial was set for December 2021, but just before trial, the trial court granted defense counsel's motion to withdraw, and new counsel was appointed.

The trial court set a new trial date in January 2022. The defendant objected to the continuance, but the trial court ordered it to give new counsel adequate time to prepare for trial. The trial court also issued an order that speedy trial shall be held in abeyance pursuant to the Supreme Court of Virginia's Order of Judicial Emergency in Response to the COVID-19 Emergency. Just prior to the January trial, the court learned that a court in a neighboring jurisdiction had ordered the defendant to complete a psychological evaluation. Based on the competency evaluation, the Commonwealth moved for, and the trial court granted, a continuance request, over the defendant's objection. After the defendant failed to comply with the competency evaluation in the other jurisdiction, the trial court continued the matter for a jury trial in May 2022.

However, before the May trial date, defense counsel filed another motion to withdraw. The trial court granted the motion and assigned new counsel. The parties then jointly moved to continue the matter until June 2022, due to defense counsel's recent appointment and due to counsel's unexpected medical issues. In June 2022, the parties jointly moved again to continue the case because the Commonwealth's expert witness from the Department of Forensic Science was unavailable and because defense counsel had surgery scheduled. The trial was set for August 2022 and the order specified that the "time period shall not count against the Commonwealth for purposes of speedy trial computation," citing § 19.2-43(4).

Before trial, the defendant filed a motion to dismiss alleging a violation of his statutory right to a speedy trial. The trial court denied the motion.

At trial, the evidence technician that submitted the cocaine to the lab did not testify during the trial. Instead, the investigating officer testified that after each controlled purchase, he packaged and submitted the substance to the evidence locker for transport to DFS. then, a different evidence custodian testified about procedures that the department followed when receiving evidence and submitting it for analysis. Using business records, the then-current evidence custodian testified that no one accessed the evidence, besides the investigating officer, transport office, and the lab.

The DFS forensic analyst then testified that DFS received the evidence in sealed bags. Using records and logs from the lab, he testified when the items were received, how they were stored, and what identifying numbers they bore. He testified that what he received and tested were what were described on the request for analysis prepared by the investigating officer.

The defendant objected to the admission of the certificates of analysis, arguing that the transport officer was an essential link in the chain of evidence. The trial court overruled the objection and admitted the certificates.

Held: Affirmed.

Regarding statutory speedy trial, the Court first examined each continuance and ruled that the trial court did not violate the defendant's statutory speedy trial rights. For example, the Court ruled that the continuance due to the defendant's failure to comply with a competency evaluation was imputed to him, not the Commonwealth, explaining that "a defendant may not invoke speedy trial protections where his conduct caused the delay."

Regarding the certificates of analysis, the Court found that, given the witness testimony, the trial court did not need to hear from "every witness who physically handled the samples for the evidence to be admissible." The Court found that the prosecution provided reasonable assurance that the evidence obtained by the police was the same evidence tested.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1664223.pdf>

Greene v. Commonwealth: December 28, 2023

Chesterfield: Defendant appeals his convictions for Robbery and Conspiracy on grounds including Speedy Trial, Mistrial, and Retroactivity of the new Robbery statute.

Facts: The defendant and his confederate robbed the victim. During the robbery, they shot and killed the victim. The defendant was charged by direct indictment on August 12, 2020. He was then arrested on October 23, 2020, and he was held without bail. On January 4, 2021, counsel for the defendant and the attorney for the Commonwealth made a joint motion to continue the case for trial to August 23, 2021. On June 25, 2021, the defendant filed a motion to dismiss, alleging that his constitutional and statutory speedy trial rights were violated. The trial court denied the motion.

At trial, the defendant made a motion for a mistrial after the attorney for the Commonwealth questioned the defendant about a potential alibi witness and then commented on the absence of that potential alibi witness during closing arguments. The prosecutor specifically asked, "[S]o based on what you said today, you didn't think to give the police the name of the person who could exonerate you from this whole incident, correct?" The defendant then acknowledged that he did not tell the police during an interview that he was with his girlfriend on the night of the murder. The attorney for the Commonwealth stated during closing arguments, "For the first time in two and a half years, he's claimed that he was with his girlfriend. Which, again, by his own admission today, he admits he did not tell Detective Bates. He also doesn't have her here today. She's not testified in defense." The trial court denied the mistrial motion.

At sentencing, the defendant contended that the trial court should have sentenced him under the newly amended version of § 18.2-58 for his robbery conviction. The trial court refused.

Held: Affirmed. The Court held that the defendant's statutory and constitutional speedy trial rights were not violated because both the defendant and the Commonwealth sought the continuance and agreed to the trial date that resulted in most of the delay leading up to the trial. In addition, given clear precedent from the Supreme Court, the Court ruled that it was entirely proper for the attorney for the Commonwealth to question the defendant about (and to comment on) the defendant's failure to call his girlfriend as an alibi witness. Finally, the Court ruled that the trial court did not err when it applied the penalty under § 18.2-58 that was in effect at the time that the defendant committed the robbery.

Regarding statutory speedy trial, the Court noted that, given that the mutually agreed-upon continuance tolled the running of the statutory speedy trial clock for all but 73 of the 152 allowable days, the defendant's statutory speedy trial rights clearly were not violated. Regarding constitutional speedy trial, the Court concluded that, given that the defendant was responsible for most of the delay and given that the defendant had not shown that he suffered any specific prejudice, the constitutional speedy trial factors weighed in favor of the Commonwealth.

Regarding the defendant's motion for a mistrial, the Court pointed out that the defendant chose to testify in his own defense and, therefore, subjected himself to cross-examination and potential impeachment. The Court agreed that the Commonwealth lawfully impeached the defendant's testimony by questioning the defendant about his prior inconsistent statement to the police. The Court noted that the Supreme Court has held that a defendant's failure to call an alibi witness "'was the legitimate subject of comment by the Commonwealth's attorney' and 'a circumstance to be considered by the jury.'" Consequently, the Court concluded that the attorney for the Commonwealth did not improperly comment during closing argument on the absence of the defendant's girlfriend from testifying at trial. In addition, given that the absence of the girlfriend at trial was "a circumstance to be considered by the jury," the attorney for the Commonwealth could also impeach the defendant's credibility on this point during cross-examination.

Lastly, the Court explained that "§ 18.2-58, like many other newly amended statutes recently analyzed by this Court, simply does not have retroactive effect." Because Code § 18.2-58 did not have retroactive application and because the defendant committed the robbery offense in 2019, the Court ruled that the trial court did not err when it sentenced the defendant according to the law that was in effect at the time that the relevant offense was committed.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0931222.pdf>

Commonwealth v. Drane: November 21, 2023

Hampton: The Commonwealth appeals the dismissal of charges on Speedy Trial grounds.

Facts: The defendant faces numerous charges, including Robbery and Abduction. Because the defendant was 16 years old at the time of the offense, the Commonwealth charged him by petition in

JDR court. The Commonwealth sought to certify the case and proceeded with a preliminary hearing in accordance with § 16.1-269.1(C). At the preliminary hearing held November 16, 2022, the JDR court certified all charges to a grand jury. On November 18, 2022, a grand jury indicted the defendant. The case was scheduled for a first appearance in the trial court on December 16, 2022, and for a bench trial on January 13, 2023.

Thereafter, the defendant's attorney filed a notice purporting to appeal the JDR court's "transfer" of the case to the trial court, incorrectly believing she was appealing the result of a transfer hearing under § 16.1-269.1(A), rather than the result of a preliminary hearing under § 16.1-269.1(C). Nevertheless, a hearing on that appeal was scheduled in the trial court for January 27, 2023, and the January 13 trial date was cancelled. Accordingly, the parties did not appear in the trial court again until January 27, on which date defense counsel acknowledged her withdrawal of the appeal and filed a motion to withdraw from the case entirely at the defendant's request.

The trial court granted the motion to withdraw and entered an order appointing a new attorney to represent the defendant. Because the new attorney was not present at the January 27 hearing, the trial court continued the case to February 16, 2023, "for a to-be-set date" so the parties could select a new trial date. Nevertheless, despite notice of this February 16 hearing, neither the defendant nor his attorney appeared. To avoid further delay, the trial court scheduled a bench trial for April 24, 2023. The defendant raised no objection and made no mention of his speedy trial rights until filing a motion to dismiss for violation of statutory speedy trial on April 10, 2023.

At a hearing on the defendant's motion to dismiss, the trial court granted the defendant's motion without elaboration and dismissed the charges against him.

Held: Reversed, Case Reinstated. The Court ruled that the trial court erred in granting the defendant's motion to dismiss.

The Court first repeated that the time between the preliminary hearing and initial trial date counts against the Commonwealth for speedy trial purposes. However, the Court also repeated that a continuance granted on the motion of the accused or his counsel tolls the statutory speedy trial clock.

In this case, the Court examined four periods of delay in this case, totaling 159 days:

(1) 58 days between the preliminary hearing on November 16, 2022, and the first trial date of January 13, 2023;

(2) 14 days between January 13, 2023, when the first trial date was cancelled, and January 27, 2023, the hearing date set for the appeal of the JDR court's ruling;

(3) 20 days between January 27, 2023, when the trial court appointed new counsel, and February 16, 2023, a "to-be-set date" for the parties to schedule a trial;

(4) 67 days between the status hearing on February 16, 2023, and the next scheduled trial date of April 24, 2023.

While the Court attributed the first period to the Commonwealth, the Court found that the other three, totaling 101 days, are attributable to the defendant and thus do not count against the Commonwealth's 152-day speedy trial clock.

The Court first explained that the delay for purposes of hearing the defendant's erroneous appeal did not count towards the speedy trial deadline. Similarly, the Court found that the defendant's request for new counsel necessitated the 20-day third period delay, and therefore cannot be

attributable to the Commonwealth. The Court then pointed out that not only was new counsel not present in court when appointed but he also needed time to review the case and prepare for trial. The Court also found that the 67-day fourth period is not attributable to the Commonwealth based on the defendant's silence and subsequent motion.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0733231.pdf>

Commonwealth v. Pettiford: October 24, 2023

And

Commonwealth v. Jackson: October 24, 2023

Richmond: The Commonwealth appeals a dismissal on Speedy Trial grounds.

Facts: The defendants and a third defendant face several charges regarding the murder of a child and the attempted murder of another person with a firearm. The trial court granted the Commonwealth's motion to try the three defendants jointly. During the proceedings, the trial court granted the third defendant's motion to suppress evidence police obtained by searching his cell phone. The court ruled that the evidence was inadmissible only against the third defendant.

The Commonwealth then filed three separate notices of appeal of the trial court's suppression ruling for all three defendants. The Commonwealth then argued the case should be continued pending the Commonwealth's appeal of the suppression ruling, because the cases remained joined and the suppressed evidence "was necessary to prove the guilt or innocence" of all three defendants. The Commonwealth asserted that the statutory speedy trial period was tolled during the appeal. The defendants objected to continuing their cases, arguing that an appeal of a ruling suppressing evidence only with respect to the third defendant's case did not apply to them.

The Court of Appeals granted the Commonwealth's appeal in the third defendant's case, but dismissed the other two appeals, holding that they were beyond the scope of § 19.2-398(A)(2) because the trial court did not prohibit the use of any evidence in these defendants' trials. The Court further stated that § 19.2-398 "contains no language permitting the Commonwealth to appeal a defendant's case merely to maintain joinder with a co-defendant with an appealable issue."

The defendants then moved to dismiss their cases on statutory speedy trial grounds. The trial court granted the motions. The trial court found that the Commonwealth had appealed the suppression ruling in the defendants' cases to maintain joinder of their trial with the third defendant. The trial court did not find that the Commonwealth had appealed to be dilatory or to "willfully misle[a]d the court," but that it had "merely acted in error, inadvertently." The trial court concluded that the Commonwealth's appeals had not been authorized by § 19.2-398(A)(2) and thus § 19.2-409 did not apply to toll the statutory speedy trial period.

Held: Reversed, Motion to Dismiss Improperly Granted.

The Court first observed that § 19.2-409 is not ambiguous. The Court noted that the statute clearly states that speedy trial provisions “shall not apply to the period of time commencing when the Commonwealth’s notice of pretrial appeal is filed pursuant to this chapter [Chapter 25 of Title 19] and ending 60 days after the Court of Appeals or Supreme Court issues its mandate disposing of the pretrial appeal.” Accordingly, based on the plain language of the statute, the Court ruled that the speedy trial period was tolled from when the Commonwealth noted its appeals of the trial court’s suppression ruling, until 60 days after the date on which the Court of Appeals dismissed the appeals in the defendants’ cases.

The Court then ruled that the Court of Appeals’ conclusion that the issue raised was “outside the scope” did not preclude tolling of the speedy trial period under § 19.2-409. The Court wrote that: “Suspending a case during the pendency of an appeal is consistent with tolling the speedy trial period. But then allowing a trial court to determine, after an appeal has been dismissed, that there has been no tolling disregards the plain language of the statutory scheme and leads to an absurd result.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0787232.pdf>

Commonwealth v. Smith: September 19, 2023

Richmond: The Commonwealth appeals a Dismissal on Speedy Trial grounds.

Facts: Held without bail on the charge of Possession of a Firearm, the defendant faced a preliminary hearing in June 2022. The Grand Jury indicted the defendant in July, and in August the trial court set the matter for trial in December. The Grand Jury also indicted two other charges against the defendant.

At a December pretrial conference, both parties brought an error to the attention of the trial court where the trial court had continued all matters for a jury trial to one date rather than separating the matters into two trials, one in December for malicious wounding and use of a firearm and the other also in December for firearm possession. At the request by both parties, the trial court entered an order clarifying that the possession charge would be heard one week later for jury trial, also in December.

The parties appeared again a few days later, and the trial court informed the parties that it could not accommodate the first jury trial for the malicious wounding and use of a firearm charges. The trial court asked the Commonwealth if the second December trial date for the possession charge should stay on the schedule. The Commonwealth responded “No . . . we need to take that off.” The defendant objected to the continuances “for purposes of speedy trial.”

The trial court overruled the defendant’s objection and the parties then set about scheduling the matter. The court suggested a few days, some rejected by the Commonwealth and others by the defense; one of the dates that the defendant rejected was within the speedy trial deadline. Finally, the parties agreed on a new date.

Prior to that date, however, the defendant moved to dismiss the felony possession charge, alleging statutory speedy trial rights violation. The trial court granted the motion and the Commonwealth appealed.

Held: Affirmed, Motion Properly Granted. The Court held that the Commonwealth failed to meet its burden to prove that the delay was based on one of the reasons enumerated in § 19.2-243 or on the defendant's waiver, actual or implied, of his right to be tried within the designated period. In this case, the Court found no actions by the defendant to waive setting the trial outside the speedy trial period, a request for a continuance, or a concurrence in the Commonwealth's motion to vacate the original December trial date.

The Court pointed out that, in this case, even when the defendant noted availability for a date outside the speedy trial period, the defendant first entered a speedy trial objection. Thus, the Court found that the defendant did not waive his speedy trial right when his counsel provided dates outside the statutory period after the trial court granted the Commonwealth's continuance motion over his objection.

The Court explained that so long as a defendant objects to a continuance, the accused has no duty to request that a trial date be set within the prescribed period in order to preserve his or her statutory right to a speedy trial. The Court further explained that the fact that defense counsel rejected a trial date within the speedy trial window that was available to the trial court and Commonwealth did not change this analysis. The Court found no authority for the premise that counsel having a conflict on a proposed trial date is akin to a request for a continuance.

The Court repeated that, while it is well-settled that the charge of a felon in possession of a firearm be tried to a separate jury from the one that hears any other crimes charged, there is no requirement that one trial pre-date the other. The Court also rejected the Commonwealth's argument that a defense request for separate trials is an exception to § 19.2-243 that tolls the speedy trial period.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0690232.pdf>

Lochetto v. Commonwealth: June 27, 2023

Spotsylvania: Defendant appeals his conviction for Child Sexual Assault on Constitutional Speedy Trial grounds.

Facts: The defendant sexually assaulted a child. The defendant was arrested in February 2020, and was tried 536 days, or 18 months, later, in August 2021. The defendant remained incarcerated throughout the proceedings. 345 days of the delays were due to the Supreme Court's emergency orders in response to the COVID-19 pandemic. Due to the logistics of summoning potential jurors, the first jury trial was not held until March 11, 2021.

The defendant moved to dismiss his charges on Constitutional speedy trial grounds. He argued that although he wanted a bench trial, the Commonwealth asked for a jury, and therefore the ensuing unnecessary delay was not justified.

Held: Affirmed. The Court held that the defendant's constitutional speedy trial rights were not violated.

The Court first acknowledged that a delay approaching one year is presumptively prejudicial and requires further review of the other three factors under *Barker v. Wingo*. The Court then ruled that the delay in this case was justified because it occurred in the ordinary administration of justice. The Court noted that the Commonwealth had a right to a jury trial and therefore ruled that the delay created by the Commonwealth's initial request for a jury was justified.

The Court then found that the Commonwealth neither intentionally nor negligently caused the delay. Rather, the Court found that the delay resulted from the restrictions imposed on trial courts by the COVID-19 pandemic. Because the delay was not the fault of the Commonwealth, and the Commonwealth proceeded "with reasonable diligence" in bringing the defendant to trial, the Court explained that the defendant must show specific prejudice to prevail on his claim. However, the Court found that the defendant had failed to do so.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0571222.pdf>

Sentencing

Virginia Supreme Court

Vasquez v. Dotson: April 18, 2024

Prince William: Defendant seeks Habeas relief, alleging Denial of Earned Sentence Credits.

Facts: In 2016, the defendant and two other men robbed the victim during a marijuana purchase, and then shot and killed him when he tried to flee. Initially indicted by a grand jury for first-degree murder in violation of § 18.2-32, the defendant pleaded guilty in 2019 to an amended charge of conspiracy to commit a felony in violation of § 18.2-22 — with the predicate felony being first-degree murder. The defendant also pleaded guilty to violating § 18.2-46.2(A), participating in an act with a criminal street gang. The trial court sentenced the defendant on each conviction to 10 years imprisonment with years suspended for a total of 10 years of active incarceration.

The defendant entered the penitentiary in July 2020. At that time, he was eligible under then-existing §§ 53.1-202.2 and 53.1-202.3 to receive earned-sentence credits at a maximum rate of 4.5 days of credit for every 30 days served. Under the then-existing statutory framework, all convicted felons would serve at least 85% of their sentences.

However, in 2020, the General Assembly amended the earned-sentence credit program so that prisoners with qualifying convictions are eligible to receive credits at a higher rate of up to 15 days of credit for every 30 days served. Thus, some but not all convicted felons will serve 67% of their sentences. The Code has a short list of disqualifying convictions that do not receive the new, more favorable, sentencing credits. One of them is “any violation of § 18.2-32.” However, the list does not include a violation of § 18.2-22 (Conspiracy) as a disqualifying conviction.

The defendant sought a writ of habeas corpus, asserting that he had a right under § 53.1-202.3 to an early release from prison. Since one of the defendant’s two convictions involved conspiracy to commit first-degree murder, DOC objected, contending that the General Assembly did not intend such a “serious and dangerous” offense to be eligible under the early-release statutes.

Held: Writ Granted. The Court issued a writ of habeas corpus directed to the DOC ordering that the defendant be released from custody.

The Court agreed with the defendant that the literal text of § 53.1-202.3, when contextually construed using neutral principles of statutory interpretation, demonstrates that the early-release statute applies to his conspiracy conviction. Because the General Assembly chose not to disqualify conspiracy to commit murder from § 53.1-202.3’s calculation of enhanced earned-sentence credits, the Court ruled that the defendant is entitled to these credits and thus to early release from prison.

The Court wrote: “One cannot murder a victim by merely thinking about murdering him, plotting to murder him, or entering into a conspiratorial agreement with others to murder him. A conspiracy to commit a murder requires only an agreement to commit a future murder that may or may not ever occur. But if a conspirator later follows through on the agreement and maliciously kills the targeted victim, the conspirator has committed two crimes: murder and conspiracy to commit murder.... He can be indicted for and convicted of both crimes.”

Full Case At:

<https://www.courts.state.va.us/opinions/opnscvwp/1230514.pdf>

Anderson v. Clarke: October 12, 2023

Albemarle: Defendant appeals the denial of his Habeas petition seeking Earned Sentence Credits.

Facts: While detained on federal drug charges, the defendant and other inmates attempted to escape from custody, attacking and abducting several guards at a jail. The defendant was convicted and sentenced to 13 years, including one year for attempted escape, five years for abduction, two years for assault on a law enforcement officer, and five years for a second assault on a law enforcement officer. After the defendant finished serving his sentences for his federal drug charges, the defendant began serving his state sentences.

Pursuant to § 53.1-202.2, the defendant entered Virginia’s statutorily constructed ESC system, which is designed to incentivize good behavior and rehabilitation among inmates by awarding ESCs to

inmates who demonstrate positive conduct. Each ESC an inmate accrues deducts “one day from a person’s term of incarceration.” § 53.1-202.2(A).

Under the ESC scheme that existed when the defendant was sentenced for his state convictions, an inmate could earn up to 4.5 ESCs for every 30 days served, depending on his or her “classification level” as designated by DOC. To determine appropriate classification levels, DOC periodically evaluated each inmate, considering things like disciplinary infractions incurred, employment, and participation in rehabilitative programs. For each 30 days served, Level I inmates earned the maximum available 4.5 ESCs, Level II inmates earned 3 ESCs, Level III inmates earned 1.5 ESCs, and Level IV inmates earned 0 ESCs.

In 2020, the General Assembly passed, and the Governor signed, House Bill 5148, amending §53.1-202.3. The amendments created statutory classification levels for inmates in the ESC program, increased the number of credits available up to a maximum of 15 ESCs per 30 days served for Level I inmates, and delineated certain offenses that would not be eligible for the enhanced credits under the new system, but rather, would be subject to a maximum of 4.5 ESCs per 30 days served. According to an enactment clause in the bill, the enhanced maximum ESCs that could be earned would apply retroactively over an inmate’s entire period of incarceration and would not be limited to periods of incarceration occurring after the effective date of the new system. The bill was to become effective on July 1, 2022.

However, in adopting the 2022 budget, which was signed by the Governor on June 22, 2022, the General Assembly modified the ESC program by including Budget Item 404(R)(2). Item 404(R)(2) provides that “[n]otwithstanding the provisions of § 53.1-202.3, Code of Virginia, a maximum of 4.5 sentence credits may be earned for each 30 days served on a sentence that is concurrent with or consecutive to a sentence for a conviction of an offense enumerated in subsection A of § 53.1-202.3, Code of Virginia.” The budget expressly provides that its provisions, to include Item 404(R)(2), were to become “effective on July 1, 2022.”

Although the defendant was serving a sentence for abduction, an offense listed in § 53.1-202.3(A)(5), he also was serving sentences for non-disqualifying offenses, rendering at least some of his offenses eligible for HB 5148’s enhanced ESC program. However, under the express terms of Item 404(R)(2), the fact that the defendant is serving a sentence for abduction renders all of his offenses ineligible for the enhanced ESC credits provided for in HB 5148.

The defendant filed a petition for a writ of habeas corpus. The defendant contended that, under HB 5148, he was entitled to up to 15 ESCs per 30 days served prior to July 1, 2022, and that any limitation on his ability to earn enhanced ESCs imposed by Item 404(R)(2) applies only to time served after July 1, 2022. The defendant argued that the General Assembly directed that the program created by HB 5148 be applied retroactively and nothing in Item 404(R)(2) demonstrates that it was to apply retroactively. The defendant contended that Item 404(R)(2) should “be given only prospective effect” and that he “should receive earned sentence credits under [the program created by HB 5148] for his time served prior to July 1, 2022.”

The defendant also argued that, if Item 404(R)(2) renders him ineligible for the enhanced ESC program created by HB 5148, it is unconstitutional because it violates the ex post facto and due process clauses of the United States and Virginia Constitutions. Lastly, the defendant argued that interpreting

Item 404(R)(2) to preclude him from receiving enhanced ESCs for time that he served before July 1, 2022, violated his due process rights.

The trial court denied the petition.

Held: Affirmed. The Court explained that the defendant's premise that HB 5148 entitled him to receive more than 4.5 ESCs per 30 days served was a faulty premise. Instead, the Court held that, given HB 5148's delayed effective date and its modification by Item 404(R)(2), the defendant was never eligible to receive enhanced ESCs under HB 5148.

The Court found that, given that they became effective on the same day, HB 5148 and Item 404(R)(2) must be read together and that doing so established that the defendant was entitled to a maximum of 4.5 ESCs per 30 days served for as long as Item 404(R)(2) remains in effect. The Court found that, because the General Assembly expressly provided that Item 404(R)(2) governs over any conflicting provision found in § 53.1-202.3, the defendant was not eligible for the enhanced sentence credit program created by HB 5148.

The Court reasoned that nothing about the defendant's prior time served or entitlement to ESCs changed when Item 404(R)(2) went into effect. The Court pointed out that the "status quo was unchanged, and thus, no 'new legal consequences' were imposed upon" the defendant as a result of Item 404(R)(2). The Court wrote: "That a different status quo might have existed, and, if HB 5148 had become effective before July 1, 2022, would have existed, does not change the analysis." Since HB 5148 did not go into effect prior to July 1, 2022, and has never been in effect without the modification, the Court concluded that neither the defendant nor others similarly situated have ever been eligible to receive enhanced ESCs under HB 5148.

The Court then ruled that Item 404(R)(2) did not violate the prohibition on ex post facto laws. Because the defendant was eligible to receive 4.5 ESCs per 30 days served both before and after the effective date of Item 404(R)(2), the Court pointed out that Item 404(R)(2) effectuated no change at all in his ability to earn ESCs.

Lastly, regarding the defendant's due process argument, that Court explained that, although it is true that an inmate may have a cognizable due process interest in a state's earned sentence credit program, the Court's interpretation of Item 404(R)(2) did not offend any due process interest that the defendant might possess. The Court reasoned that the defendant never had a legitimate interest in an ESC program in which he could receive more than 4.5 ESCs per 30 days served because no such program has ever been in effect. Accordingly, the Court ruled that the defendant never had a cognizable interest in such a program, and thus, Item 404(R)(2) does not offend the defendant's due process rights.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230172.pdf>

Prease v. Clarke: July 6, 2023

888 S.E.2d 758 (2023)

Botetourt: Defendant seeks a Writ of Habeas Corpus based on Denial of Earned Sentence Credits.

Facts: The defendant opened fire on police officers, engaging in an extended gunfight until police captured him. In November 2013, the trial court convicted the defendant of attempted aggravated murder of a law enforcement officer under §§ 18.2-25 and -31, along with several other offenses. The trial court sentenced the defendant to a total sentence of 63 years plus 12 months, with all but 13 years plus 12 months suspended.

In 2020, the General Assembly revised the statutory scheme governing earned sentence credits by amending Code § 53.1-202.3. The revised statutory scheme created a two-tier system whereby prisoners convicted of a few enumerated offenses could only receive 4.5 credits for every 30 days served. In contrast, prisoners convicted of an offense other than those enumerated in § 53.1-202.3(A) were eligible to receive expanded earned sentence credits. Using DOC's pre-existing 4-tier system, which it had developed after 1995, the new statute stated that prisoners at Level I received 15 credits for every 30 days served, prisoners at Level II received 7.5 credits for every 30 days served, prisoners at Level III received 3.5 credits for every 30 days served, and prisoners at Level IV were not eligible to receive any sentence credits. The new statute directed that the credits shall be awarded retroactively.

In March 2022, VDOC informed the defendant that he would be released between July 1 and August 30, 2022, based on the retroactive application of expanded earned sentence credits. However, in an April 2022 opinion, the Attorney General interpreted § 53.1-202.3 and concluded that the phrases "any violation" and "any felony violation" of a criminal statute encompass the completed offense as well as the associated inchoate offenses (e.g., conspiracy, attempt, or solicitation to commit that offense). The Attorney General further opined that conspiracy to commit aggravated murder and attempted aggravated murder were ineligible for expanded earned sentence credits.

Based on that opinion, VADOC determined that the defendant's convictions for attempted aggravated murder rendered him ineligible for expanded earned sentence credits and revised his release date to June 4, 2024. In October 2022, the defendant petitioned for a writ of habeas corpus, arguing that VADOC improperly denied him expanded earned sentence credits that would have resulted in his release shortly after July 1, 2022.

Held: Writ Granted. The Court granted the defendant's petition and issued a writ of habeas corpus directed to VADOC ordering that the defendant be released from custody.

The Court agreed that under § 53.1-202.3, a person convicted of aggravated murder is ineligible to receive expanded earned sentence credits. The Court pointed out, however, that the defendant was not convicted of aggravated murder, but was convicted of attempted aggravated murder. The Court explained that "The remainder of Code § 53.1-202.3(A) enumerates a number of specific offenses that are also ineligible for expanded earned sentence credits. Notably, attempted aggravated murder is not one of those enumerated offenses. Thus, it would appear that there is no basis in the governing statutes for denying [the defendant] expanded earned sentence credits on his attempted aggravated murder convictions."

The Court rejected the Commonwealth's argument that the verbiage used throughout § 53.1-202.3(A) indicates that the General Assembly intended to exempt actual violations of the enumerated statutes as well as the associated inchoate crimes from receiving expanded earned sentence credits. The Court also refused to consider the public policy implications associated with the General Assembly's inclusion of less serious offenses as exempt under § 53.1-202.3.

In a footnote, the Court cautioned that under normal circumstances, the Court generally lacks jurisdiction to award habeas relief regarding the calculation of earned sentence credits. The Court explained that, as there is the possibility that earned sentence credits can be forfeited, a challenge to the calculation of those credits will usually only result in a potential impact on the duration of confinement. The Court found that this case, however, represented an exception to this general rule, because the defendant filed his habeas petition after the date he would have been released if he was eligible to earn expanded sentence credits. In other words, his assertion was that VA DOC's alleged miscalculation of credits resulted in the extension of his detention without lawful authority, and therefore made him eligible to seek a writ.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220665.pdf>

**Virginia Court of Appeals -
Published**

Vanmeter v. Commonwealth: February 27, 2024

Washington: Defendant appeals the Denial of Credit towards Court Costs.

Facts: The defendant is an inmate employed by the Virginia Department of Corrections doing janitorial work at the prison where he is serving his sentence for abduction, child sexual assault, drug offenses, and many other felony convictions. The defendant filed a motion requesting that the trial court offset the costs he owed under his sentencing order by the value of the work he performed while incarcerated. The defendant contended that his work amounts to “community service work” under §19.2-354(C)(ii) for which he should receive credit toward the costs imposed by the trial court at sentencing. The defendant specifically sought credit toward his costs for the difference between the minimum wage and the amount he is actually paid for his work.

The trial court denied the motion.

Held: Affirmed. The Court ruled that § 19.2-354(C)(ii) does not entitle inmates to offset their fines or costs with community-service credits for work performed for the Virginia Department of Corrections at the prisons that house them.

The Court first ruled that the trial court had jurisdiction to consider the defendant's request. The Court repeated that the trial court that imposed the sentence retains the continuing authority to consider matters pertaining to a defendant's payment of costs. However, the Court then examined the 2020 amendments to the Code and concluded that an inmate's work for the Virginia Department of Corrections does not qualify under any of the six community-service programs specified in § 19.2-354(C)(ii). The Court found that under the text of § 19.2-354(C)(ii), credit is not available for any other type of community-service work other than that specified in the Code.

The Court pointed out that, as originally introduced, the bills that amended § 19.2-354(C) permitted credit for any community-service work during imprisonment. However, that general language was altered in committee to specify that credits are available “in accordance with” the six specified statutes.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0505233.pdf>

Hamilton v. Commonwealth: February 6, 2024

Chesapeake: Defendant appeals the Revocation of his Probation on the Length of Suspension of his Sentence.

Facts: In 2006, the trial court sentenced the defendant to five years of imprisonment for each of three convictions for Distribution of Marijuana (a Class 5 felony), totaling fifteen years of imprisonment with fourteen years and four months suspended. In 2008, the defendant violated the terms of his probation. The trial court revoked the previously suspended sentence of fourteen years and four months, and it resuspended thirteen years and ten months of that sentence. In 2010, the defendant violated probation again, and the trial court revoked the previously suspended sentence of thirteen years and ten months, placing him on an indeterminate period of good behavior and supervised probation. The trial court then resuspended twelve years and ten months of that sentence “on the same conditions as contained in the previous sentencing order of this Court.”

In 2014, the defendant violated the terms of his probation for the third time due to a new robbery conviction. For the robbery conviction, the trial court explicitly stated that the period of suspension for his suspended sentence was twenty years, ending in 2034.

The trial court also revoked the twelve years and ten months of the suspended sentence for his three underlying convictions from 2006. It then resuspended ten years and ten months of that sentence “on the same conditions as contained in the previous sentencing order,” and it also placed the defendant on supervised probation “for three (3) additional years.”

In 2022, the defendant violated probation again. The defendant objected, citing the 2021 amendments to § 19.2-306, and argued that any sentence for a probation violation after July of 2021 for the charges from 2006 could not be imposed after 2016 because the period of probation is limited to the maximum period for which the defendant might have been imprisoned. He then argued that, since the trial court sentenced the defendant more than ten years ago, the trial court lacked subject matter or active jurisdiction over the defendant and any violation filed after July 1, 2021.

The trial court rejected the defendant’s argument, and it determined that it still had jurisdiction over the previously suspended sentence. The trial court revoked a total of twenty years and ten months of the previously suspended sentence (combining the ten years and ten months of the suspended sentence remaining from the 2006 convictions with the ten years of the suspended sentence from the 2014 robbery conviction, and it then resuspended a total of eighteen years and six months, giving him an active sentence of two years and four months.

In addition, the trial court ordered, “Sentence suspended on the same conditions as contained in the previous sentencing order of this Court with the following additions or changes...Good behavior. The defendant shall be of good behavior for twenty (20) years.” The trial court also placed the defendant on supervised probation for an indeterminate period.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the judgment of the trial court, except that the Court reversed the trial court’s ruling regarding the future good behavior requirement.

The Court held that trial court did not err in determining that it still had jurisdiction over the defendant’s suspended sentence. The Court concluded that the trial court was well within the period of suspension for either of the previously suspended sentences and had jurisdiction then to revoke his previously suspended sentence, impose two years and four months of active incarceration, and resuspend the remainder of that previously suspended sentence. Consequently, the Court affirmed the trial court’s decision to revoke the suspended sentence, to impose an active sentence of two years and four months, to resuspend the remainder of that previously suspended sentence, and to have the defendant returned to supervised probation upon his release from incarceration.

The Court began by examining whether the trial court had jurisdiction to consider the probation violation. The Court repeated that a trial court may combine the maximum potential sentences from a defendant’s multiple underlying convictions in order to calculate the period of suspension when all of those convictions arose out of the same case. The Court pointed out that, in 2006, the trial court would have been authorized to order the defendant to serve an active sentence consisting of three ten-year sentences that ran consecutively. The Court concluded that the trial court still had jurisdiction to revoke the remaining ten years and ten months of the previously suspended sentence from the 2006 convictions, impose two years and four months of that sentence as it did, and then resuspend eight years and six months.

The Court explained that while a trial court must reduce the remaining time of the suspended sentence as the defendant actively serves that time, the period of suspension does not get reduced as the defendant actively serves these portions of his suspended sentence under § 19.2-306(C). For example, the Court explained that if the trial court here had originally sentenced the defendant to thirty years of imprisonment (with sixteen years of active imprisonment and with fourteen years suspended), the trial court would not lose jurisdiction over the fourteen-year suspended sentence once the defendant had served more than fifteen years of active imprisonment.

The Court reasoned that if the period of suspension were reduced as the defendant actively served time, then a trial court would always lose jurisdiction over a defendant’s suspended sentence when that defendant had served enough active time that was more than half of his period of suspension. Consequently, given that the defendant’s thirty-year period of suspension began in 2006 and given that a trial court must “measure the period of any suspension of sentence from the date of the entry of the original sentencing order,” the Court concluded that the trial court will lose jurisdiction over the defendant’s suspended sentence in 2036, regardless of how much time the defendant actively serves of that previously suspended sentence, per § 19.2-306(C).

In addition, given that the trial court had jurisdiction to revoke and resuspend the defendant’s previously suspended sentence, the Court also found that the trial court also had jurisdiction to place the defendant back on supervised probation.

However, the Court then observed that the new twenty-year period of good behavior in the trial court's 2022 order will not expire until 2042. Consequently, the Court found that the trial court entered an order beyond a period that the recently amended statute allows the trial court to enforce it. Therefore, the Court ruled that the trial court erred by ordering the defendant to be of good behavior for twenty additional years because the trial court will lose jurisdiction over both of the suspended sentences long before that new twenty-year period requiring good behavior ends.

The Court therefore held that the trial court erred in ordering that the defendant be of good behavior for an additional twenty years, until 2042. The Court reversed that requirement in because the trial court will lose jurisdiction over a large portion of that time requiring good behavior no later than 2036, as the General Assembly has been clear that a court does not have authority to impose requirements for a suspended sentence when the period of suspension for that suspended sentence has expired.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1367221.pdf>

Cheripika v. Commonwealth: September 19, 2023

78 Va. App. 480, 891 S.E.2d 754 (2023)

Fluvanna: Defendant appeals his convictions for Child Sexual Assault Under 13 on admission of Prior Bad Acts, Admission of Medical Records, Prohibiting Access to the Internet in Discovery, a Jury Instruction, and the Constitutionality of his Mandatory Life Sentence.

Facts: The defendant repeatedly sexually assaulted his own stepchild from age eight to age twelve. The child disclosed the years of abuse to her mother and revealed the abuse but could not remember specific dates because it happened at least two or three times a week for a long period of time. The mother contacted the police, who immediately investigated, along with CPS.

After speaking with police and CPS, the defendant left the family home and admitted himself into a hospital in New Jersey. While receiving mental health treatment, the defendant admitted that he had sexually assaulted a child who was a member of his family. The medical records also indicated that "everything seemed normal" when the defendant's mother saw him for Easter, but a couple days later, he wanted to go to New Jersey for treatment. A police investigator obtained and executed a search warrant for the defendant's medical records.

Before trial, the defendant moved to exclude from the evidence his medical records from the hospital in New Jersey that contained his admission that he had sexually assaulted a child who was a member of his family. He argued that admitting the records would violate his right to confront his accusers. The trial court denied the motion, finding that the statements were not testimonial because he was at the hospital seeking treatment.

The defendant elected to proceed pro se despite having several attorneys appointed for him. During discovery, the defendant asked the trial court to allow him to access the internet to "try and receive defense information" and "print off other materials as part of [his] defense." The defendant asserted that he needed internet access to retrieve exculpatory evidence from cloud storage. He also

argued that his lack of internet access violated his First Amendment rights. The defendant did not proffer what information was in the cloud storage, or what the nature of the purportedly exculpatory evidence was; he stated only that “they’re documents.” The trial court denied the defendant’s motion, finding that there was “nothing specific enough” for it to act upon.

The defendant had also sexually assaulted the victim’s sister, who was three years younger. At trial, over the defendant’s objection, the sister testified as well that the defendant sexually abusing her when she was eight years old. The defendant objected that the testimony served no purpose other than to prove his propensity to commit sexual offenses, but the trial court rejected his argument. Nonetheless, the Court instructed the jury that it could consider the other child’s testimony “only as evidence of [the defendant’s] motive or intent or as evidence of [his] scheme or plan as evidenced by his conduct and feelings toward the victim.”

At trial, the trial court gave the Flight instruction, over the defendant’s objection. The defendant had asserted that the record was devoid of evidence that he fled the scene of the crime to avoid detection, apprehension, arrest, or criminal prosecution.

During sentencing, the trial court appointed the defendant’s standby counsel for the sentencing phase of the trial. The defendant’s convictions for object sexual penetration of a victim under the age of 13 carried mandatory minimum terms of life imprisonment per § 18.2-67.2. The trial court sentenced him to the mandatory minimum of life imprisonment for each of two charges.

The defendant unsuccessfully asserted that the mandatory life sentences were grossly disproportionate to his crimes, arguing that he was a first-time offender with no criminal record. He also argued that the mandatory sentences violated his Sixth Amendment right to counsel because although represented, his attorney could do nothing to change the mandatory sentences. The trial court rejected the defendant’s argument that the mandatory life sentences were unconstitutional.

Held: Affirmed.

Regarding the defendant’s prior sexual assaults against the other child, the Court repeated that when the prior sexual abuse was committed against another victim, evidence of the abuse may be admissible to demonstrate a defendant’s common motive, method, plan, or scheme, particularly in prosecutions for crime involving “a depraved sexual instinct.” The Court repeated that acts “showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character.”

In this case, the Court reasoned that when the two daughters provided substantially similar testimony that described the defendant’s same pattern of abuse, each daughter’s testimony had significant probative value of demonstrating the defendant’s incestuous disposition toward his daughters and that his offenses against both were “inspired by one purpose.” The Court found that the other child’s testimony describing the sexual abuse was highly probative of the nature of the defendant’s relationship with both children and established the parallel conduct of his abuse with both girls.

The Court pointed out that the children were siblings in the same household and close in age. Both testified that the defendant began abusing them when they were eight years old, which the Court reasoned demonstrated that he was sexually attracted to children of that age. The Court also noted that the defendant employed the same method of abuse with both children. Thus, the Court concluded that

their testimony highlighting the defendant's parallel conduct was highly probative of the common scheme and method he employed to abuse the victim in this case.

The Court also relied on the trial court's jury instruction, repeating that it would presume the jury followed the trial court's limiting instruction.

Regarding the defendant's medical records, the Court found that the circumstances surrounding the challenged records demonstrated that the defendant was seeking medical treatment, during the defendant's treatment for his suicidal ideation. The Court applied *Crawford* and concluded that the primary purpose of the statements was not to create an out-of-court substitute for trial testimony. Rather, the statements were made to properly document the defendant's medical chart for his treatment. Accordingly, the Court found that the statements in the defendant's medical records were not testimonial, and the trial court did not abuse its discretion by admitting them.

Regarding the defendant's request for Internet access in discovery, the Court complained that the defendant failed to provide any proffer—let alone an adequate one—of the information he sought to obtain from the internet. On this record, the Court found no basis to determine whether the trial court committed reversible error by denying him that access.

Regarding the flight instruction, the Court agreed that there was sufficient evidence for the jury to have concluded that the defendant travelled to New Jersey to avoid detection, apprehension, arrest, or prosecution. The Court noted that there was no evidence that demonstrated that he could not seek treatment within the Commonwealth, a circumstance from which a rational factfinder could conclude he sought to distance himself from apprehension.

Regarding the constitutionality of the defendant's life sentences, the Court again declined to engage in a proportionality review, as the defendant's life sentence does not lack the possibility of parole. The Court noted that the defendant's convictions were not Class 1 felonies, so he will be eligible for geriatric release under § 53.1-40.01. Therefore, although the defendant was sentenced to life in prison, he was not sentenced to life without parole.

The Court also rejected the defendant's argument that the mandatory sentences deprived him of counsel who could advocate on his behalf. The Court found that the record demonstrated that despite the predetermined sentences, the defendant's counsel challenged the validity of the mandatory sentences, argued that the sentences should not have been imposed, addressed the Commonwealth's arguments, and cross-examined a witness. The Court noted that counsel's actions during the sentencing hearing preserved the defendant's arguments for appeal. Thus, the Court concluded that the defendant's Sixth Amendment right to counsel was fully vindicated at the sentencing hearing.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1153222.pdf>

**Virginia Court of Appeals -
Unpublished**

Plecker v. Commonwealth: April 30, 2024

Augusta: Defendant appeals his sentence alleging Violation of the Limits on Supervised Probation.

Facts: The defendant repeatedly sexually assaulted a five-year-old child. The defendant pleaded guilty to aggravated sexual battery of a minor under the age of 13, in violation of § 18.2-67.3(A)(1). After convicting him, the trial court sentenced the defendant to 20 years' incarceration, with 8 years suspended indefinitely, conditioned on indefinite supervised probation.

The defendant challenged the conditions of his suspended sentence, arguing that recent amendments to § 19.2-303 prohibited the trial court from imposing indefinite periods of suspension and supervised probation as conditions of his suspended sentence. The defendant contended that § 19.2-303 implicitly barred trial courts from imposing a period of suspension exceeding the duration of the applicable statutory maximum penalty—in this case, 20 years. Similarly, the defendant contended the trial court lacked authority to impose more than five years of supervised probation.

Held: Affirmed. The Court examined § 19.2-303 and found that it specifically requires the trial court to impose a suspension period “at least” equal to the applicable maximum statutory penalty. Further, the trial court must also impose a concurrent period of probation, during which the defendant may be placed on “active supervision.” In this case, consistent with that provision, the trial court imposed an “indefinite” suspension period that was “at least” equal to the 20-year maximum penalty for aggravated sexual battery. In addition, the trial court placed the defendant on a concurrent period of probation during which he would be subject to “indefinite” active supervision, consistent with the statute. Thus, the Court ruled that the trial court did not violate § 19.2-303.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0494233.pdf>

Huffman v. Commonwealth: March 12, 2024

Spotsylvania: Defendant appeals his conviction for Murder and Use of a Firearm on Refusal to Admit Victim's Criminal History and Denial of a Self-Defense Jury Instruction.

Facts: During an apparent road-rage incident, the defendant walked over to the victims' car and shot them both almost twenty times while they sat in their car. At trial, the defendant claimed self-defense.

Prior to trial, the Commonwealth moved the trial court to exclude evidence of the victims' prior criminal convictions. These convictions included a 22-year-old conviction for forcible sodomy and convictions of assault, theft, fraud, failure to appear, various drug-related charges, and traffic matters—including hit and run and eluding the police.

With the exception of the hit and run, the trial court excluded all of the victims' convictions, finding they were not “relevant in any way” to the case. In doing so, the trial court determined that the defendant had not shown that the decades-old conviction could “characterize” his conduct toward the victim on the evening of the killing. Applying the same logic to the other convictions, the trial court

determined that it had “heard nothing” to believe that most of the prior convictions were relevant to his conduct towards the victim just before his death. The trial court withheld a determination with respect to the hit and run conviction, pending additional evidence of its “violent” circumstances.

At trial, the defendant sought a jury instruction on “imperfect self-defense.” The text of the proposed instruction read: “If fear was adequately and in fact provoked, but is insufficient for self-defense, the resultant killing is voluntary manslaughter. Thus, the fearful killer is a manslayer when his fear is produced by facts insufficient to make him a self-defender, e.g., the deadly response was unnecessary, or the fear was unreasonable.”

The trial court rejected this instruction. During deliberations, the jury asked, “what if we believe there was heat of passion that was provoked by words, can it still be malicious?” The trial court instructed the jury on the distinction between murder and manslaughter, the definitions of malice and heat of passion, and that words alone cannot serve as justification for a heat of passion.

During sentencing, the defendant again attempted to introduce evidence of the victims’ prior bad acts. The court excluded the evidence.

Held: Affirmed. The Court held that the trial court did not err in excluding evidence of the victims’ criminal histories at trial. The Court also held that any error in excluding such evidence at sentencing was harmless. The Court lastly held that the trial court did not abuse its discretion in rejecting the defendant’s proposed jury instruction.

Regarding the victims’ prior bad acts, the Court also saw nothing in the record creating a nexus between the decades-old conviction and the victims’ conduct on the night of the killing. The Court also agreed that the prior conduct was not proper mitigation evidence at sentencing.

Regarding the defendant’s self-defense instruction, in view of the trial court’s instructions, the Court found that the defendant’s proposed instruction would have served only to include more terminology. Rather than clarify matters for the jury, the Court found it likely that the defendant’s proposed instruction would itself create confusion, by providing the jury with seemingly disparate standards such as considering an “adequate,” rather than a “reasonable” fear.

The Court rejected the defendant’s assertion that the jury’s verdict could be inferred from questions it asked during its deliberations. For the Court, the jury’s question carried no probative value.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0765222.pdf>

Reese v. Commonwealth: February 27, 2024

Chesapeake: Defendant appeals the Revocation of his Probation, seeking Retroactive Application of the Changes to Probation Authority.

Facts: The defendant was convicted of Grand Larceny in 2013. The sentencing order required the defendant to complete an indeterminate period of supervised probation upon his release from confinement. In 2017, the trial court found the defendant in violation of his probation and again

imposed indefinite probation up to 20 years. In 2019, the trial court found the defendant in violation of his probation again and again imposed an indefinite period of supervised probation up to 20 years.

In 2022, the defendant again violated probation. The defendant moved to dismiss the revocation proceeding. The defendant argued that, as amended effective July 1, 2021, § 19.2-303 limited the period of supervised probation to five years from the release from any active incarceration. Without contesting the validity of his original sentencing order or the subsequent revocation orders, the defendant contended that, applying § 19.2-303, the trial court lacked jurisdiction to find him in violation because he had already served more than five years of supervised probation after release from incarceration. The trial court denied the motion.

Held: Affirmed. The Court held that the five-year cap on supervised probation contained in §19.2-303 does not apply retroactively. The Court applied § 19.2-306(A) and concluded that the trial court retained the statutory authority to revoke the defendant’s suspended sentence for any cause deemed sufficient that occurred within the maximum period of 20 years to which he could have been sentenced and imprisoned for Grand Larceny.

The Court examined the question of whether the trial court’s active jurisdiction was affected by the 2021 amendments such that the trial court lacked the authority to consider whether the defendant violated the terms of supervised probation ordered in 2019. The Court ruled that the trial court had jurisdiction because the amendments clearly were not intended to be retroactive. The Court therefore ruled that the defendant may not collaterally attack the 2019 revocation order based on the new restrictions contained in the 2021 amendments.

In conclusion, the Court wrote: “In coming to our conclusion today, we hold only that the five-year cap does not apply retroactively. In doing so, we specifically decline to answer the question whether the new mandate contained in Code § 19.2-306(C)—that courts “shall measure the period of any suspension of sentence from the date of the entry of the original sentencing order”—would apply to cases such as this. Even if this new mandate is entirely procedural under Code § 1-2391 and therefore applicable to Reese’s case, Reese’s period of supervised probation would still have been in effect when he violated the terms of his probation, as the 2019 order lawfully suspended that sentence for an indeterminate period of up to 20 years.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1766221.pdf>

Davis v. Commonwealth: October 17, 2023

Henry: Defendant appeals his sentence for Distribution of Drugs on Admission of Text Messages at Sentencing.

Facts: Over six different transactions, the defendant sold hundreds of grams of methamphetamine to a police informant. After entering his guilty pleas, but before sentencing, the defendant filed a motion in limine to exclude a series of text messages from evidence at the sentencing

hearing. At the sentencing hearing, the Commonwealth asked the trial court to consider limited text messages showing that the defendant had engaged in efforts to intimidate the confidential informant in the case, that the defendant's illegal drug business had been lucrative, and that he was unremorseful for his crimes.

The text exchanges occurred between an inmate using the defendant's assigned password at the County Jail and the defendant's known friends and associates. The messages indicated that the writer's drug business had been lucrative, as the defendant's distributions of drugs to the informant certainly had been. In attempting to explain their meaning, the defendant admitted writing all of the text messages in question except one. The defendant contended that the Commonwealth had failed to "lay the necessary foundation" for admission of the messages. The trial court noted that the rules of evidence were permissive, rather than mandatory, at a sentencing hearing, and denied the motion in limine.

Held: Affirmed.

The Court repeated that, when exercising the wide discretion inherent in sentencing, a judge should not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. The Court explained that the trial court was not required to apply the rules of evidence in determining whether to consider the text messages at the sentencing hearing.

In this case, the Court concluded that the circumstances and context supplied indicia of reliability for the text messages. Considering these facts and circumstances, the Court ruled that there were sufficient indicia of reliability for the trial court to consider the text messages at sentencing.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1952223.pdf>

Bowser v. Commonwealth: September 19, 2023

Petersburg: Defendant appeals her conviction for Petit Larceny on Refusal to Defer Disposition.

Facts: The defendant stole a wallet from her niece with a large amount of cash inside. At trial, after the trial court announced it found her guilty, the defendant asked the court to consider "allow[ing] her some opportunities to keep this off of her record" due to her lack of a significant criminal history and the adverse effect a conviction would have on her employment. The trial court denied her request.

Held: Affirmed. The Court ruled that the defendant's request for a deferred disposition came too late, and the trial court, lacking the authority to grant the request, did not abuse its discretion by denying it.

In this case, the Court noted that before the defendant asked the trial court to consider giving her an opportunity to keep the conviction off her record, the court pronounced not only that it found evidence beyond a reasonable doubt but also that it found her guilty. Thus, the Court found that the

trial court's pronouncement constituted a judgment of conviction. The Court repeated that once the judgment of conviction has been entered, the question of the penalty to be imposed is entirely within the province of the legislature, and the court has no inherent authority to depart from the range of punishment legislatively prescribed.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1209222.pdf>

Lumpkin v. Commonwealth: July 18, 2023

Danville: Defendant appeals his convictions for Child Sexual Assault on Refusal to Appoint an Expert, Sentencing him via Video on Sixth Amendment Confrontation grounds, and Eighth Amendment grounds.

Facts: The defendant raped and sexually assaulted an 11-year-old child. Prior to trial, the defendant made motions for the appointment of two experts: a urologist and for urine testing for semen content before trial.

In support of his motion for a urologist, the defendant testified that since 2004 he has been unable to have an erection or ejaculate. He claimed that he saw a physician for this issue in 2004 and 2005, but initial treatment was unsuccessful. The defendant was unable to remember where he received treatment or the name of the physician who provided treatment. The defendant also moved for testing of a urine sample for semen content, based on the proffer that a test could show semen seeping into his urine which can be indicative of a male who has not ejaculated in some time. The trial court denied both motions.

At sentencing, the defendant appeared by video because of COVID issues. The defendant objected to appearing remotely, contending that doing so was a violation of the confrontation clause and his due process rights. The trial court overruled the objection.

The trial court sentenced the defendant to life plus 120 years. The defendant objected on Eighth Amendment grounds, but the trial court overruled the objection.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in refusing to appoint an expert, order medical testing, nor in sentencing the defendant. The Court also ruled that the trial court did not violate the defendant's Sixth Amendment right to confrontation.

Regarding the denials of experts, the Court ruled that the trial court did not abuse its discretion in concluding that the defendant failed to present a particularized need for an expert. The Court noted that the defendant had no documentation of his impotency, a problem he claimed existed since 2004. Nor did he assert that the condition, once diagnosed, would have persisted to the date of the offenses and beyond. Additionally, the Court pointed out that he was unable to otherwise identify the diagnosing physician and had failed to mention the condition to any subsequent physicians for eighteen years. Lastly, the Court also noted that the crimes for which he was convicted occurred roughly two years before he made the request to appoint a urologist.

The Court concluded that any finding that the defendant was impotent at the time of testing would therefore not necessarily prove that he was impotent at the time the crimes occurred. The Court wrote: “Although Lumpkin hoped that expert assistance would develop mitigating evidence that would lead to acquittal, ‘a mere hope or suspicion that favorable evidence may result from an expert’s services does not create a constitutional mandate.’”

Regarding his sentencing via video, the Court rejected the defendant’s assertion that the trial court violated his Confrontation rights under the Sixth Amendment when it required him to appear via video conference at his sentencing hearing. The Court repeated that Confrontation is a trial right, and the Confrontation Clause of the Sixth Amendment does not apply to sentencing.

Lastly, the Court rejected the defendant’s argument that his sentence was unconstitutionally disproportionate. The Court restated that it declines to engage in a proportionality review in cases that do not involve life sentences without the possibility of parole. The Court explained that “The only reason that the aggregate sentences exceeded [Lumpkin’s] life expectanc[y] [is] because [he] committed so many separate crimes.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0129223.pdf>

Mackey v. Commonwealth: June 6, 2023

Norfolk: Defendant appeals his sentencing for Murder, Abduction, Burglary, and Use of a Firearm on Admission of Evidence at Sentencing.

Facts: The defendant and his confederates broke into a home and abducted a woman at gunpoint. Another male resident returned home and when he entered, the attackers shot and killed him. They also shot the female victim. At trial, the jury convicted the defendant of second-degree murder, abduction, and burglary, along with three counts of use of a firearm in the commission of a felony. The jury acquitted him, however, of maliciously wounding the woman and an accompanying use-of-a-firearm charge.

At sentencing, the female victim testified about her injuries. The defendant objected to the trial court considering conduct underlying his charge of malicious wounding—of which he was acquitted by the jury. The defendant argued that trial court could not consider the woman’s testimony about her shooting-related injuries at sentencing because to do so would punish him for acquitted conduct, violating the Fifth Amendment’s Double Jeopardy Clause, the Sixth Amendment, and the Fourteenth Amendment’s Due Process Clause. The trial court overruled his objection.

Held: Affirmed.

The Court relied on the U.S. Supreme Court’s ruling in *U.S. v. Watts*, where it held “that a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.” The Court found that *Watts* rejected the argument that the Double Jeopardy Clause prevented the trial court

from considering facts underlying the acquitted malicious wounding charge. The Court pointed out that the record demonstrated that the Commonwealth's evidence established that the defendant was a perpetrator in the shooting inside the home, and the female victim was shot multiple times during that shooting.

Judge Lorish dissented.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1091221.pdf>

Statute of Limitations

Virginia Court of Appeals - Published

Pompell v. Commonwealth: March 26, 2024

Rockingham: Defendant appeals his conviction for Unlawful Entry on Statute of Limitations grounds.

Facts: The defendant unlawfully entered a residence in July 2021 and was charged by warrant with felony breaking and entering with the intent to commit assault and battery. A grand jury indicted the defendant in May 2022. In November 2022, the Commonwealth moved to amend the felony charge to misdemeanor unlawful entry. The defendant objected to permitting the Commonwealth to amend an indictment to a misdemeanor that is not a lesser-included offense of the originally charged felony after the one-year statute of limitations on misdemeanors had expired.

In March 2023, the trial court amended the indictment to misdemeanor unlawful entry. Relying on § 19.2-231, the trial court found that the Commonwealth was permitted to amend the indictment because the amendment did not “change the nature or character of the offense charged.” The defendant moved to dismiss the amended indictment, again asserting that the amendment violated the statute of limitations because more than one year had passed between the offense. The trial court denied the motion to dismiss.

Held: Affirmed. The Court ruled that, because it did not change the nature or character of the originally charged offense and was permissible under § 19.2-231, the amendment did not commence a new prosecution that would be time-barred by § 19.2-8.

The Court first noted that this case presented an issue of first impression in Virginia: whether an amended indictment charging a misdemeanor similar in nature and character to the originally charged felony, but which is not a lesser-included offense, commences a new prosecution triggering the statute of limitations. The Court held that the rationale in the *Hall* case extends to amendments charging misdemeanors that are not lesser-included offenses of the originally charged felony. The Court explained that under § 19.2-231 and *Hall*, an amended indictment continues a prosecution, and does

not commence a new one, if the amendment “does not change the nature or character of the offense charged.”

The Court clarified that this analysis does not by necessity hinge on whether the amended charge is a lesser-included offense. The Court noted that in *Pulliam* the Court had specifically rejected an approach that compared the elements of each offense and instead focused on the defendant’s underlying conduct.

Therefore, so long as the prosecution is commenced within the applicable limitations period for misdemeanors, the Court ruled that an amendment that comports with the requirements in § 19.2-231 protects the right of an accused to timely notice of the charges against him. Significantly, the Court noted that § 19.2-231 provides a remedy if the amendment “operates as a surprise.” In such an event, “the accused . . . shall be entitled, upon request, to a continuance of the case for a reasonable time.”

In a footnote, the Court distinguished the *Taylor* case, which ruled that an amendment from a felony to a lesser-included misdemeanor is barred by the statute of limitations if the prosecution for the originally charged felony began after the limitations period on the lesser-included misdemeanor had already expired. The Court explained that in this case, however, the warrant was issued well within the one-year limitations period for misdemeanors in Code § 19.2-8.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1246233.pdf>

Statutory Construction

Virginia Court of Appeals - Published

Shaw v. Commonwealth: January 23, 2024

Arlington: Defendant appeals his conviction for Concealing a Dead Body on Bill of Particulars, Jury Instruction Issues, Vagueness, and Denial of Diminished Capacity Evidence.

Facts: The defendant, after working with an accomplice for three days to clean up the apartment and get rid of the deceased body of his romantic partner, lied to police when questioned about his partner’s whereabouts, telling a police officer that his partner was at the hospital recovering from a seizure. In fact, his partner had suffered multiple blunt-force traumas and had been dead for three days; the battered, bloody, and bruised corpse of the defendant’s romantic partner was concealed in the apartment they shared, wrapped up in a shower curtain and secured with duct tape that contained the defendant’s DNA. Although he did not tell the police, the defendant believed that his partner had been murdered.

The grand jury returned an indictment under § 18.2-323.02, for concealing a dead body “with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or

the manner or cause of death.” The defendant filed a motion for a bill of particulars, seeking “what the unlawful act is or what the manner . . . and cause of death were [that] the Commonwealth believes that Mr. Shaw wanted to conceal or prevent the detection of.” The trial court denied the defendant’s motion. The trial court also denied the defendant’s motion to dismiss the indictment on the ground that the statute was unconstitutionally vague.

Prior to trial, the trial court granted the Commonwealth’s motion to exclude the testimony of the defendant’s expert, Dr. Sara Boyd, Ph.D., a licensed clinical psychologist, under § 19.2-271.6. The defendant proffered that Dr. Boyd would supply evidence tending to negate the mens rea for the offense. Dr. Boyd wrote:

“[The defendant’s] overall pattern of behavior around the time of the alleged offense . . . is more consistent with a disorganized and highly stressed person with Complex-PTSD, whose limited mental resources were overwhelmed by the shock and pain of finding his partner dead, than it is with planful, intentional, and instrumental concealment to avoid detection of the dead body.”

She said that the defendant’s “symptoms impaired his ability to process the information about death in a reality-based way, to reason about his circumstances, and to independently formulate and execute organized planning.” His “behaviors and responses during the roughly three-day period . . . are best characterized as reactive, impulsive, and instinctive, rather than planful.” That is, he “engaged in unconsidered, impulsive behavior that was focused on the immediate moment rather than days or weeks ahead.” The court asked: “So can you say that there were times during the three-day period where he had the ability to plan and act intentionally?” She answered, “I would say it’s possible given the flux in his symptoms more than . . . I can say that it’s affirmatively true.”

The trial court excluded Dr. Boyd’s testimony after determining that she failed to apply her description of the defendant’s “mental illness to the distinct, separate statutory intent elements.” The trial court found it “unclear whether Dr. Boyd’s opinion [went] to the malicious intent requirement or the body concealment mens rea requirements of” § 18.2-323.02, or the time period.

At trial, the defendant argued that under § 18.2-323.02, the Model Jury Instruction for malice, was inappropriate because homicide and malicious wounding are malum in se—crimes that are “inherently immoral”—while maliciously concealing a dead body is only malum prohibitum—“a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.” The trial court overruled his objection and used the Model Jury Instruction to define malice under § 18.2-323.02.

Held: Affirmed.

The Court first examined the meaning of “malicious intent” in Code § 18.2-323.02. The Court concluded that the trial court did not err in using the Model Jury Instruction to define malice under Code § 18.2-323.02. The Court also agreed that the evidence more than sufficed for a reasonable jury to conclude that the defendant intentionally concealed the body and that he did so “with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death.”

The Court rejected the defendant’s facial challenge to the statute at the start because he did not claim that § 18.2-323.02 is unconstitutionally vague as applied to him. The Court noted that the defendant had not claimed, for instance, that ordinary people would not understand that the statute

criminalizes what the defendant did here: conceal a battered corpse in his apartment for three days and lie to police when asked about it for fear of having his probation revoked.

Regarding the defendant's request for a Bill of Particulars, the Court ruled that the Commonwealth's indictment here satisfied the law. The Court ruled that the defendant was not entitled to a bill of particulars requiring the Commonwealth to identify the evidence it planned to adduce in support of each element of that offense.

Regarding the defendant's diminished capacity evidence, the Court agreed that § 19.2-271.6 allows evidence of a mental disorder to explain why a defendant did not have a requisite mental state in a specific instance, whether or not the disorder prevented the defendant from forming culpable mental states altogether. However, the Court cautioned that the statute does not permit mental-condition evidence to support a diminished-capacity theory if such evidence does not show that the defendant lacked the state of mind to commit the offense.

The Court then conducted an extensive review of other jurisdictions' rulings regarding similar evidentiary rules. After the review, the Court concluded that to be "helpful" to the fact finder, it is not enough that a defendant may be diagnosed as suffering from a particular mental condition. Instead, the Court emphasized that the diagnosis "must be capable of forensic application" to help the trier of fact assess the defendant's mental state at the time of the crime." The Court quoted a 3rd Circuit ruling that cautioned:

"Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea." ... "Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires."

In this case, the Court complained that the Doctor did not explain how the defendant's mental condition showed that he was not knowingly hiding the body from the police. The Court wrote: "Missing from Dr. Boyd's many sworn statements was an explanation connecting Shaw's mental condition to how it negated the state of mind required to violate Code § 18.2-323.02... Dr. Boyd's testimony resembles that of other experts that courts have deemed inadmissible to negate mens rea: general psychiatric testimony that "may easily slide into wider usage that opens up the jury to theories of defenses more akin to justification.""

The Court ruled that the trial court did not abuse its discretion by excluding Dr. Boyd's testimony after concluding that she failed to show how the defendant's mental condition negated either of the two statutory state-of-mind requirements. In this case, the Court agreed that given the "separate missing variables" about which the trial court had complained, the jury would have "to speculate [about] which of Shaw's numerous mental health symptoms impaired the differing intent requirements and whether they did so in a manner significant enough to negate both intent requirements under the statute."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1349224.pdf>

Unpublished

Commonwealth v. Holmes: March 27, 2024

Fredericksburg: Commonwealth appeals the dismissal of a Disorderly Conduct charge.

Facts: The defendant drew attention at a hospital by falling in a bathroom while intoxicated. An officer responded and the defendant admitted to the officer that he was drunk when he fell. The defendant became loud and struck his sister in front of the officer. EMS convinced the defendant to seek treatment at a hospital. However, after the officer attempted to leave the scene, the defendant became disorderly, running down hallways and swinging his arms at hospital staff.

The officer arrested the defendant for the domestic assault and later obtained a warrant against the defendant for disorderly conduct on hospital grounds in violation of § 37.2-429 for his interference with the hospital staff.

Before the trial, the defendant filed a motion to declare § 37.2-429 unconstitutional and to dismiss the warrant against him. The trial court did not hear witness testimony and did not admit any evidence. After oral argument, the trial court declared the statute unconstitutional on its face and dismissed the disorderly conduct charge. In a very brief letter opinion, the trial court wrote: “While the objective [of the statute] is certainly valid, the lack of mens rea or intention renders the statute invalid.” The trial court concluded that “the language of § 37.2-429 cannot withstand a constitutional challenge for broadness and vagueness.”

The Commonwealth appealed the trial court’s ruling.

[Note: This case was released on a Wednesday, which is very unusual for the Court of Appeals, and therefore I missed it last week – EJC].

Held: Reversed, Motion Improperly Granted. The Court wrote that “hospitals are special facilities – with very special needs – as a place of healing, and specific protections against certain conduct in hospitals are therefore appropriate. Hospitals are not like a city or town sidewalk or park. No Virginia caselaw from this Court or the Supreme Court has ever held the use of the word “insulting” in a statute to be unconstitutional on its face.”

The Court first repeated that, contrary to the trial court’s opinion, a statute is not unconstitutional on its face merely because it does not have an explicit intent requirement in its text, since such a requirement will be read into the statute by the court when it appears the legislature implicitly intended that it must be proved. In this case, the Court found that § 37.2-429 can and should be interpreted as requiring a criminal mens rea. The Court concluded that a defendant cannot be convicted under § 37.2-429 unless the Commonwealth provides proof that the defendant at least had some criminal mens rea or unlawful intent.

Regarding the statute’s alleged overbreadth, the Court reasoned that § 37.2-429 has a compelling, legitimate purpose – to protect the ability of sick, seriously injured, and overall frail patients to heal in peace and with as little stress as is reasonably possible by preventing unnecessary disruptions in hospitals and training centers. The Court found that the statute specifically addresses conduct – actions – and only the conduct that occurs at a hospital or training center. The Court distinguished that

hospitals are not open to the public in the same way as a park or city sidewalk. Instead, the Court found that “given a hospital’s unique and esteemed purpose, special statutory protections to preserve hospitals from disruptive behavior are entirely appropriate, are indeed common sense, and are something that the people’s elected representatives are certainly within their rights to enact if they so choose – as the Virginia General Assembly has chosen to do here.”

The Court then rejected the argument that § 37.2-429 prohibits or threatens protected speech. The Court reasoned that prohibiting people from conducting themselves in an insulting or disorderly manner and resisting hospital staff on hospital grounds is an entirely reasonable regulation of behavior and conduct, and § 37.2-429 is not directed at suppressing any specific views or opinions that public officials might deem to be insulting. In fact, the Court found, the statute is not aimed at any views or the content of speech at all. The Court noted that the statute does not prohibit the expression of insulting views, disorderly views, or even medical views that oppose those of the hospital or its staff.

The Court concluded that § 37.2-429 provides a reasonable prohibition against a person disrupting the operation of a hospital by conducting himself in an insulting or disorderly manner. The Court wrote: “Simply put, content of speech is not prohibited by the statute. Speech is only punishable under the statute if it is expressed through conduct that is executed in a manner that is insulting or disorderly – all while in the context of disrupting the operations of a hospital where sick and frail patients are trying to heal.”

In a footnote, the Court rejected the trial court’s reliance on the *Squire v. Pace* federal district court ruling from 1974. The Court noted that the statute in that case prohibited behaving in a riotous or disorderly manner in any public place and specifically excluded public conveyances where the government has a greater regulatory interest. While the Court acknowledged that a person could expect his right to freedom of speech to be at its greatest height in the public square, in this case, § 37.2-249 applies only to conduct that wrongly disrupts hospitals and training centers. The Court explained that “A person has no right to organize a loud, boisterous march through the rooms of a hospital, and the government has a compelling interest in maintaining an orderly and calm environment in hospitals so that sick and frail patients can heal.”

The Court also rejected the defendant’s argument that § 37.2-429 is unconstitutionally vague. The Court found that the facts in this case did not demonstrate that § 37.2-429 is vague as applied to the defendant or even that the statute interferes with the right of free speech. Therefore, the Court ruled that the trial court erred by declaring § 37.2-429 unconstitutionally vague on its face before even determining what conduct by the defendant resulted in his arrest and whether that conduct was clearly prohibited by the statute.

The Court also ruled that § 37.2-429 is not unconstitutionally vague on its face. The Court explained that any person would reasonably understand that, in the specific and narrow setting of a hospital, he will be punished if he disrupts the hospital’s operations by conducting himself in an insulting or disorderly manner or by resisting hospital staff such that the staff have more difficulty in discharging their duties. The Court wrote: “It is certainly constitutional for the General Assembly to prohibit intentional, wrongful, and unnecessary disruptions in hospitals.”

Judge Lorish concurred in part and dissented in part, contending that the statute’s prohibition on “insulting” speech and conduct is unconstitutionally overbroad because it sweeps up a substantial

amount of protected First Amendment expression. Judge Lorish would have therefore severed this unconstitutional portion from the statute, leaving the rest of the narrowed statute intact.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1404232.pdf>

Statutory Construction - Retroactivity

Virginia Court of Appeals - Published

Smith v. Commonwealth: September 5, 2023

78 Va. App. 371, 891 S.E.2d 414 (2023)

Caroline: Defendant appeals his conviction for DUI on Retroactivity of the Bar on Certain Traffic Stops, Admission of the DMV Transcript, and Admission of Expert Testimony.

Facts: The defendant drove while intoxicated after having two previous convictions for that offense. At the time of the stop, in February 2021, the officer's reason for stopping the defendant was for driving with a defective tag light in violation of § 46.2-1003. Prior to trial, the defendant argued that the March 2021 amendment, which added subsection C to Code § 46.2-1003 and barred a law-enforcement officer from stopping a person for driving a motor vehicle with defective vehicle equipment, was retroactive. The trial court rejected the argument.

At trial, to prove that the defendant had two prior DWI convictions, the Commonwealth introduced a DMV transcript showing that the defendant was convicted in the Henrico County General District Court of driving while intoxicated in May 2016, and driving while intoxicated, second offense within 10 years, in June 2020. The Commonwealth also presented the June 2020 court order, signed by the judge, stating that the defendant pleaded guilty to the DWI-second offense. The Commonwealth did not offer the court order reflecting the DWI-first conviction in 2016. The trial court denied the defendant's motion to exclude the DMV transcript.

The trial court excluded the certificate of analysis showing the defendant's BAC. At trial, over the defendant's objection, the Commonwealth called Dr. Jon K. Dalgleish from DFS as an expert on the effects of alcohol on a typical individual. The defendant objected to Dr. Dalgleish's expert testimony about the effects of alcohol on the body after the court excluded the certificate of analysis, but the trial court overruled the objection.

In the defendant's case-in-chief, the trial court received into evidence a letter addressed "To Whom It May Concern," signed by a deputy clerk for the Henrico County General District Court. The letter identified the defendant and the case number for the DWI-first conviction shown on the DMV transcript. The letter stated: "After conducting a search for the above referenced case, we are unable to locate it at this time." The defendant argued that the letter negated the Commonwealth's proof that the defendant was convicted of the requisite "first" offense, but the trial court rejected the argument.

Held: Affirmed.

First, the Court rejected the defendant's argument that the stop was unlawful. The Court repeated that even if an officer uses the defendant's minor traffic offense as a legal pretext to stop a car, it does not invalidate the reasonableness of the stop under the Fourth Amendment. In this case, as in *Montgomery, Street*, and many other recent cases, the Court ruled that the officers who stopped the defendant in February 2021 because his tag light was out could not have stopped him "in violation of" subsection C because that subsection had not yet become law.

Regarding the defendant's prior conviction, the Court rejected the defendant's reliance on the clerk's letter and the *Mwangi* case. The Court concluded that the clerk's letter here did not rebut the DMV transcript as a matter of law. Instead, the Court reasoned that the letter reported only that the clerk could not "locate" the file "at this time" and did not show that the criminal case never existed or that the DWI-first conviction was invalid because the judge failed to sign the disposition. The Court concluded that, absent decisive rebuttal evidence, the DMV transcript was "prima facie evidence" of the first and second DWI convictions. The Court pointed out that, although the conviction order was not introduced to corroborate the May 2016 conviction, prior convictions may be proved by any competent evidence.

The Court also noted that both the second conviction order and the DMV transcript reported the June 2020 conviction as a second DWI offense, corroborating that the May 2016 conviction shown on the DMV transcript was the first DWI conviction. The Court reasoned that it was reasonable for the jury here to have concluded from the DMV transcript, together with the defendant's conviction order for a second DWI in 2020, that the defendant had been convicted of two prior DWI offenses within the preceding ten years.

As for the DMV transcript, the Court ruled that, as "prima facie evidence" of the defendant's two prior DWI convictions, the DMV transcript had substantial probative value. The Court found that the trial court could properly conclude from the transcript that the defendant would not suffer unfair prejudice from the transcript's admission.

Regarding the expert testimony, the Court repeated that § 18.2-266 does not require proof of the defendant's BAC to prove that he was driving while intoxicated. The Court ruled that the trial court did not abuse its discretion in admitting Dr. Dalgleish's testimony about how intoxication affects a person's behavior. Without evidence to show the defendant's intoxication based on his BAC, the Court noted that the Commonwealth depended on the officers' observations, as well as on the dash-camera video. The Court reasoned that Dr. Dalgleish's testimony helped the jury understand how the defendant's behavior reflected being under the influence of alcohol. The Court also reasoned that that testimony was "beyond the knowledge and experience of ordinary persons," under Va. R. Evid. 2:702(a)(ii), and it assisted the jury to understand that what the officers observed during the field sobriety test evidenced the defendant's intoxication.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0169222.pdf>

Guest v. Commonwealth: August 8, 2023

78 Va. App. 187, 890 S.E.2d 653 (2023)

Spotsylvania: Defendant appeals his conviction for Felony Petit Larceny on Retroactively of the Repeal of that Offense.

Facts: The defendant committed a petit larceny in May 2021, after having at least two previous convictions for that offense. At the time, § 18.2-104 provided that a third or subsequent conviction of a larceny offense constituted a Class 6 felony. Effective July 1, 2021, the General Assembly repealed § 18.2-104 in its entirety. The Commonwealth indicted the defendant after the repeal of § 18.2-104 with a violation of that offense.

The defendant pled guilty to the offense. However, later, the defendant moved to dismiss the indictment as void, arguing that he pleaded guilty to an offense that “no longer existed,” for which the court lacked jurisdiction. The trial court rejected his argument.

Held: Affirmed. The Court held that the repeal of § 18.2-104 was not retroactive and held that the triggering event for purposes of § 1-239 is the date of the criminal offense. Because the defendant committed the offense before the statute’s repeal date of July 1, 2021, the Court ruled that his conduct constituted an offense against the former law, and the repeal does not affect the jurisdiction of the trial court to prosecute the defendant.

The Court ruled that the repeal of § 18.2-104 is not retroactive, and a trial court may convict a defendant under the enhanced punishment scheme when the crime occurred prior to July 1, 2021. Applying the reasoning in *Gionis*, the Court held that courts should look to the date of the offense, not the indictment, in determining whether prosecution is available under a repealed and non-retroactive statute. Because the defendant’s criminal activity occurred before July 1, 2021, the Court found that the Commonwealth had jurisdiction to prosecute under § 18.2-104 and upheld his conviction.

In a footnote, the Court noted that the Commonwealth may also elect to proceed under a new statute—with the consent of the accused—in certain circumstances, pursuant to § 1-239.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0672222.pdf>

Virginia Court of Appeals

Unpublished

Greene v. Commonwealth: December 28, 2023

Chesterfield: Defendant appeals his convictions for Robbery and Conspiracy on grounds including Speedy Trial, Mistrial, and Retroactivity of the new Robbery statute.

Facts: The defendant and his confederate robbed the victim. During the robbery, they shot and killed the victim. The defendant was charged by direct indictment on August 12, 2020. He was then

arrested on October 23, 2020, and he was held without bail. On January 4, 2021, counsel for the defendant and the attorney for the Commonwealth made a joint motion to continue the case for trial to August 23, 2021. On June 25, 2021, the defendant filed a motion to dismiss, alleging that his constitutional and statutory speedy trial rights were violated. The trial court denied the motion.

At trial, the defendant made a motion for a mistrial after the attorney for the Commonwealth questioned the defendant about a potential alibi witness and then commented on the absence of that potential alibi witness during closing arguments. The prosecutor specifically asked, “[S]o based on what you said today, you didn’t think to give the police the name of the person who could exonerate you from this whole incident, correct?” The defendant then acknowledged that he did not tell the police during an interview that he was with his girlfriend on the night of the murder. The attorney for the Commonwealth stated during closing arguments, “For the first time in two and a half years, he’s claimed that he was with his girlfriend. Which, again, by his own admission today, he admits he did not tell Detective Bates. He also doesn’t have her here today. She’s not testified in defense.” The trial court denied the mistrial motion.

At sentencing, the defendant contended that the trial court should have sentenced him under the newly amended version of § 18.2-58 for his robbery conviction. The trial court refused.

Held: Affirmed. The Court held that the defendant’s statutory and constitutional speedy trial rights were not violated because both the defendant and the Commonwealth sought the continuance and agreed to the trial date that resulted in most of the delay leading up to the trial. In addition, given clear precedent from the Supreme Court, the Court ruled that it was entirely proper for the attorney for the Commonwealth to question the defendant about (and to comment on) the defendant’s failure to call his girlfriend as an alibi witness. Finally, the Court ruled that the trial court did not err when it applied the penalty under § 18.2-58 that was in effect at the time that the defendant committed the robbery.

Regarding statutory speedy trial, the Court noted that, given that the mutually agreed-upon continuance tolled the running of the statutory speedy trial clock for all but 73 of the 152 allowable days, the defendant’s statutory speedy trial rights clearly were not violated. Regarding constitutional speedy trial, the Court concluded that, given that the defendant was responsible for most of the delay and given that the defendant had not shown that he suffered any specific prejudice, the constitutional speedy trial factors weighed in favor of the Commonwealth.

Regarding the defendant’s motion for a mistrial, the Court pointed out that the defendant chose to testify in his own defense and, therefore, subjected himself to cross-examination and potential impeachment. The Court agreed that the Commonwealth lawfully impeached the defendant’s testimony by questioning the defendant about his prior inconsistent statement to the police. The Court noted that the Supreme Court has held that a defendant’s failure to call an alibi witness “‘was the legitimate subject of comment by the Commonwealth’s attorney’ and ‘a circumstance to be considered by the jury.’” Consequently, the Court concluded that the attorney for the Commonwealth did not improperly comment during closing argument on the absence of the defendant’s girlfriend from testifying at trial. In addition, given that the absence of the girlfriend at trial was “a circumstance to be considered by the jury,” the attorney for the Commonwealth could also impeach the defendant’s credibility on this point during cross-examination.

Lastly, the Court explained that “§ 18.2-58, like many other newly amended statutes recently analyzed by this Court, simply does not have retroactive effect.” Because Code § 18.2-58 did not have retroactive application and because the defendant committed the robbery offense in 2019, the Court ruled that the trial court did not err when it sentenced the defendant according to the law that was in effect at the time that the relevant offense was committed.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0931222.pdf>

Trial Issues

Fourth Circuit Court of Appeals

U.S. v. Maynard: January 11, 2024

W.Va: Defendant appeals his conviction for Assault on a Detainee Sixth Amendment Confrontation grounds, regarding Witnesses Wearing Masks at Trial.

Facts: The defendant, a law enforcement officer, assaulted a prisoner in his custody. Before trial, the district court ordered all persons, including witnesses, to wear a face covering or mask, which covers both the wearer’s nose and mouth, at all times. The defendant challenged the order, arguing that it violated his right under the Sixth Amendment to confront witnesses. In lieu of face masks, the defendant asked the court to permit the use of a clear face shield, but the trial court refused.

Held: Affirmed. Noting that the witnesses here testified live, in person, under oath, subject to cross-examination, and could see and be seen by the defendant and jury, the Court concluded that the trial preserved the Confrontation Clause’s core principles—physical presence and the opportunity for cross-examination.

The Court agreed that the trial court’s mask order was necessary to further an important public policy. The Court acknowledged that the trial court could have permitted the use of clear face shields as the defendant requested but considering the CDC guidance and the number of COVID-19 related deaths and hospitalizations at the time, it would be “the worst kind of hindsight” to say that the trial court needed to do so.

In this case, the Court pointed out that the witnesses were under oath, cross-examined, and the jury could observe their demeanor. The Court also noted that witnesses were physically present in the courtroom and could see and be seen by both the defendant and the jury. The Court reasoned that jurors assess credibility not only by facial expressions, but also by the words the witnesses said, how they said them, their body language, their pauses, their mannerisms, and all the other intangible factors that are present in a trial. The Court found that it could not say that a mask covering only a witness’s nose and mouth violates the Confrontation Clause.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/224178.P.pdf>

Virginia Supreme Court

McBride v. Commonwealth: October 19, 2023 (En Banc)

Rev'd Panel Ruling of October 4, 2022

Fairfax: Defendant appeals his conviction for PWID, 3rd offense, on Permitting the Commonwealth to Reopen its Case.

Facts: The defendant possessed drugs with the intent to distribute, after having two previous convictions for that offense in Maryland. The Commonwealth litigated a pretrial motion to admit the prior convictions. At the motion to strike phase of the trial, the defendant argued that that none of the Commonwealth's testimonial or documentary evidence tied the defendant on trial to the person referenced in the Maryland documents through a birth date, social security number, DMV records, photos, fingerprints, or any other identifying information. The Court agreed and granted the motion to strike.

After the trial court granted the defendant's motion to strike, the Commonwealth objected. The Commonwealth explained that it had not submitted any evidence about the defendant's identity because of the trial court's ruling in the pre-trial motion in limine to admit those documents. The trial court allowed the Commonwealth to reopen its case and submit additional evidence, explaining "since it was a misunderstanding, I'm going to allow you to reopen to call one witness."

Based on that added evidence, the trial court reversed itself and ruled that the cumulative evidence was now sufficient and overruled the motion to strike.

The Court of Appeals reversed the conviction. The Court found that the trial court erred under Rule 3A:15(c) by not entering an order of acquittal after the court elected to grant the motion to strike based on the evidence presented in the Commonwealth's case-in-chief. [Note: After the trial in this case, the Court amended a number of rules, including Rule 3A:15, to replace the word "shall" with the word "must" as part of an effort to clarify the use of the word "shall." The change was intended as a clarifying amendment and does not alter the meaning of the rules. – EJC].

Held: Court of Appeals Reversed, Conviction Affirmed. The Court ruled that Rule 3A:15 does not preclude a trial court from timely reconsidering a motion to strike. The Court further ruled that the trial court could exercise its discretion to permit the Commonwealth to introduce additional evidence concerning the Maryland court records.

The Court began by recognizing the "inherent" authority of a court to reconsider an erroneous or flawed decision, even if it is not mentioned in the text of a rule. The Court wrote: "The power to decide carries with it the power to reconsider as a necessary adjunct." The Court then acknowledged that this power can be constrained by rules or statutes that limit its timing or scope.

The Court then ruled that when a court has concluded that its earlier ruling on a motion to strike was erroneous or flawed, it may timely reconsider its decision to grant (or deny) a motion to strike, just as it may reconsider other decisions. The Court explained that: “The requirement of Rule 3A:15 that a court “shall enter a judgment of acquittal if it strikes the evidence reflecting the judgment of acquittal” ensures an accurate record and thus protects a defendant from future jeopardy. It is not meant to cabin the discretion of a judge to promptly reconsider an erroneously granted motion to strike.” Thus, the Court found, a verbal pronouncement from the bench granting a motion to strike is not a final judgement for Double Jeopardy purposes.

The Court then examined the Double Jeopardy rule, specifically as applied by the U.S. Supreme Court in the *Smith* case. The Court distinguished the ruling in *Smith*, noting that in this case, the prosecution here did what the prosecution in *Smith* had not done, which is to immediately object to the trial court’s decision to grant the motion to strike. In this case, the trial court also promptly reversed itself, before the defendant presented any evidence or released any of its witnesses, further distinguishing this case from *Smith*.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220715.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1354214.pdf>

Virginia Court of Appeals - Published

Barnes v. Commonwealth: April 23, 2024

Fredericksburg: Defendant appeals his convictions for Shooting Into an Occupied Building and Property Destruction, alleging Inconsistent Verdicts, and on sufficiency of the evidence.

Facts: The defendant, armed with a gun, confronted another man at a shopping center. When that man drew a firearm, the defendant drew his firearm. The defendant started shooting at the man and two men exchanged gunfire. The defendant shot and killed the other man. The defendant also shot the occupied stores behind the man, shattering glass entrances.

At trial, the jury acquitted the defendant of second-degree murder and use of a firearm in the commission of a murder, while finding the defendant guilty of unlawfully discharging a firearm into an occupied building and unlawful destruction of property.

The defendant objected that these verdicts were inconsistent, since “the jury determined that [he] acted lawfully (self-defense) when shooting at the decedent with regard to murder and the related firearms offense, but acted unlawfully when the same conduct damaged property around the decedent.” The defendant contended that the jury’s verdicts, because inherently inconsistent, constituted an “actual irregularity,” and as such, should have been set aside.

Held: Affirmed.

The Court acknowledged that Virginia law does address “irregularities” with respect to, among other things, juror misconduct and juror lists. However, the Court clarified that an apparently inconsistent jury verdict is not an “irregularity.” The Court rejected the defendant’s reliance on the *Akers* ruling, explaining that the *Akers* ruling is only applicable to elemental inconsistency in bench trial verdicts.

In a footnote, the Court rejected the defendant’s contention that the jury found that he acted in self-defense. In this case, the Court explained that, no less than in any other case, it did not know why the jury acquitted the defendant of some of the charges. The Court wrote: “While we may conjecture the jury’s motivation, such is merely imaginative reasoning and offers no window into the actual motivations and beliefs of the jurors. We simply do not know why the jury acquitted Barnes of the second-degree murder and use of a firearm in commission of a murder charges.”

Regarding sufficiency of the evidence, since the shooting happened in the afternoon during normal business hours on a day that the defendant had visited one of the stores, the Court found that it was reasonable for the jury to conclude that the defendant knew or should have known that the stores were occupied. The Court concluded that the jury could infer that although the defendant may not have specifically intended to shoot the occupied stores or damage them, he knew or should have known what would likely result, not least because the stores were directly in the line of fire.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0991232.pdf>

Tatusko v. Commonwealth: February 6, 2024

Chesterfield: Defendant appeals his conviction for Reckless Driving on many grounds.

Facts: The defendant drove at 100 miles per hour or more in a 60 mile per hour zone. An officer observed the defendant speeding and visually estimated his speed to be in the “high 90s.” The officer’s LIDAR2 device yielded two readings: 103 and 100 miles per hour. The officer stopped the defendant and issued a summons for “reckless by speed 100/60 (LASER),” in violation of § 46.2-862. The General District Court convicted the defendant. He appealed to the circuit court.

In circuit court, the defendant first moved to suppress the stop, arguing that the officer lacked reasonable suspicion for the stop. During the motion, the defendant moved for a rule on witnesses. Over the defendant’s objection, the trial court allowed the Commonwealth’s trial expert, a police sergeant, to remain in the courtroom during the motion to suppress. The expert did not testify during the motion.

At the motion to suppress, over the defendant’s objection, the officer testified to his visual estimate of the defendant’s speed. He explained that he positioned himself on the highway, observed the flow of traffic, noticed the defendant’s vehicle traveling faster than the flow of traffic, and estimated the defendant’s speed. The trial court denied the motion to suppress.

Prior to trial, the Commonwealth moved to strike the words “100/60 (LASER)” from the summons so that it would just read “reckless by speed” under § 46.2-862. The court overruled the defendant’s objection that the amendment materially altered the underlying charge. The court also denied the defendant’s motion to continue the trial date, rejecting his claim of “surprise” that the summons had been amended.

After the trial court re-arraigned the defendant, he demanded to be sentenced by a jury if convicted. However, the trial court denied the request as the defendant had failed to demand jury sentencing in writing at least 30 days prior to trial under § 19.2-295(A).

At trial, the defendant argued that the LIDAR calibration was invalid because the LIDAR was tested for distance, not speed. The Commonwealth offered an expert to testify about how LIDAR works, but the defendant objected that the expert could not testify before the facts were in evidence. The trial court overruled the objection.

The Commonwealth’s expert explained that the LIDAR sends about 200 laser pulses per second to the target and measures the nanoseconds for the pulses to reflect, calculating speed by measuring the differential. The device is calibrated at certified locations using targets at distances of 50 and 100 feet. The officer testified that he calibrated the device that way before his shift.

At trial, on cross-examination, the defendant requested that the trial court take judicial notice of the stopping-distance table in § 46.2-880. The trial court declined to do so.

During closing argument, the defendant objected twice to the prosecutor’s oration. At one point, the prosecutor said: “What I find interesting about this case is that,” until interrupted by an objection. At another, the prosecutor remarked: “I found” defense counsel’s questions of the two officers “confusing,” drawing an objection. The trial court overruled the objections.

Held: Affirmed.

The Court first ruled that the trial court properly struck “100/60 (LASER)” from the summons. Interpreting §§ 16.1-129.2 and -137, the Court repeated that, on appeal, a circuit court may amend a warrant or a summons. The Court then noted that the amendment came before trial, and therefore a continuance was warranted only “upon a showing that such amendment operated as a surprise.” In this case, the Court complained that the defendant never proffered what he would have done differently or what evidence he would have offered at trial if the continuance had been granted.

The Court also rejected the defendant’s call for a bill of particulars, finding that the charging document gave the defendant notice of the nature and character of the offense charged so he could make his defense, and therefore a bill of particulars was not required.

The Court also ruled that the amendment did not reset the 30-day period before trial for the defendant to make written demand under § 19.2-295 for jury sentencing if convicted. The Court agreed that the trial court was right to proceed directly to trial after determining that a continuance was unwarranted.

The Court also found no reversible error in the trial court’s decision to let the expert witness remain in the courtroom during the suppression hearing. Construing § 19.2-265.1 and Va. R. Evid. 2:615(a), the Court noted that the expert was not a witness at the suppression hearing.

The Court also agreed that the trial court properly permitted the officer to testify at the suppression hearing about his estimate of the defendant’s speed, repeating that “anyone with a

knowledge of time and distance is a competent witness to give an estimate.” The Court also ruled that the officer’s visual estimate of speed was sufficient alone to provide reasonable suspicion that the defendant was driving at speeds in violation of § 46.2-682.

The Court also found that the evidence supported the prosecution’s claim that the LIDAR was properly calibrated. The Court rejected the defendant’s argument that the calibration was invalid because the LIDAR was tested for distance, not speed. The Court pointed out that § 46.2-882 permits calibration by “any . . . method employed in calibrating or testing any laser speed determination device.”

The Court then rejected the defendant’s objection that the expert improperly testified first and before the fact witness. The Court concluded that the expert’s description about how LIDAR devices work was fact testimony about how such devices work in general, how they are calibrated, and what an officer would see if a device malfunctioned.

Regarding the defendant’s attempt to cross-examine the officer using the speed tables in § 46.2-880, the Court found no error in the trial court’s ruling that it was irrelevant and would confuse the jury. The Court pointed out that the Va. Supreme Court has “repeatedly discouraged” instructing a jury “on the tables of speed and stopping distances unless it is clearly supported by the evidence.”

Lastly, the Court examined the prosecutor’s closing argument and agreed that the prosecutor’s statements here did not cross the line into “injecting their own personal opinion of the evidence, or personal opinion as to the competency of witnesses and the weight to be accorded their testimony.”

Regarding the defendant’s 18 separate arguments on appeal, the Court stated: “We recognize that criminal defendants may sometimes insist that their lawyers raise as many arguments as possible, including arguments that, even though not frivolous, have virtually no chance of succeeding.” The Court described the defendant’s appellate strategy as a “blunderbuss approach” and wrote: “Appellate courts have sometimes lamented that “the number of claims raised in an appeal is usually in inverse proportion to their merit.” ... When a party comes to us with nine grounds for reversing the [trial] court, that usually means there are none. ... Those predictions have been borne out here.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1500222.pdf>

Watwood v. Commonwealth: February 6, 2024

Chesterfield: Defendant appeals the dismissal of his Motion to Void his Convictions on a Prohibition from Filing Future Motions.

Facts: The defendant was tried and convicted of child sexual assault in 2017. In 2022, the defendant filed a motion to vacate his convictions, alleging fraud on the court. The circuit court denied the motion to vacate, finding his claims were frivolous. The circuit court further found that the defendant had violated § 8.01-271.1 and held that it would not “entertain any further pro se pleadings from [the defendant] of any kind concerning this matter, for any other matter, or any future litigation not yet commenced.”

The circuit court directed the clerk “to file any subsequent pro se pleadings with the case papers and take no further action.” The court noted that “[t]he courthouse is not closed to [the defendant]. He may advance any meritorious claims and causes desired by and through qualified Virginia counsel appearing as counsel of record for him.”

Held: Reversed.

The Court cautioned that courts orders restricting a litigant’s access to the courts must be narrowly tailored to prevent the specific problem encountered. The Court repeated that a court considering such sanctions must consider, under *Cromer*:

- (1) the party’s history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits;
- (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass;
- (3) the extent of the burden on the courts and other parties resulting from the party’s filings; and
- (4) the adequacy of alternative sanctions.

Even if these factors are met, the Court emphasized that a pre-filing restriction must be narrow.

In this case, the Court complained that there was no indication that the circuit court applied all four *Cromer* factors and complained that the trial court’s refusal to entertain pro se pleadings “for any other matter, or any future litigation not yet commenced” was not narrowly tailored to the specific problem encountered because it reaches a wide swath of potential circumstances beyond this case.

The Court explained that a court may not completely prohibit future pro se filings. The Court ruled that the circuit court therefore abused its discretion.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1148222.pdf>

Virginia Court of Appeals -
Unpublished

Biggs v. Commonwealth: April 2, 2024

Hanover: Defendant appeals his conviction for Rape on Denial of a Continuance and Trial in Absentia.

Facts: The defendant raped a woman in 2017 while he was visiting her college. The defendant was arrested and indicted for rape. In 2019, the defendant and his initial counsel signed an “Agreement Setting Case for Trial” that established an initial trial date and stated that “[t]he defendant is hereby warned that failing to appear . . . may result in further charges and/or trial and conviction in absentia.”

At the beginning of the COVID pandemic, the trial court continued the defendant’s trial and released him on bond. Upon his release, the defendant signed a recognizance form that cautioned, “If I fail to appear, the court may try and convict me in my absence.” After another continuance, the

Commonwealth moved to revoke the defendant's bond, arguing that he had violated bond conditions restricting his use of computers and social media. The defendant did not appear at the revocation hearing and the trial court revoked his bond and issued a capias for his arrest.

Two weeks later, the defendant's attorney moved to withdraw, revealing that the defendant had orchestrated a three-way phone call between her, the defendant, and a third party who threatened her and her firm. The defendant then posted portions of the call on social media, disparaging the attorney. The defendant also hosted live social media events in which he shared information such as the victim's identifying information, the victim's previous testimony, and other witnesses' identities. The Court declared that the defendant was a fugitive and did not rule on the motion.

The defendant then failed to appear at trial. The defendant's attorney stated that she did not know of his whereabouts and revealed that she had no contact with him for two months. In addition, the defendant had posted on social media that he was "on the run" and commented that revocation of his bond before Christmas was unfair. The defendant's attorney requested a continuance and again moved to withdraw. The trial court denied both motions.

The Commonwealth then moved to try the defendant in his absence. The trial court determined that the defendant had voluntarily waived his right to be present for trial. The trial continued in the defendant's absence, and the jury convicted him of rape through incapacitation. Two weeks after his conviction, officers located and arrested the defendant.

[Great job to Alison Linas, who tried this case – EJC].

Held: Affirmed. The Court held that the trial court did not abuse its discretion in denying the motion for a continuance made on the morning of trial and in proceeding with the trial in the defendant's absence.

The Court first repeated its rule from *Cruz* that a knowing and voluntary waiver of the right to be present by a defendant who is voluntarily absent from the entire trial cannot be shown unless the defendant (1) has been given notice of his trial date; and (2) has been warned that his failure to appear could result in a trial in his absence. In this case, the Court pointed out that the record contained a document he signed advising that should he fail to appear, he could be tried in his absence, and that he signed bond paperwork with similar language. Thus, the Court found that the trial court could reasonably conclude that the defendant knew of the trial date and that he could be tried in his absence if he did not appear. The Court concluded that the record supported a conclusion that the defendant was voluntarily absent from trial.

The Court rejected the defendant's argument that the Commonwealth would not have been prejudiced if the trial court had continued the trial. The Court explained that, in analyzing whether the Commonwealth would have been prejudiced had the case been continued, it would consider the likelihood that the accused would appear, and the trial could take place at a later date. However, when the record is devoid of any assurance, or even hint, that the defendant would be available in the future, the Court repeated that a trial court does not abuse its discretion in proceeding with trial in the defendant's absence.

In this case, the Court agreed that, at the time the trial court considered the motion to continue, there was no assurance that the defendant would be available at any time in the future. The Court noted that the defendant did not appear at his bond revocation hearing, at counsel's hearing to

withdraw as counsel of record, or at the start of his trial. The defendant was wanted at the time of trial and had been for months. Thus, the trial court had no information concerning the defendant's whereabouts or a definitive reason for his absence. The Court found that the defendant's unexcused absence, his statements on social media, and his failure to contact his attorney reasonably raised the specter that the defendant never intended to appear for trial voluntarily and would abscond until apprehended.

Regarding prejudice to the Commonwealth, the Court pointed out that the Commonwealth noted the exceptional delay in trying this matter, the threats defendant and his associate made on social media against the victim, and the anticipated expense and inconvenience to the witnesses. The Court found it irrelevant that the defendant was found just two weeks after the conclusion of his trial.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1325222.pdf>

Gutierrez v. Commonwealth: March 19, 2024

Arlington: Defendant appeals his convictions for Rape and Sexual Battery on Permitting the Jury to Rehear Testimony.

Facts: Over the course of several assaults, the defendant raped and sexually battered his daughter. After the victim disclosed the assaults to a counselor, she messaged the defendant via "WhatsApp," a messaging application. During the text conversation, which took place in the Spanish language, the victim confronted the defendant about the assaults, at one point telling him that he was wrong for "penetrating" her. The defendant stated: "I never wanted to hurt you" and "I don't know how I could do that."

At trial, the Commonwealth introduced the messages. Because the messages were in Spanish, the court interpreter orally translated the messages, without objection, for the jury. During jury deliberations, the jury asked, "Can we have the court translator come in and read the text messages aloud re: the use of the word penetration?"

The trial court informed the jury that it would not allow the court interpreter to enter the jury deliberation room and reinterpret the text messages. The trial court offered, however, to instruct the court reporter to replay the original oral interpretation of all the text messages. The jury foreman indicated that would be "very helpful." The court informed the jury that it would replay all the text messages so that no message would be taken out of context.

The defendant objected. He asserted that the interpretation of the messages by the interpreter was improper as it did in fact place undue emphasis on only a part of the evidence presented at trial. Because the jury's request was so specific, he argued that allowing the jury to rehear any part of the testimony would put undue emphasis on the part of the testimony reheard. Alternatively, he argued that the trial court should have required the jury to rehear the entirety of the testimony of the witness during whose testimony the WhatsApp messages were introduced, including the cross-examination of that witness.

The trial court overruled the defendant's objections. The oral translation replayed for the jury was a 16-minute-long portion of the 2-day trial.

Held: Affirmed. The Court concluded that the trial court did not abuse its discretion in replaying the translation of the WhatsApp messages between the defendant and the victim.

The Court reviewed its ruling in the 1994 *Kennedy* case, where it cautioned that the practice of rereading requested testimony to a jury is appropriate only in limited circumstances and should be carefully undertaken by trial courts on a case-by-case basis. The Court cautioned that a court may not simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses. The Court repeated that "If there is any emphasis being placed on the evidence, it is being placed there by the jury."

In this case, the Court noted that the testimony of interest to the jury was specifically identified and relevant to a factual matter at the heart of the case.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0127234.pdf>

Greene v. Commonwealth: December 28, 2023

Chesterfield: Defendant appeals his convictions for Robbery and Conspiracy on grounds including Speedy Trial, Mistrial, and Retroactivity of the new Robbery statute.

Facts: The defendant and his confederate robbed the victim. During the robbery, they shot and killed the victim. The defendant was charged by direct indictment on August 12, 2020. He was then arrested on October 23, 2020, and he was held without bail. On January 4, 2021, counsel for the defendant and the attorney for the Commonwealth made a joint motion to continue the case for trial to August 23, 2021. On June 25, 2021, the defendant filed a motion to dismiss, alleging that his constitutional and statutory speedy trial rights were violated. The trial court denied the motion.

At trial, the defendant made a motion for a mistrial after the attorney for the Commonwealth questioned the defendant about a potential alibi witness and then commented on the absence of that potential alibi witness during closing arguments. The prosecutor specifically asked, "[S]o based on what you said today, you didn't think to give the police the name of the person who could exonerate you from this whole incident, correct?" The defendant then acknowledged that he did not tell the police during an interview that he was with his girlfriend on the night of the murder. The attorney for the Commonwealth stated during closing arguments, "For the first time in two and a half years, he's claimed that he was with his girlfriend. Which, again, by his own admission today, he admits he did not tell Detective Bates. He also doesn't have her here today. She's not testified in defense." The trial court denied the mistrial motion.

At sentencing, the defendant contended that the trial court should have sentenced him under the newly amended version of § 18.2-58 for his robbery conviction. The trial court refused.

Held: Affirmed. The Court held that the defendant's statutory and constitutional speedy trial rights were not violated because both the defendant and the Commonwealth sought the continuance and agreed to the trial date that resulted in most of the delay leading up to the trial. In addition, given clear precedent from the Supreme Court, the Court ruled that it was entirely proper for the attorney for the Commonwealth to question the defendant about (and to comment on) the defendant's failure to call his girlfriend as an alibi witness. Finally, the Court ruled that the trial court did not err when it applied the penalty under § 18.2-58 that was in effect at the time that the defendant committed the robbery.

Regarding statutory speedy trial, the Court noted that, given that the mutually agreed-upon continuance tolled the running of the statutory speedy trial clock for all but 73 of the 152 allowable days, the defendant's statutory speedy trial rights clearly were not violated. Regarding constitutional speedy trial, the Court concluded that, given that the defendant was responsible for most of the delay and given that the defendant had not shown that he suffered any specific prejudice, the constitutional speedy trial factors weighed in favor of the Commonwealth.

Regarding the defendant's motion for a mistrial, the Court pointed out that the defendant chose to testify in his own defense and, therefore, subjected himself to cross-examination and potential impeachment. The Court agreed that the Commonwealth lawfully impeached the defendant's testimony by questioning the defendant about his prior inconsistent statement to the police. The Court noted that the Supreme Court has held that a defendant's failure to call an alibi witness "'was the legitimate subject of comment by the Commonwealth's attorney' and 'a circumstance to be considered by the jury.'" Consequently, the Court concluded that the attorney for the Commonwealth did not improperly comment during closing argument on the absence of the defendant's girlfriend from testifying at trial. In addition, given that the absence of the girlfriend at trial was "a circumstance to be considered by the jury," the attorney for the Commonwealth could also impeach the defendant's credibility on this point during cross-examination.

Lastly, the Court explained that "§ 18.2-58, like many other newly amended statutes recently analyzed by this Court, simply does not have retroactive effect." Because Code § 18.2-58 did not have retroactive application and because the defendant committed the robbery offense in 2019, the Court ruled that the trial court did not err when it sentenced the defendant according to the law that was in effect at the time that the relevant offense was committed.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0931222.pdf>

Smith v. Commonwealth: September 12, 2023

Prince William: Defendant appeals his convictions for Manslaughter and Use of a Firearm on Fourth Amendment, Fifth Amendment, and Jury Inconsistency grounds.

Facts: The defendant and his confederate shot and killed a man and shot a woman during a purported marijuana sale. The original call for emergency service indicated that the perpetrators of the

shooting fled the scene. Police responded to the scene of the nearby shooting, learned the description of two suspected shooters, and sent a radio transmission to be on the lookout for the suspects. Officers found the defendant's confederate nearby with a gunshot wound nearby. A few hundred yards from that store, another individual reportedly offered cash for a ride to "escape" from the area.

Officers found the defendant wandering aimlessly near the shooting location soon thereafter; his arms were scratched, and he was underdressed in cold weather. He claimed to have been a victim of an attempted robbery and admitted he came from that shooting scene. He gave a name of his friend that was similar to the name of the confederate police found shot nearby. Officers detained him at gunpoint and with handcuffs. Officers instructed the defendant that although he was being detained for investigative purposes, he was not under arrest.

At the police station, officers read the defendant his *Miranda* warnings. The defendant agreed to speak with officers and admitted to the offense. At trial, the officer testified that, although he did not record it, he read the defendant's *Miranda* rights from a card and that the defendant agreed to speak with him. At the time of his arrest, the defendant was 19 years old and had experienced 3 prior arrests for unrelated conduct. The interview lasted four and a half hours, but the defendant had four thirty-minute breaks during that time, and he was attentive and responsive when questioned.

Prior to trial, the defendant moved to suppress his seizure under the Fourth Amendment, arguing that the officers lacked reasonable suspicion to detain him and that because two officers detained him at gunpoint with handcuffs he was effectively arrested, requiring probable cause rather than reasonable articulable suspicion. Lastly, he argued that even if the initial seizure was permissible, after he gave an innocent explanation that he was the victim of an attempted robbery the officers no longer had cause to detain him, and his continued detention therefore violated his Fourth Amendment rights.

The defendant also moved to suppress his arrest, arguing that at the time he was transported from the scene in police custody for interrogation, the officers lacked probable cause to arrest him, in violation of the Fourth Amendment.

The defendant lastly moved to suppress his statements under the Fifth Amendment. He argued that the evidence was insufficient to establish that the officers read his *Miranda* rights because the officer did not record it with his body worn camera and, thus, violated his own department's procedures for advising suspects of their rights. He also contended that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights. Lastly, he contended that his statement to the police was inadmissible because it was involuntary. The defendant argued that his statement was involuntary because the officers suggested he would be punished less severely if he confessed and appealed to the defendant's religious preferences.

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

At trial, regarding the offense of Use of a Firearm, the verdict form advised the jury to find the defendant either guilty or not guilty of "Use or Display [of a] Firearm in Commission of a Felony, as charged in the indictment." The indictment stated, in relevant part, that the defendant "did use or display a firearm in a threatening manner while committing or attempting to commit the murder of [the victim], in violation of 18.2-53.1."

At the conclusion of the trial, the jury found the defendant guilty of voluntary manslaughter, and not murder, but found the defendant guilty of using a firearm to commit murder. The defendant

argued that because the jury found him guilty of voluntary manslaughter, and not murder, that their inconsistent verdict of using a firearm to commit murder must be set aside. The trial court rejected his argument.

Held: Affirmed.

The Court first found that the officers had reasonable articulable suspicion that the defendant was involved in the criminal activity under investigation and was justified in detaining him. The Court then also ruled that it was reasonable to detain the defendant at gunpoint and with handcuffs. For these reasons, the Court ruled that the initial seizure did rise to the level of an arrest and did not violate the Fourth Amendment.

The Court also explained that although there was a possibility that the defendant was innocent of criminal activity, his claimed explanation for his presence there did not negate the reasonable articulable suspicion that he was involved in the shooting. The Court noted that the defendant's own statements indicated his involvement in a nearby shooting to some degree, and the officers were therefore reasonable in continuing his detention to fully investigate whether the defendant was a perpetrator or victim of criminal conduct.

The Court then concluded that there was probable cause, in that an objective police officer could reasonably believe there was a substantial chance that the defendant was one of the suspects of the shooting incident. The Court therefore found that the defendant's Fourth Amendment rights were not violated when officers transported him to the police station, as there was probable cause justifying that seizure.

Regarding the *Miranda* issue, that Court rejected the defendant's argument that the evidence of a waiver was insufficient due to the lack of a video recording. The Court also found no basis to disturb the trial court's conclusion that the defendant knowingly and intelligently waived his *Miranda* rights. Lastly, the Court noted that the record contained no evidence of coercive conduct by the police. The Court agreed that the trial court's finding that the defendant's will was not overborne during the interview was supported by facts in the record.

Regarding the verdict form and the allegedly inconsistent verdict, the Court distinguished this case from the *Bundy* case, noting that the verdict form in this case referenced the predicate felony of murder by stating that the jury found him guilty of use of a firearm in commission of a felony "as charged in the indictment," and the indictment stated that the defendant was charged with use of a firearm in the commission of murder.

The Court explained that the fact that the defendant was convicted of manslaughter did not require the Court to reverse his conviction of use of a firearm in the commission of murder based on legal inconsistency. The Court repeated that a defendant can be convicted of using a firearm while committing an enumerated felony in § 18.2-53.1 even when the jury finds him not guilty of the enumerated felony.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0753224.pdf>

CRIMES & OFFENSES

Abduction

Virginia Court of Appeals - Published

Swezey v. Commonwealth: June 13, 2023

77 Va. App. 809, 887 S.E.2d 795 (2023)

Campbell: Defendant appeals his conviction for Abduction on the Incidental Detention Doctrine

Facts: The defendant entered the home of his estranged wife and pointed a handgun at her. When the victim asked if he was there to kill her, the defendant nodded and said “yes, but I’m not going to go down for this.” The victim tried to flee but could not escape. Unable to get away, she dropped to the floor. The defendant then stood over her, pointing the gun to her head; the victim screamed and pleaded with him not to kill her. She later testified that she was in shock and believed she was going to die. The defendant demanded that the victim’s companion leave them alone and that the wife speak with him alone. She agreed, but soon the police arrived and arrested the defendant.

The Commonwealth brought a series of charges against the defendant, including Abduction, Assault and Brandishing a Firearm. At trial, the defendant argued that his detention of the victim was incidental to the assault and to one of the brandishing offenses.

Held: Affirmed. The Court found that the detention was not incidental to the Assault and Brandishing offense because those crimes were completed before the defendant detained the victim.

The Court first examined the standard under which a court should apply the “Incidental Detention Doctrine” in abduction cases. The Court acknowledged that the Court of Appeals’ four-factor test under *Hoyt* is in tension with the Supreme Court’s later decision in *Lawlor*, which expressed no opinion on the *Hoyt* factors. The Court concluded that when a court determines whether the detention at issue is an intrinsic element of another crime, the *Lawlor* test is mandatory, and consideration of the *Hoyt* factors is permissive. Under *Lawlor*, a Court must determine “whether any detention exceeded the minimum necessary to complete the required elements of the other offense.” But because *Lawlor* did not overrule *Hoyt*, a court may also consider the *Hoyt* factors when helpful.

The Court then determined that the defendant’s detention of the victim was not incidental to the crime of assaulting her and brandishing a firearm at her. The Court then also applied the *Hoyt* factors, observing that the detention was short, but lasted long enough to keep terrorizing the victim and to coerce her into agreeing to speak with him alone.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0490223.pdf>

Virginia Court of Appeals -
Unpublished

Ali v. Commonwealth: May 28, 2024

Chesterfield: Defendant appeals his convictions for Abduction on Fifth Amendment *Miranda*, Hearsay, and sufficiency of the evidence grounds.

Facts: The defendant, a Lyft ride-sharing driver, picked up the victim, who was intoxicated and had requested a ride using a ride-sharing app. The defendant arrived at the victim's home and then provided notice to Lyft that he had arrived at the agreed destination. However, instead of leaving the victim at her home as agreed, the defendant then drove her to a nearby church parking lot while the victim was unconscious. While in the parking lot, the victim awoke, discovered that her pants and underwear had been pulled out of place, and the defendant was "close to" her. The victim immediately began striking the defendant while demanding that he take her home. The defendant finally took the victim home.

Officers investigated and spoke to the defendant at the police station. There, the officers explained to the defendant that he was not under arrest and that he could leave the interview whenever he wanted. That interview took place in English, although the defendant's brother translated some statements for him into Arabic. The defendant made various false statements, including denying that he brought the victim to the church at all.

Later the same day, an officer arrested the defendant and conducted a second interview. The officer began that interview by both reading the defendant his *Miranda* rights in English from a printed card and by explaining in greater detail the various *Miranda* rights he possessed. The defendant advised the officer that he had no questions about his rights and continued the interview. The officer used the language line to conduct the interview in Arabic.

Prior to trial, the defendant moved to suppress his statements to the police. The defendant argued that he had not validly waived his *Miranda* rights prior to being interrogated, based on his alleged lack of knowledge of the English language which he alleged prevented him from understanding the *Miranda* warnings given him by the officer. As a result, he asserted that he neither knowingly nor voluntarily waived his constitutional rights. After reviewing the videotaped statements, the trial court determined that the defendant was able to communicate in English.

The defendant also argued that the officer employed "a number of devious and deceptive tactics to attempt to coerce a confession from" him. He first contended that the officer's failure to advise him of his rights during the first interview followed by a second interrogation the same day constituted coercion. The defendant then asserted that the officer lied to him about having proof that a sexual assault occurred during the interrogation and that the officer repeatedly told the defendant that he was a "good and honorable man." The trial court overruled the defendant's motion to suppress and ruled that the defendant voluntarily waived his *Miranda* rights when the officer interviewed him.

During trial, the defendant objected to the responding officer's testimony, in which the officer described the victim's statements to him indicating that the defendant had touched or attempted to

touch her sexually. The victim had testified that she could not recall any sexual assault or touching of any kind. The trial court overruled the objection and admitted the officer's testimony.

At trial, the defendant unsuccessfully argued that the evidence presented by the Commonwealth was insufficient to support a conviction for abduction because there was no evidence that he used force, intimidation or deceit to transport or confine the victim, nor was there any evidence that he intended to deprive her of her personal liberty. He contended that since the victim voluntarily entered the vehicle and then failed to exit it, his driving beyond her destination cannot constitute "force" within the meaning of the statute.

Although the defendant was indicted and tried by a jury for abduction with intent to defile, the jury convicted him only of the lesser-included offense of abduction.

Held: Affirmed.

Regarding the motion to suppress, the Court agreed that the record supported the trial court's factual determination that the defendant was able to communicate in English. The Court complained that the defendant provided no citation to any authority nor argument that two interviews on the same day constituted coercion that overbore his will.

Regarding the responding officer's testimony relating statements that the victim made indicating that the defendant had touched or attempted to touch her sexually, the Court concluded that although the admission of this hearsay testimony was in error, the error was harmless. The Court noted that although Rule 2:801(d)(2) expressly allows for admission of a "prior statement that is consistent with the hearing testimony of the witness," the victim testified at trial that she could not recall any sexual assault or touching of any kind. Hence, the Court pointed out, the prior hearsay statements admitted through the responding officer were not consistent with the victim's testimony at trial. Thus, the Court ruled that the statements were not admissible pursuant to Rule 2:801(d)(2), and the trial court erred in concluding that they were.

However, since the totality of the evidence submitted at trial was overwhelmingly indicative of guilt, the Court concluded that any influence the officer's testimony might have had upon the jury's determination was insignificant and slight, especially given that the defendant was convicted of the lesser-included offense of abduction.

Regarding sufficiency, the Court noted that in this case, the defendant took a woman to an unwanted location after arriving at the agreed destination. The Court found that the evidence that the victim was unconscious, intoxicated, and unaware that she had reached her destination also supported the jury's conclusion that the evidence met the degree of force required to support the conviction for simple abduction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1894222.pdf>

Mizell v. Commonwealth: April 2, 2024

Suffolk: Defendant appeals his convictions for Aggravated Malicious Wounding and Abduction on sufficiency of the evidence.

Facts: The defendant locked his girlfriend in a room for nearly 24 hours, without access to food, water, or a bathroom. When the victim confronted the defendant upon his return, he struck the victim with a closed fist. The blow left her bloody and unable to defend herself; the victim almost lost consciousness and felt dizzy. The victim's tooth was pushed back, and her lip was split.

The defendant then left the room, again locking her inside. The victim later found the defendant's cell phone and called 911. Police had to kick in the door to rescue the victim.

The victim endured broken bones in her face and lacerations on her lip. Her injuries were so severe that she remained in the hospital for at least four days and underwent several surgeries for her gums and teeth. At the time of trial more than two years later, her lip was still numb, and she had wires in her mouth holding her tooth in place.

At trial, the defendant argued that the evidence did not show his intent to permanently injure the victim. The defendant also argued that the evidence was insufficient to show an abduction. The trial court disagreed. The trial court's finding of abduction was based on the defendant's conduct after his return to the residence, after he struck the victim. The trial court did not make a ruling as to whether locking the victim in the room prior to the blow was an abduction.

Held: Affirmed.

The Court first ruled that the totality of this evidence sufficiently proved the elements of aggravated malicious wounding. Even if merely a single blow, the Court agreed that the blow to the victim's face was attended with such circumstances of violence and brutality that a reasonable fact finder could infer that the defendant possessed the requisite intent to maim, disable, disfigure, or kill the victim and that his actions resulted in permanent and significant injury.

Regarding abduction, the Court ruled that the trial court did not err in concluding that the evidence was sufficient to support a conviction for abduction. The Court found that the crime of abduction was completed when the defendant purposely locked the victim in the room, scared and bleeding. In doing so, the Court agreed that the defendant knowingly and intentionally deprived her of her personal liberty without legal justification or excuse. The Court emphasized that the victim "was not required to jump out of a second story window, nor was she required to scream for help."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0052231.pdf>

Adult Abuse & Neglect

Virginia Supreme Court

Tomlin v. Commonwealth: June 29, 2023

Aff'd Ct. of App. Ruling of March 15, 2022

Augusta: Defendant appeals her convictions for Abusing or Neglecting an Incapacitated Adult.

Facts: The defendant abused and neglected her mother, the victim. For some time, the defendant had refused offers of assistance from the local social services department to take help care of her mother. After a maintenance worker discovered the victim lying on the floor, covered in bed bugs, and requiring medical attention, he called 911. Firefighters responded and found the victim in horrifying condition [*the details are truly horrifying and will not be detailed in full here – EJC*]. The defendant told rescue workers that the victim had been on the floor since a fall two days before. The defendant stated that she had not assisted her and instead left her in her own filth for two days without any treatment or cleaning because she “did not have time.”

Doctors who examined the victim determined that her bed sores presented a risk of death significant enough to make them a life-threatening condition. Her condition was life-threatening because of the combination of bed sores, leg sores, and the increased risk of infection created by the ubiquitous bed bugs, feces, and urine covering her body. At trial, the defendant argued that the victim had not suffered “serious bodily injuries.”

After the victim entered the hospital, the defendant took the victim’s money to live in a hotel and pay for various expenses, without the victim’s consent. The victim died in hospice care a couple of months later. At trial, the Commonwealth did not offer testimony directly bearing on her mental capacity from the time she was admitted to the hospital to the time of her death approximately two months later. The trial court based its decision about her inability to understand financial matters on evidence of her inability to understand her healthcare needs.

The Court of Appeals reversed and dismissed the conviction with respect to the conviction for financial exploitation of a mentally incapacitated adult but affirmed the conviction for abuse or neglect of an incapacitated adult. The Court of Appeals found that the trial court lacked sufficient evidence to conclude that the victim was mentally incapacitated with respect to financial matters. However, the Court of Appeals also found that the trial court had sufficient evidence to conclude that the victim had suffered “serious bodily injuries.”

Held: Conviction for Abuse and Neglect Affirmed. The Court held that the trial court could have rationally determined that the defendant’s abuse and neglect of the victim caused her to suffer a “serious bodily injury” under § 18.2-369.

The Court explicitly refused to find a singular, comprehensive definition of “serious bodily injury” to apply to § 18.2-369(C). The Court explained that “it would make no sense to treat this phrase as a technical term of art that must be understood ‘according to the acceptance of the learned in [the pertinent] art, trade, and science.’” Instead, the Court elucidated that when a statute uses the term “serious” but does not define it, the Court uses common-sense meanings.

To illustrate such meanings, the Court cited three dictionary definitions of “serious”: First, “having important or dangerous possible consequences” as in “a serious injury.” (Merriam-Webster Online Dictionary). Next, as “attended with danger” and “giving cause for anxiety,” as in a “serious

illness” or “condition.” (Oxford English Dictionary). Lastly, “to cause considerable distress, anxiety, or inconvenience: attended with danger” as in “a serious injury.” (Webster’s)

The Court rejected the defendant’s argument that bedsores do not qualify as “serious bodily injury” under § 18.2- 369(C) because that code section provides an exhaustive list of serious injuries and diseases and bedsores do not appear on the list. The Court explained “As the ‘include but not be limited to’ phrase makes clear, the statutory list is neither exhaustive nor is it a series of similitudes limiting the linguistic range of the phrase ‘serious bodily injury or disease.’” Instead, the Court found that the phrase “include but not be limited to” merely provides a non- exhaustive, illustrative list of meanings.

The Court also rejected the defendant’s argument that serious bodily injury under § 18.2-369 must necessarily be one posing a substantial risk of death.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220223.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0561213.pdf>

Virginia Court of Appeals – **Unpublished**

Jackson-Hope v. Commonwealth: March 12, 2024

Richmond: Defendant appeals her conviction for Neglect of a Vulnerable Adult on sufficiency of the evidence.

Facts: The defendant and her husband began caring for their nephew, the victim, after his mother died. The victim is a vulnerable adult with cerebral palsy, autism, and an intellectual disability who is unable to orally communicate.

Within a matter of months, the victim began suffering severe weight loss. A physician who examined the victim recommended a follow-up appointment, but the defendant did not follow up. Seven months after the defendant began caring for the victim, the victim arrived at the emergency room with “no blood pressure,” in cardiac arrest, and “looked dead” according to medical staff. The victim had sustained burns around his body that affected 10 to 12 percent of his body. He had also suffered extensive fractures to his head and face.

At the time, the victim appeared severely malnourished. A doctor determined that the fractures were a day or two old. A surgeon observed that that it likely would have taken a few hours for the victim’s blood’s base excess level to reach the point that it did while he was bleeding internally from the fractures.

Police investigated. At the home, police found physical damage and blood spatter throughout the home. The defendant claimed no knowledge of the victim’s injuries or how he became injured. At trial, the defendant contended that her conduct did not constitute neglect, but merely demonstrated that she “lacked perceptiveness.”

The jury convicted the defendant of adult neglect in violation of § 18.2-369(B).

Held: Affirmed.

The Court agreed that the jury could reasonably infer from the victim's extreme condition and the supporting evidence that the defendant did not merely "lack perceptiveness," but rather knowingly and willfully failed to provide the victim with the treatment and care he required without justifiable excuse. The Court also agreed that a rational fact finder could also conclude from the victim's dire condition when he arrived at the hospital and the blood throughout his room that he was not timely treated for his burns.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0878222.pdf>

Arson

Virginia Court of Appeals – Unpublished

Anderson v. Commonwealth: October 31, 2023.

Hanover: Defendant appeals his convictions for Arson of an Unoccupied Building and Maliciously Burning a Structure on sufficiency of the evidence.

Facts: The defendant intentionally set fire to his house and garage. No one was present in the house when he set fire to it and the defendant left the house after setting the fire. At trial, the trial court rejected the defendant's argument that the evidence was insufficient to prove he acted with malice because malice requires ill will toward another person or entity, and he did not burn the property of another, nor was the property occupied. Therefore, the trial court convicted the defendant of arson of an unoccupied building in violation of § 18.2-77.

At trial, regarding the offense of malicious burning under § 18.2-80, the Commonwealth did not introduce evidence about the value of the garage and the property inside it. The defendant argued that the Commonwealth failed to present sufficient evidence that the garage and its contents were valued at \$500 or more under § 18.2-80. The trial court rejected his argument. Instead, the trial court determined that if the court assigned "a minimal value of a dollar to each and every component [of the garage], each and every piece of concrete block, every square foot[,] let's say of concrete pad, shingles, windows, doors, the value is clearly in excess of five hundred dollars. Clearly in excess." Therefore, the trial court also convicted the defendant of maliciously burning a structure with the property inside it valued at \$500 or more, in violation of §18.2-80.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the defendant's conviction for arson of an unoccupied building, in violation of § 18.2-77, but reversed and remand his conviction for maliciously burning a structure (the garage) with property valued at \$500 or more, in violation of § 18.2-80.

The Court first rejected the defendant's argument alleging a lack of malice. The Court pointed out that the plain language of both § 18.2-77 and § 18.2-80 does not limit the offenses to the property of another or to a structure that is occupied. Thus, the Court refused to read into the statute the requirement that the burning of the structure be directed toward another person or property owned by another person when both statutes clearly provide otherwise. Instead, the Court emphasized that under the definition of malice, the commission of a wrongful act intentionally establishes malice. Thus, the Court ruled that the trial court did not err in finding that the defendant acted with malice.

Regarding the conviction for maliciously burning a structure (garage) with property valued at \$500 or more, in violation of § 18.2-80, the Court held that the Commonwealth did not carry its burden to establish the value of the property. The Court complained that the Commonwealth introduced no evidence about the value of the garage or the property contained inside the garage. Regarding the trial court's conclusion, the Court wrote: "The fact that particular factfinders may have knowledge that allows them to combine past experience with inference to arrive at a conclusion does not relieve the Commonwealth of its burden to present evidence to establish the element of an offense." The Court contended that the value of property was not within the range of common experience of the jury; thus, the Commonwealth was required to present evidence of value.

Because the Court ruled that the evidence sufficiently established every element of the lesser-included offense of misdemeanor malicious burning of a structure under § 18.2-80, the Court remanded the matter for retrial.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0220222.pdf>

Assaults

Virginia Supreme Court

Tomlin v. Commonwealth: June 29, 2023

888 S.E.2d 748 (2023)

Aff'd Ct. of App. Ruling of March 15, 2022

Augusta: Defendant appeals her convictions for Abusing or Neglecting an Incapacitated Adult.

Facts: The defendant abused and neglected her mother, the victim. For some time, the defendant had refused offers of assistance from the local social services department to take help care of her mother. After a maintenance worker discovered the victim lying on the floor, covered in bed bugs, and requiring medical attention, he called 911. Firefighters responded and found the victim in horrifying

condition [*the details are truly horrifying and will not be detailed in full here – EJC*]. The defendant told rescue workers that the victim had been on the floor since a fall two days before. The defendant stated that she had not assisted her and instead left her in her own filth for two days without any treatment or cleaning because she “did not have time.”

Doctors who examined the victim determined that her bed sores presented a risk of death significant enough to make them a life-threatening condition. Her condition was life-threatening because of the combination of bed sores, leg sores, and the increased risk of infection created by the ubiquitous bed bugs, feces, and urine covering her body. At trial, the defendant argued that the victim had not suffered “serious bodily injuries.”

After the victim entered the hospital, the defendant took the victim’s money to live in a hotel and pay for various expenses, without the victim’s consent. The victim died in hospice care a couple of months later. At trial, the Commonwealth did not offer testimony directly bearing on her mental capacity from the time she was admitted to the hospital to the time of her death approximately two months later. The trial court based its decision about her inability to understand financial matters on evidence of her inability to understand her healthcare needs.

The Court of Appeals reversed and dismissed the conviction with respect to the conviction for financial exploitation of a mentally incapacitated adult but affirmed the conviction for abuse or neglect of an incapacitated adult. The Court of Appeals found that the trial court lacked sufficient evidence to conclude that the victim was mentally incapacitated with respect to financial matters. However, the Court of Appeals also found that the trial court had sufficient evidence to conclude that the victim had suffered “serious bodily injuries.”

Held: Conviction for Abuse and Neglect Affirmed. The Court held that the trial court could have rationally determined that the defendant’s abuse and neglect of the victim caused her to suffer a “serious bodily injury” under § 18.2-369.

The Court explicitly refused to find a singular, comprehensive definition of “serious bodily injury” to apply to § 18.2-369(C). The Court explained that “it would make no sense to treat this phrase as a technical term of art that must be understood ‘according to the acceptance of the learned in [the pertinent] art, trade, and science.’” Instead, the Court elucidated that when a statute uses the term “serious” but does not define it, the Court uses common-sense meanings.

To illustrate such meanings, the Court cited three dictionary definitions of “serious”: First, “having important or dangerous possible consequences” as in “a serious injury.” (Merriam-Webster Online Dictionary). Next, as “attended with danger” and “giving cause for anxiety,” as in a “serious illness” or “condition.” (Oxford English Dictionary). Lastly, “to cause considerable distress, anxiety, or inconvenience: attended with danger” as in “a serious injury.” (Webster’s)

The Court rejected the defendant’s argument that bedsores do not qualify as “serious bodily injury” under § 18.2- 369(C) because that code section provides an exhaustive list of serious injuries and diseases and bedsores do not appear on the list. The Court explained “As the ‘include but not be limited to’ phrase makes clear, the statutory list is neither exhaustive nor is it a series of similitudes limiting the linguistic range of the phrase ‘serious bodily injury or disease.’” Instead, the Court found that the phrase “include but not be limited to” merely provides a non- exhaustive, illustrative list of meanings.

The Court also rejected the defendant's argument that serious bodily injury under § 18.2-369 must necessarily be one posing a substantial risk of death.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220223.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0561213.pdf>

Virginia Court of Appeals -
Published

Barnes v. Commonwealth: April 23, 2024

Fredericksburg: Defendant appeals his convictions for Shooting Into an Occupied Building and Property Destruction, alleging Inconsistent Verdicts, and on sufficiency of the evidence.

Facts: The defendant, armed with a gun, confronted another man at a shopping center. When that man drew a firearm, the defendant drew his firearm. The defendant started shooting at the man and two men exchanged gunfire. The defendant shot and killed the other man. The defendant also shot the occupied stores behind the man, shattering glass entrances.

At trial, the jury acquitted the defendant of second-degree murder and use of a firearm in the commission of a murder, while finding the defendant guilty of unlawfully discharging a firearm into an occupied building and unlawful destruction of property.

The defendant objected that these verdicts were inconsistent, since "the jury determined that [he] acted lawfully (self-defense) when shooting at the decedent with regard to murder and the related firearms offense, but acted unlawfully when the same conduct damaged property around the decedent." The defendant contended that the jury's verdicts, because inherently inconsistent, constituted an "actual irregularity," and as such, should have been set aside.

Held: Affirmed.

The Court acknowledged that Virginia law does address "irregularities" with respect to, among other things, juror misconduct and juror lists. However, the Court clarified that an apparently inconsistent jury verdict is not an "irregularity." The Court rejected the defendant's reliance on the *Akers* ruling, explaining that the *Akers* ruling is only applicable to elemental inconsistency in bench trial verdicts.

In a footnote, the Court rejected the defendant's contention that the jury found that he acted in self-defense. In this case, the Court explained that, no less than in any other case, it did not know why the jury acquitted the defendant of some of the charges. The Court wrote: "While we may conjecture the jury's motivation, such is merely imaginative reasoning and offers no window into the actual

motivations and beliefs of the jurors. We simply do not know why the jury acquitted Barnes of the second-degree murder and use of a firearm in commission of a murder charges.”

Regarding sufficiency of the evidence, since the shooting happened in the afternoon during normal business hours on a day that the defendant had visited one of the stores, the Court found that it was reasonable for the jury to conclude that the defendant knew or should have known that the stores were occupied. The Court concluded that the jury could infer that although the defendant may not have specifically intended to shoot the occupied stores or damage them, he knew or should have known what would likely result, not least because the stores were directly in the line of fire.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0991232.pdf>

Stillwell v. Commonwealth: February 27, 2024

Lynchburg: Defendant appeals her conviction for Felony Hate Crime Assault and Battery on sufficiency of the evidence.

Facts: The defendant, while shopping at a retail store, became convinced that two employees were laughing and talking about her. The defendant began screaming and throwing objects at them, striking the victim. Throughout the attack, the defendant hurled racial slurs and racially-based comments at the victim and her companion.

At trial, the defendant testified that she attacked because she thought they were laughing at her and talking about her, not because of their race. However, the trial court noted that the video showed no evidence that the employees had been laughing at the defendant. The Court found no provocation for the defendant’s actions.

Held: Affirmed. The Court held that the evidence made it clear that the defendant assaulted the victim because of her race.

The Court examined § 18.2-57(B), which elevates Assault and Battery to a Class 6 felony with a minimum term of confinement of six months “if a person intentionally selects the person against whom an assault and battery resulting in bodily injury is committed because of his race, religious conviction, gender, disability, gender identity, sexual orientation, color, or national origin.” In this case, the Court agreed that the reasonable inferences from the evidence established beyond a reasonable doubt that the defendant had selected her victim based on her race.

The Court analogized this case to the *Carfagno* case, finding that in both cases the racial epithets combined with the unprovoked nature of the attack supported the conviction. The Court wrote: “Laughter is not justification for a battery. [The defendant’s] subjective perception of the situation does not excuse her unprovoked derogatory remarks or aggressive behavior and does not require this Court to find, in light of the evidence, that she did not choose her victim because she was in fact a Black woman.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0884233.pdf>

Assault on Law Enforcement

Virginia Court of Appeals – Unpublished

Cunningham v. Commonwealth: December 19, 2023

Martinsville: Defendant appeals his convictions for Assault on Law Enforcement and Fleeing from a Law Enforcement Officer on sufficiency of the evidence.

Facts: An officer observed the defendant begging for money in violation of Martinsville’s City Code. After approaching the defendant to arrest him for that violation, the officer could smell the odor of alcohol, and decided to arrest the defendant for public intoxication. The officer ordered the defendant to place his hands on the patrol car and then attempted to grab the defendant’s hands. However, the defendant twisted around and grabbed hold of the officer and pushed and shoved him. After the two spun around the front of the patrol car, the defendant pushed off of the officer and ran.

At trial, regarding fleeing a law enforcement officer under § 18.2-460(E), the defendant argued that if he was only detained pursuant to *Terry* when he fled, there was no arrest and this charge failed as a matter of law for lack of an arrest. Alternatively, he also argued that if he was arrested prior to his flight, the arrest was not lawful, and the charge failed for lack of a lawful arrest.

Regarding Assault on Law Enforcement, the defendant argued that the officer used excessive restraint for a *Terry* stop—specifically, he contended that the officer’s attempt to use handcuffs on the defendant was unreasonable given the non-violent nature of the crimes.

Held: Affirmed.

Regarding fleeing a law enforcement officer under § 18.2-460(E), the Court explained that it did not matter that the officer had a subjective intent to arrest the defendant for public intoxication, for which he did not have probable cause. The Court found that the record objectively demonstrated that the officer had probable cause to lawfully arrest the defendant for several offenses before he fled. The Court noted that the officer specifically had observed the defendant begging for money in violation of Martinsville Code of Ordinances, obstructed the officer in the performance of his duties by wrestling with him over the patrol car in violation of § 18.2-460(A) or (B), and battering a law enforcement officer in violation of § 18.2-57(C).

The Court then pointed out that the officer applied physical force to the defendant and that the defendant fled. Therefore, the Court found that the evidence was sufficient to support the defendant’s conviction for violating § 18.2-460(E).

Regarding assault on law enforcement, the Court acknowledged that under the common law, a citizen generally is permitted to use reasonable force to resist an illegal arrest. However, the Court also repeated that a citizen has no right to resist the investigatory detention. In this case, the Court concluded that the officer did not use excessive force during the momentary investigative detention converting the detention into an arrest. The Court noted that when the defendant initiated the battery, the officer had only ordered him to place his hands on the patrol car and then attempted to grab the defendant's hands. Therefore, the Court ruled that the investigatory detention did not become an unlawful arrest based on the officer's unreasonable use of force and the trial court did not err in rejecting the defense of resisting an unlawful arrest.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0141233.pdf>

Jenkins v. Commonwealth: October 10, 2023

Arlington: Defendant appeals her Juvenile Adjudication for Assault on Law Enforcement on Refusal to Admit Video Evidence, Refusal of Jury Instructions, and Revocation of her Deferred Disposition.

Facts: Officers stopped the defendant, then a juvenile, for a metro fare evasion. The officers sought to advise her of the offense, identify her and her parents, and then release her. However, the defendant refused to cooperate and pushed the officer away. The officer continued to try to reason with the defendant for several minutes. Soon, however, the defendant balled up her fist and lunged at one of the officers. The defendant then bit an officer on his arm and spit on him.

At trial, the defendant moved to strike the evidence, challenging the lawfulness of her arrest and arguing that she bit and spat on the officer in self-defense. The trial court denied the motion, finding that the defendant was lawfully arrested because the officer had probable cause to arrest her after she pushed him.

The defendant then offered a video her friend recorded showing a portion of the physical struggle with the three officers on the train platform while handcuffing the defendant. In response to the Commonwealth's relevance objection, the defendant argued that the video contradicted the officers' testimony regarding the number of bites and when exactly they occurred. The trial court excluded the video, holding that it was not relevant as impeachment of the officers' testimony because the record was ambiguous on the purported point of impeachment—whether the officer stated that the defendant had bit him, and if so, how many times. The trial court found that any "possible" impeachment value was "speculative" and that the narrated video contained inadmissible hearsay.

Before submitting the case to the jury, the trial court rejected two jury instructions that the defendant offered to explain her defense of justification. The first proposed instruction read:

"A person has a common law right to use reasonable force to resist arrest, if the arresting officer does not have probable cause for the arrest."

The second proposed instruction read:

“Where an officer attempts an unlawful arrest, the officer is the aggressor which gives the arrestee the right to use self-defense to resist so long as the force used is reasonable. The amount of force used must be reasonable in relation to the harm threatened.”

The trial court refused both instructions, finding that its earlier ruling that the arrest was lawful rendered the instructions irrelevant.

The jury found the defendant guilty of assault and battery of a law enforcement officer, but the trial court deferred the finding and ordered the defendant to comply with probation until her eighteenth birthday. Over the next three years, the trial court held numerous review hearings to follow the defendant’s progress pursuant to her deferred disposition. However, the defendant’s noncompliance with the terms of her supervision lasted several years and culminated in defiant statements at her dispositional hearing. Finally, the trial court found that the defendant had been noncompliant with the terms of her deferred disposition and formally entered the felony adjudication.

Held: Affirmed. The Court held that the trial court did not err in excluding the defendant’s proposed video evidence or jury instructions, nor in entering a felony adjudication.

Regarding the video, the Court first pointed out that the trial court had already ruled that the officer had probable cause to arrest the defendant before the events recorded on the video transpired. The Court repeated that if an officer has probable cause to arrest a suspect, that person has no legal right to resist the arrest. Viewed in the context of the trial court’s probable cause ruling settling that the defendant’s arrest was lawful, the Court ruled that the defendant’s claim of unlawful arrest was no longer properly at issue in the case; therefore, the trial court properly excluded the video so far as it was offered to prove the claim of unlawful arrest.

The Court also rejected the defendant’s argument that the video contradicted the officer’s testimony concerning whether she bit him and therefore was admissible to generally question his credibility. Because the video did not capture the beginning of the physical struggle between the officers and the defendant, the Court noted that it did not reveal what was said or done prior to the start of the recording. Also, the Court found that from the vantage point of the recording it did not show the defendant’s face or the officer’s hands leading up to the point when he stated, “she bit me.” Therefore, the Court ruled, the video was not clarifying on the points of alleged inconsistency and there was nothing in the video that appeared to impeach the officer’s testimony.

Regarding the defendant’s jury instructions, the Court again noted that the trial court’s uncontested probable cause ruling rendered the defendant’s proffered instructions inapplicable as a matter of law. The Court confirmed that it was the court’s prerogative to rule on the legal question of probable cause, and if probable cause existed, the defendant had no legal right to resist the lawful arrest. The Court reasoned that accepting the proposed instructions would have wrongly invited the jury to address questions of law disposed of by the court and not challenged.

Lastly, regarding the trial court’s revocation of her deferred disposition, the Court agreed that the defendant’s defiant statements at her dispositional hearing were consistent with the well-documented history of her noncompliance with supervision and supported the trial court’s finding that she had violated the conditions of the deferred disposition order.

Full Case At:

Domestic Assault and Battery

Virginia Court of Appeals - Published

Yellock v. Commonwealth: January 30, 2024

79 Va. App. 627, 896 S.E.2d 802 (2024)

Martinsville: Defendant appeals his conviction for Domestic Assault on sufficiency of the evidence.

Facts: The defendant battered the victim, his girlfriend, after an argument in the victim's vehicle. At trial, the victim testified that they were in a relationship that "involve[d] touching each other," including "touch[ing] each other's hair."

At trial, the defendant unsuccessfully argued that the Commonwealth failed to prove that the victim was "a family or household member," as required to sustain a conviction for domestic assault and battery pursuant to § 18.2-57.2.

Held: Reversed. The Court found that the Commonwealth failed to establish "cohabitation" between the defendant and the victim within the meaning of § 18.2-57.2. Because the Commonwealth failed to prove that the parties cohabited, it did not establish that the victim was "a family or household member" as required to sustain a conviction for domestic assault and battery pursuant to § 18.2-57.2.

The Court repeated the factors under *Rickman* to consider when assessing whether cohabitation has been established:

- (1) sharing of familial or financial responsibilities,
- (2) consortium, and
- (3) length and continuity of the relationship.

The Court quoted *Rickman*: "Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets." "Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations." The Court also explained that the duration and continuity of the relationship are also appropriate factors for consideration.

In this case, the Court complained that there was no evidence establishing that the parties shared familial or financial resources. The Court refused to infer sharing of familial or financial responsibilities solely because they were in a relationship that involved touching each other on the date of the incident. The Court also complained of a lack of evidence that the parties shared food, shelter, clothing, or utilities, and no evidence of comingled assets. Additionally, the Court noted that there was little to no evidence of consortium.

The Court wrote: "Furthermore, the undeveloped record simply does not demonstrate a relationship involving mutual respect, fidelity, and the type of partnership required under *Rickman*."

While the Commonwealth suggests that the couple's ride-sharing and touching evince affection, society, and cooperation, the evidence here relating to the consortium factor does not support a finding of cohabitation."

Finally, the Court complained that the Commonwealth provided very limited evidence on how long the parties had been in a relationship. For example, there was no testimony that they had been a couple for a lengthy or continuous period; the evidence was only that they were in a relationship on the date of the incident.

The Court then remanded the case for trial on the lesser-included offense of simple assault and battery. The Court concluded that simple assault and battery requires no additional or different element than is required for a conviction for domestic assault and battery. Because simple assault and battery does not contain an element that the charged offense does not contain, the Court ruled that simple assault and battery is a lesser-included offense of domestic assault and battery.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1936223.pdf>

Malicious Wounding & Shooting

Virginia Supreme Court

Fary v. Commonwealth: January 18, 2024

896 S.E.2d 235 (2024)

Aff'd En Banc Ruling of April 18, 2023

King William: Defendant appeals his convictions for Attempted Malicious Wounding on sufficiency of the evidence.

Facts: The defendant, angry and upset after the victims' boat passed his boat, followed the victims for 15-25 minutes until they parked at a dock. After the victims parked, the seven of them remained on the boat. The defendant approached them in his boat, yelled and cursed at them, put his boat in gear, and slammed their boat with his own boat at a 90-degree angle. The impact knocked over one of the children on the victims' boat, and the defendant's own boat intruded into the victims' boat's passenger compartment, where a child hit his head on the defendant's boat. The defendant then backed down, cursed the victims again, restarted his engine, and rammed the victims again. Police responded and the defendant admitted to striking the victims' boat, but claimed it was an accident.

In an 11-6 ruling, the Court of Appeals, en banc, affirmed the conviction. The Court distinguished this case from the 1995 *Haywood* case and the 1997 *Crawley* case, but also concluded that the Court's statements in *Haywood* and *Crawley* were inconsistent with settled law. The Court criticized those panel decisions for ruling that the evidence "failed to exclude as a reasonable hypothesis the possibility" that the defendants in those cases did not have the requisite intent. Citing the Virginia Supreme Court's

ruling in *Barney*, the Court explained that it is the fact finder, not the Court of Appeals, that determines whether a defendant's hypothesis is reasonable.

In a footnote, the Court further explained that the appellate courts of the Commonwealth have no such role in determining the existence of "reasonable doubt." The Court criticized the dissent for having "reweighed the evidence, reassigned the credibility of the witnesses, and otherwise engaged in the factfinding exercises that the above precedents hold are the sole responsibility of a trial jury or, as in this case, a trial judge, who was in a far better position to do so than our dissenting colleagues."

Held: Affirmed. The Supreme Court simply ruled that "the Court is of the opinion that there is no reversible error in the judgment of the Court of Appeals. Accordingly, the Court affirms the judgment of the Court of Appeals for the reasons stated by the en banc majority in *Fary v. Commonwealth*, 77 Va. App. 331 (2023) (en banc)."

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230344.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1079212.pdf>

Virginia Court of Appeals -
Unpublished

Farley v. Commonwealth: May 14, 2024

Mecklenburg: Defendant appeals his convictions for Rape, Burglary, Arson, Aggravated Malicious Wounding, and related offenses on Jury Instruction and sufficiency grounds.

Facts: The defendant broke into the home of his mother-in-law, who had custody of his two daughters, raped, beat, and sexually assaulted her, and then set her house on fire. To escape, the victim leapt from a window, causing her severe injuries. Due to the injuries, the victim had to use a cane to walk and needed knee replacement surgery. At trial, the defendant argued that he did not proximately cause that injury, but the trial court found otherwise.

At trial, the parties agreed on a jury instruction for sodomy under § 18.2-67.1. The agreed instruction stated that to establish sodomy the Commonwealth had to "prove beyond a reasonable doubt" the defendant's penis "penetrated into the mouth, anus or sexual organ of D.W. . . . against her will" and "by force, threat or intimidation." The defendant did not object to this instruction at trial.

After trial, the defendant complained that the jury was misinformed on the elements of the offense. He asserted that the jury could have believed his testimony that the fellatio was consensual, and thus not a crime, but found he committed sodomy because the penetration of his penis into the victim's "sexual organ" was nonconsensual.

Held: Affirmed.

The Court noted that a sodomy conviction under § 18.2-67.1 requires proof of cunnilingus, fellatio, anilingus, or anal intercourse. Even though the instruction improperly stated the elements of the offense, the Court held that no reversible error occurred. The Court repeated that “It can hardly be a ‘grave injustice’ for a trial court to give an agreed upon jury instruction.”

The Court acknowledged that a “grave injustice” occurs if a jury instruction omits an element of the crime and the Commonwealth failed to prove the omitted element. In this case, however, the Court noted that the defendant did not deny that fellatio had occurred; he asserted only that the victim had initiated the oral sex. The Court distinguished the *Campbell* case, noting that the instruction in this case did not omit an essential element of the offense, and evidence pertaining to the elements required to prove sodomy was presented. The Court found that in this case the error was harmless because there was overwhelming evidence that the defendant’s penis penetrated the victim’s mouth without her consent.

Regarding the Aggravated Malicious Wounding offense, the Court agreed that the injuries inflicted by the defendant were a “permanent and significant physical impairment.” The Court also agreed that the defendant proximately caused the knee injury because the victim hurt her knee when she jumped out of her bedroom window to escape from the defendant.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0234232.pdf>

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim’s brother called 911 and told the dispatcher that the victim had called him and told him that “her boyfriend had shot her and they were trying to kill her.” The brother stated that the victim could barely speak. He also stated that he “d[idn’t] know what to do” because he doesn’t live near the victim. He stated that “she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster.” On the recording, the brother said it sounded like the victim “was hiding” while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver’s seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions like, “You doing all right man?” and, “you still tired?” The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, “how was your day, though?” to which the officer responded, “It was good, how was yours?” The defendant answered: “It was horrible,” to which the officer reiterated, “horrible day?” The defendant also asked the officer, “you know, I found evidence of her almost burning me?” to which the officer responded, “[b]urning you?”

The defendant also asked the officer “hey, is that Michael Kors bag going to go . . . in my evidence file?” The officer asked, “what’s that?” The defendant clarified, “the Michael Kors bag in the car,” to which the officer responded, “I’m not sure what you’re talking about.” The defendant also asked, “did you guys search the vehicle?” to which the officer responded, “I’ve been with you the entire time.”

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim’s social media. The detective asked, “What’s her Facebook page?” to which the defendant responded. The defendant then talked about the victim cheating on him, saying, “I caught her!” The detective asked, “was it one of your boys?” to which the defendant responded that he doesn’t know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim’s first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that “only recently, on January 20th . . . received a letter from the Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse.” The trial court further stated that there was an “inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen.” The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness “is the father of a former classmate.” Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church “on a personal level.” All three of the jurors indicated

that they would not credit the witnesses' testimony simply based on the jurors' familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors' assurances that they would not necessarily credit the officers' testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant's objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant's Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant's objection. An officer testified that the gun depicted in the defendant's Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers' questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did violate the defendant's Miranda rights.

Regarding the defendant's request for an expert witness, the Court ruled that the trial court did not err in denying the defendant's motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant's arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that "a number of things" had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court's approval. The Court noted that this delay was not intentional or due to the Commonwealth's negligence. The Court then held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother's statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother's call was to ask for help responding to an ongoing emergency—getting medical care for the victim's gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant's social media posts, the Court reasoned that evidence from the defendant's Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*, the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Jones v. Commonwealth: April 16, 2024

Henrico: Defendant appeals his conviction for Unlawful Wounding on Jury Instruction, Mistrial, and sufficiency grounds.

Facts: While obtaining marijuana from the victim, the defendant shot him. The defendant brought the firearm with him to purchase marijuana well after midnight. During the transaction, he phoned his cousin, who appeared to be waiting outside. He then brandished his firearm and instructed the victim to be quiet and get on the ground. When the victim lunged at him, the gun fired and the defendant shot the victim, resulting in serious injuries.

The defendant made statements to a police officer after the incident. The defendant also admitted to shooting the victim on recorded jail calls, calls that the Commonwealth admitted into evidence. At trial, the defendant claimed that someone else shot the victim.

During the jail phone calls, the defendant and the victim spoke to one another. Both referenced the fact that the defendant was in jail. The defendant discussed being released and “com[ing] back out there” “on the streets.” At one point, the victim said to the defendant, “you’re on a f&*ing jail call.” The defendant also told the victim that he was not “trying to jail talk” with a man because he had women to do that with. The defendant talked about being “in here” and, trying to convince the victim not to testify, said that if he did not appear in court “they gotta let [him] up out of this” facility.

At trial, the Commonwealth sought to instruct the jury that if it believed that the defendant previously made a statement that was inconsistent with his testimony at trial, his prior statement could be considered as proof that what he previously said was true. The defendant objected and asserted that the evidence failed to show he made an inconsistent statement. He argued that his testimony at trial was entirely consistent with the statements he made to the officer.

During closing arguments, the Commonwealth referred to the defendant’s “jail calls.” The defendant objected and moved for a mistrial. The trial court denied the motion.

Held: Affirmed.

Regarding the jury instruction, the Court agreed that the statements that the defendant made in the jail calls were inconsistent with his trial testimony. Therefore, the evidence supported the jury instruction.

Regarding the defendant’s motion for a mistrial, considering the “innocuous nature” of the prosecutor’s comment in light of all of the facts and circumstances of this case, and that the calls themselves—even without the prosecutor’s comment—indicated that they were made when the defendant was in jail, the Court concluded that the prosecutor’s reference to “jail[call]s” in closing in no way interfered with the defendant’s right to a fair trial. Accordingly, the Court ruled that the trial court did not abuse its discretion in refusing to grant the defendant’s motion for a mistrial.

Lastly, regarding sufficiency, the Court found it entirely foreseeable that a shooting might occur when brandishing a loaded firearm.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1412222.pdf>

Mizell v. Commonwealth: April 2, 2024

Suffolk: Defendant appeals his convictions for Aggravated Malicious Wounding and Abduction on sufficiency of the evidence.

Facts: The defendant locked his girlfriend in a room for nearly 24 hours, without access to food, water, or a bathroom. When the victim confronted the defendant upon his return, he struck the victim

with a closed fist. The blow left her bloody and unable to defend herself; the victim almost lost consciousness and felt dizzy. The victim's tooth was pushed back, and her lip was split.

The defendant then left the room, again locking her inside. The victim later found the defendant's cell phone and called 911. Police had to kick in the door to rescue the victim.

The victim endured broken bones in her face and lacerations on her lip. Her injuries were so severe that she remained in the hospital for at least four days and underwent several surgeries for her gums and teeth. At the time of trial more than two years later, her lip was still numb, and she had wires in her mouth holding her tooth in place.

At trial, the defendant argued that the evidence did not show his intent to permanently injure the victim. The defendant also argued that the evidence was insufficient to show an abduction. The trial court disagreed. The trial court's finding of abduction was based on the defendant's conduct after his return to the residence, after he struck the victim. The trial court did not make a ruling as to whether locking the victim in the room prior to the blow was an abduction.

Held: Affirmed.

The Court first ruled that the totality of this evidence sufficiently proved the elements of aggravated malicious wounding. Even if merely a single blow, the Court agreed that the blow to the victim's face was attended with such circumstances of violence and brutality that a reasonable fact finder could infer that the defendant possessed the requisite intent to maim, disable, disfigure, or kill the victim and that his actions resulted in permanent and significant injury.

Regarding abduction, the Court ruled that the trial court did not err in concluding that the evidence was sufficient to support a conviction for abduction. The Court found that the crime of abduction was completed when the defendant purposely locked the victim in the room, scared and bleeding. In doing so, the Court agreed that the defendant knowingly and intentionally deprived her of her personal liberty without legal justification or excuse. The Court emphasized that the victim "was not required to jump out of a second story window, nor was she required to scream for help."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0052231.pdf>

Wesley v. Commonwealth: August 22, 2023

Fairfax: Defendant appeals his convictions for Aggravated Malicious Wounding and Strangulation on denial of his Insanity Defense and sufficiency of the evidence.

Facts: The defendant randomly attacked a woman who was walking one morning on a bike path in a residential neighborhood. The defendant repeatedly struck her with a blunt object on the head and face, screaming at her to "shut up." The defendant then stood up, apologized, and fled.

The defendant had called in absent from work the morning of the attack. He drove to a nearby parking lot and left his keys in the ignition of his vehicle. He brought gloves with him, which he dropped after the attack. The first time the defendant passed his victim, he kept his head down so she would not

see his face. The defendant wore a medical mask, which further obstructed the view of his face. He had allowed the victim to pass him, before following her to a more remote location, a fitness loop. The defendant then waited for her to exit the loop before he ambushed her.

The defendant struck the victim at least five times in the head, and she suffered more blows to the face and other places and sustained a concussion. She had a laceration on the top of her head, injuries to her mouth, and her head was swollen to about twice its normal size. The injuries on her neck were consistent with strangulation. Her medical treatment for her head wounds included twenty-eight staples in her head and stitches in her mouth and forehead. The victim suffered black eyes and a “significantly bruised” nose. She also had scrapes and bruises on her legs and elbows. The victim suffered nerve damage in her right hand that took six to eight months to resolve. At trial, the victim exhibited the scar she sustained to her forehead and indicated her other scars in her hairline that remained sensitive to the touch.

At trial, the defendant argued that the Commonwealth had failed to prove that the victim’s injury was “permanent and significant” as required by § 18.2-51.2, but the trial court found otherwise.

After the attack, the defendant removed some of his outer garments. Police soon responded. When the defendant encountered law enforcement, he sought to avoid them and then lied about why he was in the area. Ultimately, police captured him. During recorded jail calls, the defendant called himself “stupid” for the way he got caught and lamented that he had been outside the police “perimeter” and then was spotted when he returned.

At trial, the defendant presented an insanity defense. He introduced testimony from a psychiatrist, who testified that the defendant suffered from a mental disease involving psychosis and severe mood symptoms. The psychiatrist opined that the defendant had an acute episode of psychosis and mood symptoms at the time of the offenses and that the episode then dissipated; she claimed that the defendant was too “disorganized” to have the ability to make the choice to attack the victim.

The defendant also contended that because he “established by a preponderance of the evidence that he was insane at the time of the offense,” the trial court erred in denying his motions to strike the two charges.

Held: Affirmed.

The Court first ruled that a reasonable finder of fact could conclude beyond a reasonable doubt that the victim sustained a permanent and significant injury to support the conviction for aggravated malicious wounding.

The Court then ruled that a reasonable fact finder, based on the evidence presented by the Commonwealth of the defendant’s planning and concealment, could have rejected the insanity defense. The Court found that a reasonable fact finder could have concluded that the defendant possessed the ability to resist the impulse to attack the victim, but instead chose to commit the crimes he did of his own volition. The Court pointed to the evidence that the Commonwealth presented of the defendant’s substantial planning and preparation. The Court also pointed out that the defendant engaged in behavior after the attack that indicated an effort to conceal his crimes.

In a footnote, the Court also considered whether the defendant’s evidence would have implicated 19.2-271.6. The Court noted that, in *Calokoh*, the Court had found that 19.2-271.6 does not provide individuals with a qualifying mental condition “an excuse or justification for what would

otherwise be criminal conduct.” Instead, presenting evidence of a qualifying mental condition under the statute may constitute a denial of an essential element of the offense. With this new evidentiary rule abrogating the common law rule that precluded all evidence of a defendant’s mental state unless the defendant raised an insanity defense, a defendant may now raise an insanity defense, or, short of that, satisfy the requirements of § 19.2-271.6. Thus, the Court explained, a defense of insanity is distinct from a claim that there was proof that a defendant lacked criminal intent based upon evidence admitted under § 19.2-271.6.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1694224.pdf>

Bribery

Virginia Court of Appeals - Published

Abouemara v. Commonwealth: June 6, 2023

77 Va. App. 719, 887 S.E.2d 751 (2023)

Mecklenberg: Defendant appeals his conviction for Bribery on sufficiency of the evidence.

Facts: Defendant operated a convenience store that featured “gaming” machines. On a night that the town was conducting proceedings about an investigation into the defendant’s business, the defendant appeared and publicly offered to make “a monthly donation” of \$500 per month to the town, if the town would give him, in return, a letter “in support of his machines that he has at his place of business.” The council voted to reject his offer.

After the meeting, the defendant told a council employee that he still wanted to donate \$200 to the town. The defendant presented the employee with a \$200 check, payable to the town and drawn on the account of his business. The town declined to deposit the check.

The defendant argued that, under § 18.2-447, his proposal was not a “quid pro quo” and did not constitute a bribe because it was not done in a clandestine manner.

Held: Affirmed.

The Court began by examining the history of the bribery code section, reaching back to Blackstone and the first version of § 18.2-447 enacted in 1786. In this case, the Court found that the evidence sufficed to show that the defendant violated § 18.2-447(1)(a) because he “offer[ed] . . . to confer upon another . . . any pecuniary benefit as consideration for or to obtain or influence the recipient’s decision, opinion, recommendation, vote or other exercise of discretion as a public servant.” The Court found that the evidence showed that the defendant knew he was asking the councilmembers to “vote” on his proposal. Although the councilmembers may or may not have formally voted on the proposal, they definitively decided not to accept it. Thus, the Court found that the evidence showed that

the defendant offered to confer a “pecuniary benefit,” “upon another,” “to obtain or influence” the councilmembers’ “decision, opinion, recommendation, [or] vote,” to issue a letter endorsing his gaming machines.

The Court explained that the crime of bribery is complete when a defendant “offers . . . any pecuniary benefit as consideration for or to obtain or influence the recipient’s decision, opinion, recommendation, vote or other exercise of discretion as a public servant.” The Court also ruled that there was sufficient evidence to support the trial court’s conclusion that the defendant proposed a quid pro quo—to wit, “something for something.”

Judge Chaney dissented.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0284222.pdf>

Burglary

Virginia Court of Appeals -

Unpublished

Jones v. Commonwealth: July 5, 2023

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

Facts: The defendant attacked the victim in her home. The victim had locked the defendant out of the house after he had become intoxicated. The victim testified that the defendant did not live with her, and she put him out and locked the door “so he would leave.” The defendant became enraged, punched a hole in the door to gain entry, and immediately went to a bedroom and retrieved his gun. The defendant fired his gun and then held the gun to the victim’s head.

The victim and defendant had resided separately. They sometimes stayed overnight at each other’s homes and the defendant kept some of his belongings at the victim’s house. The defendant did not pay rent or utilities for the victim’s house. Before the attack, the defendant had stayed overnight at the victim’s house for six consecutive nights.

At trial, the defendant argued that he was an invitee at the victim’s home and, as such, had a right to be there, but the trial court rejected his argument.

Held: Affirmed. The Court agreed that the evidence supported the trial court’s finding that the defendant broke into the house with the intent to commit assault and battery.

The Court acknowledged that a person cannot unlawfully break and enter a home which he has the right to occupy. However, the Court repeated that even a person authorized to enter a dwelling may be guilty of burglary if he exceeds the scope of his permission to do so, including by entering to commit a criminal act. In other words, the Court explained, an invitee’s permission or authorization to enter may be negated by his improper intent when entering.

The Court agreed that the evidence failed to demonstrate that the defendant either resided at the house or had permission to enter after the victim locked him out. The Court also emphasized that even if the defendant had permission to enter the victim's house after she locked him out, the defendant could not lawfully re-enter with the intent to assault the victim because that permission would have been negated by his intent to commit assault and battery.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0592223.pdf>

Child Abuse & Neglect

Virginia Court of Appeals – Unpublished

Garten v. Commonwealth: May 21, 2024

Henry: Defendant appeals her conviction for Felony Child Endangerment on Cross-Examination regarding Prior Bad Acts and sufficiency of the evidence.

Facts: The defendant drove recklessly with her child in the vehicle. An off-duty officer saw her driving and followed the defendant. The officer saw that the defendant was “driving all over the road,” swerving and braking, and driving into oncoming traffic. She almost collided with the officer's truck three or four times and nearly hit the guardrails several times.

A state trooper responded and found the defendant stopped in the middle of the road. After stopping, the defendant continued to behave erratically with the trooper. After the trooper arrested the defendant, she later acted erratically with a CPS employee in jail, refusing to explain her actions or provide basic information about her child.

At trial, the defendant testified in her own defense. The defendant testified that her car malfunctioned, and she attributed her driving behavior and demeanor to feeling “a little bit tired” and to the “harrowing experience” of being followed by the unfamiliar truck. The defendant testified that she “would never intentionally put [her] child in any danger” and she “would never endanger [her children's] lives.”

During cross-examination, the Commonwealth sought to impeach the defendant with questions about her previous involvement with CPS. The defendant objected and argued that the questions were not relevant because “someone doesn't have to have done anything to endanger their child to have a run-in with” CPS. The court overruled the objection, finding that the defendant had “put her credibility at issue.” The trial court admitted this evidence only to the extent it would discredit the defendant's prior statement about never endangering her child's life. The evidence was not admitted as proof that the defendant acted in conformity on the night of the incident, but instead to rebut her character evidence that she would never endanger her children.

On cross-examination the defendant admitted that CPS had investigated her for “truancy issues” related to her other children. The trial court then reiterated it would only allow “evidence that would discredit” the defendant’s prior statement about never endangering her child’s life and excluded as irrelevant any testimony concerning “truancy or some other menial issues.” At that point, the defendant acknowledged that CPS removed two of her other children because her home was in “poor condition” and that she had tested positive for drugs both at the time of the CPS investigation and approximately one week after the arrest.

The trial court convicted the defendant of reckless driving and of child neglect in violation of § 18.2-371.1(B)(1).

Held: Affirmed. The Court held that the evidence was sufficient to prove felony child endangerment under § 18.2-371.1(B)(1), and that the trial court did not err in allowing the challenged cross-examination.

Regarding the cross-examination, the Court found that the trial court did not abuse its discretion in finding that the defendant put at issue a character trait relevant to the offense and “opened the door” to cross-examination concerning that subject.

Regarding sufficiency, the Court noted that § 18.2-371.1(B)(1) required proof that (1) she committed a “willful act or omission in the care” of a child; and (2) the act or omission was “so gross, wanton, and culpable as to show a reckless disregard for human life.” The Court agreed that an objectively reasonable person would understand that this reckless and dangerous driving behavior would probably result in an injury to her child in the back seat. Although the record did not establish the defendant’s intoxication or impairment, the Court repeated that criminally negligent driving behavior does not require a specific finding of intoxication or impairment. The Court agreed that the totality of her conduct and surrounding circumstances were sufficient to satisfy the “gross, wanton, and culpable” standard of criminal negligence.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0258233.pdf>

Smith v. Commonwealth: August 15, 2023

Norfolk: Defendant appeals his convictions for Murder, Child Abuse and Neglect, and related charges on Jury Instruction and sufficiency issues.

Facts: The defendant repeatedly left the victim, his four-year-old son, in the care of his girlfriend’s fourteen-year-old son. Over the course of several months, the older son beat the child repeatedly until one day when he beat the victim to death. The defendant had been aware that the older child had been violent towards the victim.

During an autopsy, a physician determined that the victim died due to several severe beatings throughout the weekend. The physician noted that the victim’s body was covered with 80 to 100 bruises, some of which were in groups, suggesting they were grip marks or knuckle marks. There were

patterned injuries on the child's back suggesting he had been hit with a belt and sustained repeated injuries. The injuries were in various states of healing, indicating that the victim had sustained them over an extended period.

Police later interviewed the older child, who finally confessed to killing the child by punching him in the stomach while pinning him down with a knee. He also admitted to having choked the child earlier in the year.

A police investigation found that the defendant's cell phone contained photos, taken months before the murder, of bruises on the victim's body. The defendant admitted to police that the victim told him that the older child was hurting him, but the defendant did nothing but warn the older child to stop disciplining the victim, which the defendant admitted was ineffective. Someone also informed the defendant that the older child and his girlfriend were both abusing the victim.

The defendant was aware that the victim had come to harm while in the older child's care on other occasions. On one occasion, both boys had strangulation injuries that required emergency medical treatment at the hospital. Although the hospital warned the defendant, the defendant instead concocted a false narrative to protect himself from a CPS investigation. Three days before the victim's death, the defendant noticed bruises on the victim's body and saw that the victim was vomiting blood, in pain, and defecating. The defendant did not take the victim to the hospital, but instead again left the victim in the older child's care a couple of days later, which is when the victim finally died.

At trial, the parties agreed to use the Virginia Model Jury Instruction defining "willful." However, the defendant also proffered an additional proposed instruction regarding the meaning of "willful." His proposed instruction was as follows: "The term willful is stronger than voluntary or intentional; it is traditionally the equivalent of malicious, evil or corrupt." This proposed instruction used a Black's Law Dictionary definition of willful taken from *White v. Commonwealth*, 68 Va. App. 111, 119 (2017). The trial court refused the instruction, noting that the model jury instruction was sufficient.

Held: Affirmed.

Regarding the defendant's proposed jury instruction, the Court found that the model instruction the trial court granted was an accurate statement of law and provided the jury with proper guidance concerning a factual finding required for conviction. The Court explained that the trial court was not required to accept an additional instruction simply because it was taken from the language of an opinion. Accordingly, the Court found no abuse of discretion in the trial court's decision to refuse the defendant's proposed additional instruction on the term "willful."

The Court then concluded that the evidence was sufficient to prove that the defendant acted willfully under § 18.2-371.1(A). The Court agreed that the evidence was sufficient to prove that the defendant, like the defendant in *Barrett*, knew that the victim, was at risk of harm from the older child, and despite this risk, he repeatedly entrusted the victim to the older child's care.

In this case, the Court concluded that the defendant knew of the older child's propensity to injure the victim and recklessly ignored the prior situations in neglect of his duty to protect the victim. "Even assuming for a moment that Smith did not know that Robbie was the direct cause of L.C.'s injuries, he was, at minimum, aware that L.C. had been seriously harmed while in Robbie's care on multiple occasions, and he continued to leave L.C. in Robbie's care. A reasonable factfinder could conclude beyond a reasonable doubt that Smith's conscious decision to leave L.C. with Robbie while

unsupervised created a situation likely to cause L.C. serious injury and even the death that ultimately resulted. Thus, we find the evidence was sufficient to find that Smith’s actions were willful.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0346221.pdf>

Internet Solicitation and Child Exploitation Material

Virginia Court of Appeals – Unpublished

Carmack v. Commonwealth: March 5, 2024

Southampton: Defendant appeals his conviction for Soliciting a Minor on Venue grounds.

Facts: The defendant solicited the 11-year-old granddaughter of his roommate for a photograph of her not wearing clothes. The defendant was in Suffolk, where he resided, when he sent his solicitation to the child. The child was in Southampton when she received it.

At trial, the defendant contended the special venue provision of § 18.2-374.1(E) did not allow the trial court to hear his case because the unlawful act—soliciting photographs from a minor—occurred at the defendant’s home in Suffolk, not in Southampton where the minor received the message.

Held: Affirmed. The Court affirmed the trial court’s denial of the defendant’s motion to strike for lack of venue because it found that the language of § 18.2-374.1 encompasses both the sending and receiving aspects of solicitation. The Court held that the unlawful act of accosting, enticing, or soliciting a minor to produce child pornography occurs not only wherever the message is sent but also wherever it is received.

The Court explained that, as the unlawful act can occur in multiple jurisdictions, venue necessarily can be proper in multiple jurisdictions. In this case, the Court found that venue was proper under § 18.2-374.1(E) in two places: Southampton and Suffolk.

In a footnote, the Court observed: “Interestingly, the plain language of Code § 18.2-374.1(B)(1) does not consider the mechanism through which the target is accosted, enticed, or solicited. Rather, it is the transmission of the message from the sender and the receipt by the target that constitutes the unlawful act—whether through an in-person verbal communication or through a social media platform. This further supports the conclusion that the receipt by the target is part of the unlawful act because the transmission of the message is the criminal conduct not merely sending it or sending it via a particular medium.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0048231.pdf>

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

Facts: The defendant solicited a child over the Internet asking for pictures of her unclothed. The defendant instructed the child to “[t]ake [his] shirt off,” and offered the child, a seventeen-year-old boy, one thousand dollars to “take more than [his] shirt off.” The defendant brought up payment several times throughout the texts. He said he could “take care” of the child financially, offered one hundred dollars an hour or half an hour “to hang out,” and sent a photograph of at least nine hundred dollars in cash. During the lengthy exchange, the defendant urged the child at least four times to keep the messages between the two of them private and at least twice asked if anyone else was seeing them. In addition, after the child informed the defendant that he was “done” because the conversation was “weird,” the defendant implicitly offered him one thousand dollars to not tell anyone.

The defendant had his Snapchat application that he used for the texts and photographs set to delete them automatically after they were read or opened. The Snapchat application had been removed from the defendant’s mobile phone before it was examined by police about two weeks after the encounter.

At trial, the defendant argued that the evidence was insufficient because the Commonwealth did not prove his purpose in communicating with the victim was to persuade him to send a photograph in violation of either § 18.2-370 or § 18.2-374.1.

Held: Affirmed. The Court ruled that the evidence was sufficient to support the conclusion that the defendant communicated with the child with the requisite intent under § 18.2-374.3.

The Court first reaffirmed that when the indictment does not list the particular theory under which the Commonwealth is proceeding, the offense can be proved under any acceptable theory. In this case, the Court found that the indictment appeared to charge either § 18.2-374.3(B) or (D). In a footnote, the Court found that § 18.2-374.3(B) did not apply to the facts of this case.

The Court analyzed the conduct under subsection (D), explaining that to establish the requisite intent under §18.2-374.3(D), the Commonwealth can prove that the defendant’s communications were for the purpose of “moving forward with a scheme” of “propos[ing]” that the child “expose his sexual or genital parts to such person.” In this case, the Court found that the context surrounding the defendant’s instruction for the child to send him a photograph supports the reasonable inference that the defendant sent the messages via Snapchat with the purpose of convincing the child to send a photograph of his sexual or genital parts. Considering the amount of money offered and the defendant’s emphasis on secrecy, the Court agreed that the trial court could reasonably conclude that the defendant communicated with the child for the purpose of persuading him to send a photograph of his sexual or genital parts.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1592221.pdf>

Conspiracy & Solicitation

Virginia Court of Appeals - Published

Griffin v. Commonwealth: February 13, 2024

Winchester: Defendant appeals his convictions for Murder, Solicitation for Murder, and related offenses on Nolle Prosequi of Charges and Venue grounds.

Facts: The defendant ambushed, shot, and killed a man after an argument outside of the victim's home. A witness saw the shooting. After his arrest, the defendant solicited a fellow gang member with whom he was incarcerated to kill the witness.

A multi-jurisdictional grand jury (MJGJ) indicted the defendant on the charges of first-degree murder, use of a firearm in the commission of a felony, and possession of a firearm by a violent convicted felon. A regular Grand Jury separately indicted the defendant on the charge of solicitation of murder.

The defendant moved to dismiss the three MJGJ indictments without prejudice, asserting that the MJGJ "that handed down the indictments lacked impartiality, and there is grave doubt that the decision to indict was free from influences that rendered the MJGJ impartial." The trial court denied the motion, but afterward, the Commonwealth then moved to nolle prosequi the three MJGJ indictments. Although the Commonwealth denied any impropriety by the MJGJ, it moved to nolle prosequi the three MJGJ indictments "in an abundance of caution."

The Commonwealth noted that a nolle prosequi would provide the defendant with the relief he sought in his motion to dismiss. In addition, the Commonwealth emphasized that the defendant would not be prejudiced by the motion to nolle prosequi because he was being held without bond on the solicitation of murder charge that had been handed down separately by the regular grand jury.

The trial court granted the Commonwealth's motion over the defendant's objection. The Commonwealth sought new indictments for the same three charges from a different grand jury that same day, thereby enabling the parties to keep their previously set trial dates. Later that same day, a regular grand jury indicted the defendant on the same three charges that had been nolle prosequi'd. The trial court also ordered that, per § 53.1-187, the defendant would receive credit for the time he had served awaiting trial on the original charges.

After the re-indictment, the defendant and his fellow gang member spoke again about killing the witness. At this point, the fellow gang member had moved from the defendant's jail. To arrange the killing, the defendant and the gang member communicated using a woman as an intermediary. The woman who handled the communications lived in Winchester. At trial, over the defendant's objection, the court concluded that venue for the solicitation offense was proper in Winchester.

Held: Affirmed.

Regarding the Commonwealth's nolle prosequi, the Court held that the trial court did not err by granting the Commonwealth's motion to nolle prosequi the three MJGJ indictments as there was no evidence in the record of prosecutorial vindictiveness or prejudice to the defendant. The Court noted that the Commonwealth's decision to nolle prosequi the three MJGJ indictments resulted in the dismissal of the original charges without prejudice — the same relief that the defendant had sought in his motion to dismiss — and the defendant received credit for his time served while awaiting trial on the original charges. The Court found no evidence of prosecutorial vindictiveness as the Commonwealth reindicted the defendant on new charges that were identical to those that had been nolle prosequi'd.

Regarding venue, the Court held that the evidence was sufficient to give rise to a strong presumption that the defendant's solicitation of murder offense was committed within the jurisdiction of Winchester. The Court agreed that the facts showed that the solicitation to murder a witness consisted of a course of conduct that continued over an extended period and was only confirmed through the woman as the intermediary between the defendant and his fellow gang member — all while the woman was at her home in Winchester.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0042234.pdf>

Virginia Court of Appeals -
Unpublished

Harris v. Commonwealth: March 19, 2024

Fredericksburg: Defendant appeals his conviction for Conspiracy to Commit Grand Larceny on sufficiency of the evidence.

Facts: The defendant and a companion stole items from a retail store by placing stolen items in an empty duffel bag and then fleeing the store. Two days later, the defendant returned with two new confederates, arriving together in the defendant's vehicle. Together, the three collected items into a shopping cart along with an empty duffel bag. The defendant then took the cart into a fitting room. When he emerged, the duffel bag was now full. The defendant then fled the store with the bag, activating the store's alarm. The defendant's two confederates also concealed items on their person and continued to push carts around the store.

The store notified police, who responded. Officers intercepted the defendant's vehicle outside the store and surrounded it. As they did, the defendant's confederates received a phone call inside the store. They abandoned their duffel bag and other concealed items and fled to the parking lot. However, police captured the defendant's confederates before they could escape.

Police recovered the items that the defendant stole and placed in his duffel bag. The value of those items was \$952. The items remaining in the abandoned shopping cart were over \$600 worth of

merchandise. At trial, the defendant contended that the evidence failed to prove that the perpetrators agreed to shoplift. The defendant also contended that the evidence failed to prove that the amount involved in the conspiracy exceeded \$1,000.

Held: Affirmed. The Court held that the evidence was sufficient to prove beyond a reasonable doubt that the defendant and his companions conspired to commit larceny involving goods worth \$1,000 or more.

The Court found that the circumstantial evidence was sufficient to prove beyond a reasonable doubt that the defendant and his companions agreed to shoplift merchandise. The Court noted that, just as the defendant had previously stolen merchandise two days earlier by concealing the merchandise in a duffle bag, in this case he and his companions moved throughout the store and concealed items in their respective duffle bags.

Regarding value, the Court pointed out that the defendant's duffle bag, which held over \$950 in merchandise, was "very full," permitting a rational inference that he transferred as much merchandise as possible from the shopping cart before exiting the store, leaving over \$600 worth of merchandise in the cart. Although his confederates ended their shoplifting attempt after the police were notified, the Court agreed that the trial court could rationally find that the items in the abandoned duffle bag bore some value, even though the specific value was not proven.

In this case, the Court agreed that the evidence that the defendant gathered over \$1500 worth of merchandise in his shopping cart before entering a fitting room and concealing as much of that merchandise as possible in a duffle bag before leaving the store with the bag and without paying for the items, combined with the evidence that his companions were filling another duffle bag and concealing items in their clothing, was sufficient to prove that the defendant and his companions intended to steal as much merchandise as possible when they entered the store. The Court ruled that the evidence that they collected merchandise valued over \$1,000 was sufficient to establish that stealing the merchandise was the object of their agreement, even if they were ultimately thwarted in achieving that objective.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0105232.pdf>

Sayers v. Commonwealth: June 20, 2023

Norfolk: Defendant appeals his convictions for Grand Larceny and Conspiracy to Commit Grand Larceny on sufficiency of the evidence.

Facts: The defendant and his confederate drove to a store together, arriving in the same car. The two men walked through the parking lot, retrieved a shopping cart, and entered the store together. The men went directly to the electrical aisle where the electrical wire was kept. No surveillance cameras showed a view of the store aisles. A few minutes later, the men emerged from the electrical aisle together and proceeded toward the cash registers. A large spool of electrical wire was on the bottom rack of the shopping cart. As they approached the registers, the defendant walked quickly ahead of his

confederate, who was still pushing the shopping cart. The pair walked beyond all points of sale, including two open registers and self-checkouts.

After hurrying past all points of sale, the defendant and his confederate split up, then ran through the parking lot to their parked car. The pair both went to the driver's side of the car and could be seen bending over. They then drove away, leaving an empty cart in the adjacent parking space.

The entire episode lasted approximately six minutes. The store's inventory system also indicated that it had one spool of such wire in stock on the day of the incident, and none were sold that day. At trial, a loss prevention employee testified that one person could lift this wire spool by himself without injury.

Held: Affirmed.

The Court first ruled that the evidence permitted the trial court to conclude that the defendant and his confederate acted together in taking the spool of wire and carrying it away from the store, as they "pursued the same object, one performing one part and the other[] performing another part" to complete the theft. Accordingly, the Court ruled that the evidence proved beyond a reasonable doubt that the defendant was guilty of conspiracy.

The Court then ruled that it was reasonable for the trial court to infer that the defendant helped his companion load the stolen spool of wire into the car. For the Court, the circumstances showed a concert of action to steal the spool of wire. Thus, the Court held that there was sufficient evidence that the defendant committed grand larceny as a principal in the second degree.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0382221.pdf>

Schwartz v. Commonwealth: June 20, 2023

Warren: Defendant appeals his conviction for Conspiracy to Possess with Intent to Distribute on sufficiency of the evidence.

Facts: The defendant agreed to sell 200 capsules of "scramble," a mixture of heroin and other substances, to an undercover police officer. The parties agreed to meet in a parking lot. When the defendant and his confederates arrived, the defendant was in the front passenger seat while another man drove the car and a third man rode in the back seat.

When officers approached to arrest the men, the driver accelerated, striking a police officer and propelling him onto the car's windshield. Other officers shot at the car as it continued approximately 100 feet through the parking lot before the officer was thrown off the vehicle. The sedan turned around and sped through the parking lot again before crashing into an embankment.

As officers approached, one saw the driver pass something to the backseat passenger that "[c]ould . . . have been drugs." An officer also saw the back seat passenger moving around and "throwing stuff out of his pants and putting stuff into his pants." Before police could handcuff him, the defendant threw his cell phone on the ground "as if it was a football he was trying to spike."

Police took the defendant to the hospital, where he told police that after the police moved in, his companions spoke of a “bundle of drugs,” and one of them passed “a plastic bag of drugs” to the other. However, officers searched the sedan shortly after the incident but did not find any contraband. Nevertheless, after impounding the sedan, police received a tip from an informant that the drugs were in the fabric lining of the interior roof. They searched the sedan again and found three plastic baggies containing 150 capsules in the roof lining. One bag was near the driver seat; two were in the back passenger side of the liner. DFS determined that the capsules contained a total of 75.09 grams of a powder composed of Fentanyl and other controlled substances.

Held: Affirmed. The Court ruled that the totality of the evidence was sufficient for a rational trier of fact to conclude that the defendant’s companions knew that the contraband was hidden in the sedan and were engaged in a conspiracy with the defendant to sell it.

The Court agreed that a rational trier of fact could have found that the defendant and his companions drove from Maryland with a large quantity of fentanyl capsules intending to sell them to the officers. The Court began by acknowledging, however, that it was a legal impossibility for the defendant to conspire with the police to distribute controlled substances.

In this case, Court explained that the driver’s aggressive effort to escape when the officers attempted to arrest the group permitted the court to infer that the driver knew of the fentanyl’s presence and was there to further, promote, and cooperate in the defendant’s illegal venture. The Court rejected the defendant’s “bare speculation” that the driver may have eluded because he had outstanding warrants or possessed additional contraband, noting that this argument was not supported by any evidence in the record. In addition, the Court repeated that when flight may be “attributable to several causes, ‘consciousness of guilt’ could be inferred by the trial court if any one of those causes was the instant offense.”

The Court also found that the trial court also reasonably inferred that the defendant’s companions knew of and were participating in the defendant’s illegal venture based on their discussions and furtive movements in the sedan after the police arrived.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1032224.pdf>

Contempt

Virginia Court of Appeals

Published

Orndoff v. Commonwealth: February 6, 2024 (En Banc)

Rev’d Panel Ruling of June 6, 2023

Loudoun: Defendant appeals her conviction for Contempt on sufficiency of the evidence.

Facts: During a jury trial for Domestic Assault, 3rd or subsequent offense, the defendant, who was the apparent victim, appeared and testified. After the witness testified for eighty minutes, the trial court told the defendant that she appeared to be under the influence of narcotics or some other type of substance. The trial court asked her “Have you taken any medicines or narcotics or anything else that would influence you today?” She replied, “I recently came off all of my medication -- antidepressant, mood stabilizer -- and it’s affecting me.” When the trial court asked, “In what way?” the defendant explained that she had been taking these medications for over ten years and that without them, she felt very stressed and anxious “with this whole situation.” Before the defendant finished this explanation, the trial court inquired, “What did you take today?” In response to the trial court’s questions, the defendant ultimately admitted that she had smoked marijuana earlier that day. [Note: The trial took place in September 2021, after the General Assembly eliminated penalties for simple possession of marijuana – EJC].

The trial court declared a mistrial and summarily held the defendant in criminal contempt for “misbehavior in the presence of the court,” in violation of § 18.2-456, for testifying while voluntarily intoxicated. The trial court also summarily sentenced the defendant to ten days in jail. Although the trial court provided various basis for its ruling at the trial and in subsequent orders, the trial court’s final order explains that the contempt finding was based on the defendant’s “appearance as a witness in a felony jury trial in an intoxicated condition that caused unfair prejudice within the trial.” In its final order, the trial court stated that it did not consider the defendant’s admission to smoking marijuana in finding her in contempt.

A panel of the Court of Appeals reversed the conviction in a 2-1 ruling.

Held: Conviction Affirmed, Panel Reversed. The vote of the full Court was equally divided; because the ruling was a 6-6 tie, the Court simply affirmed the contempt conviction without issuing an opinion.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0973214.pdf>

Virginia Court of Appeals -
Unpublished

Washington v. Commonwealth: March 5, 2024

Chesapeake: Defendant, an attorney, appeals his Contempt conviction on sufficiency of the evidence.

Facts: The defendant is a defense attorney who was appointed to represent his client in a criminal case before the trial court. After suffering a death in his family on the first hearing date, the defendant contacted the Commonwealth, and the parties agreed to continue the case until a second date, a week later, to set a trial date. However, on that second date, after court had begun, the defendant called the clerk’s office to inform the circuit court that he would be late.

Before the defendant arrived, his client signed a control order to continue the case one week to a third date. On that same morning of the second hearing date, the circuit court judge saw the defendant in the courtroom. The judge observed the defendant talking to the assistant Commonwealth's attorney handling the case. The defendant later left the courtroom without any contact with the court.

The defendant did not appear at all on the third date. The trial court issued a rule to show cause against the defendant. At the show cause hearing, the defendant stated that he was not present on the third date because he had no knowledge that there was a hearing in the case scheduled for that day. The trial court found the defendant guilty of the contempt of court charge and fined him \$250.

Held: Affirmed.

The Court observed that the defendant did not even contact the court after he was late to the second hearing, and he then completely missed his client's third hearing. At both hearings, the defendant's absence caused the trial court to continue the criminal case. The Court concluded that the defendant's lack of attention to his client's case (and his total failure to follow up with the court after getting to court late the first time) showed the necessary recklessness that satisfied the intent element for a conviction of contempt of court.

The Court pointed out that the defendant's lack of awareness of the third date only occurred because he was thirty minutes late to the second hearing and then failed to learn what happened in his absence. The Court reasoned that, having missed the second hearing after arriving late, the defendant had a professional duty as his client's attorney to contact the court or otherwise find out about what had happened in his absence. The Court pointed out that, if he had done so, he would have learned about the order that was entered that continued his client's case to a new date.

The Court agreed that the evidence was sufficient to establish that the defendant committed "[m]isbehavior of an officer of the court in his official character" in violation of § 18.2-456(A)(4). In addition, the Court agreed that the evidence was sufficient to establish that the defendant committed "[m]isbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice" under § 18.2-456(A)(1) because he was twice absent in a one-week period when his client's criminal case was called and because he did not follow up with the circuit court to determine what had happened with his client's case when he arrived too late for the second hearing (which caused his client's case to be continued twice). The Court wrote: "The bottom line is that Washington delayed the trial court's actions because of the cavalier way in which he treated his absences from court."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1252221.pdf>

Nguyen v. Commonwealth: June 27, 2023

Alexandria: Defendant appeals his conviction for Contempt on Waiver of his Right to Counsel and sufficiency of the evidence.

Facts: The defendant posted bond as a surety bail bondsman for the release of a man who was being held on several charges committed against the victim, including rape, strangulation, abduction, burglary, forcible sodomy, and malicious wounding. In doing so, the defendant signed a recognizance agreeing he would “obey all of the terms and conditions” on the recognizance form. One such term was that the man was to remain at the man’s parents’ home.

During the next couple of months, the defendant repeatedly invited the man to leave his parents’ home to come to work with the defendant as a bail bondsman and hang out as friends. The defendant eventually invited the man to stay at the defendant’s home while the defendant was on vacation. Before the man arrived, the defendant hid his firearm under towels. While the defendant was out of town, the man stole his gun and car and murdered the victim.

The Commonwealth charged the defendant with Contempt in violation of § 18.2-456(A)(5),

The defendant hired his own attorney. At trial, during the defendant’s case, the defendant moved for a new attorney, asking for a public defender. The court replied that it would be “too late in the game.” The defendant responded, “I can represent myself, sir, I can do it.”

The trial court conducted an extensive colloquy with the defendant about self-representation. The trial court explained the consequences of self-representation and a potential guilty verdict; that the defendant would be bound by the rules of evidence, that the defendant could not change his mind if the court allowed him to proceed pro se, that the defendant would have a right to appeal, and that the defendant need not testify in his own defense. The trial court asked the defendant, “You feel able, and competent, given all the testimony you’ve heard, and whatever there is to come . . . to present the rest of the case as you see fit, is that correct?” The defendant replied, “Yes, I’m very competent.” The trial court concluded the defendant was making his decision competently and permitted him to represent himself for the remainder of the trial.

On appeal, the defendant argued that his waiver of his Sixth Amendment right to counsel was not (1) timely, clear, and unequivocal; or (2) knowingly, intelligent, and voluntary. He argued that he simply wanted a new attorney, not to represent himself.

Held: Affirmed.

Regarding waiver of the right to counsel, the Court repeated that even if a defendant does timely, clearly, and unequivocally waive his right to counsel, such waiver is valid only if done knowingly, intelligently, and voluntarily. However, the Court also explained that no specific instruction or form of questioning is required. The Court also pointed out that the defendant consistently made clear that if he could not have a public defender appointed mid-trial, he wanted to represent himself.

The Court concluded that the defendant’s waiver of his right to counsel and exercise of his right to self-representation were knowing and intelligent. The Court refused to find that the trial court erred in telling the defendant it was “too late in the game” to replace his counsel.

Regarding sufficiency, the Court examined § 18.2-456, repeating that the Virginia contempt statutes do not limit the court’s power where it exercises its inherent common law power to punish for indirect contempt. However, since the parties proceeded to trial under § 18.2-456(A)(5), the Court also limited its examination to that code section.

The Court explained that a court may order a defendant's release on bail conditioned on the posting of a bond as well as other terms, and the recognizance memorializes those conditions and provides notice and an enforcement mechanism for revoking bail if terms are violated. The Court then ruled that a recognizance is part of the court's bail "process," and so long as that process is "lawful," disobedience of or resistance to the obligations of the recognizance can support a contempt conviction under the language of § 18.2-456(A)(5).

The Court ruled that the trial court did not err in finding that the defendant had notice of the recognizance's terms. However, while the Court agreed with the trial court that the defendant's actions qualified as contempt under § 18.2-456(A)(5), the Court disagreed that a bail bondsman is personally liable for the monitoring of the conditions of bond and ensuring that all the items indicated in the bond instrument are complied with.

The Court noted that the statutes governing bail bondsmen impose a financial obligation on a bail bondsman and permit the bondsman to arrest the defendant for violating terms or conditions of a bond, but agreed with the defendant that no statute requires a bondsman to make such an arrest. The Court noted that conditions of bond are individualized and personal, frequently limiting who a defendant may have contact with and when, or what a defendant may do within his own home (e.g., restricting the consumption of alcohol or use of the internet).

The Court contended that requiring a bondsman to ensure that a defendant is complying with every bond condition or be held in contempt of court would be both invasive for defendants and unworkable for bondsmen. The Court wrote: "In the ordinary course, if a bondsman is certain a defendant is in violation of a bond condition, he has a financial incentive to arrest the defendant, and surrender him to the court to end the contractual obligation early and ensure full payment. But that incentive is only financial." Therefore, the Court disagreed with the trial court that the surety bail bondsman "is required not only by law, but by the terms of the bonding instrument . . . to assure compliance with all the other issues on the bond document."

However, the Court agreed with the trial court that the defendant was "personally involved" in "willful" violations of the recognizance and that this disobedience to lawful process qualified as contempt under § 18.2-456(A)(5). In this case, the Court noted that the defendant pledged as surety bail bondsman to obey all of the terms and conditions of the recognizance, including the condition that the man remain at a specific address. Instead, the defendant showed a "deliberate and studied effort to disobey" the recognizance and bond conditions by creating opportunities for the man to be in locations other than his parents' home and encouraging the man to do so. Thus, the Court ruled that the evidence was sufficient to convict the defendant of criminal contempt for disobeying the court's order.

The Court wrote: "Rarely will a court's bond order or recognizance put any person in the position where his own affirmative conduct would itself constitute a criminal violation of a recognizance written for another person's release. But the unique circumstance of this case is that Nguyen invited the peril of criminal contempt by actively, affirmatively, and directly violating the recognizance and his obligation in the bail process. To sum up, we do not hold that the language in this recognizance obliged Nguyen to monitor Bouaichi's compliance with its terms or report any non-compliance he learned about. Instead, we hold the court was not plainly wrong to find that Nguyen's affirmative actions to encourage and facilitate Bouaichi regularly leaving his parents' home constituted disobedience of the court's order, in violation of Code § 18.2-456(A)(5)."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0517224.pdf>

Contributing to the Delinquency of a Minor

Virginia Court of Appeals - Published

Creekmore v. Commonwealth: December 19, 2023

79 Va. App. 241, 895 S.E.2d 783 (2024)

Henrico: Defendant appeals her conviction for Contributing to the Delinquency of a Minor on sufficiency of the evidence.

Facts: The victim's mother began sexually abusing the victim when the victim was in elementary school. When the victim turned 15, the victim experienced a panic attack at school and the school referred her to the defendant, who was a licensed psychologist. During either her second or third session, the victim reported her mother's sexual abuse to the defendant. In response, the defendant suggested to the victim that she defend herself by using her own hands to block her mother and by telling her mother to stop. The defendant also recommended a book to the victim. The victim followed the advice, but the abuse continued, which the victim again reported to the defendant at her next session.

The defendant then recommended that the defendant's mother and father join in a group therapy session. The victim's father joined in the remaining two therapy sessions but otherwise told the defendant that he did not want to be involved. He confirmed, however, that the victim was "not lying." The victim stopped attending counseling with the defendant following her fifth session, when the father declared that the sessions were no longer necessary.

The defendant did not file a report of the abuse until one month after the victim's last session. The defendant claimed that she made an anonymous report. The day of the report, a CPS investigator responded to the victim's removed the victim from the home.

A police investigator asked the defendant why she had not reported the abuse earlier. The defendant stated that she "didn't know if she believed the child." The defendant admitted, however, that after the fifth session the defendant realized that the victim had been telling the truth.

At trial, the defendant argued that her conduct in providing counseling services to a child, including a significant delay in reporting a minor patient's abuse, was insufficient to constitute willfully contributing to, encouraging, or causing any act, omission, or condition that rendered a child abused or neglected in violation of § 18.2-371.

Held: Affirmed. The Court held that the evidence, including the defendant's specific advice and conduct of during the therapy sessions, as well as the neglect of her statutory duty to report suspected

abuse and neglect, was sufficient for the trial court to conclude that she violated § 18.2-371. The Court found that, notwithstanding the time in which a mandatory reporter must make a report of suspected abuse and neglect of a child, the defendant violated her statutory duty and made no such report until approximately 30 days following the last counseling session.

The Court noted that the defendant did not make a report after the second or third session, when the abuse was first revealed, nor did she make a report following the reporting of an additional instance of abuse, nor did she make a report following the father's admission that he would not involve himself in stopping the abuse. The Court wrote that the defendant "by her own actions, caused a 15-year-old to remain in her abusive and neglectful home, where additional abuse and neglect continued. Clearly, it cannot be ignored that following the report to CPS, R.P. was immediately removed from her home and at the time of the trial of this matter had not been returned to her parents."

The Court rejected the defendant's argument that because the mandatory reporting statute only subjected the defendant to a fine for failing to report sexual battery, the legislature did not intend her conduct to be criminalized. The Court noted conduct may be prosecuted when it violates more than one statute. In this case, the Court pointed out that the statutory elements set forth in the contributing statute are entirely different from those set forth in the mandatory reporting statute. The Court also criticized the defendant for failing to recognize that her prosecution was not simply for the failure to report. The Court explained that the defendant "faces prosecution due to her violation of a statutory duty, her specific advice, and her conduct during treatment—all of which greatly impacted R.P., who continued to be abused and neglected."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1487222.pdf>

Destruction of Property

Virginia Court of Appeals - Published

Barnes v. Commonwealth: April 23, 2024

Fredericksburg: Defendant appeals his convictions for Shooting Into an Occupied Building and Property Destruction, alleging Inconsistent Verdicts, and on sufficiency of the evidence.

Facts: The defendant, armed with a gun, confronted another man at a shopping center. When that man drew a firearm, the defendant drew his firearm. The defendant started shooting at the man and two men exchanged gunfire. The defendant shot and killed the other man. The defendant also shot the occupied stores behind the man, shattering glass entrances.

At trial, the jury acquitted the defendant of second-degree murder and use of a firearm in the commission of a murder, while finding the defendant guilty of unlawfully discharging a firearm into an occupied building and unlawful destruction of property.

The defendant objected that these verdicts were inconsistent, since “the jury determined that [he] acted lawfully (self-defense) when shooting at the decedent with regard to murder and the related firearms offense, but acted unlawfully when the same conduct damaged property around the decedent.” The defendant contended that the jury’s verdicts, because inherently inconsistent, constituted an “actual irregularity,” and as such, should have been set aside.

Held: Affirmed.

The Court acknowledged that Virginia law does address “irregularities” with respect to, among other things, juror misconduct and juror lists. However, the Court clarified that an apparently inconsistent jury verdict is not an “irregularity.” The Court rejected the defendant’s reliance on the *Akers* ruling, explaining that the *Akers* ruling is only applicable to elemental inconsistency in bench trial verdicts.

In a footnote, the Court rejected the defendant’s contention that the jury found that he acted in self-defense. In this case, the Court explained that, no less than in any other case, it did not know why the jury acquitted the defendant of some of the charges. The Court wrote: “While we may conjecture the jury’s motivation, such is merely imaginative reasoning and offers no window into the actual motivations and beliefs of the jurors. We simply do not know why the jury acquitted Barnes of the second-degree murder and use of a firearm in commission of a murder charges.”

Regarding sufficiency of the evidence, since the shooting happened in the afternoon during normal business hours on a day that the defendant had visited one of the stores, the Court found that it was reasonable for the jury to conclude that the defendant knew or should have known that the stores were occupied. The Court concluded that the jury could infer that although the defendant may not have specifically intended to shoot the occupied stores or damage them, he knew or should have known what would likely result, not least because the stores were directly in the line of fire.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0991232.pdf>

Disorderly Conduct

Virginia Court of Appeals - Unpublished

McVey v. City of Newport News: December 12, 2023

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

Facts: The defendant taunted police trainees and shouted racially charged slurs outside a police department. An officer saw an American flag hanging upside down in a nearby tree on police station grounds, removed the flag, and walked back toward the police building. The defendant confronted the

officer, alleged the flag was his, and demanded its return. The officer refused and stated that the flag had been abandoned.

The defendant followed the officer inside the police station and became loud and disruptive. He confronted a civilian working at the front desk and accused her of “making a face at him.” The employee left her station and walked away. The officer demanded that the defendant leave the building and began escorting him outside. The defendant continued his loud and disruptive behavior, and the officer announced that he was under arrest for disorderly conduct and trespassing and took him into custody.

At trial, the defendant argued that the evidence failed to “prove he engaged in conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed.” The jury convicted the defendant of disorderly conduct but acquitted him of trespassing.

Held: Affirmed. The Court concluded that the defendant interrupted an on-going training class and his refusal to cease the disruptive behavior would cause “a reasonable officer to respond with physical force” to stop the defendant’s harassment.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1701221.pdf>

DUI and Refusal

Virginia Court of Appeals - Published

Smith v. Commonwealth: September 5, 2023

78 Va. App. 371, 891 S.E.2d 414 (2023)

Caroline: Defendant appeals his conviction for DUI on Retroactivity of the Bar on Certain Traffic Stops, Admission of the DMV Transcript, and Admission of Expert Testimony.

Facts: The defendant drove while intoxicated after having two previous convictions for that offense. At the time of the stop, in February 2021, the officer’s reason for stopping the defendant was for driving with a defective tag light in violation of § 46.2-1003. Prior to trial, the defendant argued that the March 2021 amendment, which added subsection C to Code § 46.2-1003 and barred a law-enforcement officer from stopping a person for driving a motor vehicle with defective vehicle equipment, was retroactive. The trial court rejected the argument.

At trial, to prove that the defendant had two prior DWI convictions, the Commonwealth introduced a DMV transcript showing that the defendant was convicted in the Henrico County General District Court of driving while intoxicated in May 2016, and driving while intoxicated, second offense within 10 years, in June 2020. The Commonwealth also presented the June 2020 court order, signed by the judge, stating that the defendant pleaded guilty to the DWI-second offense. The Commonwealth did not offer the court order reflecting the DWI-first conviction in 2016. The trial court denied the defendant’s motion to exclude the DMV transcript.

The trial court excluded the certificate of analysis showing the defendant's BAC. At trial, over the defendant's objection, the Commonwealth called Dr. Jon K. Dalgleish from DFS as an expert on the effects of alcohol on a typical individual. The defendant objected to Dr. Dalgleish's expert testimony about the effects of alcohol on the body after the court excluded the certificate of analysis, but the trial court overruled the objection.

In the defendant's case-in-chief, the trial court received into evidence a letter addressed "To Whom It May Concern," signed by a deputy clerk for the Henrico County General District Court. The letter identified the defendant and the case number for the DWI-first conviction shown on the DMV transcript. The letter stated: "After conducting a search for the above referenced case, we are unable to locate it at this time." The defendant argued that the letter negated the Commonwealth's proof that the defendant was convicted of the requisite "first" offense, but the trial court rejected the argument.

Held: Affirmed.

First, the Court rejected the defendant's argument that the stop was unlawful. The Court repeated that even if an officer uses the defendant's minor traffic offense as a legal pretext to stop a car, it does not invalidate the reasonableness of the stop under the Fourth Amendment. In this case, as in *Montgomery, Street*, and many other recent cases, the Court ruled that the officers who stopped the defendant in February 2021 because his tag light was out could not have stopped him "in violation of" subsection C because that subsection had not yet become law.

Regarding the defendant's prior conviction, the Court rejected the defendant's reliance on the clerk's letter and the *Mwangi* case. The Court concluded that the clerk's letter here did not rebut the DMV transcript as a matter of law. Instead, the Court reasoned that the letter reported only that the clerk could not "locate" the file "at this time" and did not show that the criminal case never existed or that the DWI-first conviction was invalid because the judge failed to sign the disposition. The Court concluded that, absent decisive rebuttal evidence, the DMV transcript was "prima facie evidence" of the first and second DWI convictions. The Court pointed out that, although the conviction order was not introduced to corroborate the May 2016 conviction, prior convictions may be proved by any competent evidence.

The Court also noted that both the second conviction order and the DMV transcript reported the June 2020 conviction as a second DWI offense, corroborating that the May 2016 conviction shown on the DMV transcript was the first DWI conviction. The Court reasoned that it was reasonable for the jury here to have concluded from the DMV transcript, together with the defendant's conviction order for a second DWI in 2020, that the defendant had been convicted of two prior DWI offenses within the preceding ten years.

As for the DMV transcript, the Court ruled that, as "prima facie evidence" of the defendant's two prior DWI convictions, the DMV transcript had substantial probative value. The Court found that the trial court could properly conclude from the transcript that the defendant would not suffer unfair prejudice from the transcript's admission.

Regarding the expert testimony, the Court repeated that § 18.2-266 does not require proof of the defendant's BAC to prove that he was driving while intoxicated. The Court ruled that the trial court did not abuse its discretion in admitting Dr. Dalgleish's testimony about how intoxication affects a person's behavior. Without evidence to show the defendant's intoxication based on his BAC, the Court

noted that the Commonwealth depended on the officers' observations, as well as on the dash-camera video. The Court reasoned that Dr. Dalgleish's testimony helped the jury understand how the defendant's behavior reflected being under the influence of alcohol. The Court also reasoned that that testimony was "beyond the knowledge and experience of ordinary persons," under Va. R. Evid. 2:702(a)(ii), and it assisted the jury to understand that what the officers observed during the field sobriety test evidenced the defendant's intoxication.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0169222.pdf>

Virginia Court of Appeals -
Unpublished

Williams v. Commonwealth: May 28, 2024

Pittsylvania: Defendant appeals her conviction for DUI on Admission of a Certificate of Analysis.

Facts: The defendant drove while intoxicated. An officer arrested the defendant and obtained a breath sample from the Intoxilyzer, resulting in a .20 BAC.

When the machine tried to print the result, the paper alignment was off, and the information did not display in the correct boxes on the certificate of analysis form. The officer threw away that first, misaligned printed result. He attempted to reprint it, but it misaligned again. The officer took the defendant in front of the magistrate to continue the charging process, intending to go back and fix the printer issue and provide the defendant with a printed copy afterward.

After the magistrate issued the warrant to hold the defendant, the officer was dispatched to another call involving a fight. When he arrived back at the jail an hour and a half later, he fixed the machine and printed the results. However, the defendant had already been released from the jail. The certificate of analysis form asks the operator to check a box indicating either that the arrestee received a copy and signed the form or that the arrestee refused to sign for a copy of the certificate. Confused as to which box to check, the officer opted for the "refused" box. On a second copy he intended to provide the defendant, he wrote above the checked box that she truly had not refused to sign, but that she did not have a chance to receive a copy due to the printer issue. The officer then attached his printout copy of the certificate to the court paperwork.

At trial, on appeal of her DUI conviction in the general district court to the circuit court, the defendant argued that the certificate of analysis of the breath test was not admissible. She asserted that because the officer did not comply with a requirement of § 18.2-268.9 by failing to give the defendant a printed copy of the certificate at the time of the test, the trial court should exclude the certificate and therefore strike the sentencing enhancement applicable to a BAC of .20. The trial court overruled the objection, finding that the officer's actions amounted to "substantial compliance" with the procedural requirements and that the breath test result was therefore admissible under § 18.2-268.11.

Held: Affirmed. The Court affirmed the trial court's finding that the officer substantially complied with the statutory requirements and that the certificate of analysis was admissible.

The Court rejected the defendant's argument that she was prejudiced by the failure to give her a copy of the printout because of the enhanced punishment charged in the warrant. The Court explained that there is a difference between the prejudicial effect of evidence being admitted at trial and a delay in receiving inculpatory evidence. The Court complained that the defendant presented no argument that receiving the paperwork in discovery rather than at the time of the test prejudiced her ability to defend herself at trial.

The Court noted that, under the substantial compliance statute, the defendant was permitted to present evidence that she was prejudiced by the procedural failure, but she presented none at trial. The Court also noted that the officer's explanation for why the defendant did not receive a copy was "exceedingly reasonable" with no evidence of bad faith. Thus, the Court ruled that the procedural violation in this case was "minor, trivial, and nonmaterial."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1291233.pdf>

Fitzgerald v. Commonwealth: January 23, 2024

Botetourt: Defendant appeals his conviction for DUI on Probable Cause and Admission of Retrograde Analysis issues.

Facts: The defendant drove while intoxicated and crashed into two other vehicles. The responding officer established that the defendant was at fault for the substantial vehicle collision that produced multiple serious injuries. Although the officer did not initially notice any odor of alcohol, once he removed his mask, he smelled an odor of an alcoholic beverage coming from the defendant and noted that the defendant had glassy eyes.

When the officer first asked the defendant if he had consumed any alcohol that day, the defendant stated that he had not, but later admitted having consumed nine ounces of beer that afternoon. On field sobriety tests, the defendant failed multiple tests. The defendant consented to a preliminary breath test, which indicated he had been consuming alcohol, and later returned an Intoxilyzer result of 0.05 grams per 210 liters of breath. At trial, the defendant argued that the officer lacked probable cause for arrest.

At trial, Dr. Trista Wright, a DFS forensic toxicologist, provided expert testimony on a retrograde extrapolation of the defendant's BAC at the time of the collision. That extrapolation also indicated that the defendant had been consuming alcohol prior to his collision and that the amount he had consumed had been in excess of what he reported to the officer. He also objected to the trial court considering Dr. Trista Wright's retrograde extrapolation.

The trial court made no factual finding about the defendant's BAC at the time of the collision under Code § 18.2-266(i). In fact, the court made clear that it afforded the defendant the benefit of the rebuttable presumption against intoxication provided by § 18.2-269(A)(1) and ruled that "[t]he

presumptions contained in Code § 18.2-269 are not applicable” when contemplating conviction under § 18.2-266(i).

Held: Affirmed.

The Court agreed that the totality of the circumstances of the collision, the defendant’s contradictory statements about alcohol consumption, his poor performance on the field sobriety tests, and the positive preliminary breath test result were sufficient to establish probable cause to arrest for suspicion of driving under the influence of alcohol.

Regarding the retrograde analysis, the Court noted that it is not impermissible for a trial court to consider retrograde extrapolation testimony in a prosecution alleging a violation of § 18.2-266(ii). The Court agreed that, from the totality of the circumstances, a rational trier of fact could conclude beyond a reasonable doubt that at the time the defendant was driving and caused a collision, alcohol so affected him as to impair his ability to operate safely a motor vehicle.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0331233.pdf>

Filipeanu v. Commonwealth: October 10, 2023

Alexandria: Defendant appeals his conviction for DUI Maiming on sufficiency of the evidence.

Facts: While heavily intoxicated from the combination of alcohol, alprazolam, acetone, and isopropanol in his blood, the defendant drove in a grocery store parking lot, where many pedestrians were walking to and from their vehicles. The defendant was not aware of the vehicles around him and “got scared” when his SUV reversed because the parking lot was so busy. Due to his intoxication, however, the defendant’s attempt to brake resulted in him stepping on the gas so hard that, within seconds, he was travelling twenty-two miles per hour in reverse. The defendant’s SUV pinned the victim against his own car, amputating his legs.

Immediately after the crash, the defendant remained in his SUV with his head leaned back toward the seat. After paramedics arrived, he awkwardly stood over the victim’s legless body and blankly stared at the paramedic as she repeatedly instructed the defendant to move so that she could administer life-saving treatment. Later, when talking to the police, the defendant was disoriented, unstable on his feet, and “stared” at the ground. He also failed each field sobriety test. The defendant stated that he only drank four or five beers and a glass of port the previous evening and was “not feeling bad” when he drove to the grocery store.

The defendant’s BAC was 0.106 several hours after the accident. In addition, the defendant had acetone, isopropanol, and therapeutic levels of alprazolam in his blood. At trial, Dr. Kevin Schneider, a forensic toxicologist with the Department of Forensic Science, testified. He explained how that cocktail of central nervous system depressants had an “additive” effect, resulting in a more “severe” reduction in his coordination, balance, reaction times, movements, and thoughts.

At trial, the defendant argued that, while his actions may have constituted ordinary negligence, the evidence failed to establish that he was criminally negligent.

Held: Affirmed.

The Court examined the elements of § 18.2-51.4(B), noting that the Commonwealth must prove beyond a reasonable doubt that the defendant (1) drove while intoxicated, (2) drove “in a manner so gross, wanton, and culpable as to show a reckless disregard for human life,” and (3) “unintentionally cause[d] the serious bodily injury of another person resulting in permanent and significant physical impairment.” The Court focused on the second element and concluded that the defendant’s decision to drive in a busy parking lot while so heavily intoxicated supported a finding that his series of negligent acts rose to the level showing a reckless disregard of human life.

The Court distinguished this case from the *Coomer* case, noting that the defendant in that case attempted to avoid an accident by driving below the speed limit and “reacted quickly enough to avoid a serious accident.” In this case, the Court pointed out, the defendant did not take any actions to avoid a crash and was so intoxicated that he could not properly react after realizing his SUV was reversing. Thus, the Court ruled that the evidence in this case was sufficient to support a finding that the defendant acted with criminal negligence.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1315224.pdf>

Spinner v. Commonwealth: August 15, 2023

Lynchburg: Defendant appeals his convictions for Involuntary Vehicular Manslaughter, Hit and Run, and DUI on Admission of Witness Testimony, Video Evidence, a Certificate of Analysis, and HGN testimony.

Facts: The defendant drove while intoxicated and struck and killed a woman who was crossing the street. The video recording of the crash reflects that the car did not slow down after impact with the victim, nor did it stop at the scene. Instead of stopping immediately, the defendant circled the block, parked the car a block away, smoked a cigarette, and then returned to the collision scene on foot.

Despite the obvious damage to the driver’s windshield, headlamp, and side mirror, the defendant first lied and told the responding officer that someone else hit the victim. On further questioning, he admitted to having hit the victim, but claimed that he did not stop sooner because he did not know he had hit someone. He also testified at trial that he knew he hit “something” but did not realize at the time “it was a person.”

The defendant told the investigating officer that he had consumed alcohol in the early morning hours but none since he fell asleep at 5:00 a.m. that morning. The defendant failed FSTs, and the officer arrested the defendant. The officer first conducted a breath test, and then obtained a search warrant for the defendant’s blood.

One of the field sobriety tests that the officer administered was an HGN test. At trial, the officer testified that bodies are affected by alcohol consumption. Specifically, he testified that with a nystagmus

field sobriety test, he looked for involuntary eye movement that can be present due to alcohol consumption. The defendant objected to this testimony, arguing that only a medical expert could testify about the effects of alcohol on the body. The trial court overruled the objection and allowed the testimony. The officer described how he conducted the nystagmus test and explained it was the “standard way that the test is administered.” He stated that he noticed a mild “nystagmus and jerking motion of the eye” during the test.

During the breath test, the officer forgot to inform the defendant of his right to observe the breath test process, the blood alcohol reading it produced, and the equipment used to perform the breath test, even though he attested on the certificate that he had in fact done so. However, the defendant was physically present during that entire process until the end of the process when the test results printed out on the printer of the machine. The officer observed the defendant for twenty minutes before conducting the breath test to ensure that the defendant did not burp or belch before the test, which would affect the test’s accuracy. The defendant was present through the entire procedure and was provided with a copy of the printout of the results. The officer also allowed the defendant to observe the test results and gave him a copy of those results.

At trial, the officer testified about his qualifications, the process, and the equipment he used for the test. He explained that he was a licensed breath test operator and used equipment approved by the Department of Forensic Science. The defendant objected to the admission of the certificate based on the officer’s failure to inform the defendant of his rights to observe, but the trial court overruled the objection and admitted the breath certificate.

At trial, DFS toxicologist Trista Wright testified. She had analyzed the defendant’s blood specimen and found a BAC of .038%. Dr. Wright also explained that she could calculate what the defendant’s BAC was at the time of the crash through a “retrograde extrapolation,” an analysis that determines an individual’s BAC at an earlier time based on specific information. To determine the appellant’s BAC using this method, Wright needed to know when he last consumed alcohol and that no alcohol was consumed after the accident. Over the defendant’s objection, Wright opined, based on the breath test certificate, the blood analysis result, and the information about the defendant’s last drink of alcohol, that the defendant’s BAC was between .08 to .13% by weight by volume at the approximate time of the crash.

The defendant argued that Dr. Wright’s retrograde extrapolation testimony was inadmissible under Rule 2:702(b), which provides that speculative testimony is not admissible. He suggested that the extrapolation was based on the unproven assumption that he did not consume alcohol after the accident. The trial court overruled his objection.

At trial, the defendant’s cousin testified. The defendant objected because the cousin had not been on the Commonwealth’s witness list and instead the Commonwealth only disclosed his name and identity two days before trial, rather than 21 days before trial as ordered. According to the prosecutor, she was unable to contact the cousin until two days before trial. She argued that there was “no surprise” because the defendant had originally subpoenaed the cousin as his own witness. The court allowed the testimony over the defendant’s objection.

At trial, the Commonwealth also introduced a surveillance video from a nearby store. The store owner testified that she had video surveillance cameras at her store. Her son programmed the surveillance system, which included a date and time stamp synchronized to the internet clock. She

noted that she and her son were the only ones with access to the video recordings. Following the incident, the owner saved the parking lot video from the relevant time to a DVD and provided it to the police. The surveillance system allowed the owner to download segments of the video but not to edit the recordings.

The defendant objected that the video was inadmissible under the “silent-witness theory” because the witness was unable to testify as to “the process by which the video was made.” The trial court overruled his objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the cousin’s testimony, the surveillance video, Dr. Wright’s expert testimony on retrograde extrapolation, or the officer’s HGN testimony, and it agreed that the evidence supported the findings that the defendant had knowledge someone was injured as a result of the crash and that he failed to stop immediately as required by statute.

The Court first addressed the admission of the cousin’s testimony, despite the pretrial order. The Court rejected the defendant’s contention that the lack of notice deprived him of the “opportunity to research, vet, and discuss with” with witness what he knew and why the Commonwealth called him as a witness, finding that his claim of alleged prejudice was both general and speculative. The Court complained that the defendant did not specify any portion of the cousin’s testimony that surprised him, nor did he explain how an earlier disclosure would have benefited his defense or altered the course of the trial.

Regarding the video, the Court ruled that the owner’s testimony provided the trial court with a sufficient basis to find that the video was what the Commonwealth claimed it to be: an accurate recording of the traffic accident that occurred outside her convenience store on the date of the crash. The fact that the owner did not have formal training on the computer recording system and was unaware precisely how the software worked did not change the Court’s analysis.

Regarding the breath certificate, the Court ruled that the officer substantially complied with § 18.2-268.9 when he administered the breath test. The Court noted that the officer conducted everything in the defendant’s presence and provided him with a copy of the results. The Court concluded that the officer’s failure to specifically tell the defendant that he could watch the test and see the equipment did not render the certificate of analysis inadmissible. Instead, the procedural deficiency went to the weight of the evidence rather than its admissibility.

Regarding Dr. Wright’s testimony, the Court found that under the evidence, a reasonable jurist could conclude that the defendant did not have any alcohol after the crash and before the BAC testing. Consequently, the Court ruled that Dr. Wright’s testimony on retrograde extrapolation of the BAC at the time of the collision was based on facts in evidence.

Regarding the officer’s HGN testimony, the Court ruled that the officer was not offering a medical opinion. Instead, the Court noted that he simply explained how he conducted the nystagmus field sobriety test and that his execution of the test comported with the standard for test administration. Hertzog described the involuntary eye motion he looked for when conducting the test and noted that such motion can be present if the subject has consumed alcohol. Because this testimony was not a medical opinion, the Court ruled that the defendant’s argument necessarily failed. The Court explained that, once the threshold for admissibility of the testimony was met, it was up to the jury to

determine what weight to give it and the trial court did not abuse its discretion in permitting the testimony.

Lastly, regarding sufficiency, the Court agreed that the evidence was sufficient that the defendant, after striking a pedestrian, did not immediately stop as close to the scene of the accident as possible to do safely.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0725223.pdf>

Allen v. Commonwealth: August 15, 2023

Pittsylvania: Defendant appeals his conviction for Felony DUI on Fourth Amendment grounds, Implied Consent, and Admission of the Certificate of Analysis.

Facts: The defendant drove while intoxicated, with several prior convictions for that offense, passing out in a stranger's driveway. The defendant left his vehicle running, left the radio on, and blocked the driveway. The residents summoned the police, who noted that the defendant's vehicle was registered to a different vehicle that was registered to a different address. After several loud attempts to awaken the defendant, officers finally woke the defendant up after significant effort. The defendant was disoriented, claimed that he was in his family's driveway, smelled of alcohol, had glassy eyes, and spoke with slurred speech.

The officer asked him for identification and inquired whether he had any "weapons" or "anything like that" in his pockets. The defendant said that he did not. The officer asked for and retrieved the defendant's wallet from his pants pocket. While removing the wallet, the officer saw a syringe in the pocket. The defendant removed the syringe, which contained an unknown liquid.

The defendant's explanation for his possession of the syringe evolved. He first denied any knowledge of it, then claimed he was a "borderline" diabetic, and finally admitted that he did not have a prescription for any medications or "needles." The officer searched the same pocket where he found the syringe and discovered a folded piece of paper. It contained a tan powder that he suspected was an illegal drug. When the officer asked the defendant when he had last used drugs, the defendant replied that "this [was] the first time" he had "used" in years.

After discovering the suspected drugs, the officers searched the car and found two cold beer cans. The defendant admitted that he had consumed alcohol before driving. The officer then performed the horizontal gaze nystagmus (HGN) test and found that his eyes were "really jumping" on all six parts of the test, indicating intoxication. The officer arrested the defendant. The officer obtained a search warrant for the defendant's blood. At the hospital, a nurse drew the defendant's blood using the DFS blood test kit that the officer provided to her. DFS determined his BAC to be .185.

The defendant moved to suppress, but the trial court denied the motion. At trial, the court rejected the defendant's argument that, because his car was on private property, he was not required to submit to a blood test and forcing him to do so, without advising him of Virginia's implied consent law, required exclusion of the test result, despite the fact that the police had a warrant.

At trial, the trial court admitted evidence of the blood test result over the defendant's chain-of-custody objection. The officer's body camera and his testimony showed that the nurse who drew the defendant's blood used the white DFS test kit that the officers provided. The nurse also completed a certificate of blood withdrawal for alcohol determination and attached the certificate to the vial as required by § 18.2-268.6. From the officers' body-worn camera footage and the notations on that blood withdrawal form, the trial court found that the blood was taken by "Lori A. Crouch RN," a registered nurse and therefore an authorized person under § 18.2-268.5. Then, when the blood was tested at the DFS laboratory, the certificate of blood withdrawal was affixed to the certificate of analysis produced by the lab, as directed by § 18.2-268.7(A).

The officers' body-worn camera footage also indicated that the nurse used "Betadine" on the defendant's arm. Betadine is a brand name for povidone-iodine, a "topical anti-infective," which is one of the cleaning solutions specifically authorized for use by § 18.2-268.5. The defendant argued that the blood draw procedure was deficient because the evidence did not "meet the authentication requirement as to [the] qualifications" of the person who drew his blood "and how she did the draw," but the trial court rejected his arguments.

Regarding the DFS lab certificate, Mika Smith, a DFS employee at the time she signed the certificate's attestation clause as the examiner, testified at trial. Smith provided a detailed explanation of how evidence was received in and processed by the DFS lab where the blood sample was tested. She explained that the toxicology section "work[ed] kind of like . . . an assembly line" and that "different people c[ould] do different analyses." Smith further testified that only eight or nine people worked in that section. Any of them could have performed the test, and all of them had "undergo[ne] a rigorous training program," including competency and proficiency testing.

Smith additionally confirmed that no one else would have had access to the blood or the test results. Specifically, Smith explained that her job as the signer of the certificate was to look at all the data "with the [specific] case" and "generate" the certificate "based [on] that data." Although Smith did not know whether she personally tested the blood, she was the official "examiner" for this case. Smith explained that she could have been the person who performed the blood alcohol test but that she could not be certain because she no longer had access to the file containing that information. She examined the data produced as a result of the laboratory's analysis and "ma[d]e sure all of the data ma[d]e sense" and "passe[d] all of [DFS's] quality control criteria."

The defendant contested the proof of the chain of custody at the DFS lab due to "doubts" about who analyzed the blood. He noted that the examiner who testified at trial "did not bring [the] file since she was no longer working for the lab," and he suggested that without the file, the certificate of analysis was "useless." He argued that the certificate and any derivative evidence must be excluded. Based on Smith's testimony, the trial court admitted the certificate over the defendant's objection.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress or admitting the certificate of blood alcohol analysis over the defendant's chain-of-custody objections.

The Court first examined the officer's initial interaction with the defendant, which the Court ruled provided the officers with reasonable suspicion, at the very least, to investigate further to determine whether the defendant was committing a variety of offenses, including trespassing, a vehicle licensing violation, and a DUI offense. The Court then ruled that, based on the discovery of the syringe

and tan powder, as well as the defendant's admissions, the officers had probable cause to arrest him for illegal drug possession. The Court found that the probable cause to arrest provided the officers with justification to search the car for additional evidence of that crime, during which they discovered two cold cans of beer, evidence of a DUI offense. The Court also ruled that the same probable cause that supported the arrest for driving under the influence of alcohol also supported the issuance of the search warrant to draw and test the defendant's blood.

The Court also found that the results from the horizontal gaze nystagmus test supplied additional evidence of intoxication. The Court concluded that these facts, as well as the officers' observations that he smelled of alcohol, had "glossy" eyes, and was either passed out or asleep and disoriented upon waking, provided probable cause to arrest him for driving while intoxicated.

Regarding the defendant's Implied Consent argument, the Court found that nothing in Virginia's implied consent statute states or even suggests that law enforcement may obtain a breath or blood sample from an individual only by means of that statute and no other statute or authorizing legal principle. Instead, the Court pointed out, since 2017, § 18.2-269(A) has expressly recognized the admissibility of test results from blood drawn pursuant to a search warrant in certain DUI prosecutions.

The Court explained that implied consent statute does not supplant the ability of an officer to obtain a search warrant for a defendant's blood or breath in circumstances not covered by implied consent, such as when an individual has been detained for his behavior on private property rather than a public highway. Therefore, the Court ruled that the alleged failure to advise the defendant of implied consent principles when his blood was obtained pursuant to a valid warrant did not render the court's ruling on the motion to suppress erroneous.

Regarding the certificate of analysis itself, the Court found that the record contained sufficient evidence to support the trial court's factual finding that the person who drew the defendant's blood was a registered nurse, who met the statutory qualification requirement under § 18.2-268.5. The Court agreed that the trial court properly found that the Commonwealth substantially complied with the statutory scheme, and the certificate was properly admitted.

The Court then held that the challenged certificate of analysis was properly admitted under substantial compliance over the defendant's chain-of-custody objection. The Court noted that, although the defendant highlighted the absence of evidence regarding who actually performed the BAC analysis, he did not request a continuance to obtain the laboratory's records or articulate any specific claim of prejudice. The Court held that under these circumstances, the certificate was admissible, and it was up to the trier of fact to determine what weight to give it.

In a footnote, the Court noted that the defendant did not argue that the Confrontation Clause or any constitutional or statutory principle other than those in §§ 18.2-268.5 and -268.11 supported his contention, so the Court did not address those issues.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1247223.pdf>

Hussein v. Commonwealth: August 1, 2023

Spotsylvania: Defendant appeals his convictions for Felony Eluding, DUI, and related offenses on Fourth Amendment and sufficiency grounds.

Facts: An officer observed the defendant's tractor-trailer on the side of the road and stopped nearby, asking him to turn on his hazard lights. Instead of turning on his lights, the defendant repeatedly yelled "no" at the "top of his lungs." The officer then asked the defendant for his license, but the defendant rolled up his window, locked his door, and drove off slowly. The officer pursued him.

Fleeing the area, the defendant drove over double-yellow lines and into oncoming traffic that had to swerve to avoid being hit. The defendant drove through three red lights without engaging his brakes. Even after his front tires deflated from the spike strips, he disregarded repeated commands from the officers and other deputies to stop. He drove at speeds from 9 to 15 miles per hour for about 80 minutes. The pursuit ended when the defendant's tractor-trailer "jackknifed" off the road and into a ditch. The defendant retreated to the sleeper cab of his tractor-trailer, precipitating a three-hour standoff with SWAT and tactical officers. Officers forcibly entered the vehicle and arrested the defendant.

Officers discovered Methamphetamine in the vehicle and arrested the defendant for various offenses, including DUI. A blood test revealed the defendant's BAC to contain .18 mg of Methamphetamine.

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

Regarding the DUI offense, the defendant argued that the Commonwealth did not exclude every reasonable theory of innocence, including that he ingested methamphetamine when he was in the tractor-trailer's sleeper cab and out of sight of the officers. The trial court rejected his argument.

Held: Affirmed.

Regarding the motion to suppress, the Court ruled that the defendant's Fourth Amendment argument failed because he was not seized until officers removed him from the tractor-trailer, by which point they had ample suspicion that the defendant had committed several offenses. Before then, the Court pointed out that the defendant had not been physically restrained and had not submitted to the officers' show of authority. The Court noted that his tractor-trailer was already stopped when the officer arrived. The Court found that the defendant was not seized when the pursuit began, so his Fourth Amendment rights were not violated regardless of the level of suspicion the officer had at that time.

Regarding sufficiency of the Felony Eluding evidence, the Court concluded that even though the defendant drove at slow speeds throughout the incident, the trial court could reasonably conclude that the defendant endangered himself, the officers, and the motorists he encountered along the way.

Regarding sufficiency of the DUI evidence, the Court found that a reasonable jury could have rejected the defendant's hypothesis of innocence based on his behavior when interacting with the officer and his driving behavior.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0779222.pdf>

Henrico: Defendant appeals his conviction for DUI on Fourth Amendment and Admission of the Certificate of Analysis.

Facts: An officer stopped the defendant's vehicle because, despite having a green light, the defendant's car remained stopped, its brake lights illuminated, for several seconds. As the officer arrived at the intersection, the defendant's car finally moved forward. The defendant had remained stopped at the green light for nine seconds. There were no vehicles moving through the intersection that would have obstructed the defendant's path forward.

The officer approached the defendant's vehicle at the next stoplight, but the defendant drove away. The defendant then signaled for the defendant to stop, although the defendant did not stop for almost thirty seconds. The officer then conducted a DUI investigation after smelling the odor of alcohol. He arrested the defendant and transported the defendant for a breath test. The officer, a licensed breath-test operator, followed DFS procedures by observing the defendant for 20 minutes before administering the test. The defendant's hands remained secured behind his back the whole time.

Although the officer did not specifically inspect the defendant's mouth before administering the breath test, as called for in the DFS manual, the defendant did not appear to have anything in his mouth. The officer had engaged in "a very lengthy" conversation with the defendant while transporting him. During that time, the defendant did not consume any food or drink, did not "belch, burp, or vomit," and did not put his hands in his mouth. The officer took the breath sample, and the breath test revealed the defendant's BAC to be .11.

The defendant moved to suppress, arguing that his nine-second failure to move forward when the traffic light turned green did not give the officer reasonable suspicion to detain him. The trial court denied his motion.

At trial, the defendant asked the trial court to exclude the breathalyzer results because the officer did not first confirm that the defendant had nothing in his mouth before administering the test, as required by the DFS manual, which states: "The operator should always inspect the subject's mouth for any foreign objects." The trial court overruled the objection and admitted the certificate.

The defendant also contended that the certificate of analysis constituted expert testimony, requiring the Commonwealth to establish "the scientific validity" of the breath test as a condition of admissibility. The trial court rejected the argument.

Held: Affirmed. The Court held that the officer had a reasonable, articulable suspicion for conducting the traffic stop, and that he substantially complied with the DFS regulations for conducting the breath test.

The Court first concluded that, pursuant to *Joyce*, the officer had reasonable suspicion to believe that the defendant had violated § 46.2-833(A), which provides that a green signal "indicates the traffic shall move in the direction of the signal and remain in motion as long as the green signal is given, except that such traffic shall yield to other vehicles and pedestrians lawfully within the intersection." The Court explained that the mere possibility that the defendant might have had an innocent explanation for not moving did not negate the officer's reasonable suspicion that the defendant had violated § 46.2-833(A).

The Court also noted that impeding traffic is not an element of the offense under § 46.2-833. The Court also explained that, although the defendant's apparent violation of § 46.2-833(A) alone provided reasonable suspicion for the stop, that reasonable suspicion was magnified when the defendant repeatedly ignored the officer's signals to pull over. The Court pointed out that the defendant was not seized within the meaning of the Fourth Amendment until he "actually submitted" to the officer's authority by stopping his vehicle.

Regarding the officer's failure to check the defendant's mouth, the Court noted that the purpose of visually inspecting the subject's mouth is to ensure the absence of any foreign object that could cause an inaccurate result. The Court pointed out that the defendant never asserted, and the evidence did not suggest, that he had a foreign object in his mouth before or during the breath test. Based on the facts of this case, the Court found that the officer's failure to adhere to the manual's instruction that the officer should inspect the subject's mouth was a "minor" and "trivial" departure.

The Court also rejected the defendant's claim that the certificate of analysis constituted expert testimony, requiring the County to establish "the scientific validity" of the breath test as a condition of admissibility.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0677212.pdf>

Drugs

U.S. District Court

Northern Virginia Hemp v. Commonwealth: October 30, 2023

E.D.Va: Plaintiffs seek an Injunction to prevent Virginia's Hemp Regulations

Facts: In April 2023, Virginia enacted SB 903, a set of statutes that regulate hemp products and products that contains THC or synthetic THC. Those statutes took effect on July 1, 2023.

In September 2023, the plaintiffs filed a lawsuit seeking an injunction against implementing or enforcing SB 903, specifically Virginia's limits on THC-containing substances using a "total THC" or "synthetic THC" standard, rather than Virginia's previous THC limits, which focused only on "Delta-9" THC. The lawsuit attacked Virginia's 2023 law from several angles, arguing broadly that because the federal government legalized industrial hemp in 2018, Virginia had unlawfully overruled federal law by banning certain hemp products. The lawsuit claimed that the 2018 Farm Bill pre-empted Virginia law. The lawsuit also argued that SB 903 violates the Commerce Clause and the Dormant Commerce Clause of the U.S. Constitution.

Held: Preliminary Injunction Denied. The Court ruled that the plaintiffs had not demonstrated either a likelihood of success on the merits or irreparable injury if SB 903 remains in effect, and that they had failed to show that the balance of equities and public interest weigh in favor of an injunction.

Regarding the plaintiffs' claim that Federal law pre-empted state law, the Court pointed out that the 2018 Farm Bill has a provision stating: "No preemption. Nothing in this subsection preempts or limits any law of a State or Indian tribe that (i) regulates the production of hemp; and (ii) is more stringent than this subchapter."

The Court ruled that, at this stage of litigation, the Commonwealth had "demonstrated that delta-8 THC is a credible threat to the Virginia population, and there is a strong public interest in protecting the citizens of the commonwealth from substances like delta-8, including a vulnerable population, such as children, from hospitalizations and poisoning." The Court continued, "The decision to advance that interest was done by the elected policymakers of Virginia, and this court must defer to those political and social welfare judgements."

The Court further explained that "If Congress chooses to make a substance — here, industrial hemp as defined by its delta-9 THC level — legal at the federal level with respect to the Controlled Substances Act, that does not mean that Congress has mandated that the substance must be legal in every state... Nor does it mean that Congress has mandated that any product that simply includes industrial hemp as one ingredient or derivative among many must be legalized by every state legislature."

Full Case At:

https://www.virginiamercury.com/wp-content/uploads/2023/10/Hemp_Opinion.pdf

Virginia Supreme Court

Commonwealth v. Garrick: May 9, 2024

Rev'd Court of Appeals Ruling of May 30, 2023

Virginia Beach: Defendant appeals his conviction for Possession of a Firearm and Heroin on sufficiency of the evidence.

Facts: Police found the defendant asleep in a car, with the engine idling, at a convenience store parking lot. After a search of the car, the police discovered a handgun and a bag of heroin in the glove compartment. Police also found two receipts for maintenance of the car in the glove compartment. The receipts listed the defendant's name and were dated from the previous month. The defendant told the police that the car belonged to his mother. When asked if he was the main user of the vehicle, the defendant replied that he drove it "three out of seven" days of the week.

The Court of Appeals reversed the conviction. The Court of Appeals held that the trial court erred in finding the evidence sufficient to establish that the defendant possessed the contraband discovered in the car. The Court argued that there was, at best, a month, and at worst, two months, in which any other person who drove the car could have placed the illegal items in the glove compartment.

The Court contended that those facts raised a reasonable doubt as to whether someone else, unknown to the defendant, could have put the firearm and heroin in the glove compartment.

Held: Court of Appeals Reversed, Conviction Reinstated.

The Court examined the facts at trial and concluded that the factfinder was free to conclude that the defendant was “no stranger to the vehicle and his presence in it on the night in question was far from a unique event.” The Court explained that the presence of multiple documents from different dates bearing the defendant’s name in the glove compartment allowed the factfinder to conclude that, in addition to driving and maintaining the vehicle, the defendant used the glove compartment. The Court found that this conclusion, coupled with the proximity of the defendant documents to the heroin and firearm in the glove compartment, rationally tied the defendant not just to the vehicle and its glove compartment, but to the heroin and firearm.

The Court wrote that the factfinder “was free to reject the suggestion, unsupported by anything more than rank speculation, that some wholly unknown person left the heroin and the firearm in the vehicle for some unknown period of time. Although it is true that any of these facts are insufficient in and of themselves to demonstrate beyond a reasonable doubt that Garrick constructively possessed the heroin and the firearm, collectively they “combined” to allow “a reasonable mind [to be led] irresistibly to a conclusion.””

The Court criticized the Court of Appeals, noting that no evidence was offered that established that anyone other than the defendant ever drove the vehicle. The Court pointed out that the only evidence regarding the defendant’s mother and the vehicle was that she owned it; no one ever testified or offered other evidence that the defendant’s mother ever drove it. Similarly, the Court observed that the defendant’s statement that he drove the vehicle “three out of seven” days did not constitute affirmative evidence that anyone else drove the vehicle as opposed to it remaining parked on the days that the defendant did not drive it.

The Court acknowledged that it may be permissible for a rational factfinder to conclude that a vehicle’s owner likely drives it or that a vehicle is driven more than three days a week. In this case, however, the Court pointed out that the factfinder did not draw those inferences, but rather, implicitly rejected them. The Court emphasized that the appellate standard of review precludes an appellate court from drawing inferences that were rejected by the factfinder, and therefore, the Court ruled that the Court of Appeals erred by substituting its judgment for that of the factfinder and by drawing inferences that favored the party that lost at trial.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230511.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1415211.pdf>

Virginia Court of Appeals –
Unpublished

Chesterfield: Defendant appeals his convictions for Possession with Intent to Distribute on Fourth Amendment and Admission of Expert Testimony grounds.

Facts: In December 2020, an officer stopped the defendant on suspicion of DUI and learned that the defendant's license was suspended. To impound the vehicle, the officer began an inventory search.

When the officer opened the defendant's trunk during the inventory search, he smelled the odor of marijuana. He also recognized that plastic containers in the trunk were labelled with the street names of different strains of marijuana, and he noted the presence of what appeared to be marijuana residue on the containers. Also in plain view were bags of pills. The pills were grouped inside multiple knotted corner bags that he recognized as items used in the narcotics trade. The officer recognized the pills as comprising Xanax based upon the fact that they exhibited the "pretty specific" and "pretty unique" appearance of Xanax pills. Each of the multiple knotted bags or baggies was the size of a golf ball. The officer searched the car and located a large quantity of drugs and paraphernalia.

Prior to trial, the defendant moved to suppress. First, he argued that the officer's detection of the odor of marijuana did not provide probable cause for him to expand the scope of his warrantless search. He argued that § 4.1-1302(A), which took effect on July 1, 2021, more than six months after the search of his car, is procedural in nature, that the statute applies retroactively and that it was thus unlawful for the officer to expand his search based upon his detection of the odor of marijuana. Second, he argued that the plain view doctrine did not justify expansion of the search, because the pills' incriminating nature as contraband was not immediately apparent to the officer. The trial court denied the motion.

DFS only tested three of the more than 1,300 similar pills recovered from the defendant's car and only certified that those three specific pills contained Alprazolam, or Xanax. DFS also certified that the unanalyzed pills had been visually examined and compared with the analyzed ones and that based upon their common physical characteristics, including their shape, color, and manufacturer's markings, all were "consistent with a pharmaceutical preparation containing Alprazolam." Additionally, DFS noted that "[t]here was no apparent tampering of the [pills]."

At trial, the Commonwealth's expert testified that the amount of drugs was inconsistent with the personal use of the drugs. The defendant objected that the Commonwealth's expert opinion testimony regarding possession for personal use and the street value of the Xanax was "based on the total number of pills rather than the number of pills tested" and shown to contain the drug, and therefore was not "based upon facts in evidence." The trial court overruled the objection.

Held: Affirmed.

The Court first rejected the defendant's argument that under § 4.1-1302(A), it was unlawful for the officer to expand his search of the car based upon his detection of the odor of marijuana. The Court repeated that its decision in *Street* controlled its analysis, and that the statute was not retroactive.

The Court then applied the three requirements for the plain view exception and observed that the incriminating character of the pills as contraband narcotics was immediately apparent to the officer. At that point, the Court concluded that there was ample probable cause for the officer to move from an

inventory search to a broader investigatory search. The Court also agreed that the distinctive odor that the officer smelled emanating from the trunk was a basis for probable cause to believe that the car contained marijuana. The Court also noted that there was more than mere “plain smell” to provide the officer with probable cause to expand his inventory search into a broader search for contraband narcotics. The Court found it clear that upon opening the defendant’s trunk during a lawful inventory search, a trained police officer applying common sense would have reasonably believed he had found contraband narcotics. Thus, the Court ruled that the officer had probable cause to search for contraband.

Regarding the expert’s testimony and the certificate of analysis, the Court ruled that based on the facts in evidence from the certificate of analysis, together with the additional factual and circumstantial evidence introduced at trial, the expert could provide expert opinion testimony about a large quantity of Xanax, the likelihood of its possession for personal use, and its potential street value. Such opinion evidence, grounded as it was in the facts and evidence presented at trial, did not violate the rules governing such testimony.

In a footnote, the Court pointed out several cases where DFS tested only a portion of a large amount of suspected controlled substance.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0238222.pdf>

Distribution

Virginia Court of Appeals – Unpublished

Hinton v. Commonwealth: September 5, 2023

Warren: Defendant appeals his convictions for Distribution and Possession with Intent to Distribute on Due Process, Entrapment, Accommodation, and Sentencing grounds.

Facts: The defendant resumed dealing heroin and cocaine upon his release from prison, where he had served an eight-year sentence for possession with the intent to distribute cocaine and heroin convictions. When a police informant contacted the defendant, the defendant agreed to connect the informant with drug sources he knew in Richmond. After the informant said he could not travel to Richmond, the defendant agreed to bring drugs to the informant.

Upon agreeing on a date and location, the defendant obtained both heroin and cocaine from his contacts in Richmond on “credit.” He met the informant for the purpose of packaging the drugs and selling them. The defendant distributed a quantity of heroin and cocaine to the informant, who then left the motel room ostensibly to deliver the drugs to an awaiting client. The defendant remained in the room with the remaining quantities of heroin and cocaine, which he continued to prepare for

distribution to other purchasers, as the informant had told him that business would be “booming.” When law enforcement entered the defendant’s hotel room to arrest him, the defendant was packaging the drugs for sale. The defendant later admitted to police that he was a narcotics dealer and typically sold heroin.

Prior to trial, the defendant moved to quash the indictments against him because of “the government’s and informant’s egregious conduct” that he claimed resulted in a violation of his right to due process. The defendant complained of alleged “wide latitude” that the police afforded to the informant. He asserted that the informant set up the details for the transaction through contacts with the defendant that were unsupervised by the police. The defendant claimed that the informant was using drugs when he was working as an informant, a violation of his written agreement with the police. In addition, the defendant maintained the police ignored the requirement that they arrest the informant “forthwith” upon the outstanding warrant for his arrest by having the indictments sealed until after he concluded a transaction involving the defendant. The trial court denied the motion to quash.

At trial, in support of his claim of accommodation, the defendant testified that although his initial “intention[] was not to make a profit[,] . . . [he] ended up coming to make a profit.” The defendant also argued entrapment at trial.

At trial, the trial court rejected the defendant’s entrapment defense and found that the defendant distributed the two \$50 packages of cocaine and heroin to the informant as an accommodation. In addition, the trial court convicted the defendant of possessing with the intent to distribute the heroin and cocaine found in the motel room. The trial court refused to find that the defendant possessed the cocaine and heroin in the motel room with the intent to distribute as an accommodation.

The defendant also contended that the imposition of sentence for the distribution of drugs as an accommodation offenses violated the “doctrine” of *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985), which held that where the defendant “distributes a sample [of drugs] and retains the remainder for the purpose of making an immediate distribution to the same recipients at the same place and at the same time, verdicts of guilty may be returned on both counts but the defendant may be punished on only one.” The trial court rejected his argument.

Held: Affirmed.

Regarding the motion to quash, the Court complained that the defendant cited no opinion of a Virginia appellate court finding conduct by government agents was so “outrageous” as to violate due process. The Court noted that it could not find such a case either and “given the type of conduct necessary to establish the violation, this will not be the first.” The Court ruled that the facts and circumstances presented in this case were not so outrageous or egregious that law enforcement should be barred from obtaining a conviction against the defendant.

Regarding the defendant’s entrapment defense, the Court reaffirmed that entrapment is an affirmative defense. Employing the test laid out in *Howard*, where the Court held that police “trickery, persuasion, or fraud” only results in entrapment where the person who commits the crime “would not have perpetrated it” absent said coercion by the police or their agent, the Court examined whether the defendant was “predisposed to commit the crime.” The Court concluded that the facts and

circumstances supported the trial court's conclusion that the defendant was predisposed to engage in illegal narcotics activity, and the trial court did not err in rejecting his entrapment defense.

Regarding the defendant's accommodation argument, the Court noted that even if the defendant did not expect to profit personally in the operation, he believed there would be "a commercial transaction in which there [wa]s a consideration involved," and therefore concluded that the trial court did not err in finding that the drugs he possessed in the motel room were not merely to accommodate the informant.

Regarding the defendant's reliance on the *Palafox* case, the Court noted that, unlike *Palafox*, in this case the defendant planned multiple sales to numerous purchasers and the heroin and cocaine the defendant distributed to the informant were not samples but the first of many sales contemplated by the defendant. The Court noted that the remainder in the defendant's possession was intended for additional sales, and thus the distribution and possession with the intent to distribute offenses were not part of a single criminal undertaking but rather were distinct offenses.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1034224.pdf>

Possession

Virginia Court of Appeals - Published

Camann v. Commonwealth: January 16, 2024

79 Va. App. 427, 896 S.E.2d 370 (2024)

Aff'd Unpublished Ct. of App. Ruling of February 28, 2023

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

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

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

Testing of the white powder revealed that it contained two controlled substances: Fentanyl and Etizolam. The pills tested positive for two other controlled substances. The defendant admitted that he was a drug addict, that he had tried to conceal the foil underfoot, that the foil contained "a drug," and

that the items found in his pockets were all his. He admitted knowing that the white powder was fentanyl but denied knowing that it also contained etizolam, a drug he'd never heard of.

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

A panel of the Court of Appeals affirmed in part and reversed in part. The panel affirmed the trial court's decision denying the defendant's motion to suppress the evidence but reversed the conviction for possession of a Etizolam.

Regarding the suppression motion, the Court first agreed that the defendant was seized when the officer told him to move his foot, not because the defendant was not free to leave, but because a reasonable person in the defendant's position would not have felt free to keep his foot planted. (In a footnote, the Court explained that its analysis evaluated whether the defendant's person was illegally seized, not whether the space under his foot was illegally searched.) Thus, to justify telling the defendant to move his foot, the officer needed reasonable, articulable suspicion that the defendant was engaged in, or was about to engage in, criminal activity.

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

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

The Commonwealth petitioned for rehearing en banc as to the reversal of conviction for possession of Etizolam. The defendant did not seek rehearing en banc as to the motion to suppress.

Held: Panel ruling affirmed. In a 14-2 ruling, the Court reversed and vacated the etizolam conviction. As it was not part of the en banc review, the panel's ruling affirming the denial of the defendant's suppression motion in part A of the panel opinion "remains undisturbed."

The Court examined the statute, previous cases, and the history of Virginia's possession statute to reach the conclusion that a conviction for possession under § 18.2-250 must be supported by proof of knowing possession. The Court likened this case to *Young* in explaining that the Commonwealth must establish that the defendant intentionally and consciously possessed the drug with knowledge of its nature and character.

The Court reaffirmed that § 18.2-250 requires a defendant to know that the substance he possesses is in fact a controlled substance, but not precisely what controlled substance it is. Thus, if a person thinks he has heroin, but it turns out to be fentanyl, that person has still knowingly or intentionally possessed a controlled substance in violation of § 18.2-250. The Court repeated that a

claim by a defendant that he knew he was possessing a controlled substance but was unaware or mistaken as to the precise identity of that substance, is not a defense under § 18.2-250.

The Court made clear that each conviction for drug possession under § 18.2-250 requires the Commonwealth to prove that the defendant possessed the substance with knowledge of its nature and character as a controlled substance. Thus, for example, the Court explained that if a defendant buys white powder thinking it is heroin, but it turns out to contain 17 controlled substances, the defendant in that situation would have knowingly possessed only 1 controlled substance, not 17.

The Court explained that under *Sierra*, a person who knows that the pill or powder he possesses contains a controlled substance is criminally liable for possession, even if he thinks he possesses a particular controlled substance that turns out to be different. Likewise, when the Commonwealth seeks two convictions for possessing a mixture containing more than one controlled substance, the Commonwealth must prove that the defendant knew there were at least two controlled substances in the mixture. The Court explained that *Sierra* simply spares the Commonwealth from having to prove that the defendant knew which controlled substances were present.

In a footnote, the Court explicitly disavowed the language in its unpublished 2018 ruling in *Howard* that would permit strict liability for additional possession convictions when the Commonwealth proves knowing possession of only a single controlled substance.

Judge Athey, joined by Judge Beales, dissented from the conclusion that the Commonwealth needed to prove that the defendant knew he possessed two separate controlled substances.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0243224.pdf>

Davis v. Commonwealth: November 21, 2023

Spotsylvania: Defendant appeals his convictions for Possession of a Controlled Substance, Possession of a Firearm by Felon, Transportation of a Firearm by a Felon, Carrying a Concealed Weapon by a Felon, and related charges on Double Jeopardy, Admission of Court Records, Jury Instruction, and sufficiency grounds.

Facts: The defendant possessed fentanyl and two handguns while he was driving a car. Police stopped him because his vehicle was reported as stolen. The defendant then ran on foot from law enforcement, taking a firearm with him as he fled into the woods. Thirty minutes later, police apprehended him and discovered that he was carrying the gun concealed. The defendant admitted to being a convicted felon. An officer searched the defendant and found pills, which the defendant stated were Percocet.

Prior to trial, the defendant moved to dismiss one of the two charged offenses under § 18.2-308.2, to wit: Possession of a Firearm by Felon and Carrying a Concealed Weapon by a Felon, on Fifth Amendment double jeopardy grounds. The trial court denied the motion.

At trial, the officers testified about the firearms that they recovered. One officer testified that the item he found in the front seat of the vehicle was a nine-millimeter Smith and Wesson pistol. He

explained that he had experience with firearms and could tell if a gun was “real.” The officer said that the item was a “real gun” and recited its serial number.

The other officer testified that he had experience with firearms, testified that the item he found on the defendant’s person was a “forty-caliber Smith and Wesson handgun semiautomatic with an extended mag and . . . one round in the chamber.” He specified that this item was a “real gun.” The officer explained that after he recovered the gun, he “rack[ed] it” to expel the bullet that was “in the chamber.” The officer provided its serial number and also described it as a “real gun.” The juries watched the video recording from the officer’s body-worn camera that showed one of the guns when officers found it on the defendant’s person. The video also recorded the officer clearing the cartridge from the chamber of that gun.

At trial, the defendant argued that the Commonwealth did not lay the proper foundation to allow testimony that the items were firearms under the statute. He suggested that the testimony of the officers did not exclude the possibilities that the items were toys or replicas.

To prove the defendant’s previous felony conviction, at trial, the Commonwealth introduced documents from the Circuit Court of Prince George’s County, Maryland, which identified the defendant by his full name and date of birth. They reflected that the Maryland court accepted the defendant’s guilty plea to the charge of “Robbery with a Dangerous Weapon” and that he was convicted of that offense. They also include a copy of the grand jury indictment, which charged that the defendant committed robbery in violation of Maryland Criminal Law Code § 3-403 and recited the elements of that offense. Maryland Criminal Law Code § 3-403, robbery with a dangerous weapon, is a felony. The Commonwealth presented a copy of that code section to the trial court, and the trial court admitted a copy into evidence.

The officer also testified that the NCIC report listed the defendant’s felony conviction for robbery with a deadly weapon in violation of “CR3403MD,” indicating Maryland Criminal Law Code § 3-403. The officer also recited the case number, which matched the case number provided on the Maryland court documents. Although the officer did not explain who maintains the NCIC database during his testimony, he stated that he routinely relied on information contained within it for police matters.

At trial, the defendant argued that the documents failed to meet the relevancy standard because they did not satisfy the requirements of a judgment order.

At trial, a forensic scientist testified that Percocet contains Oxycodone, a Schedule II controlled substance. In fact, however, the scientist testified that she located fentanyl, a different Schedule II controlled substance, in the pills. The defendant argued that the Commonwealth failed to prove that he knew the nature of the controlled substance in his possession.

Lastly, the defendant objected to the language in the jury instructions that referred to him as the “defendant.” The defendant contended that the use of the term “defendant” in the jury instructions instead of his surname biased the juries against him and therefore did not comport with the tenet that he was innocent until proven guilty. The defendant argued that by referencing him as “the defendant” in the jury instructions, the trial court improperly shifted the burden of proof to him and away from the Commonwealth.

Held: Affirmed. The Court held that the two convictions under § 18.2-308.2 involving the same gun do not violate the defendant's constitutional protection against double jeopardy. The Court also ruled that the trial court acted within its discretion by admitting officer testimony that the guns were "real." The Court held that the trial court also properly admitted the Maryland court documents. The Court held that the evidence was sufficient to prove that the defendant had previously been convicted of a felony, that each gun in his possession met the applicable legal definition of a firearm, and that his possession of a controlled substance was knowing. Finally, the Court held that the trial court did not err by rejecting the defendant's suggested jury instruction wording to refer to him by name instead of as "the defendant."

Regarding the defendant's double jeopardy argument, the Court repeated that, under *Baker*, each separate act or occurrence violating § 18.2-308.2 constitutes a separate offense. The gravamen of each of the firearm offenses proscribed by the statute is placing the community in "heightened danger," so consequently, each separate instance resulting in a heightened danger to the community may be punished separately. In this case, although he ultimately was caught not far from his car, the Court found that the defendant's act of taking the firearm with him, concealing it, and keeping it with him for the thirty minutes during which he evaded police created a heightened danger to the community separate and distinct from the danger when the officer first encountered him in the car. Therefore, the Court ruled that the trial court did not err by denying the defendant's pre-trial motion to dismiss one of the charges on double jeopardy grounds.

In a footnote, the Court pointed out that *Baker* addressed three convictions for possessing a firearm under § 18.2-308.2. This case, the Court pointed out, involved two alternative ways in which the Commonwealth can establish a violation of § 18.2-308.2: possession of a firearm and carrying it in a concealed manner. The Court explained that, just as someone can possess the same firearm in separate instances, giving rise to separate offenses, it concluded that someone could possess a firearm in one instance and carry it in a concealed manner in a second instance, similarly supporting separate charges and punishments.

Regarding the sufficiency of the evidence about the firearms, the Court repeated that the Commonwealth was not required to show that the items were operable at the time of the offenses. The Court also explained that the testimony did not have to exclude all possibility that the items were toys or replicas in order to be admissible. In this case, the Court ruled that the juries could reasonably conclude that the items in question were "designed, made, and intended to fire or expel a projectile by means of an explosion" and therefore, the Commonwealth presented evidence sufficient to prove that the items were firearms within the meaning of § 18.2-308.2.

Regarding the evidence of the defendant's previous felony conviction, the Court ruled that the documents, viewed together as a single exhibit, provided enough information to permit a fact finder to conclude that the defendant was previously convicted of a felony. The Court also agreed that the defendant's admission, the Maryland documents, and the NCIC information met the Commonwealth's burden of proving that the defendant had a previous felony conviction.

Regarding the nature of the controlled substance, the Court repeated that in proving the offense of illegal drug possession, the knowledge requirement may be met by showing that the defendant knew the identity of the substance he possessed, regardless of whether he knew it was illegal. In this case, the Court noted that the evidence that the defendant believed he had Percocet was

enough to show that he had knowledge of the pills' nature and character as a Schedule II controlled substance.

In a footnote, the Court pointed out that the trial court had also instructed the jury that "the defendant does not need to know precisely what controlled substance" he possessed, although this issue is pending an *En Banc* hearing in *Camann v. Commonwealth*, which had yet to be decided as of this ruling.

Regarding the defendant's complaint about using the word "defendant" in jury instructions, the Court complained that the defendant cited no authority holding that a trial court must refer to a defendant by name in the jury instructions, and the Court itself did not find any authority either. The Court explained that the term "defendant," in a criminal proceeding, means nothing more than the "person . . . accused" of the crime or crimes. Accordingly, the Court ruled that the trial court did not abuse its discretion by referring to the defendant as "the defendant" in the jury instructions.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0903222.pdf>

Virginia Court of Appeals -
Unpublished

Wilkerson v. Commonwealth: October 17, 2023

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

Facts: The defendant was incarcerated in a cell block of the City Jail, which consisted of ten to twelve secure "huts," each hut containing four triple-bunk beds. Absent a lockdown, the doors to each hut primarily remained open and accessible to all 144 inmates housed in the cell block. After a dog alerted on the defendant's property bag in his bunk, a search of the bag revealed a medical form bearing his name and a plastic bag containing cocaine. The defendant admitted the bag belonged to him, but denied the cocaine was his. The defendant stated that he checked his bag every 15 minutes.

A guard later testified that the defendant had been observed sleeping and "relaxing" on his bunk at some time "before," but did not specify who made the observation or when, nor did he testify to the proximity in time of the observation to the search. The guard also did not testify as to whether the defendant had been in his hut immediately before the search, or whether the defendant had left his hut, and if so, how much time had passed between the departure from his hut and the search.

The guard testified that the defendant's hut, which he shared with three other inmates, was primarily open and accessible. The guard testified that there were periods when the defendant was separate from his bag for more than 15 minutes. Moreover, the hut was nestled within a cell block which, at the time, housed approximately 30 to 40 inmates, all of whom could pass freely through the cell block, and the huts within it.

Held: Reversed. The Court found that the defendant's admission of occupancy and ownership of the jail bunk and property bag accessible to the general jail population, without more, was insufficient to show conscious knowledge of the presence, nature, and character of the cocaine.

The Court contended that the Commonwealth failed to furnish a link connecting the defendant to the controlled substance. Notwithstanding the defendant's admission that he checked his bag every 15 minutes, the Court found no evidence that he did so, or that the defendant was with his bag immediately preceding the lockdown. The Court also complained that the Commonwealth did not establish that the defendant was in his cell block immediately prior to the search, or how much time had elapsed since the defendant had been in his block.

The Court also ruled that the Commonwealth failed to show the defendant's conscious knowledge of the presence, nature, and character of the drugs. The Court complained that the Commonwealth did not introduce surveillance video evidence of the defendant on his bunk or in his hut prior to the search.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1385221.pdf>

Eluding

Virginia Court of Appeals - Unpublished

Hussein v. Commonwealth: August 1, 2023

Spotsylvania: Defendant appeals his convictions for Felony Eluding, DUI, and related offenses on Fourth Amendment and sufficiency grounds.

Facts: An officer observed the defendant's tractor-trailer on the side of the road and stopped nearby, asking him to turn on his hazard lights. Instead of turning on his lights, the defendant repeatedly yelled "no" at the "top of his lungs." The officer then asked the defendant for his license, but the defendant rolled up his window, locked his door, and drove off slowly. The officer pursued him.

Fleeing the area, the defendant drove over double-yellow lines and into oncoming traffic that had to swerve to avoid being hit. The defendant drove through three red lights without engaging his brakes. Even after his front tires deflated from the spike strips, he disregarded repeated commands from the officers and other deputies to stop. He drove at speeds from 9 to 15 miles per hour for about 80 minutes. The pursuit ended when the defendant's tractor-trailer "jackknifed" off the road and into a ditch. The defendant retreated to the sleeper cab of his tractor-trailer, precipitating a three-hour standoff with SWAT and tactical officers. Officers forcibly entered the vehicle and arrested the defendant.

Officers discovered Methamphetamine in the vehicle and arrested the defendant for various offenses, including DUI. A blood test revealed the defendant's BAC to contain .18 mg of Methamphetamine.

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

Regarding the DUI offense, the defendant argued that the Commonwealth did not exclude every reasonable theory of innocence, including that he ingested methamphetamine when he was in the tractor-trailer's sleeper cab and out of sight of the officers. The trial court rejected his argument.

Held: Affirmed.

Regarding the motion to suppress, the Court ruled that the defendant's Fourth Amendment argument failed because he was not seized until officers removed him from the tractor-trailer, by which point they had ample suspicion that the defendant had committed several offenses. Before then, the Court pointed out that the defendant had not been physically restrained and had not submitted to the officers' show of authority. The Court noted that his tractor-trailer was already stopped when the officer arrived. The Court found that the defendant was not seized when the pursuit began, so his Fourth Amendment rights were not violated regardless of the level of suspicion the officer had at that time.

Regarding sufficiency of the Felony Eluding evidence, the Court concluded that even though the defendant drove at slow speeds throughout the incident, the trial court could reasonably conclude that the defendant endangered himself, the officers, and the motorists he encountered along the way.

Regarding sufficiency of the DUI evidence, the Court found that a reasonable jury could have rejected the defendant's hypothesis of innocence based on his behavior when interacting with the officer and his driving behavior.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0779222.pdf>

Turner v. Commonwealth: July 18, 2023

Lancaster: Defendant appeals his convictions for Eluding on Admission of Preliminary Hearing Testimony, Denial of his Duress Defense, and Double Jeopardy grounds.

Facts: The defendant dangerously eluded a police officer, escaped, and then again dangerously eluded another officer. Initially, an officer saw the defendant speeding and activated his lights to conduct a traffic stop. The defendant did not stop and, instead, turned off his headlights to avoid detection. The officer, being unable to find the vehicle on the dark roads, disengaged his pursuit. The defendant believed the officers were gone and reactivated his headlights.

Minutes later, a trooper observed the defendant's car and activated his lights and sirens. The defendant again disregarded the signals to stop and fled from the police for over an hour. The chase had begun late in the evening on September 15, 2020, and ended in the early morning hours of September 16, 2020. The Commonwealth charged two separate offenses of felony eluding.

At preliminary hearing, the Commonwealth presented evidence from a witness who had been inside the vehicle. After the preliminary hearing, the witness signed a return-to-court slip. The Commonwealth coordinated with his attorney to secure his presence at trial. The Commonwealth then learned on the morning of the trial that the witness would not attend.

At trial, the Commonwealth moved to declare the witness unavailable and admit his preliminary hearing testimony. The Commonwealth introduced the return-to-court slip signed by the witness indicating that he would testify at trial. The Commonwealth then called the witness' attorney to testify. The attorney testified that he and the witness had discussed planning for the witness to appear at trial. The attorney informed the witness the evening before trial that he "had not yet found a method to travel here and would update" the attorney. The next morning, before the trial started, the witness told the attorney that he "had been unable to arrange for transportation" and "was still waiting for the results of a COVID test."

The attorney admitted that he never asked the Commonwealth for assistance securing transportation and the Commonwealth did not offer any aid. The defendant objected to using the preliminary hearing testimony. The defendant contended that the Commonwealth failed to establish the witness' unavailability, as it did not exercise due diligence in attempting to secure his presence at trial.

The trial court found that the Commonwealth undertook the necessary precautions to secure the witness' appearance. It found the witness unavailable as a witness and admitted the preliminary hearing transcript. The attorney took the stand and read the transcript of the prior testimony.

At trial, the defendant testified and presented another witness, and both testified that the missing witness threatened them with two guns. The defendant argued that he was under duress, but the trial court found that, even if the defendant was subject to duress, he had an opportunity to escape and seek protection when he was surrounded by four patrol vehicles. Because the defendant continued to evade the officers and did not take advantage of the opportunity to escape, the trial court found that the defendant failed to prove duress.

The defendant also argued that the evidence established, at most, one continuing offense instead of two separate acts of eluding. He contended that the charges differed only in the dates of the offense and argued that the difference was meaningless. The trial court rejected his argument.

Held: Affirmed. The Court found that the trial court did not abuse its discretion in admitting the witness' preliminary hearing testimony and that the evidence was sufficient to support the two felony eluding convictions.

The Court first found that the record demonstrated that the Commonwealth met the basic requirement of serving the missing witness while he was still in court and that it made reasonable efforts to secure his presence. Because the witness' preliminary hearing testimony was under oath, properly recorded, and subject to cross-examination, the Court ruled that the trial court did not err in admitting the witness' testimony.

The Court also agreed that the evidence showed that the defendant did not act under duress.

Lastly, the Court addressed the defendant's Double Jeopardy claim. The Court reasoned that the trial court did not violate the Double Jeopardy Clause because the defendant's acts constituted two eluding offenses rather than one continuing offense. The Court found that when the defendant

successfully eluded the first officer, the first offense was complete. The Court then found that when the defendant fled from the second officer, the second eluding was complete.

Although the defendant drove continuously between the two chases, the Court reasoned that his failure to stop for the second officer was not a continuation of his failure to stop for the first one. Instead, the Court explained that the second act involved a new formation and execution of purpose. Thus, the evidence supported the trial court's finding that the defendant committed two separate and distinct acts of eluding.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0615222.pdf>

Failure to Appear

Smail v. Commonwealth: May 14, 2024

Prince William: Defendant appeals his conviction for Failure to Appear on sufficiency of the evidence.

Facts: The defendant violated probation on felony offenses of statutory burglary, grand larceny, and grand larceny of a firearm. The defendant did not appear for a hearing in July 2022. The trial court issued a show cause for failing to appear and ordered him to return to court in September 2022. The defendant again was not present for the September hearing. The trial court dismissed the show cause that had been issued for the failure to appear in July for "several errors in it" and issued a capias for failing to appear before the trial court in September.

During the contempt trial, the defendant pointed out that there was no return on the show cause that ordered the defendant to return to court in September and no evidence that the defendant ever knew he had to be present. The defendant argued that it was the Commonwealth's burden to put on some evidence that the defendant had notice, and the Commonwealth failed to do so. The trial court found that the defendant was in court each time the case had been continued to know what the next date was.

The trial court concluded that the defendant had notice of the September court date and that his failure to appear was willful. The trial court convicted the defendant of failure to appear in court for his probation violation under § 18.2-456(A)(6).

Held: Reversed. The Court ruled that there was insufficient evidence in this record to show the defendant had notice of his September court date. The Court found that without a factually supported finding by the trial court of timely notice and without standalone evidence, the burden of establishing that element was not met to convict the defendant of willful failure to appear.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0020234.pdf>

False Pretense, Fraud, and Financial Exploitation

Virginia Court of Appeals - Published

Wallace v. Commonwealth: January 23, 2024 (En Banc)

Aff'd Panel Ruling of February 28, 2023

Chesapeake: Defendant appeals her convictions for Forgery, False Pretense, and Computer Fraud on sufficiency of the evidence.

Facts: The defendant deposited forged checks and uttered them using an ATM. The checks were made out from the victim's account to the defendant and had explanations in the memo line such as "work," "cleaning," and "remaining balance." After the bank discovered the forgery, police interviewed the defendant, who admitted that she did not know the person who wrote the checks. She refused to explain where she obtained the checks.

The trial court convicted the defendant of computer fraud, uttering forged checks, and larceny by false pretense. Over the defendant's objection, the trial court ruled that the defendant violated § 18.2-152.3 by using the ATM "without authority."

A divided panel of the Court of Appeals affirmed in part and reversed in part. The Court found the evidence sufficient except for the offense of computer fraud. The Court found the evidence insufficient to prove that the defendant used the ATM "without authority." Regarding the forgery and false pretense convictions, the Court concluded that the trial court was entitled to conclude that the defendant knew the falsity of the checks.

Held: Panel ruling upheld; conviction affirmed in part, reversed in part. Like the panel ruling, the full Court found the evidence sufficient except for the offense of computer fraud. The Court found the evidence insufficient to prove that the defendant used the ATM "without authority." Regarding the forgery and false pretense convictions, the Court concluded that the trial court was entitled to conclude that the defendant knew the falsity of the checks.

Regarding the offense of computer fraud, the Court ruled that one who uses a computer for a fraudulent purpose does not automatically use it "without authority" under the computer fraud statute. The Court examined § 18.2-152.2 and -152.3 and found that a computer fraud conviction requires that the defendant either "has no right, agreement, or permission" to use the computer or computer network or uses it "in a manner knowingly exceeding such right, agreement, or permission." The Court concluded that, to prove that a defendant knowingly exceeded their authorization, the Commonwealth must first establish the scope of the right, agreement, or permission. "The manner, rather than purpose, of the use must be unauthorized."

The Court rejected the Commonwealth's argument that if a defendant uses a computer to deposit forged checks—or for unlawful purposes more generally—her use is per se without authority under the computer fraud statute, citing rulings from other jurisdictions. In this case, the Court argued that, as a bank customer, she had authority to use the ATM to deposit checks and withdraw cash. By

depositing a forged check, she used the ATM for an unlawful purpose, but not in an unauthorized manner.

Judge Callins filed a concurrence, arguing that the ATM was not a computer under §18.2-152.3. Judge Athey filed a dissent, joined by Judges Humphreys and Beales, stating that he would have affirmed the convictions for computer fraud.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1040211.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1040211.pdf>

Northcraft v. Commonwealth; September 26, 2023

78 Va. App. 563, 892 S.E.2d 351 (2023)

Richmond: Defendant appeals his convictions for Larceny, Unlawfully Obtaining Documents from DMV, False Statement to DMV, Money Laundering, and Attempted Money Laundering on Jury Selection, Sufficiency of the Evidence, and Denial of his Defenses of Claim of Right and Reliance on Official Authority.

Facts: The defendant used Virginia’s abandoned vehicle process (“AVP”), §§ 46.2-1200 through -1207, which allows applicants to dispose of an abandoned vehicles left on a highway, public property, or private property, to steal at least five parked cars off the street and sell them at auction. The defendant first completed an online record request application for the five vehicles. The online record request application requires the applicant to state that they are in “possession of [the] motor vehicle” and indicate a reason for their possession. The defendant stated that the vehicles were located on public streets and that his claim was based on “possession of a motor vehicle... that was left unattended on public property for more than 48 hours in violation of a state law or local ordinance.”

The defendant then submitted applications for certificate of title for the vehicles in which he listed himself as the owner of the vehicles. On two occasions, DMV clerks recalled asking the defendant if he worked for a towing company or dealership. The defendant responded that he did not and said that the vehicles had been left on his property. At trial, the defendant objected to their testimony, but the trial court overruled the defendant’s objection.

After obtaining titles, the defendant took the vehicles off the street, in one case obtaining a replacement key for one of the vehicles. The defendant then enlisted a third-party to sell two of the vehicles at auction. At trial, the third-party testified that he entered an agreement to auction vehicles on behalf of the defendant and had an agreement to pay the defendant the money. However, when the owners noticed the vehicles missing, they notified police, who learned of the defendant’s scheme. Police were able to stop one of the two sales from taking place and the defendant did not receive the proceeds of the other sale.

At trial, the owners of the vehicles testified that they did not know the defendant, did not give him possession or ownership of their cars, and instead regularly parked their vehicles themselves during the relevant time.

During voir dire, defense counsel asked potential jurors about whether the number of charges would influence their decision-making. One juror agreed that her initial reaction to the number of charges was that “he must have done something wrong.” She then stated that she would be able to set aside that initial reaction and “would have to listen to the evidence....But it kind of would still be in my head.”

The trial court then gave the juror a clarifying instruction, informing her that she could only find the defendant guilty based on the evidence and could not infer guilt from the fact that he had been charged with an offense. When asked by the court if she could apply that fairly, she stated, “Yes” and further stated, “That is your rule, and I have to do it the way you say do it.” When the trial court told her that it did not “want to put words in [her] mouth” and wanted her “to understand that that’s the process,” the juror told the court, “I understand.”

The trial court denied the defendant’s motion to strike the juror for cause, rejecting the defendant’s argument that her voir dire demonstrated that she could not set aside the number of charges that the defendant was facing and the implication that this meant he must have done something wrong.

At trial, the defendant argued that the evidence was insufficient to support his convictions under § 46.2-105.2(A) for Unlawfully Obtaining Documents from DMV because there was no evidence in the record that he did not “satisf[y] all legal and procedural requirements” to receive title to the vehicles; he contended that he met all of the requirements set out in the AVP at the time of the offense. The defendant argued that the only sensible interpretation of the statute was that an individual possesses a vehicle under the statute if the person knows where the vehicle is located and also knows that the vehicle was abandoned on the side of the road for more than 48 hours, in violation of a state or local ordinance.

The defendant also argued that the evidence was insufficient regarding False Statement to DMV, noting that, at the time, the application for certificate of title itself did not ask whether the applicant is in possession of the vehicle for which title is sought. The defendant further argued that there was insufficient evidence of the fraudulent intent necessary for his convictions under § 46.2-605.

Regarding the offense of Grand Larceny, the defendant argued that because he took the vehicles after he obtained titles to them, they were not taken without their owners’ permission, as he was their owner after obtaining the titles.

Regarding the Money Laundering offense, the defendant argued that the evidence failed to establish that a financial transaction occurred. The defendant also argued that there was insufficient evidence of an attempt to conceal or disguise the ownership of the property involved under § 18.2-246.2.

Lastly, at trial, the defendant raised two defenses, a good faith claim-of-right defense and a good faith reliance defense. First, the defendant asserted that he had a good faith belief that he was entitled to the vehicles, because he found the AVP, a legitimate process through the DMV, utilized that process, and subsequently received titles to the vehicles from the DMV. The defendant asked the trial court to instruct the jury on a good faith claim-of-right defense in relation to the three grand larceny offenses. His proposed instruction stated, “If you find that [the defendant], in good faith, believed that the [vehicle] belonged to him at the time of the taking then you shall find [the defendant] not guilty of grand larceny.” The trial court refused the instruction.

Second, the defendant also asked the trial court to instruct the jury on the defense of good faith reliance on authority, pursuant to *Miller v. Commonwealth*, 25 Va. App. 727 (1997), for the unlawfully obtaining documents from the DMV charges. The court refused the instruction, noting that it thought “it is misleading of the law in the case” and that “more importantly, there is no affirmative evidence provided in accordance with *Miller*.”

[Note: DMV has since changed the AVP procedure to avoid this situation – EJC].

Held: Affirmed. The Court held that the trial court did not err in failing to strike a juror for cause, in denying the defendant’s motions to strike the evidence, or in denying jury instructions on good faith claim-of- right and good faith reasonable reliance.

Regarding jury selection, the Court found that the voir dire, viewed in its entirety, did not demonstrate that the juror’s opinion—that the number of charges that the defendant faced was indicative of his guilt—was a fixed opinion. The Court concluded that the juror’s own responses, which were not merely “yes” answers to the trial court’s questioning, provided evidence that her initial reaction upon hearing the number of charges against the defendant was not fixed. Rather, the Court found that she indicated in her own words that she understood the legal instruction regarding the presumption of innocence after being instructed on it and could set aside her prior opinion. Contrary to the defendant’s assertion, the Court ruled that the record demonstrated that the trial court’s questioning and instruction of the juror constituted clarification and not improper rehabilitation.

Regarding sufficiency of the offense of Unlawfully Obtaining Documents, the Court first ruled that the statutory scheme clearly sets out that to utilize the AVP, the applicant must be in possession of the abandoned vehicle. The Court then addressed the question of whether the defendant was in possession of the vehicles for which he obtained titles from the DMV.

The Court noted that § 46.2-1200 does not provide a definition for the term “in possession of.” The Court concluded that the plain meaning of “possession” in § 46.2-1202(A) is neither ambiguous nor creates absurd results when applied in the context of the statute. Rather, under this definition, the Court found that the evidence established that the defendant did not have possession of the vehicles in question. The Court noted there had been no indication that anyone but the owners had control of or held at their disposal the vehicles prior to the defendant using the AVP to obtain the vehicles’ titles. Because the vehicles were not in the defendant’s possession, the Court concluded that he was not entitled to use the AVP to obtain their titles. Thus, the Court agreed that the defendant obtained the titles from the DMV without “satisfy[ng] all legal and procedural requirements for the issuance thereof,” or “otherwise [being] legally entitled thereto,” in violation of § 46.2-105.2(A).

Regarding the offense of False Statement to DMV, the Court noted that, although the application for certificate of title itself does not ask whether the applicant is in possession of the vehicle for which title is sought supporting documentation included his record request receipts and vehicle removal certificates, both documents require an applicant to state who is in possession of the vehicle. In this case, the Court found that the defendant provided the false information that he was in possession of the vehicles on both the online record request applications and the vehicle removal certificates. Because the defendant provided false information on his supporting documentation, while certifying on the applications for certificate of title that his supporting documentation was true and accurate, the

Court agreed that the evidence established that he provided false information on his applications for certificate of title.

Regarding the element of intent for False Statement to DMV, the Court found that the defendant's conduct and representations plainly indicated his fraudulent intent in making false statements on his applications for certificate of title in violation of § 46.2-605.13. While the Court acknowledged that the defendant did not attempt to conceal his identity on the applications for certificate of title, the Court explained that this fact alone did not negate the other evidence in the record indicating his fraudulent intent in his use of the AVP.

In a footnote, the Court also found that it was proper to admit the statements that the defendant made to the two DMV employees. The Court concluded that the fact that the defendant lied to two different DMV employees regarding the location of vehicles for which he sought title was relevant to show his fraudulent intent, because it demonstrated his intent to conceal the fact that he was not actually in possession of the vehicles and therefore was using the AVP unlawfully.

Regarding the Grand Larceny offense, the Court concluded that because his titles to the vehicles were procured through his fraudulent actions, they did not convey legal title to him. The Court explained that the defendant's fraudulent use of the AVP to obtain the vehicles' titles was the first part of his larcenous scheme to deprive the rightful owners of their vehicles. The Court observed that the defendant committed an initial larceny in obtaining the titles themselves—he used the AVP to fraudulently take another's property, namely the titles to the vehicles that were issued to him by the DMV, but which legally belonged to the vehicles' true owners. He then committed the charged larcenies of the three vehicles themselves, physically taking the vehicles from the streets and later attempting to sell two of them at auction.

Because the defendant obtained the titles and vehicles through his larcenous actions, at the time he took the vehicles, the Court ruled that the defendant did not have "legal title" to them under § 46.2-100; he merely had the physical certificates of title. Accordingly, the Court ruled that he was not the owner of the vehicles at the time he stole them, and the evidence was sufficient to support his larceny convictions.

Regarding the Money Laundering offenses, the Court first found that the fact that the defendant did not actually receive money from the third-party seller was not dispositive. The Court pointed out that the defendant initiated a financial transaction, made an agreement to sell the vehicles, and the third-party received money in exchange for auctioning the one of the cars. While the defendant did not receive any money as a result of his agreement, the Court found that he did initiate the transaction, thus the Court concluded that the evidence was sufficient to prove that he conducted a financial transaction in this case.

Regarding the "concealment" element of Money Laundering, the Court found the federal cases interpreting the federal money laundering statute to be instructive. In this case, the Court agreed that the evidence was sufficient to establish the defendant's intent to conceal or disguise the source of the property involved. The Court found that, by employing a third party to sell the vehicles at auction, the defendant demonstrated his intent to structure the transaction so as to conceal the true source of the property involved in the transaction. The Court quoted an 8th Circuit case that "the money laundering statute does not require the jury to find that [accused] did a good job of laundering the proceeds." In this case, the Court ruled that the defendant's use of a third party constituted sufficient evidence to

show that the transaction was designed in whole or in part to conceal or disguise the source of the property involved in the transaction.

Regarding the defendant's intent to commit the Money Laundering offense, the Court again found sufficient evidence of intent to commit the offense by his agreement to sell the vehicles, the proceeds of his grand larcenies, at auction via the third party. As far as the conviction for Attempted Money Laundering, the Court also ruled that the defendant signing over the title and giving the vehicle to the third party was the direct act done toward the commission of the offense, one that was only ineffectual because the one of the cars was identified as stolen before the third-party could sell it. Accordingly, because the evidence established that the defendant conducted a financial transaction designed to conceal the source of one of the vehicles and that he attempted to do so for the other vehicle, the Court concluded that the trial court did not err in finding the evidence sufficient to support both convictions.

Regarding the defendant's Claim of Right defense, the Court found that the defendant did not have a good faith belief that he owned the vehicles at issue because his obtaining of their titles was predicated on his fraudulent statements on the AVP documents that he was in possession of the vehicles. The Court reasoned that he could not have sincerely believed that he was in possession of the vehicles at the time he completed the applications for certificates of title because the vehicles were located on public streets and were regularly parked there by their true owners, and the Court specifically pointed to his false statements to DMV in support of his applications.

Lastly, regarding the defendant's claim of Reliance on Official Authority, the Court concluded that the evidence clearly showed that the defendant failed to receive assurances from DMV employees that his use of the AVP was lawful. The Court warned that the mere acceptance of paperwork and the issuance of the titles does not qualify as an affirmative assurance that the conduct giving rise to his convictions was lawful. In this case, the Court pointed out that the defendant did not receive an affirmative assurance on the lawfulness of his use of the AVP from any DMV employee.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1067212.pdf>

Firearms and Weapons Offenses

Fourth Circuit Court of Appeals

Maryland Shall Issue v. Moore: November 21, 2023

Baltimore: Plaintiff's appeal the denial of an injunction in their Second Amendment lawsuit.

Facts: Plaintiffs sued under the Second Amendment to challenge Maryland's handgun qualification license, which is a requirement that precedes Maryland's handgun registration process and is separate from Maryland's concealed-carry handgun process. In Maryland, since 2013, to obtain a

handgun qualification license, one must submit fingerprints to undergo a background investigation and take a four-hour-long firearms safety training course that must include live-fire.

The district court dismissed the plaintiff's lawsuit.

Held: Reversed, Injunction Granted. [Note: This ruling is pending En Banc review before the full 4th Circuit – EJC].

The Court examined the U.S. Supreme Court's ruling in *Bruen*, which provided that when that the Second Amendment's plain text covers an individual's conduct, the Constitution "presumptively protects that conduct." The Court explained that once a court has made that finding, the challenged regulation is unconstitutional unless the government can show that "the regulation is consistent with this Nation's historical tradition of firearm regulation." The Court complained that Maryland could not point to any historical laws that operated by preemptively depriving all citizens of firearms to keep them out of dangerous hands.

In this case, the Court complained that though the Maryland law does not permanently bar the plaintiffs from owning handguns, the challenged law deprives them of that ability until their application is approved, no matter what they do. In a footnote, the Court noted that "*Bruen* seems to require that a law is a 'regulation' of protected conduct, which entails some burden on or hindrance to its exercise... We need not and do not now decide where to draw this line." However, in a later footnote, the Court explained that a restriction on whether someone can even possess a firearm in or out of the home is more burdensome than one that only limits his right to carry that firearm publicly.

The Court pointed out that Maryland's law does not merely identify a dangerous group of people and prohibit them from acquiring handguns; Instead, it prohibits all people from acquiring handguns until they can prove that they are not dangerous. The Court discussed the potential limitations that are permissible under *Bruen* for the possession of firearms by individuals who pose a level of "dangerousness" to the public. The Court noted that other circuits that have reviewed this issue tend to agree that history and tradition support an exception affording legislatures "the power to prohibit dangerous people from possessing guns." The Court wrote, however, that "even if the modern federal prohibitions that Maryland cites are all constitutional—because they fit within a historical tradition allowing states to prohibit "dangerous" people from owning firearms—that says nothing about Maryland's law."

Justice Keenan filed a dissent.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/212017.P.pdf>

Virginia Supreme Court

Commonwealth v. Barney: 884 S.E.2d 81 (2023).

Reversed Court of Appeals Ruling of November 3, 2021

Hampton: The defendant appeals his convictions for Use of a Firearm on jury instruction and sufficiency issues.

Facts: The defendant robbed a store. During the robbery, the defendant made statements and gestures to imply that she had a firearm. The defendant kept her hand in her pocket and handed the victim a note that stated “[T]his is a robbery, stay calm, [and] don’t make a sound if you want to live.” At trial, the victim testified that the bulge in the defendant’s pocket did not look like a finger. She explained that she was “scared out of her mind,” because she thought she was being robbed at “gunpoint.” She explained that she believed, if the defendant “pulled that trigger,” she “would be shot.” On video, a shape in the defendant’s pocket looked like a firearm. Police arrested the defendant the next day but did not recover a firearm.

At trial, the defendant requested an additional jury instruction as to the definition of a “firearm” under the statute, seeking to clarify the requirement that the Commonwealth must prove that the defendant had a firearm or an object with the appearance of a working firearm. The defendant offered ten possible supplemental jury instructions. For example, the defendant offered one alternate instruction: “The defendant’s fingers or hands are not considered a firearm,” and another: “It is not sufficient to convict if you believe that the defendant used an object to make the victim believe that she had a firearm.” The trial court denied the additional instructions, only using the Model Jury Instruction, No. 18.702.

The Court of Appeals reversed, concluding that no rational, properly instructed jury could conclude beyond a reasonable doubt that the defendant used a firearm or an object physically resembling a working firearm.

Held: Court of Appeals Reversed, Conviction Reinstated. In a 4-3 ruling, the Court held that the Court of Appeals erred in holding that the trial court abused its discretion by not supplementing the agreed-upon jury instruction defining a firearm and in holding that the evidence was insufficient to sustain the jury’s guilty verdict. The Court concluded that a rational jury could find that the defendant threatened to kill the victim during the robbery and used a concealed firearm as the threatened murder weapon.

The Court likened this case to *Powell*. In a footnote, the Court clarified that *Yarborough’s* holding regarding the insufficiency of “a victim’s subjective belief as to the presence of a firearm” is still good law in the Commonwealth. Here, however, the Court noted that the defendant threatened to kill the victim and made this threat while pointing at the victim what looked like the barrel of a handgun. “The murder weapon in her pocket — Barney’s words and gestures obviously implied — was a handgun, not a finger.”

Regarding the jury instruction, the Court held that the trial court did not abuse its discretion in refusing to issue a specific instruction explicitly saying that a finger is not a firearm because that was never a contested issue in the case.

Justice Mann filed a dissent, joined by Justices Goodwyn and Mimms

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1211126.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1057201.pdf>

Virginia Court of Appeals -
Published

Barnes v. Commonwealth: April 23, 2024

Fredericksburg: Defendant appeals his convictions for Shooting Into an Occupied Building and Property Destruction, alleging Inconsistent Verdicts, and on sufficiency of the evidence.

Facts: The defendant, armed with a gun, confronted another man at a shopping center. When that man drew a firearm, the defendant drew his firearm. The defendant started shooting at the man and two men exchanged gunfire. The defendant shot and killed the other man. The defendant also shot the occupied stores behind the man, shattering glass entrances.

At trial, the jury acquitted the defendant of second-degree murder and use of a firearm in the commission of a murder, while finding the defendant guilty of unlawfully discharging a firearm into an occupied building and unlawful destruction of property.

The defendant objected that these verdicts were inconsistent, since “the jury determined that [he] acted lawfully (self-defense) when shooting at the decedent with regard to murder and the related firearms offense, but acted unlawfully when the same conduct damaged property around the decedent.” The defendant contended that the jury’s verdicts, because inherently inconsistent, constituted an “actual irregularity,” and as such, should have been set aside.

Held: Affirmed.

The Court acknowledged that Virginia law does address “irregularities” with respect to, among other things, juror misconduct and juror lists. However, the Court clarified that an apparently inconsistent jury verdict is not an “irregularity.” The Court rejected the defendant’s reliance on the *Akers* ruling, explaining that the *Akers* ruling is only applicable to elemental inconsistency in bench trial verdicts.

In a footnote, the Court rejected the defendant’s contention that the jury found that he acted in self-defense. In this case, the Court explained that, no less than in any other case, it did not know why the jury acquitted the defendant of some of the charges. The Court wrote: “While we may conjecture the jury’s motivation, such is merely imaginative reasoning and offers no window into the actual motivations and beliefs of the jurors. We simply do not know why the jury acquitted Barnes of the second-degree murder and use of a firearm in commission of a murder charges.”

Regarding sufficiency of the evidence, since the shooting happened in the afternoon during normal business hours on a day that the defendant had visited one of the stores, the Court found that it was reasonable for the jury to conclude that the defendant knew or should have known that the stores were occupied. The Court concluded that the jury could infer that although the defendant may not have specifically intended to shoot the occupied stores or damage them, he knew or should have known what would likely result, not least because the stores were directly in the line of fire.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0991232.pdf>

Miner v. Commonwealth: March 12, 2024

Hampton: Defendant appeals his conviction for False Statement on a Firearms Form on the Defense of Reliance on Official Authority and sufficiency of the evidence.

Facts: While under indictment for burglary, the defendant attempted to purchase a firearm. Where the ATF Form 4473, question 11(b), inquired: “Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year?” the defendant answered “No.” At the time, the defendant had entered into a plea agreement. Under the agreement, adjudication of the felony charge would be deferred until the following year, upon which date it would be reduced to a misdemeanor subject to the defendant’s compliance with the terms of the agreement.

When a police officer investigated and asked him why he answered the form falsely, the defendant stated that he thought his felony charge had been reduced to a misdemeanor “and that when he returned to court next year, all he would do is a few days in jail.” The defendant stated that his “attorney said that he was good as far as trying to purchase a firearm.” At trial, the defendant argued that when he attempted to purchase the firearm, he was relying on the advice of his attorney and that he was legally entitled to rely on such advice. The trial court rejected that defense.

At trial, the Commonwealth entered a copy of the indictment along with the defendant’s signed plea agreement as evidence. The defendant unsuccessfully argued that § 18.2-308.2:2 “only criminalizes false statements to questions required or enumerated under Sections B and C and that “the legislative intent of [the statute] was to NOT criminalize any statement made under ATF question 11(b)” and “the answer to the question ‘are you under indictment’ was never meant to be criminalized.”

Held: Affirmed.

The Court first agreed that the evidence proved the defendant was under indictment at the time he attempted to purchase the firearm. The Court also agreed that the defendant’s denial of that fact on the ATF Form 4473 was a “materially false statement” made in violation of § 18.2-308.2:2(K).

Regarding the defendant’s claim of reliance on official authority, the Court acknowledged that Virginia has not officially considered the question of whether a private attorney can constitute a government official under the rulings in the *Miller* and *Palmer* cases, although an unpublished decision in *Lott* opined that “a private attorney is not a government official.” In this case, the Court explained that, although attorneys are “officers of the court,” they are not officials of government by virtue of being lawyers. Thus, the Court concluded that the defendant’s former attorney was not a public officer “charged by law with responsibility for defining the permissible conduct with respect to the offense at issue.” Therefore, the Court ruled, the trial court did not err in denying the defendant’s motion to strike on that basis.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1964221.pdf>

Davis v. Commonwealth: November 21, 2023

Spotsylvania: Defendant appeals his convictions for Possession of a Controlled Substance, Possession of a Firearm by Felon, Transportation of a Firearm by a Felon, Carrying a Concealed Weapon by a Felon, and related charges on Double Jeopardy, Admission of Court Records, Jury Instruction, and sufficiency grounds.

Facts: The defendant possessed fentanyl and two handguns while he was driving a car. Police stopped him because his vehicle was reported as stolen. The defendant then ran on foot from law enforcement, taking a firearm with him as he fled into the woods. Thirty minutes later, police apprehended him and discovered that he was carrying the gun concealed. The defendant admitted to being a convicted felon. An officer searched the defendant and found pills, which the defendant stated were Percocet.

Prior to trial, the defendant moved to dismiss one of the two charged offenses under § 18.2-308.2, to wit: Possession of a Firearm by Felon and Carrying a Concealed Weapon by a Felon, on Fifth Amendment double jeopardy grounds. The trial court denied the motion.

At trial, the officers testified about the firearms that they recovered. One officer testified that the item he found in the front seat of the vehicle was a nine-millimeter Smith and Wesson pistol. He explained that he had experience with firearms and could tell if a gun was “real.” The officer said that the item was a “real gun” and recited its serial number.

The other officer testified that he had experience with firearms, testified that the item he found on the defendant’s person was a “forty-caliber Smith and Wesson handgun semiautomatic with an extended mag and . . . one round in the chamber.” He specified that this item was a “real gun.” The officer explained that after he recovered the gun, he “rack[ed] it” to expel the bullet that was “in the chamber.” The officer provided its serial number and also described it as a “real gun.” The juries watched the video recording from the officer’s body-worn camera that showed one of the guns when officers found it on the defendant’s person. The video also recorded the officer clearing the cartridge from the chamber of that gun.

At trial, the defendant argued that the Commonwealth did not lay the proper foundation to allow testimony that the items were firearms under the statute. He suggested that the testimony of the officers did not exclude the possibilities that the items were toys or replicas.

To prove the defendant’s previous felony conviction, at trial, the Commonwealth introduced documents from the Circuit Court of Prince George’s County, Maryland, which identified the defendant by his full name and date of birth. They reflected that the Maryland court accepted the defendant’s guilty plea to the charge of “Robbery with a Dangerous Weapon” and that he was convicted of that offense. They also include a copy of the grand jury indictment, which charged that the defendant committed robbery in violation of Maryland Criminal Law Code § 3-403 and recited the elements of that

offense. Maryland Criminal Law Code § 3-403, robbery with a dangerous weapon, is a felony. The Commonwealth presented a copy of that code section to the trial court, and the trial court admitted a copy into evidence.

The officer also testified that the NCIC report listed the defendant's felony conviction for robbery with a deadly weapon in violation of "CR3403MD," indicating Maryland Criminal Law Code § 3-403. The officer also recited the case number, which matched the case number provided on the Maryland court documents. Although the officer did not explain who maintains the NCIC database during his testimony, he stated that he routinely relied on information contained within it for police matters.

At trial, the defendant argued that the documents failed to meet the relevancy standard because they did not satisfy the requirements of a judgment order.

At trial, a forensic scientist testified that percocet contains oxycodone, a Schedule II controlled substance. In fact, however, the scientist testified that she located fentanyl, a different Schedule II controlled substance, in the pills. The defendant argued that the Commonwealth failed to prove that he knew the nature of the controlled substance in his possession.

Lastly, the defendant objected to the language in the jury instructions that referred to him as the "defendant." The defendant contended that the use of the term "defendant" in the jury instructions instead of his surname biased the juries against him and therefore did not comport with the tenet that he was innocent until proven guilty. The defendant argued that by referencing him as "the defendant" in the jury instructions, the trial court improperly shifted the burden of proof to him and away from the Commonwealth.

Held: Affirmed. The Court held that the two convictions under § 18.2-308.2 involving the same gun do not violate the defendant's constitutional protection against double jeopardy. The Court also ruled that the trial court acted within its discretion by admitting officer testimony that the guns were "real." The Court held that the trial court also properly admitted the Maryland court documents. The Court held that the evidence was sufficient to prove that the defendant had previously been convicted of a felony, that each gun in his possession met the applicable legal definition of a firearm, and that his possession of a controlled substance was knowing. Finally, the Court held that the trial court did not err by rejecting the defendant's suggested jury instruction wording to refer to him by name instead of as "the defendant."

Regarding the defendant's double jeopardy argument, the Court repeated that, under *Baker*, each separate act or occurrence violating § 18.2-308.2 constitutes a separate offense. The gravamen of each of the firearm offenses proscribed by the statute is placing the community in "heightened danger," so consequently, each separate instance resulting in a heightened danger to the community may be punished separately. In this case, although he ultimately was caught not far from his car, the Court found that the defendant's act of taking the firearm with him, concealing it, and keeping it with him for the thirty minutes during which he evaded police created a heightened danger to the community separate and distinct from the danger when the officer first encountered him in the car. Therefore, the Court ruled that the trial court did not err by denying the defendant's pre-trial motion to dismiss one of the charges on double jeopardy grounds.

In a footnote, the Court pointed out that *Baker* addressed three convictions for possessing a firearm under § 18.2-308.2. This case, the Court pointed out, involved two alternative ways in which the Commonwealth can establish a violation of § 18.2-308.2: possession of a firearm and carrying it in a concealed manner. The Court explained that, just as someone can possess the same firearm in separate instances, giving rise to separate offenses, it concluded that someone could possess a firearm in one instance and carry it in a concealed manner in a second instance, similarly supporting separate charges and punishments.

Regarding the sufficiency of the evidence about the firearms, the Court repeated that the Commonwealth was not required to show that the items were operable at the time of the offenses. The Court also explained that the testimony did not have to exclude all possibility that the items were toys or replicas in order to be admissible. In this case, the Court ruled that the juries could reasonably conclude that the items in question were “designed, made, and intended to fire or expel a projectile by means of an explosion” and therefore, the Commonwealth presented evidence sufficient to prove that the items were firearms within the meaning of § 18.2-308.2.

Regarding the evidence of the defendant’s previous felony conviction, the Court ruled that the documents, viewed together as a single exhibit, provided enough information to permit a fact finder to conclude that the defendant was previously convicted of a felony. The Court also agreed that the defendant’s admission, the Maryland documents, and the NCIC information met the Commonwealth’s burden of proving that the defendant had a previous felony conviction.

Regarding the nature of the controlled substance, the Court repeated that in proving the offense of illegal drug possession, the knowledge requirement may be met by showing that the defendant knew the identity of the substance he possessed, regardless of whether he knew it was illegal. In this case, the Court noted that the evidence that the defendant believed he had Percocet was enough to show that he had knowledge of the pills’ nature and character as a Schedule II controlled substance.

In a footnote, the Court pointed out that the trial court had also instructed the jury that “the defendant does not need to know precisely what controlled substance” he possessed, although this issue is pending an *En Banc* hearing in *Camann v. Commonwealth*, which had yet to be decided as of this ruling.

Regarding the defendant’s complaint about using the word “defendant” in jury instructions, the Court complained that the defendant cited no authority holding that a trial court must refer to a defendant by name in the jury instructions, and the Court itself did not find any authority either. The Court explained that the term “defendant,” in a criminal proceeding, means nothing more than the “person . . . accused” of the crime or crimes. Accordingly, the Court ruled that the trial court did not abuse its discretion by referring to the defendant as “the defendant” in the jury instructions.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0903222.pdf>

Taylor v. Commonwealth: August 1, 2023
78 Va. App. 147, 890 S.E.2d 634 (2023)

Richmond: Defendant appeals his conviction for Carrying a Pistol with an Extended Magazine on sufficiency of the evidence.

Facts: The defendant openly carried a handgun with an extended magazine in the City of Richmond. An officer stopped him and seized the firearm. At trial, the officer testified that the firearm was a Taurus PT 111 capable of holding 12 rounds, that it was a semi-automatic handgun, and that the extended magazine held 24 cartridges. The Commonwealth presented no evidence or testimony that the handgun was a center-fire pistol. It did not introduce the firearm itself into evidence.

The trial court convicted the defendant of § 18.2-287.4, which prohibits, inter alia, the carrying of a semi-automatic center-fire pistol with an extended magazine on a public street in certain localities, including the City of Richmond. The trial court rejected the defendant's argument that the Commonwealth had failed to prove that the handgun was a "centerfire pistol."

Held: Reversed. Because the Commonwealth failed to prove that the pistol was "center-fire," as required by § 18.2-287.4, the Court reversed the conviction.

The Court noted that the Commonwealth did not introduce the firearm itself into evidence or present other evidence about whether the pistol was centerfire could be determined from other attributes of the weapon that were in evidence. The Court rejected the Commonwealth's argument that the trial court found the firearm was a semi- automatic center-fire firearm based on its own familiarity with firearms and related offenses, explaining that it would be error for the trial judge to base that finding on his own personal knowledge of firearms.

The Court also rejected the argument that the trial court took judicial notice of the firearm's nature, pointing out that the Commonwealth did not claim that a Taurus PT 111 is commonly known to be a center-fire pistol, nor that its status as such could be readily determined by an unimpeachable source. The Court also pointed out that the trial court did not take judicial notice on the record.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0427222.pdf>

Miles v. Commonwealth: July 25, 2023

78 Va. App. 73, 889 S.E.2d 663 (2023)

Charlottesville: Defendant appeals his convictions for Discharging a Firearm in an Occupied Building on sufficiency of the evidence.

Facts: An officer responded to an apartment in response to a call for shots fired. Inside, the defendant saw the officer and opened fire, firing six times and striking the officer.

At trial, the jury convicted the defendant of six counts of unlawful discharge of a firearm in an occupied building. After the trial, the defendant argued that the evidence had failed to prove that the building was "occupied" when he fired his weapon because the officer was neither a resident nor a guest there. He also argued the evidence failed to prove six separate counts of unlawfully discharging a

firearm because he fired all six bullets in rapid succession and only placed one person (the officer) at risk.

Held: Affirmed.

The Court first examined the meaning of the word “occupied.” The Court held that, given the legislature’s intent to protect all people inside any building against physical harm, the term “occupied” in § 18.2-279 refers to the physical presence of any individual in the building when a firearm is discharged. Accordingly, as the officer was in the building when the defendant discharged his weapon, the evidence was sufficient to prove beyond a reasonable doubt that the defendant unlawfully discharged a firearm in an occupied building.

Regarding the number of convictions, the Court pointed out that it had recently held in *Taylor* that the term “discharge” in § 18.2-279 is “bullet-specific,” meaning each shot fired from a gun constitutes a separate discharge; and, thus, a separate offense. In *Taylor*, the Court had noted that the essence, or gravamen, of an offense under § 18.2-279 is the risk of endangerment or death to another as a result of discharging a firearm and that “[t]he life of another is endangered with the discharge of each shot, even if multiple shots are discharged in rapid succession.” Thus, under *Taylor*, the undisputed evidence supported the jury’s reasonable conclusion that the defendant was guilty of six counts of unlawfully discharging a firearm in an occupied building because the defendant fired six times.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0288222.pdf>

Virginia Court of Appeals -
Unpublished

Roane v. Commonwealth: April 8, 2024

Newport News: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment, Jury Instruction, and sufficiency grounds.

Facts: The defendant, a convicted felon, carried a firearm while riding as a backseat passenger in a vehicle. During the stop, the defendant opened the door and started to get out. The officer ordered the defendant to get back inside, and the defendant complied. The defendant stated that he was getting a ride from the driver. The officer asked the defendant for ID, which the defendant provided.

After a dog alerted to the presence of narcotics in the vehicle, the officers ordered everyone out of the car and, consistent with departmental policy, proceeded to handcuff them and move them to the curb. The defendant began moving around and reached towards his right side. The officers ordered the defendant to raise his hands. When the defendant complied, the act of raising his arms lifted his shirt and officers noticed he was carrying a concealed handgun.

A struggle ensued between the defendant and the officers. The officers repeatedly shouted: “stop reaching.” Officers finally were able to control the defendant and an officer grabbed the defendant’s gun.

The defendant moved to suppress. The defendant argued that absent reasonable suspicion particularized to him, a mere passenger, the officer’s order to him to remain in the car when he tried to leave the scene violated his Fourth Amendment rights. The trial court denied the motion.

At trial, an officer identified the gun as a black “Glock 42” .380 caliber gun with a magazine inside it that contained six bullets. Officers also noted the gun’s serial number. One of the officers explained that a “BB gun fires BBs” whereas a “real firearm fires bullets.” He testified that the item was a firearm, not a BB gun. Another officer explained that when a firearm is discharged, “the firing pin hits the igniter[,] which releases the powder” that “caus[es] the explosion” and “mak[es] the bullet fly out of the firearm.” An officer also testified that he test-fired the firearm prior to trial and it worked as designed.

At trial, the defendant objected to the Commonwealth’s jury instruction defining the term “firearm” for purposes of § 18.2-308.2. The Commonwealth used Model Jury Instruction number 18.622: “A firearm is an instrument designed, made, and intended to expel a projectile by means of an explosion. It is not necessary that the firearm be operable, capable of being fired, or have the actual capacity to do serious harm.” The defendant argued that the prosecution did not offer any evidence regarding the definition of a firearm. The trial court overruled the defendant’s objection.

Lastly, at trial, the Commonwealth introduced two of the defendant’s prior felony convictions. The two orders reflected that a person with the defendant’s name and social security number was convicted for possession of a concealed weapon by a felon, a violation of § 18.2-308.2, based on an offense date of October 13, 1997. Both orders were copies certified by a circuit court deputy clerk. Additionally, the orders were entered by the same circuit court in which the defendant was tried for the instant offense. The trial court also admitted redacted copies of a certified prior conviction order from 1998 and a related “Correction Order” from 2021, entered nunc pro tunc to the date of entry of the 1998 order.

The defendant contended that the evidence was insufficient to prove he had the requisite prior conviction for a violent felony. He noted that the two prior conviction orders relied upon by the prosecution listed his name but reflected two different birthdates. He argued that these orders were “of suspect validity,” particularly given that they were signed by two different judges more than twenty years apart and the second one was entered in 2021, “after [the instant] case had started.” The trial court rejected his argument.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress. The Court also held that the trial court did not err in determining that the instruction properly stated the law. Lastly, the Court concluded that the evidence was sufficient to prove that the defendant had the requisite prior conviction for a violent felony at the time he possessed the firearm at issue in this case.

The Court reaffirmed that the officers’ order to the defendant to remain in the car during the traffic stop was reasonable and lawful under the Fourth Amendment. The Court also found that the officer was permitted to order the defendant to get out of the car pending completion of the routine traffic stop.

The Court then observed that the K9 alert provided an additional reason to continue the stop—to investigate the potential drug offense—as well as probable cause to search the vehicle. The Court found that, while removing the defendant from the car to conduct the search, the police acted reasonably by directing him to raise his hands for safety reasons. The Court noted that this action revealed the firearm, which had previously been concealed by the defendant’s shirt, in plain view at his waist. Once the firearm was in plain view, the Court concluded that the officers were entitled to seize it as evidence of the crime of carrying a concealed weapon.

Regarding the jury instruction, the Court explained that the prosecution was not required to call a witness from the forensic laboratory to provide testimony about the weapon to support the proffered instruction. In this case, the Court found the witness testimony about the weapon given by three different law enforcement officers provided the necessary quantum of evidence to support the instruction.

In this case, while the Commonwealth was not required to establish that the firearm was operable, the Court elucidated that proof that it was operable when he test-fired it provided evidence that it was, in fact, designed to function as a firearm and was not merely a replica of a firearm. The Court concluded that this evidence amply supported the trial court’s decision to overrule the defendant’s objection to the proffered “firearm” instruction.

Lastly, regarding the prior convictions, the Court agreed that the evidence was sufficient to permit the jury, as the finder of fact, to determine that the order accurately reflected the defendant’s 1998 conviction for the offense of possession of a concealed weapon by a convicted felon in violation of § 18.2-308.2 and that the only substantive difference between the two orders was a correction of the birthdate listed. The Court noted that both orders bore the identical name and social security number—the same name and social security number on the identification that the defendant provided to the officers shortly prior to his arrest for the instant offense.

The Court repeated that, while many persons have the same name, a social security number is a unique number that is assigned to and identifies a specific individual. Consequently, the Court found that the record supported the conclusion that the single-digit difference between the birthdate in the original order and the defendant’s birthdate was a clerical error, not a failure to adequately identify the person who was the subject of the prior conviction order.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0032231.pdf>

Chapman v. Commonwealth: August 15, 2023

Lancaster: Defendant appeals his conviction for Murder and Use of a Firearm on Jury Instruction issues.

Facts: The defendant shot and killed a man. At trial, in the jury instruction for Use of a Firearm under § 18.2-53, the instruction explained:

The defendant is charged with the crime of shoot, stab, cut or wound another person in the commission of, or attempt to commit, a felony. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant shot, stabbed, cut or wounded another person; and
- (2) That the shooting, stabbing, cutting or wounding occurred while the defendant was committing or attempting to commit a felony.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of shoot, stab, cut or wound another person in the commission of, or attempt to commit, a felony.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt either or both of the elements of the crime, then you shall find the defendant not guilty.

The defendant objected, asserting that the instruction “was inappropriate because it suggested that an inference of guilt could be drawn in the absence of any evil [intent] or mens rea.” The trial court overruled his objection.

[Note: The instruction did not include the statutory term “unlawfully” before the words “shot, stabbed, cut or wounded,” but the defendant did not challenge its absence – EJC].

Held: Affirmed. The Court found that the jury instruction did not dispense with the need to prove scienter. Instead, the Court observed that the instruction required the Commonwealth to prove beyond a reasonable doubt that the defendant shot victim while committing or attempting to commit an underlying felony—namely, first-degree murder, second-degree murder, or voluntary manslaughter. By convicting the defendant of second-degree murder, the jury found that his killing of victim was “malicious.” Thus, the Court found that the malice required to prove second-degree murder sufficed to support the defendant’s conviction under § 18.2-53 for shooting victim while murdering him.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0514222.pdf>

Lopez-Ramirez v. Commonwealth: August 1, 2023

Chesterfield: Defendant appeals his convictions for Possession with Intent to Distribute, Possession of a Firearm, and Concealed Weapon on Admission of the Certificate of Analysis and Refusal to Apply the Exception for Carrying a Concealed Handgun.

Facts: An officer stopped the defendant, who was carrying a concealed handgun and drugs intended for sale, for a traffic violation. The defendant drove for a mile and a half before stopping. When the officer asked the defendant to exit the vehicle, his passenger ran away. The officer patted the defendant down and discovered the barrel to a firearm in the defendant’s pocket, contained in a plastic bag. The officer then searched the vehicle and found the rest of the firearm underneath the driver’s seat, along with another firearm, drugs, and paraphernalia, including a digital scale with drug residue.

The officer collected the evidence from the vehicle and handed it to a backup officer. Although the officer did not observe the backup officer package the evidence, the property storage report stated that the backup officer was the one who relinquished the items to the property section on the same day. The evidence was secured in a police locker and could only be accessed thereafter by officers assigned to the property division.

Later, a property and evidence unit technician retrieved the evidence from a secured locker and transported them to DFS. When she reviewed the certificate of analysis during trial, the technician confirmed that the items listed on the certificate were the same items she delivered to the lab for testing. The lab's description of the evidence was consistent with the officer's description of the evidence seized from the vehicle.

At trial, the investigating officer and the technician testified, but the backup officer who packaged and delivered the evidence did not testify. The defendant argued that the evidence failed to prove the chain because no testimony established "how the evidence was initially packaged, who actually packaged the evidence, or who transported the property to evidence." The trial court overruled the objection and admitted the certificate of analysis.

In his defense, the defendant asked the trial court to apply the "carve out exception for concealed weapons secured within containers" referenced in § 18.2-308, but the trial court refused.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in admitting the certificate of analysis into evidence and that it did not err in refusing to apply the container exception to § 18.2-308.

Regarding the certificate of analysis, the Court found that the evidence provided reasonable assurances that the items collected from the defendant's vehicle were the same items sent to DFS. The Court noted that the officer's description of the evidence collected at the scene was the same description as the evidence that was submitted to the lab. The Court repeated that a trial court need not hear from every witness who physically handled the samples for the certificate to be admissible. Instead, the Commonwealth need only provide "reasonable assurance" that the evidence obtained by the police was the same evidence tested.

In this case, although the backup officer did not testify, the Court concluded that the circumstantial evidence provided reasonable assurances that the items collected by the investigating officer were the same items transported to DFS. The Court pointed out that there was no evidence that the items were tampered with before their analysis and no evidence to call into question the presumption that the evidence was properly handled. Accordingly, the Court ruled that the Commonwealth established every vital link in the chain of possession, thereby demonstrating with reasonable certainty that the evidence was not altered, substituted, or contaminated. Therefore, the trial court did not abuse its discretion in admitting the certificate of analysis.

Regarding the defendant's appeal to the exception to the Concealed Handgun statute for handguns stored in containers in a vehicle, the Court distinguished this case from *Myers*, noting that in this case, the cylinder of the handgun was located on the defendant's person inside a plastic bag. The Court noted that there was no evidence that the cylinder was "secured," because there was no evidence that the cylinder was "latched or otherwise fastened" inside the plastic bag; the cylinder was merely "wrapped up in a plastic bag" and partially sticking out of the defendant's pocket. The Court also

pointed out that there was no evidence that the remaining part of the gun, which was under the driver's seat and within arm's reach of the defendant, was secured in any way contemplated by the statute. Because the handgun was not entirely secured inside a container or compartment inside the defendant's vehicle, the Court ruled that the statutory exception in § 18.2-308 did not apply.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0839222.pdf>

Gambling

Virginia Supreme Court

Commonwealth v. Sadler Bros: October 13, 2023

(Unpublished)

Greensville: The Commonwealth appeals the granting of a preliminary injunction prohibiting enforcement of the ban on gambling using "Skill Games."

Facts: In 2020, the General Assembly criminalized playing or offering for play so-called "skill games," although the statute provided an exemption that allowed skill games to be played so long as the prizes for the games were limited in specified ways and so long as the games were located at a "family entertainment center."

In 2021, an oil company that operates truck stops and convenience stores that offer customers skill game machines to play filed suit to enjoin the enforcement of the statute. The plaintiff alleged that the statutes violated the free speech clause of the Virginia Constitution. The plaintiff also alleged that the exemption for family entertainment centers was unconstitutionally vague and unconstitutionally discriminated against the plaintiff's speech based on the nature of their businesses. The plaintiff also asserted that the statutory scheme constituted an unconstitutional content-based restriction of their speech and further alleged that the definition of "skill game" was unconstitutionally vague and overbroad.

After initial proceedings, the trial court granted a preliminary injunction enjoining the Commonwealth "from enforcing the ban on skill games as defined in Va. Code §§18.2-325(6) and 18.2-334.6." The trial court ordered that the injunction last until trial, which is currently scheduled for December 2023.

Aware of the injunction, the General Assembly amended the statute in 2022. Specifically, the General Assembly altered the statutory definition of "skill game." The General Assembly eliminated the exemption for games at family entertainment centers in its entirety, replacing it with an exemption for an "amusement device." Under the amendment, the new exemption covers an "[a]musement device," which is defined as "a game that is activated by a coin, token, or other object of consideration or value and that does not provide the opportunity to (i) enter into a sweepstakes, lottery, or other illegal gambling event or (ii) receive any form of consideration or value, except for an appropriate reward." Further, under §18.2-334.6, an "[a]ppropriate reward" is "a noncash, merchandise prize (i) the value of

which does not exceed the cost of playing the amusement device or the total aggregate cost of playing multiple amusement devices, (ii) that is not and does not include an alcoholic beverage, (iii) that is not eligible for repurchase, and (iv) that is not exchangeable for cash or cash equivalents.”

Held: Reversed, Injunction Vacated.

The Court repeated that gambling is conduct that may be heavily regulated and even banned by the Commonwealth as an exercise of its police powers. The Court wrote: “At least as it pertains to the statutes at issue and the record before us at this stage in the proceeding, we agree with the United States Supreme Court that “the activity [of] . . . gambling . . . implicates no constitutionally protected right[,]” and thus, “falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether.”

The Court rejected the plaintiff’s reliance on the fact that their “skill games” contain expressive content, with some “depict[ing] ghost stories, pirate ship battles, adventures in the old west, . . . medieval dragon hunting,” and other themes. The Court wrote: “Although true, nothing in the text of the relevant statutes regulates this content. Nothing in the statutory scheme prohibits video games from containing exactly the same themes and messages of “ghost stories, pirate ship battles, adventures in the old west, and medieval dragon hunting[.]” In fact, nothing in the statutory scheme prohibits Respondents from charging customers to play games with these very themes and messages. Rather, the statutory scheme only prohibits the ability of Respondents to offer customers a chance to wager on the outcome of the games—that is, it prohibits the conduct of gambling.”

The Court concluded that, because nothing in the record suggested that the General Assembly sought to regulate the content of the expression contained within the plaintiff’s video games, but rather, only sought to prevent the promise (and the ultimate execution) of a payout if a game ends in a particular fashion, the plaintiff is unlikely to succeed on the merits of the free speech claim.

In a footnote, the Court wrote: “If criminalizing promises of monetary winnings as determined by the outcome of a game violated free speech rights, the Commonwealth would be unable to prohibit unregulated bookmakers from taking bets on sporting events or citizens from running private “numbers” games because such activities involve the same basic promise. Virginia’s historic banning of such activities supports the conclusion that regulating or banning activities with similar promises does not violate Article I, Section 12.”

Full Case At:

<https://www.virginiamercury.com/wp-content/uploads/2023/10/ORD-10-13-2023-Commonwealth-230610.pdf>

Gang Offenses

Virginia Court of Appeals –
Unpublished

Diaz Martinez v. Commonwealth: March 26, 2024

Fairfax: Defendant appeals his convictions for Murder and Gang Participation on Refusal of a Jury Instruction and sufficiency of the evidence.

Facts: The defendant and three other members of MS-13 abducted and murdered a child, beating him to death behind a school. They did so on orders of the MS-13 gang, who had ordered a “birthday party” for the victim, which is a form of violent gang-enforced discipline. The four attackers beat the victim to death, with the defendant joining the attack by helping to surround the victim and by striking one of the blows against the victim.

Police interviewed the defendant, who admitted to going to the school that night, admitted to knowing that the gang had ordered an attack on the victim, and admitted to meeting one of the co-conspirators at the school. Cellphone data confirmed that the co-conspirator had been at the crime scene that night.

At trial, one of the accomplices testified against the defendant. Prior to the trial verdict, the trial court denied the defendant a proposed cautionary jury instruction regarding uncorroborated accomplice testimony, finding that the accomplice’s testimony was corroborated by other evidence.

Held: Affirmed. The Court held that the trial court did not err in refusing the proposed cautionary jury instruction, as other evidence corroborated the accomplice’s testimony that the defendant was present during the murder. The Court also held that the evidence was sufficient to support a jury finding that the defendant participated in the murder as a principal in the second degree, as the defendant joined the other attackers and struck the victim at least once. Lastly, the Court held that the evidence was sufficient to convict the defendant of criminal street gang participation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0591224.pdf>

Hit & Run

Virginia Court of Appeals – Published

Hooper v. Commonwealth: September 19, 2023

78 Va. App. 508, 891 S.E.2d 768 (2023)

Lancaster: Defendant appeals his convictions for Involuntary Manslaughter and Felony Hit & Run (Watercraft) on sufficiency of the evidence.

Facts: The defendant drove his father’s large boat with the victim as a passenger in the middle of the night while intoxicated and crashed, sending the victim overboard. While the victim drowned, the

defendant returned to the dock and went to sleep. The next day, when friends began looking for the victim, the defendant told the friends to stop looking and made up various, inconsistent, and sometimes bizarre reasons to not look for him or report him missing, such as that perhaps the victim had had a panic attack and checked himself into a local hospital, that maybe he had fallen off the dock, or that maybe he had just gone into another room or was in the garage.

The victim's friends summoned the police. The defendant first denied having taken the large boat out that night, telling the officer that he had taken out a smaller boat. The defendant later told an officer that he remembered that the three men drank more wine and beer together on the dock before the defendant and the victim went riding on the boat late that night for the second boat ride on that day, having gone out earlier with the friends. After an extensive search, rescuers found the victim's body floating near a damaged bulkhead.

Only the defendant had driven the boat on the long first outing of the day, even though he had been drinking and had four other people on the boat to help him drive it. A month later, the defendant admitted to police that he was intoxicated when he was driving the boat and crashed. However, he told police that he did not remember who drove the boat at the time of the incident. The defendant also stated that he remembered thinking that the victim "was a good swimmer, that he would swim to shore."

During a related civil lawsuit, the defendant also stated: "that the boat hit something hard," and then he further remembered calling out for the victim (after the victim apparently had fallen out of the boat). The defendant further remembered that he "restarted the boat's engine and headed to the boat dock up Carter's Creek towards my parent[s'] home" where he loaded the boat on a boatlift on his parents' dock—exactly as he had done earlier that afternoon.

At trial, the jury found the defendant guilty of involuntary manslaughter under § 18.2-36.2(A) and felony hit and run under § 29.1-740.

[Good job to Matt Kite and Tiffany Webb, Commonwealth's Attorneys, King William, for prosecuting this case and for their presentation about it at Spring Institute 2023.]

Held: Affirmed.

The Court agreed that the jury could reasonably infer that the defendant drove the boat late that night and that the victim (who had flown in from Atlanta) would not drive the defendant's friend's father's boat at night in waters with which he was not nearly as familiar as the defendant was. Furthermore, the Court agreed that the jury could reasonably infer from the totality of the evidence, including the defendant's deceptive conduct and lies to the police and to his friends about the victim's disappearance, that the defendant was driving the boat at the time of the collision.

Given that the defendant acknowledged that he had been drinking a lot, given that he was clearly under the influence of alcohol while he drove his father's boat into a bulkhead, and given that the victim died as a result of being thrown from the boat into the water after this collision with the bulkhead, the Court agreed that the evidence was sufficient to support the conviction of involuntary manslaughter under § 18.2-36.2(A).

Furthermore, given that the defendant left the scene of the collision in violation of § 29.1-739(A) and drove the boat back to his parents' home after he crashed the boat into a bulkhead and

given that the victim died as a result of this collision, the Court also agreed that the evidence was sufficient to support the defendant's conviction of felony hit and run under § 29.1-740.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0752221.pdf>

Virginia Court of Appeals -
Unpublished

Scroggins v. Commonwealth: January 30, 2024

Fredericksburg: Defendant appeals his conviction for Hit and Run on sufficiency of the evidence.

Facts: The defendant drove recklessly without a license and crashed into the victim. The victim told the defendant that he was going to call the police, but the defendant told him that there was “no need” to do so. Soon, the owner of the defendant's vehicle arrived. After exchanging some information, such as the vehicle's registration number and the owner's insurance information, the victim informed the owner that she was going to return to her vehicle to report the accident to law enforcement. The owner stated that “she'd do the same.”

However, while reporting the accident to the operator, the victim observed that the defendant, the owner, and their car had left the scene. Police responded. The victim provided the officer with the owner's insurance information, which the owner had provided. The officer discovered that the owner lived down the driveway from the location of the accident. Although the home could not be seen from the vantage point of the victim's vehicle, it was “a little ways down the driveway” and “a couple hundred feet away” from the accident.

The officer spoke with the owner, who finally retrieved the defendant. However, when the officer told the defendant that he knew he had been driving, the defendant became “defensive” and refused to continue the conversation.

At trial, the defendant unsuccessfully argued that the owner had provided all the information that the victim requested, and that information allowed the officer to quickly find him and the vehicle.

Held: Affirmed. The Court agreed that the defendant failed to provide all four requirements to law enforcement by failing to identify himself as the driver. The Court explained that it was the defendant's obligation, not the owner's, to provide the required information as the driver of one of the vehicles involved in the collision. Consequently, the Court concluded that the defendant did not provide the required information and left the scene of the accident in violation of § 46.2-894.

The Court agreed that it was not enough that the defendant initially identified himself as the driver to the victim—he was also required to provide his information to her. The Court noted that §46.2-894 provides that the driver must provide the enumerated information and that the duty was on him to provide his own required information. Despite this requirement, the Court noted that it was the owner who exchanged insurance information with the victim, not the defendant. The Court pointed out that

although the officer was able to determine that the owner was the insurance policy owner, the officer was unable to determine the driver's identity.

In this case, the Court noted that the defendant did not provide information to the police, the victim, nor did he identify himself as the driver. The Court pointed out that the defendant's only interaction with law enforcement was his denial of being the driver and, when he was confronted by the officer, his refusal to continue the conversation. He failed to provide his name, address, or driver's license number to the victim or the police or identify himself as the driver to the officer.

The Court rejected the defendant's argument that, through the information that the defendant provided, the officer and victim had all the necessary information to pursue their respective inquiries, finding that claim to be irrelevant to whether the defendant complied with his statutory obligations.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1516222.pdf>

Spinner v. Commonwealth: August 15, 2023

Lynchburg: Defendant appeals his convictions for Involuntary Vehicular Manslaughter, Hit and Run, and DUI on Admission of Witness Testimony, Video Evidence, a Certificate of Analysis, and HGN testimony.

Facts: The defendant drove while intoxicated and struck and killed a woman who was crossing the street. The video recording of the crash reflects that the car did not slow down after impact with the victim, nor did it stop at the scene. Instead of stopping immediately, the defendant circled the block, parked the car a block away, smoked a cigarette, and then returned to the collision scene on foot.

Despite the obvious damage to the driver's windshield, headlamp, and side mirror, the defendant first lied and told the responding officer that someone else hit the victim. On further questioning, he admitted to having hit the victim, but claimed that he did not stop sooner because he did not know he had hit someone. He also testified at trial that he knew he hit "something" but did not realize at the time "it was a person."

The defendant told the investigating officer that he had consumed alcohol in the early morning hours but none since he fell asleep at 5:00 a.m. that morning. The defendant failed FSTs, and the officer arrested the defendant. The officer first conducted a breath test, and then obtained a search warrant for the defendant's blood.

One of the field sobriety tests that the officer administered was an HGN test. At trial, the officer testified that bodies are affected by alcohol consumption. Specifically, he testified that with a nystagmus field sobriety test, he looked for involuntary eye movement that can be present due to alcohol consumption. The defendant objected to this testimony, arguing that only a medical expert could testify about the effects of alcohol on the body. The trial court overruled the objection and allowed the testimony. The officer described how he conducted the nystagmus test and explained it was the "standard way that the test is administered." He stated that he noticed a mild "nystagmus and jerking motion of the eye" during the test.

During the breath test, the officer forgot to inform the defendant of his right to observe the breath test process, the blood alcohol reading it produced, and the equipment used to perform the breath test, even though he attested on the certificate that he had in fact done so. However, the defendant was physically present during that entire process until the end of the process when the test results printed out on the printer of the machine. The officer observed the defendant for twenty minutes before conducting the breath test to ensure that the defendant did not burp or belch before the test, which would affect the test's accuracy. The defendant was present through the entire procedure and was provided with a copy of the printout of the results. The officer also allowed the defendant to observe the test results and gave him a copy of those results.

At trial, the officer testified about his qualifications, the process, and the equipment he used for the test. He explained that he was a licensed breath test operator and used equipment approved by the Department of Forensic Science. The defendant objected to the admission of the certificate based on the officer's failure to inform the defendant of his rights to observe, but the trial court overruled the objection and admitted the breath certificate.

At trial, DFS toxicologist Trista Wright testified. She had analyzed the defendant's blood specimen and found a BAC of .038%. Dr. Wright also explained that she could calculate what the defendant's BAC was at the time of the crash through a "retrograde extrapolation," an analysis that determines an individual's BAC at an earlier time based on specific information. To determine the appellant's BAC using this method, Wright needed to know when he last consumed alcohol and that no alcohol was consumed after the accident. Over the defendant's objection, Wright opined, based on the breath test certificate, the blood analysis result, and the information about the defendant's last drink of alcohol, that the defendant's BAC was between .08 to .13% by weight by volume at the approximate time of the crash.

The defendant argued that Dr. Wright's retrograde extrapolation testimony was inadmissible under Rule 2:702(b), which provides that speculative testimony is not admissible. He suggested that the extrapolation was based on the unproven assumption that he did not consume alcohol after the accident. The trial court overruled his objection.

At trial, the defendant's cousin testified. The defendant objected because the cousin had not been on the Commonwealth's witness list and instead the Commonwealth only disclosed his name and identity two days before trial, rather than 21 days before trial as ordered. According to the prosecutor, she was unable to contact the cousin until two days before trial. She argued that there was "no surprise" because the defendant had originally subpoenaed the cousin as his own witness. The court allowed the testimony over the defendant's objection.

At trial, the Commonwealth also introduced a surveillance video from a nearby store. The store owner testified that she had video surveillance cameras at her store. Her son programmed the surveillance system, which included a date and time stamp synchronized to the internet clock. She noted that she and her son were the only ones with access to the video recordings. Following the incident, the owner saved the parking lot video from the relevant time to a DVD and provided it to the police. The surveillance system allowed the owner to download segments of the video but not to edit the recordings.

The defendant objected that the video was inadmissible under the “silent-witness theory” because the witness was unable to testify as to “the process by which the video was made.” The trial court overruled his objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the cousin’s testimony, the surveillance video, Dr. Wright’s expert testimony on retrograde extrapolation, or the officer’s HGN testimony, and it agreed that the evidence supported the findings that the defendant had knowledge someone was injured as a result of the crash and that he failed to stop immediately as required by statute.

The Court first addressed the admission of the cousin’s testimony, despite the pretrial order. The Court rejected the defendant’s contention that the lack of notice deprived him of the “opportunity to research, vet, and discuss with” with witness what he knew and why the Commonwealth called him as a witness, finding that his claim of alleged prejudice was both general and speculative. The Court complained that the defendant did not specify any portion of the cousin’s testimony that surprised him, nor did he explain how an earlier disclosure would have benefited his defense or altered the course of the trial.

Regarding the video, the Court ruled that the owner’s testimony provided the trial court with a sufficient basis to find that the video was what the Commonwealth claimed it to be: an accurate recording of the traffic accident that occurred outside her convenience store on the date of the crash. The fact that the owner did not have formal training on the computer recording system and was unaware precisely how the software worked did not change the Court’s analysis.

Regarding the breath certificate, the Court ruled that the officer substantially complied with § 18.2-268.9 when he administered the breath test. The Court noted that the officer conducted everything in the defendant’s presence and provided him with a copy of the results. The Court concluded that the officer’s failure to specifically tell the defendant that he could watch the test and see the equipment did not render the certificate of analysis inadmissible. Instead, the procedural deficiency went to the weight of the evidence rather than its admissibility.

Regarding Dr. Wright’s testimony, the Court found that under the evidence, a reasonable jurist could conclude that the defendant did not have any alcohol after the crash and before the BAC testing. Consequently, the Court ruled that Dr. Wright’s testimony on retrograde extrapolation of the BAC at the time of the collision was based on facts in evidence.

Regarding the officer’s HGN testimony, the Court ruled that the officer was not offering a medical opinion. Instead, the Court noted that he simply explained how he conducted the nystagmus field sobriety test and that his execution of the test comported with the standard for test administration. Hertzog described the involuntary eye motion he looked for when conducting the test and noted that such motion can be present if the subject has consumed alcohol. Because this testimony was not a medical opinion, the Court ruled that the defendant’s argument necessarily failed. The Court explained that, once the threshold for admissibility of the testimony was met, it was up to the jury to determine what weight to give it and the trial court did not abuse its discretion in permitting the testimony.

Lastly, regarding sufficiency, the Court agreed that the evidence was sufficient that the defendant, after striking a pedestrian, did not immediately stop as close to the scene of the accident as possible to do safely.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0725223.pdf>

Homicide

Virginia Court of Appeals – Published

Hooper v. Commonwealth: September 19, 2023

78 Va. App. 508, 891 S.E.2d 768 (2023)

Lancaster: Defendant appeals his convictions for Involuntary Manslaughter and Felony Hit & Run (Watercraft) on sufficiency of the evidence.

Facts: The defendant drove his father's large boat with the victim as a passenger in the middle of the night while intoxicated and crashed, sending the victim overboard. While the victim drowned, the defendant returned to the dock and went to sleep. The next day, when friends began looking for the victim, the defendant told the friends to stop looking and made up various, inconsistent, and sometimes bizarre reasons to not look for him or report him missing, such as that perhaps the victim had had a panic attack and checked himself into a local hospital, that maybe he had fallen off the dock, or that maybe he had just gone into another room or was in the garage.

The victim's friends summoned the police. The defendant first denied having taken the large boat out that night, telling the officer that he had taken out a smaller boat. The defendant later told an officer that he remembered that the three men drank more wine and beer together on the dock before the defendant and the victim went riding on the boat late that night for the second boat ride on that day, having gone out earlier with the friends. After an extensive search, rescuers found the victim's body floating near a damaged bulkhead.

Only the defendant had driven the boat on the long first outing of the day, even though he had been drinking and had four other people on the boat to help him drive it. A month later, the defendant admitted to police that he was intoxicated when he was driving the boat and crashed. However, he told police that he did not remember who drove the boat at the time of the incident. The defendant also stated that he remembered thinking that the victim "was a good swimmer, that he would swim to shore."

During a related civil lawsuit, the defendant also stated: "that the boat hit something hard," and then he further remembered calling out for the victim (after the victim apparently had fallen out of the boat). The defendant further remembered that he "restarted the boat's engine and headed to the boat

dock up Carter's Creek towards my parent[s'] home" where he loaded the boat on a boatlift on his parents' dock—exactly as he had done earlier that afternoon.

At trial, the jury found the defendant guilty of involuntary manslaughter under § 18.2-36.2(A) and felony hit and run under § 29.1-740.

[Good job to Matt Kite and Tiffany Webb, Commonwealth's Attorneys, King William, for prosecuting this case and for their presentation about it at Spring Institute 2023.]

Held: Affirmed.

The Court agreed that the jury could reasonably infer that the defendant drove the boat late that night and that the victim (who had flown in from Atlanta) would not drive the defendant's friend's father's boat at night in waters with which he was not nearly as familiar as the defendant was. Furthermore, the Court agreed that the jury could reasonably infer from the totality of the evidence, including the defendant's deceptive conduct and lies to the police and to his friends about the victim's disappearance, that the defendant was driving the boat at the time of the collision.

Given that the defendant acknowledged that he had been drinking a lot, given that he was clearly under the influence of alcohol while he drove his father's boat into a bulkhead, and given that the victim died as a result of being thrown from the boat into the water after this collision with the bulkhead, the Court agreed that the evidence was sufficient to support the conviction of involuntary manslaughter under § 18.2-36.2(A).

Furthermore, given that the defendant left the scene of the collision in violation of § 29.1-739(A) and drove the boat back to his parents' home after he crashed the boat into a bulkhead and given that the victim died as a result of this collision, the Court also agreed that the evidence was sufficient to support the defendant's conviction of felony hit and run under § 29.1-740.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0752221.pdf>

Virginia Court of Appeals -
Unpublished

Heverin v. Commonwealth: May 14, 2024

Mecklenburg: Defendant appeals his convictions for Attempted Aggravated Murder, Conspiracy to Commit Murder by Mob, and related offenses on Denial of Cross-Examination, Double Jeopardy, Jury Instruction, and sufficiency of the evidence grounds.

Facts: The defendant conspired with a group of individuals to invade a home and steal a collection of guns. The defendant and his coconspirators discussed the plan to burglarize the home and cased the house. On the night of the attempted robbery, they wore dark clothing to conceal themselves to enter the home, took guns to the property, drove to the house, approached the house, and came within 20 feet of the home.

However, a confidential informant had alerted police to the plan. On the night of the attempted robbery, officers hid at the targeted home awaiting the defendant and the three other armed men. When one member of the defendant's group reached the porch of the house, someone in the group said, "that's twelve," a slang term for the police. After the officers yelled "freeze," someone fired a gun, and the group fled. A shootout ensued between the defendant, his accomplices, and the officers. One of the defendant's accomplices was killed, and another was injured. None of the officers were injured or killed. The officers subsequently arrested the defendant and the other man at the scene.

The defendant later told another inmate that he had a gun and that he fired it while running to escape in the woods. The defendant said he "shot till his clip was empty." Afterward, he tried to hide his gloves, mask, and gun.

Prior to trial, the Commonwealth argued during a motions hearing that the defendant should be prohibited from inquiring into or presenting evidence regarding the lack of officer body camera footage from the shootout. The Commonwealth explained that the officers followed policy in turning off their cameras and that the officers were concerned with following appropriate policy and federal law while carrying out a tactical maneuver that included communications based on classified and confidential information.

The defendant unsuccessfully argued that the trial court violated his constitutional rights by limiting his presentation of evidence and cross-examination regarding the lack of body-worn camera recordings from the night of the attempted burglary. He contended that he should have been allowed to present evidence and cross-examine the deputies to challenge their credibility or to establish bias. The trial court granted the Commonwealth's motion to exclude the evidence.

At trial, over the defendant's objection, the trial court granted the Commonwealth's "Concert of Action" jury instruction. The defendant argued that this was error for two reasons: (1) that the jury instruction did not apprise the jury that the Commonwealth must prove the defendant's specific intent, and (2) the Commonwealth was required to prove that the defendant was a triggerman to secure an attempted aggravated murder conviction.

At trial, among other charges, the trial court found the defendant guilty of six counts of attempted aggravated murder of a law enforcement officer. The defendant unsuccessfully argued that he could not be convicted of attempted aggravated murder as a principal in the second degree because of the "Triggerman" rule. The defendant also unsuccessfully argued that he lacked the required specific intent for each of the six attempted aggravated murder charges, because he did not intend to kill each of the six deputies. Lastly, the defendant unsuccessfully argued that the multiple convictions for attempted aggravated murder violated his constitutional protections against multiple punishments.

Held: Affirmed.

The Court first ruled that the "triggerman rule" does not apply to Attempted Aggravated Murder. The Court found, therefore, that the defendant could be (and was) found guilty as a principal in the second degree based on the concert of action theory of conspiracy, as there was evidence that the defendant's group fired far more than six shots at the officers. As a result, the Court explained, the Commonwealth did not need to prove that the defendant was individually responsible for each of the six attempted aggravated murders, even though the evidence supported that inference. Instead, through the concert of action theory, the defendant was liable for his coconspirators' actions as well as his own.

Regarding intent for Attempted Aggravated Murder of an Officer, the Court explained that the intent required is merely that the defendant intended to kill someone, not a particular person. In this case, because the defendant and the coconspirators were engaging in criminal activity, the Court agreed that the jury could also infer that the defendant shot at the officers to interfere with their official duties. The Court reaffirmed that it is “entirely permissible to infer that every person intends the natural and probable consequences of his or her acts.”

Regarding the conviction for Conspiracy to Commit Murder by Mob, the Court found that a reasonable jury could find, based on all this evidence together, that the group had either a spoken or unspoken agreement to commit murder by mob if they received any resistance to their burglary plans.

Regarding the cross-examination about the lack of body camera footage, the Court complained that the defendant did not explain how the proposed evidence would go to the issue of bias of the witness or motive of the witness to fabricate. In this case, the Court noted that the Commonwealth gave an explanation regarding the lack of body camera footage and the defendant failed to offer any evidence refuting that explanation. The Court concluded that the fact that the body camera footage was absent does not, by itself, prove any wrongdoing or bias by the deputies, especially because the Commonwealth argued that the department followed its policies. Thus, the Court ruled that it was neither unconstitutional nor an abuse of discretion for the trial court to exclude evidence of the lack of body camera footage, especially given the unique circumstances of this case.

Regarding the defendant’s double jeopardy argument, the Court ruled that because the evidence was sufficient to convict the defendant of all six attempted murder charges, the trial court did not violate the defendant’s constitutional protections. The Court explained that there was enough evidence to support the defendant firing his gun six times and thus there were six separate criminal acts by the defendant, all punishable without violating double jeopardy.

Regarding the defendant’s jury instruction argument, the Court repeated that “concert of action” is an accepted theory of culpability for attempted murder. In this case, the Court agreed that the Commonwealth put on more than enough evidence to support the theory that the defendant was working with his coconspirators to commit a burglary and in the course of the commission of that crime he and his coconspirators engaged in a shootout with the deputies. Thus, the Court ruled that it was not error for the trial court to give this instruction.

The Court again rejected the defendant’s “triggerman” argument. The Court explained that §18.2-18 excludes principals in the second degree to aggravated murder from the rule by stating “principal[s] in the second degree to an aggravated murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.” The Court found that the statute does not exclude principals in the second degree to attempted aggravated murder from being punished as a principal in the first degree.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1239222.pdf>

Diaz Martinez v. Commonwealth: March 26, 2024

Fairfax: Defendant appeals his convictions for Murder and Gang Participation on Refusal of a Jury Instruction and sufficiency of the evidence.

Facts: The defendant and three other members of MS-13 abducted and murdered a child, beating him to death behind a school. They did so on orders of the MS-13 gang, who had ordered a “birthday party” for the victim, which is a form of violent gang-enforced discipline. The four attackers beat the victim to death, with the defendant joining the attack by helping to surround the victim and by striking one of the blows against the victim.

Police interviewed the defendant, who admitted to going to the school that night, admitted to knowing that the gang had ordered an attack on the victim, and admitted to meeting one of the co-conspirators at the school. Cellphone data confirmed that the co-conspirator had been at the crime scene that night.

At trial, one of the accomplices testified against the defendant. Prior to the trial verdict, the trial court denied the defendant a proposed cautionary jury instruction regarding uncorroborated accomplice testimony, finding that the accomplice’s testimony was corroborated by other evidence.

Held: Affirmed. The Court held that the trial court did not err in refusing the proposed cautionary jury instruction, as other evidence corroborated the accomplice’s testimony that the defendant was present during the murder. The Court also held that the evidence was sufficient to support a jury finding that the defendant participated in the murder as a principal in the second degree, as the defendant joined the other attackers and struck the victim at least once. Lastly, the Court held that the evidence was sufficient to convict the defendant of criminal street gang participation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0591224.pdf>

Johnson v. Commonwealth: March 12, 2024

Virginia Beach: Defendant appeals his convictions for Murder (No-Body Homicide) and Contributing on Fifth Amendment *Miranda* grounds and sufficiency of the evidence.

Facts: The defendant murdered the mother of his children and disposed of her body. The victim’s employer and her family reported her missing after she failed to come to work, missed her son’s baseball game, and stopped responding to text messages and phone calls. It was out of character for her to miss work or her son’s baseball games. Prior to her disappearance, the victim was in daily contact with all her children. After her disappearance, however, she did not make contact with any of her family, friends, or colleagues.

Police investigated. The victim’s vehicle, which contained her purse and wallet, was found abandoned about three miles from the apartment she shared with the defendant, but her keys were later found in a dumpster that came from their apartment complex. Police discovered that a day prior to the victim’s disappearance, the defendant had searched the internet for “Suffolk garbage dump,”

“Suffolk waste disposal,” “where does dumpster trash go Virginia,” and “where does dumpster trash go Chesapeake.” The defendant’s cell phone records showed that on the day of the victim’s disappearance, his phone moved in a direction consistent with a route to where the victim’s vehicle was abandoned.

To date, no one has found the victim’s body.

While killing the victim and disposing of her body, the defendant abandoned their 20-month-old twin children at home. Police arrested the defendant for four misdemeanor charges of contributing to the delinquency of a minor, based on the defendant’s statements to police that he had left the twins alone at various times over two days.

Officers read the defendant his *Miranda* warnings and he agreed to speak with them. The interview began about 11:00 am and did not end until 5 am the next day. During the interview, police gave the defendant a snack upon arrival, and a snack and a meal later. He was continuously provided with water and given multiple opportunities to use the bathroom and take smoke breaks. The defendant was not questioned continuously throughout the entire 19-hour period. His actual interview sessions lasted, on average, about half an hour to an hour before the defendant was allowed some kind of break. Throughout, the detectives maintained a calm, even tone throughout the interview, except for a few instances of one officer raising her voice.

Roughly halfway into the interview, after several questions about leaving his children alone in the apartment, the defendant stated, “I don’t have anything else to say, man. If y’all wanna take me to jail[.] I don’t have anything else to say, man.” In response, an officer told the defendant, “[T]his is your opportunity, this is your chance.” She also reminded him that “you don’t have to say anything. You know we already—we went through your rights and you have your rights.” She then said that she was “concerned” about the defendant “making a really poor decision.” The officer asked the defendant to “make the right decisions” for his children. The officer then began questioning the defendant again about leaving his children alone, and the interview continued.

During the interview, the officers told the defendant that his actions were understandable because of the victim’s negative behaviors but did not explicitly promise him anything in exchange for an inculpatory statement. The officers stated that they were on his side and wanted to help him, and thus led him to believe that he would have a better outcome if he confessed. The defendant finally confessed that he had murdered the victim, put her body in a dumpster, destroyed her cell phone, discarded her keys in another dumpster, and moved her car to the location where it was found.

Prior to trial, the defendant moved to suppress his confession, arguing that the officers’ coercive interrogation tactics had rendered his confession involuntary. Specifically, he challenged the officers’ use of two minimization tactics: (1) the officers’ suggestion that the commission of a crime was understandable and justifiable, which could be considered an implied promise of leniency, and (2) the officers’ presenting the defendant with a false choice, as they characterized the crime as either an accident or premeditated, when both alternatives were highly incriminating. The defendant also contended that he had attempted to exercise his right to remain silent.

The trial court denied the motion to suppress.

At trial, the trial court rejected the defendant’s argument that the Commonwealth failed to prove the corpus delicti of the offenses.

Held: Affirmed. The Court held that the officers did not use coercive tactics to obtain the defendant's confession. The Court concluded that the trial court did not err in denying the motion to suppress statements made to police because his statements were voluntarily made and because he did not unequivocally invoke his right to remain silent. Further, the Court ruled that the trial court did not err in denying his motions to strike the evidence because the Commonwealth sufficiently proved the corpus delicti for all his convictions.

The Court rejected the defendant's contention that the officers' tactics, viewed in conjunction with the other circumstances of the interrogation, rendered his confession involuntary. The Court specifically rejected the defendant's argument that the detectives' sympathetic attitude rendered his confession involuntary. The Court reasoned that the minimization tactics used here that downplayed the seriousness of the offense and offered the defendant excuses for his actions were potentially coercive. However, the Court concluded that the use of such tactics, standing alone, does not render a confession involuntary. In this case, the Court found that the minimization tactics were not so unduly coercive as to overbear the defendant's free will.

The Court also concluded that any deceit or implied promise of leniency by the officers in stating that they supported the defendant and would help him were not so coercive as to completely overbear the defendant's free will.

Regarding the length of the interview, the Court found that while lengthy, the conditions were not so unduly coercive as to overbear the defendant's free will. The Court noted that, while a 19-hour interrogation is certainly longer than most, the defendant was not deprived of any physical need during the interrogation. The Court saw no evidence that the officers harmed or threatened to harm the defendant in any way if he did not answer their questions, nor was he subjected to unrelenting questioning.

Regarding the defendant's alleged invocation of his right to remain silent, the Court ruled that the defendant's statement did not constitute an unequivocal invocation of the right to remain silent. The Court found that, in context, the officers could have thought that the defendant's statement indicated only that he had nothing more to say regarding their questioning about the location of his children. The Court pointed out that the officers reminded the defendant of his *Miranda* right to remain silent, and after this reminder, the defendant did not state again that he had nothing to say to the detectives; instead, he continued to answer their questions for the next ten hours before confessing to the murder.

Viewed in the context of a lengthy interrogation, during which the defendant actively engaged with officers, the Court reasoned that his single statement that he did not "have anything else to say" was not a statement that a reasonable police officer in the circumstances would understand to be an invocation of his Fifth Amendment right to remain silent. In a lengthy footnote, the Court distinguished the Virginia Supreme Court's 2019 ruling in *Adkins*.

Regarding sufficiency of the evidence and corroboration of the defendant's confession, the Court explained that the lack of physical evidence in this case was not dispositive as to whether the Commonwealth had evidence independent of the defendant's confession to establish the murder. Instead, the Court ruled that the victim's disappearance, coupled with her uncharacteristic lack of communication and her leaving behind important personal items, provided circumstantial evidence independent of the defendant's confession to satisfy the corpus delicti rule. The Court also found that

the defendant's search history and the cellphone evidence corroborated the defendant's statements that he disposed of the victim's body in a dumpster.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1295221.pdf>

Nicholson v. Commonwealth: December 28, 2023

Virginia Beach: Defendant appeals his conviction for Involuntary Manslaughter on sufficiency of the evidence.

Facts: The defendant recklessly drove his car eighty miles per hour, twice the posted speed limit, on a street adjacent to a shopping center, across the street from a church and an apartment building, and down the street from a residential area. Sidewalks lined both sides of the street, which was divided by a concrete median. The defendant turned onto the road at "full throttle" and "hit the rev limiter" of his sports car until he reached third gear. He sped up and passed a truck and a van in front of him, then attempted to change lanes a second time and collided, at a speed of seventy-seven miles per hour, with the victim's vehicle as she exited the shopping center parking lot during business hours. The crash killed the victim.

Police recovered event data recorders from the defendant's vehicle and the victim vehicle. According to police analysis, the defendant's high rate of speed afforded him, at most, only just over four seconds to react to the presence of the victim's car in the road in front of him. According to an officer at trial, no evidence indicated that the defendant adjusted his steering to avoid the collision and the defendant did not apply his brakes until 0.2 seconds before impact.

Several eyewitnesses testified at trial, including a person who had been a professional race car driver for twenty years and raced for Porsche. Seconds before the collision, a witness saw the victim pull onto the road. At that time, the defendant's car "was nowhere in sight" and the witness "didn't know where it came from."

Held: Affirmed. The Court agreed that the evidence was sufficient to prove beyond a reasonable doubt that the defendant was criminally responsible for causing the wreck that resulted in the victim's death. The Court repeated that criminal negligence is "acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1431221.pdf>

Concealing / Defiling a Dead Body

Virginia Court of Appeals - Published

Diaz v. Commonwealth: February 27, 2024

Virginia Beach: Defendant appeals his convictions for Murder, Use of a Firearm, and Defiling a Dead Body on Admission of Electronic Evidence and sufficiency grounds.

Facts: The defendant shot and killed her boyfriend while the two were staying at a hotel. After shooting the victim, the defendant placed the victim's body on an ironing board and wrapped it in many layers of various materials. She then conscripted the unwitting aid of two other people in attempting to secret the body away from the hotel so that she could unlawfully dispose of it without alerting the authorities. In doing so, she told her companions that the body was a grandfather clock.

The defendant and one of the companions had sex in the hotel room while the body was wrapped and stashed nearby. Both the companions then attempted to help move the body into the trunk of the defendant's car under the guise that the body was merely a piece of furniture and could be treated as such. Police later found the victim's body in a vehicle, with a moving dolly lying on top of it in the back of the car.

After the murder, the defendant used the victim's Facebook account to send messages back and forth with her Facebook account, attempting to make it appear that the victim was still alive. Police obtained screenshots of the communications and confronted the defendant with the screenshots. Although the officer had spent about five to ten minutes reading all of the messages at issue in their entirety, during the interview he never read the messages aloud to the defendant; instead, during the interrogation, he only showed her the screen of his phone for "less than ten seconds." The defendant then admitted that she made the posts after killing the victim.

The Commonwealth moved to admit the screenshots at trial. The defendant objected that she never had a chance to read the contents of the posts during the interview. The defendant also objected on authenticity grounds, arguing specifically that "there's nobody here from Facebook to authenticate that these messages were sent from where to whom, so there's nothing—there's no foundation laid as far as authentication." Lastly, the defendant objected on the ground that the screenshots violated the best evidence rule. The trial court overruled the objection and allowed the screenshots of the Facebook posts into evidence.

At trial, regarding the offense of Defiling a Dead Body, the defendant unsuccessfully argued that there was insufficient evidence to support her conviction of defiling a human body, under § 18.2-126(B), because the evidence showed that the victim's body was not disfigured beyond ordinary decomposition.

Held: Affirmed.

The Court first considered the Facebook evidence. The Court ruled that the best evidence rule applies to Facebook posts, as they are clearly "writings" within the scope of the rule. The Court then endorsed the rationale contained in the recent unpublished ruling in *Newberger*, where the Court had

applied the concept of duplicate originals to screenshots of text messages, reasoning that the act of screenshotting a text message on the screen of a cell phone “is no different than photocopying or ‘carbon copying’ the cell phone screen.” In this case, the Court also found that screenshots qualify as duplicate originals for purposes of the best evidence rule.

The Court then ruled that the Facebook posts were properly authenticated. The Court noted that the defendant had recognized the posts and admitted that she had surreptitiously posted the messages, herself, from the victim’s account in an attempt to make it seem like he was still alive. The Court found that testimony to be sufficient to satisfy the authentication requirements contained in Rule 2:901.5. In a footnote, the Court explained that the defendant’s complaint about how long she reviewed the screenshots during her interview went to the weight of the evidence, not its admissibility.

Regarding the conviction for Defiling a Dead Body, the Court held that the evidence was sufficient. The Court first noted that § 18.2-126(B) requires that a perpetrator physically defile a dead human body. The Court then concluded that the defendant’s physical actions with regard to the victim’s corpse—including putting it on an ironing board, wrapping it with miscellaneous items including trash bags, enlisting the aid of people who believed they were moving a piece of furniture, packing it into the back of a crowded car, and putting a dolly on top of it—“did not comport with the typical respect and reverence with which our society ordinarily treats dead bodies.”

The Court agreed that the jury was entitled to find, based on the facts presented, that the evidence proved that the defendant physically treated the victim’s body with disrespect and dishonor as prohibited by the statute. The Court reasoned that the defendant’s argument would frustrate the legislative aim of § 18.2-126 to protect the sanctity of both a burial place and a dead body, wherever situated. In a footnote, the Court stated that the fact that the defendant may have acted with an intent to conceal the body and escape detection did not prevent a finding that she also had the necessary intent to physically defile the body.

Judge Ortiz dissented from the majority’s ruling on the conviction for defiling a dead body. In a footnote in the majority opinion, the Court acknowledged and agreed with the dissent’s contention that the fact that the defendant had sexual relations near the dead body involved no contact with the body and therefore could not be sufficient to demonstrate that she physically defile[d the body. The Court explained that its holding regarding the sufficiency of the evidence was based entirely on the facts surrounding the defendant’s physical treatment of the body.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0056231.pdf>

Shaw v. Commonwealth: January 23, 2024

Arlington: Defendant appeals his conviction for Concealing a Dead Body on Bill of Particulars, Jury Instruction Issues, Vagueness, and Denial of Diminished Capacity Evidence.

Facts: The defendant, after working with an accomplice for three days to clean up the apartment and get rid of the deceased body of his romantic partner, lied to police when questioned

about his partner's whereabouts, telling a police officer that his partner was at the hospital recovering from a seizure. In fact, his partner had suffered multiple blunt-force traumas and had been dead for three days; the battered, bloody, and bruised corpse of the defendant's romantic partner was concealed in the apartment they shared, wrapped up in a shower curtain and secured with duct tape that contained the defendant's DNA. Although he did not tell the police, the defendant believed that his partner had been murdered.

The grand jury returned an indictment under § 18.2-323.02, for concealing a dead body "with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death." The defendant filed a motion for a bill of particulars, seeking "what the unlawful act is or what the manner . . . and cause of death were [that] the Commonwealth believes that Mr. Shaw wanted to conceal or prevent the detection of." The trial court denied the defendant's motion. The trial court also denied the defendant's motion to dismiss the indictment on the ground that the statute was unconstitutionally vague.

Prior to trial, the trial court granted the Commonwealth's motion to exclude the testimony of the defendant's expert, Dr. Sara Boyd, Ph.D., a licensed clinical psychologist, under § 19.2-271.6. The defendant proffered that Dr. Boyd would supply evidence tending to negate the mens rea for the offense. Dr. Boyd wrote:

"[The defendant's] overall pattern of behavior around the time of the alleged offense . . . is more consistent with a disorganized and highly stressed person with Complex-PTSD, whose limited mental resources were overwhelmed by the shock and pain of finding his partner dead, than it is with planful, intentional, and instrumental concealment to avoid detection of the dead body."

She said that the defendant's "symptoms impaired his ability to process the information about death in a reality-based way, to reason about his circumstances, and to independently formulate and execute organized planning." His "behaviors and responses during the roughly three-day period . . . are best characterized as reactive, impulsive, and instinctive, rather than planful." That is, he "engaged in unconsidered, impulsive behavior that was focused on the immediate moment rather than days or weeks ahead." The court asked: "So can you say that there were times during the three-day period where he had the ability to plan and act intentionally?" She answered, "I would say it's possible given the flux in his symptoms more than . . . I can say that it's affirmatively true."

The trial court excluded Dr. Boyd's testimony after determining that she failed to apply her description of the defendant's "mental illness to the distinct, separate statutory intent elements." The trial court found it "unclear whether Dr. Boyd's opinion [went] to the malicious intent requirement or the body concealment mens rea requirements of" § 18.2-323.02, or the time period.

At trial, the defendant argued that under § 18.2-323.02, the Model Jury Instruction for malice, was inappropriate because homicide and malicious wounding are malum in se—crimes that are "inherently immoral"—while maliciously concealing a dead body is only malum prohibitum—"a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." The trial court overruled his objection and used the Model Jury Instruction to define malice under § 18.2-323.02.

Held: Affirmed.

The Court first examined the meaning of “malicious intent” in § 18.2-323.02. The Court concluded that the trial court did not err in using the Model Jury Instruction to define malice under § 18.2-323.02. The Court also agreed that the evidence more than sufficed for a reasonable jury to conclude that the defendant intentionally concealed the body and that he did so “with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death.”

The Court rejected the defendant’s facial challenge to the statute at the start because he did not claim that § 18.2-323.02 is unconstitutionally vague as applied to him. The Court noted that the defendant had not claimed, for instance, that ordinary people would not understand that the statute criminalizes what the defendant did here: conceal a battered corpse in his apartment for three days and lie to police when asked about it for fear of having his probation revoked.

Regarding the defendant’s request for a Bill of Particulars, the Court ruled that the Commonwealth’s indictment here satisfied the law. The Court ruled that the defendant was not entitled to a bill of particulars requiring the Commonwealth to identify the evidence it planned to adduce in support of each element of that offense.

Regarding the defendant’s diminished capacity evidence, the Court agreed that § 19.2-271.6 allows evidence of a mental disorder to explain why a defendant did not have a requisite mental state in a specific instance, whether or not the disorder prevented the defendant from forming culpable mental states altogether. However, the Court cautioned that the statute does not permit mental-condition evidence to support a diminished- capacity theory if such evidence does not show that the defendant lacked the state of mind to commit the offense.

The Court then conducted an extensive review of other jurisdictions’ rulings regarding similar evidentiary rules. After the review, the Court concluded that to be “helpful” to the fact finder, it is not enough that a defendant may be diagnosed as suffering from a particular mental condition. Instead, the Court emphasized that the diagnosis “must be capable of forensic application” to help the trier of fact assess the defendant’s mental state at the time of the crime.” The Court quoted a 3rd Circuit ruling that cautioned:

“Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea.” ... “Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires.”

In this case, the Court complained that the Doctor did not explain how the defendant’s mental condition showed that he was not knowingly hiding the body from the police. The Court wrote: “Missing from Dr. Boyd’s many sworn statements was an explanation connecting Shaw’s mental condition to how it negated the state of mind required to violate Code § 18.2-323.02... Dr. Boyd’s testimony resembles that of other experts that courts have deemed inadmissible to negate mens rea: general psychiatric testimony that “may easily slide into wider usage that opens up the jury to theories of defenses more akin to justification.””

The Court ruled that the trial court did not abuse its discretion by excluding Dr. Boyd’s testimony after concluding that she failed to show how the defendant’s mental condition negated either of the two statutory state-of-mind requirements. In this case, the Court agreed that given the “separate missing variables” about which the trial court had complained, the jury would have “to speculate

[about] which of Shaw’s numerous mental health symptoms impaired the differing intent requirements and whether they did so in a manner significant enough to negate both intent requirements under the statute.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1349224.pdf>

Larceny

Virginia Court of Appeals - Published

Welch v. Commonwealth: February 6, 2024

Augusta: Defendant appeals her conviction for Grand Larceny on her “Claim of Right” defense.

Facts: The defendant stole a tablet computer that belonged to a convenience store. The defendant spotted the item laying on a counter, unattended, in the store. The defendant concealed the device underneath a layer of napkins and left the store with the tablet. The store’s video surveillance captured the theft.

At trial, the defendant raised the defense that she genuinely believed that the computer tablet was “lost” or “abandoned” property. The defendant testified that she did not know that the tablet belonged to the store. Instead, she explained, she was “just thinking finders keepers” when she spotted it. She testified and argued at trial that doing so was not wrongful because it “was not an intentional theft” and she “didn’t know [she] was stealing anything.” The trial court rejected her defense.

Held: Affirmed.

The Court reaffirmed that a defendant charged with larceny may assert an “honest belief” that the property she is charged with stealing was abandoned; however, the accused’s mistaken belief, under a claim-of-right defense, must be sincere and not a mere pretext. In this case, the Court agreed that the defendant failed to establish an honest, good faith belief that the property was lost or abandoned and that she lacked any reasonable basis that would support such a belief.

The Court wrote that: “a ‘finder’ who locates a diamond ring with an inscription from 1980 in a cornfield or a wing-backed chair by the side of the road can make a colorable claim that the item is lost or abandoned.” In this case, however the Court complained that the defendant picked up the tablet inside a retail establishment in a place anyone could have conceivably put it down temporarily to attend to another task.

The Court explained that the defendant’s concealment of the tablet was a fact from which the trial court could infer the defendant’s intent to steal the tablet—as well as her lack of a reasonable basis to believe the device was abandoned. The Court also pointed out that the willful concealment of goods

while still on the premises is prima facie evidence of intent to defraud the owner of the value of the goods or merchandise at issue.

In a footnote, the Court explained that in a jury trial, for a trial court to grant an instruction on whether the property taken was abandoned property, the evidence must establish that a reasonable basis exists for the accused to have a good faith belief that the property was abandoned.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1985223.pdf>

Northcraft v. Commonwealth: September 26, 2023

78 Va. App. 563, 892 S.E.2d 351 (2023)

Richmond: Defendant appeals his convictions for Larceny, Unlawfully Obtaining Documents from DMV, False Statement to DMV, Money Laundering, and Attempted Money Laundering on Jury Selection, Sufficiency of the Evidence, and Denial of his Defenses of Claim of Right and Reliance on Official Authority.

Facts: The defendant used Virginia’s abandoned vehicle process (“AVP”), §§ 46.2-1200 through -1207, which allows applicants to dispose of an abandoned vehicles left on a highway, public property, or private property, to steal at least five parked cars off the street and sell them at auction. The defendant first completed an online record request application for the five vehicles. The online record request application requires the applicant to state that they are in “possession of [the] motor vehicle” and indicate a reason for their possession. The defendant stated that the vehicles were located on public streets and that his claim was based on “possession of a motor vehicle... that was left unattended on public property for more than 48 hours in violation of a state law or local ordinance.”

The defendant then submitted applications for certificate of title for the vehicles in which he listed himself as the owner of the vehicles. On two occasions, DMV clerks recalled asking the defendant if he worked for a towing company or dealership. The defendant responded that he did not and said that the vehicles had been left on his property. At trial, the defendant objected to their testimony, but the trial court overruled the defendant’s objection.

After obtaining titles, the defendant took the vehicles off the street, in one case obtaining a replacement key for one of the vehicles. The defendant then enlisted a third-party to sell two of the vehicles at auction. At trial, the third-party testified that he entered an agreement to auction vehicles on behalf of the defendant and had an agreement to pay the defendant the money. However, when the owners noticed the vehicles missing, they notified police, who learned of the defendant’s scheme. Police were able to stop one of the two sales from taking place and the defendant did not receive the proceeds of the other sale.

At trial, the owners of the vehicles testified that they did not know the defendant, did not give him possession or ownership of their cars, and instead regularly parked their vehicles themselves during the relevant time.

During voir dire, defense counsel asked potential jurors about whether the number of charges would influence their decision-making. One juror agreed that her initial reaction to the number of

charges was that “he must have done something wrong.” She then stated that she would be able to set aside that initial reaction and “would have to listen to the evidence....But it kind of would still be in my head.”

The trial court then gave the juror a clarifying instruction, informing her that she could only find the defendant guilty based on the evidence and could not infer guilt from the fact that he had been charged with an offense. When asked by the court if she could apply that fairly, she stated, “Yes” and further stated, “That is your rule, and I have to do it the way you say do it.” When the trial court told her that it did not “want to put words in [her] mouth” and wanted her “to understand that that’s the process,” the juror told the court, “I understand.”

The trial court denied the defendant’s motion to strike the juror for cause, rejecting the defendant’s argument that her voir dire demonstrated that she could not set aside the number of charges that the defendant was facing and the implication that this meant he must have done something wrong.

At trial, the defendant argued that the evidence was insufficient to support his convictions under § 46.2-105.2(A) for Unlawfully Obtaining Documents from DMV because there was no evidence in the record that he did not “satisf[y] all legal and procedural requirements” to receive title to the vehicles; he contended that he met all of the requirements set out in the AVP at the time of the offense. The defendant argued that the only sensible interpretation of the statute was that an individual possesses a vehicle under the statute if the person knows where the vehicle is located and also knows that the vehicle was abandoned on the side of the road for more than 48 hours, in violation of a state or local ordinance.

The defendant also argued that the evidence was insufficient regarding False Statement to DMV, noting that, at the time, the application for certificate of title itself did not ask whether the applicant is in possession of the vehicle for which title is sought. The defendant further argued that there was insufficient evidence of the fraudulent intent necessary for his convictions under § 46.2-605.

Regarding the offense of Grand Larceny, the defendant argued that because he took the vehicles after he obtained titles to them, they were not taken without their owners’ permission, as he was their owner after obtaining the titles.

Regarding the Money Laundering offense, the defendant argued that the evidence failed to establish that a financial transaction occurred. The defendant also argued that there was insufficient evidence of an attempt to conceal or disguise the ownership of the property involved under § 18.2-246.2.

Lastly, at trial, the defendant raised two defenses, a good faith claim-of-right defense and a good faith reliance defense. First, the defendant asserted that he had a good faith belief that he was entitled to the vehicles, because he found the AVP, a legitimate process through the DMV, utilized that process, and subsequently received titles to the vehicles from the DMV. The defendant asked the trial court to instruct the jury on a good faith claim-of-right defense in relation to the three grand larceny offenses. His proposed instruction stated, “If you find that [the defendant], in good faith, believed that the [vehicle] belonged to him at the time of the taking then you shall find [the defendant] not guilty of grand larceny.” The trial court refused the instruction.

Second, the defendant also asked the trial court to instruct the jury on the defense of good faith reliance on authority, pursuant to *Miller v. Commonwealth*, 25 Va. App. 727 (1997), for the unlawfully

obtaining documents from the DMV charges. The court refused the instruction, noting that it thought “it is misleading of the law in the case” and that “more importantly, there is no affirmative evidence provided in accordance with Miller.”

[Note: DMV has since changed the AVP procedure to avoid this situation – EJC].

Held: Affirmed. The Court held that the trial court did not err in failing to strike a juror for cause, in denying the defendant’s motions to strike the evidence, or in denying jury instructions on good faith claim-of- right and good faith reasonable reliance.

Regarding jury selection, the Court found that the voir dire, viewed in its entirety, did not demonstrate that the juror’s opinion—that the number of charges that the defendant faced was indicative of his guilt—was a fixed opinion. The Court concluded that the juror’s own responses, which were not merely “yes” answers to the trial court’s questioning, provided evidence that her initial reaction upon hearing the number of charges against the defendant was not fixed. Rather, the Court found that she indicated in her own words that she understood the legal instruction regarding the presumption of innocence after being instructed on it and could set aside her prior opinion. Contrary to the defendant’s assertion, the Court ruled that the record demonstrated that the trial court’s questioning and instruction of the juror constituted clarification and not improper rehabilitation.

Regarding sufficiency of the offense of Unlawfully Obtaining Documents, the Court first ruled that the statutory scheme clearly sets out that to utilize the AVP, the applicant must be in possession of the abandoned vehicle. The Court then addressed the question of whether the defendant was in possession of the vehicles for which he obtained titles from the DMV.

The Court noted that § 46.2-1200 does not provide a definition for the term “in possession of.” The Court concluded that the plain meaning of “possession” in § 46.2-1202(A) is neither ambiguous nor creates absurd results when applied in the context of the statute. Rather, under this definition, the Court found that the evidence established that the defendant did not have possession of the vehicles in question. The Court noted there had been no indication that anyone but the owners had control of or held at their disposal the vehicles prior to the defendant using the AVP to obtain the vehicles’ titles. Because the vehicles were not in the defendant’s possession, the Court concluded that he was not entitled to use the AVP to obtain their titles. Thus, the Court agreed that the defendant obtained the titles from the DMV without “satisfy[ng] all legal and procedural requirements for the issuance thereof,” or “otherwise [being] legally entitled thereto,” in violation of § 46.2-105.2(A).

Regarding the offense of False Statement to DMV, the Court noted that, although the application for certificate of title itself does not ask whether the applicant is in possession of the vehicle for which title is sought supporting documentation included his record request receipts and vehicle removal certificates, both documents require an applicant to state who is in possession of the vehicle. In this case, the Court found that the defendant provided the false information that he was in possession of the vehicles on both the online record request applications and the vehicle removal certificates. Because the defendant provided false information on his supporting documentation, while certifying on the applications for certificate of title that his supporting documentation was true and accurate, the Court agreed that the evidence established that he provided false information on his applications for certificate of title.

Regarding the element of intent for False Statement to DMV, the Court found that the defendant's conduct and representations plainly indicated his fraudulent intent in making false statements on his applications for certificate of title in violation of § 46.2-605.13. While the Court acknowledged that the defendant did not attempt to conceal his identity on the applications for certificate of title, the Court explained that this fact alone did not negate the other evidence in the record indicating his fraudulent intent in his use of the AVP.

In a footnote, the Court also found that it was proper to admit the statements that the defendant made to the two DMV employees. The Court concluded that the fact that the defendant lied to two different DMV employees regarding the location of vehicles for which he sought title was relevant to show his fraudulent intent, because it demonstrated his intent to conceal the fact that he was not actually in possession of the vehicles and therefore was using the AVP unlawfully.

Regarding the Grand Larceny offense, the Court concluded that because his titles to the vehicles were procured through his fraudulent actions, they did not convey legal title to him. The Court explained that the defendant's fraudulent use of the AVP to obtain the vehicles' titles was the first part of his larcenous scheme to deprive the rightful owners of their vehicles. The Court observed that the defendant committed an initial larceny in obtaining the titles themselves—he used the AVP to fraudulently take another's property, namely the titles to the vehicles that were issued to him by the DMV, but which legally belonged to the vehicles' true owners. He then committed the charged larcenies of the three vehicles themselves, physically taking the vehicles from the streets and later attempting to sell two of them at auction.

Because the defendant obtained the titles and vehicles through his larcenous actions, at the time he took the vehicles, the Court ruled that the defendant did not have "legal title" to them under § 46.2-100; he merely had the physical certificates of title. Accordingly, the Court ruled that he was not the owner of the vehicles at the time he stole them, and the evidence was sufficient to support his larceny convictions.

Regarding the Money Laundering offenses, the Court first found that the fact that the defendant did not actually receive money from the third-party seller was not dispositive. The Court pointed out that the defendant initiated a financial transaction, made an agreement to sell the vehicles, and the third-party received money in exchange for auctioning the one of the cars. While the defendant did not receive any money as a result of his agreement, the Court found that he did initiate the transaction, thus the Court concluded that the evidence was sufficient to prove that he conducted a financial transaction in this case.

Regarding the "concealment" element of Money Laundering, the Court found the federal cases interpreting the federal money laundering statute to be instructive. In this case, the Court agreed that the evidence was sufficient to establish the defendant's intent to conceal or disguise the source of the property involved. The Court found that, by employing a third party to sell the vehicles at auction, the defendant demonstrated his intent to structure the transaction so as to conceal the true source of the property involved in the transaction. The Court quoted an 8th Circuit case that "the money laundering statute does not require the jury to find that [accused] did a good job of laundering the proceeds." In this case, the Court ruled that the defendant's use of a third party constituted sufficient evidence to show that the transaction was designed in whole or in part to conceal or disguise the source of the property involved in the transaction.

Regarding the defendant's intent to commit the Money Laundering offense, the Court again found sufficient evidence of intent to commit the offense by his agreement to sell the vehicles, the proceeds of his grand larcenies, at auction via the third party. As far as the conviction for Attempted Money Laundering, the Court also ruled that the defendant signing over the title and giving the vehicle to the third party was the direct act done toward the commission of the offense, one that was only ineffectual because the one of the cars was identified as stolen before the third-party could sell it. Accordingly, because the evidence established that the defendant conducted a financial transaction designed to conceal the source of one of the vehicles and that he attempted to do so for the other vehicle, the Court concluded that the trial court did not err in finding the evidence sufficient to support both convictions.

Regarding the defendant's Claim of Right defense, the Court found that the defendant did not have a good faith belief that he owned the vehicles at issue because his obtaining of their titles was predicated on his fraudulent statements on the AVP documents that he was in possession of the vehicles. The Court reasoned that he could not have sincerely believed that he was in possession of the vehicles at the time he completed the applications for certificates of title because the vehicles were located on public streets and were regularly parked there by their true owners, and the Court specifically pointed to his false statements to DMV in support of his applications.

Lastly, regarding the defendant's claim of Reliance on Official Authority, the Court concluded that the evidence clearly showed that the defendant failed to receive assurances from DMV employees that his use of the AVP was lawful. The Court warned that the mere acceptance of paperwork and the issuance of the titles does not qualify as an affirmative assurance that the conduct giving rise to his convictions was lawful. In this case, the Court pointed out that the defendant did not receive an affirmative assurance on the lawfulness of his use of the AVP from any DMV employee.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1067212.pdf>

**Virginia Court of Appeals -
Unpublished**

Rabender v. Commonwealth: April 23, 2024

Henrico: Defendant appeals his conviction for Grand Larceny on Admission of Document Evidence and Jury Instruction issues.

Facts: While fleeing from police, the defendant stole a car from the victim's garage. Police located the vehicle, abandoned, several weeks later. Inside, police found uncovered a "Request for Appointment of a Lawyer" form belonging to the defendant's wife dated the day after the theft. At trial, the Commonwealth admitted the document into evidence over the defendant's objection. The defendant argued that the document was irrelevant.

At trial, the trial court granted a jury instruction 11 stating that “[b]ecause larceny is a continuing offense, anyone who knows that property is stolen and assists in its transportation or disposition is guilty of larceny.” The defendant objected that the instruction was overbroad and not supported by the evidence, but the trial court overruled the objection.

Held: Affirmed.

Regarding the relevance of the document, the Court noted that the Commonwealth proved at trial that the defendant’s wife called him in jail and identified herself as his wife and that the document was dated the day after the truck was stolen. The Court found that the facts tended to make the defendant’s involvement with the stolen vehicle, where the item was found, “more probable.” While there was no direct evidence that the defendant had ever read, saw, or knew of the existence of the document, the Court explained that it was within the jury’s purview to assign appropriate weight to the document in determining the defendant’s guilt or innocence.

Regarding the jury instruction, the Court reasoned that the jury was entitled to consider whether the evidence proved that the defendant knew the truck was stolen and “assist[ed] in its transportation or disposition” given that several documents and surveillance footage connected him to the vehicle. The Court ruled that the jury instruction was supported by the evidence, and the trial court did not abuse its discretion in granting it.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0269232.pdf>

Harris v. Commonwealth: March 19, 2024

Fredericksburg: Defendant appeals his conviction for Conspiracy to Commit Grand Larceny on sufficiency of the evidence.

Facts: The defendant and a companion stole items from a retail store by placing stolen items in an empty duffel bag and then fleeing the store. Two days later, the defendant returned with two new confederates, arriving together in the defendant’s vehicle. Together, the three collected items into a shopping cart along with an empty duffel bag. The defendant then took the cart into a fitting room. When he emerged, the duffel bag was now full. The defendant then fled the store with the bag, activating the store’s alarm. The defendant’s two confederates also concealed items on their person and continued to push carts around the store.

The store notified police, who responded. Officers intercepted the defendant’s vehicle outside the store and surrounded it. As they did, the defendant’s confederates received a phone call inside the store. They abandoned their duffel bag and other concealed items and fled to the parking lot. However, police captured the defendant’s confederates before they could escape.

Police recovered the items that the defendant stole and placed in his duffel bag. The value of those items was \$952. The items remaining in the abandoned shopping cart were over \$600 worth of

merchandise. At trial, the defendant contended that the evidence failed to prove that the perpetrators agreed to shoplift. The defendant also contended that the evidence failed to prove that the amount involved in the conspiracy exceeded \$1,000.

Held: Affirmed. The Court held that the evidence was sufficient to prove beyond a reasonable doubt that the defendant and his companions conspired to commit larceny involving goods worth \$1,000 or more.

The Court found that the circumstantial evidence was sufficient to prove beyond a reasonable doubt that the defendant and his companions agreed to shoplift merchandise. The Court noted that, just as the defendant had previously stolen merchandise two days earlier by concealing the merchandise in a duffle bag, in this case he and his companions moved throughout the store and concealed items in their respective duffle bags.

Regarding value, the Court pointed out that the defendant's duffle bag, which held over \$950 in merchandise, was "very full," permitting a rational inference that he transferred as much merchandise as possible from the shopping cart before exiting the store, leaving over \$600 worth of merchandise in the cart. Although his confederates ended their shoplifting attempt after the police were notified, the Court agreed that the trial court could rationally find that the items in the abandoned duffle bag bore some value, even though the specific value was not proven.

In this case, the Court agreed that the evidence that the defendant gathered over \$1500 worth of merchandise in his shopping cart before entering a fitting room and concealing as much of that merchandise as possible in a duffle bag before leaving the store with the bag and without paying for the items, combined with the evidence that his companions were filling another duffle bag and concealing items in their clothing, was sufficient to prove that the defendant and his companions intended to steal as much merchandise as possible when they entered the store. The Court ruled that the evidence that they collected merchandise valued over \$1,000 was sufficient to establish that stealing the merchandise was the object of their agreement, even if they were ultimately thwarted in achieving that objective.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0105232.pdf>

Sayers v. Commonwealth: June 20, 2023

Norfolk: Defendant appeals his convictions for Grand Larceny and Conspiracy to Commit Grand Larceny on sufficiency of the evidence.

Facts: The defendant and his confederate drove to a store together, arriving in the same car. The two men walked through the parking lot, retrieved a shopping cart, and entered the store together. The men went directly to the electrical aisle where the electrical wire was kept. No surveillance cameras showed a view of the store aisles. A few minutes later, the men emerged from the electrical aisle together and proceeded toward the cash registers. A large spool of electrical wire was on the bottom

rack of the shopping cart. As they approached the registers, the defendant walked quickly ahead of his confederate, who was still pushing the shopping cart. The pair walked beyond all points of sale, including two open registers and self-checkouts.

After hurrying past all points of sale, the defendant and his confederate split up, then ran through the parking lot to their parked car. The pair both went to the driver's side of the car and could be seen bending over. They then drove away, leaving an empty cart in the adjacent parking space.

The entire episode lasted approximately six minutes. The store's inventory system also indicated that it had one spool of such wire in stock on the day of the incident, and none were sold that day. At trial, a loss prevention employee testified that one person could lift this wire spool by himself without injury.

Held: Affirmed.

The Court first ruled that the evidence permitted the trial court to conclude that the defendant and his confederate acted together in taking the spool of wire and carrying it away from the store, as they "pursued the same object, one performing one part and the other[] performing another part" to complete the theft. Accordingly, the Court ruled that the evidence proved beyond a reasonable doubt that the defendant was guilty of conspiracy.

The Court then ruled that it was reasonable for the trial court to infer that the defendant helped his companion load the stolen spool of wire into the car. For the Court, the circumstances showed a concert of action to steal the spool of wire. Thus, the Court held that there was sufficient evidence that the defendant committed grand larceny as a principal in the second degree.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0382221.pdf>

Unauthorized Use of a Vehicle

Virginia Court of Appeals - Unpublished

King v. Commonwealth: June 13, 2023

Danville: Defendant appeals his conviction for Unauthorized Use of a Vehicle on sufficiency of the evidence.

Facts: After the victim refused the defendant's request to borrow his car, the defendant took the victim's car from the victim's home anyway and then crashed it. The tow company brought the damaged vehicle back to the victim's house. At trial, the victim explained that he owned the vehicle, which was given to him by his brother. He explained that he had not registered the vehicle in his name with the DMV because his driver's license was suspended.

At trial, the defendant argued that the evidence failed to demonstrate that the victim owned the vehicle, and failed to prove that the defendant used the vehicle without the owner's consent. The defendant cited § 46.2-100, which defines "owner" as "a person who holds the legal title to a vehicle." Using the definition, the defendant contended that the victim had a possessory interest in the vehicle but was not the registered owner.

Held: Affirmed.

The Court pointed out that § 46.2-100 restricts the definition of "owner," stating that the definition applies "[a]s used in this title," while unauthorized use is criminalized under § 18.2-102, which is found in a different title of the Code. While the Court found that the definitions found in § 46.2-100 might potentially help to determine the stronger of two competing claims of ownership, in this case the Court found it unnecessary to use these definitions because there was clear evidence of ownership which was plainly accepted by the finder of fact. The Court ruled that the victim's testimony was prima facie evidence that he owned the vehicle, and a reasonable factfinder could easily conclude that the vehicle belonged to him.

The Court also distinguished the *McDuffie* case, noting that in this case, there was only one claim as to ownership.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0484223.pdf>

Money Laundering

Virginia Court of Appeals - Published

Northcraft v. Commonwealth: September 26, 2023

78 Va. App. 563, 892 S.E.2d 351 (2023)

Richmond: Defendant appeals his convictions for Larceny, Unlawfully Obtaining Documents from DMV, False Statement to DMV, Money Laundering, and Attempted Money Laundering on Jury Selection, Sufficiency of the Evidence, and Denial of his Defenses of Claim of Right and Reliance on Official Authority.

Facts: The defendant used Virginia's abandoned vehicle process ("AVP"), §§ 46.2-1200 through -1207, which allows applicants to dispose of an abandoned vehicles left on a highway, public property, or private property, to steal at least five parked cars off the street and sell them at auction. The defendant first completed an online record request application for the five vehicles. The online record request application requires the applicant to state that they are in "possession of [the] motor vehicle" and indicate a reason for their possession. The defendant stated that the vehicles were located on public streets and that his claim was based on "possession of a motor vehicle... that was left unattended on public property for more than 48 hours in violation of a state law or local ordinance."

The defendant then submitted applications for certificate of title for the vehicles in which he listed himself as the owner of the vehicles. On two occasions, DMV clerks recalled asking the defendant if he worked for a towing company or dealership. The defendant responded that he did not and said that the vehicles had been left on his property. At trial, the defendant objected to their testimony, but the trial court overruled the defendant's objection.

After obtaining titles, the defendant took the vehicles off the street, in one case obtaining a replacement key for one of the vehicles. The defendant then enlisted a third-party to sell two of the vehicles at auction. At trial, the third-party testified that he entered an agreement to auction vehicles on behalf of the defendant and had an agreement to pay the defendant the money. However, when the owners noticed the vehicles missing, they notified police, who learned of the defendant's scheme. Police were able to stop one of the two sales from taking place and the defendant did not receive the proceeds of the other sale.

At trial, the owners of the vehicles testified that they did not know the defendant, did not give him possession or ownership of their cars, and instead regularly parked their vehicles themselves during the relevant time.

During voir dire, defense counsel asked potential jurors about whether the number of charges would influence their decision-making. One juror agreed that her initial reaction to the number of charges was that "he must have done something wrong." She then stated that she would be able to set aside that initial reaction and "would have to listen to the evidence....But it kind of would still be in my head."

The trial court then gave the juror a clarifying instruction, informing her that she could only find the defendant guilty based on the evidence and could not infer guilt from the fact that he had been charged with an offense. When asked by the court if she could apply that fairly, she stated, "Yes" and further stated, "That is your rule, and I have to do it the way you say do it." When the trial court told her that it did not "want to put words in [her] mouth" and wanted her "to understand that that's the process," the juror told the court, "I understand."

The trial court denied the defendant's motion to strike the juror for cause, rejecting the defendant's argument that her voir dire demonstrated that she could not set aside the number of charges that the defendant was facing and the implication that this meant he must have done something wrong.

At trial, the defendant argued that the evidence was insufficient to support his convictions under § 46.2-105.2(A) for Unlawfully Obtaining Documents from DMV because there was no evidence in the record that he did not "satisf[y] all legal and procedural requirements" to receive title to the vehicles; he contended that he met all of the requirements set out in the AVP at the time of the offense. The defendant argued that the only sensible interpretation of the statute was that an individual possesses a vehicle under the statute if the person knows where the vehicle is located and also knows that the vehicle was abandoned on the side of the road for more than 48 hours, in violation of a state or local ordinance.

The defendant also argued that the evidence was insufficient regarding False Statement to DMV, noting that, at the time, the application for certificate of title itself did not ask whether the applicant is in possession of the vehicle for which title is sought. The defendant further argued that there was insufficient evidence of the fraudulent intent necessary for his convictions under § 46.2-605.

Regarding the offense of Grand Larceny, the defendant argued that because he took the vehicles after he obtained titles to them, they were not taken without their owners' permission, as he was their owner after obtaining the titles.

Regarding the Money Laundering offense, the defendant argued that the evidence failed to establish that a financial transaction occurred. The defendant also argued that there was insufficient evidence of an attempt to conceal or disguise the ownership of the property involved under § 18.2-246.2.

Lastly, at trial, the defendant raised two defenses, a good faith claim-of-right defense and a good faith reliance defense. First, the defendant asserted that he had a good faith belief that he was entitled to the vehicles, because he found the AVP, a legitimate process through the DMV, utilized that process, and subsequently received titles to the vehicles from the DMV. The defendant asked the trial court to instruct the jury on a good faith claim-of-right defense in relation to the three grand larceny offenses. His proposed instruction stated, "If you find that [the defendant], in good faith, believed that the [vehicle] belonged to him at the time of the taking then you shall find [the defendant] not guilty of grand larceny." The trial court refused the instruction.

Second, the defendant also asked the trial court to instruct the jury on the defense of good faith reliance on authority, pursuant to *Miller v. Commonwealth*, 25 Va. App. 727 (1997), for the unlawfully obtaining documents from the DMV charges. The court refused the instruction, noting that it thought "it is misleading of the law in the case" and that "more importantly, there is no affirmative evidence provided in accordance with *Miller*."

[Note: DMV has since changed the AVP procedure to avoid this situation – EJC].

Held: Affirmed. The Court held that the trial court did not err in failing to strike a juror for cause, in denying the defendant's motions to strike the evidence, or in denying jury instructions on good faith claim-of-right and good faith reasonable reliance.

Regarding jury selection, the Court found that the voir dire, viewed in its entirety, did not demonstrate that the juror's opinion—that the number of charges that the defendant faced was indicative of his guilt—was a fixed opinion. The Court concluded that the juror's own responses, which were not merely "yes" answers to the trial court's questioning, provided evidence that her initial reaction upon hearing the number of charges against the defendant was not fixed. Rather, the Court found that she indicated in her own words that she understood the legal instruction regarding the presumption of innocence after being instructed on it and could set aside her prior opinion. Contrary to the defendant's assertion, the Court ruled that the record demonstrated that the trial court's questioning and instruction of the juror constituted clarification and not improper rehabilitation.

Regarding sufficiency of the offense of Unlawfully Obtaining Documents, the Court first ruled that the statutory scheme clearly sets out that to utilize the AVP, the applicant must be in possession of the abandoned vehicle. The Court then addressed the question of whether the defendant was in possession of the vehicles for which he obtained titles from the DMV.

The Court noted that § 46.2-1200 does not provide a definition for the term "in possession of." The Court concluded that the plain meaning of "possession" in § 46.2-1202(A) is neither ambiguous nor creates absurd results when applied in the context of the statute. Rather, under this definition, the Court found that the evidence established that the defendant did not have possession of the vehicles in

question. The Court noted there had been no indication that anyone but the owners had control of or held at their disposal the vehicles prior to the defendant using the AVP to obtain the vehicles' titles. Because the vehicles were not in the defendant's possession, the Court concluded that he was not entitled to use the AVP to obtain their titles. Thus, the Court agreed that the defendant obtained the titles from the DMV without "satisfy[ng] all legal and procedural requirements for the issuance thereof," or "otherwise [being] legally entitled thereto," in violation of § 46.2-105.2(A).

Regarding the offense of False Statement to DMV, the Court noted that, although the application for certificate of title itself does not ask whether the applicant is in possession of the vehicle for which title is sought supporting documentation included his record request receipts and vehicle removal certificates, both documents require an applicant to state who is in possession of the vehicle. In this case, the Court found that the defendant provided the false information that he was in possession of the vehicles on both the online record request applications and the vehicle removal certificates. Because the defendant provided false information on his supporting documentation, while certifying on the applications for certificate of title that his supporting documentation was true and accurate, the Court agreed that the evidence established that he provided false information on his applications for certificate of title.

Regarding the element of intent for False Statement to DMV, the Court found that the defendant's conduct and representations plainly indicated his fraudulent intent in making false statements on his applications for certificate of title in violation of § 46.2-605.13. While the Court acknowledged that the defendant did not attempt to conceal his identity on the applications for certificate of title, the Court explained that this fact alone did not negate the other evidence in the record indicating his fraudulent intent in his use of the AVP.

In a footnote, the Court also found that it was proper to admit the statements that the defendant made to the two DMV employees. The Court concluded that the fact that the defendant lied to two different DMV employees regarding the location of vehicles for which he sought title was relevant to show his fraudulent intent, because it demonstrated his intent to conceal the fact that he was not actually in possession of the vehicles and therefore was using the AVP unlawfully.

Regarding the Grand Larceny offense, the Court concluded that because his titles to the vehicles were procured through his fraudulent actions, they did not convey legal title to him. The Court explained that the defendant's fraudulent use of the AVP to obtain the vehicles' titles was the first part of his larcenous scheme to deprive the rightful owners of their vehicles. The Court observed that the defendant committed an initial larceny in obtaining the titles themselves—he used the AVP to fraudulently take another's property, namely the titles to the vehicles that were issued to him by the DMV, but which legally belonged to the vehicles' true owners. He then committed the charged larcenies of the three vehicles themselves, physically taking the vehicles from the streets and later attempting to sell two of them at auction.

Because the defendant obtained the titles and vehicles through his larcenous actions, at the time he took the vehicles, the Court ruled that the defendant did not have "legal title" to them under § 46.2-100; he merely had the physical certificates of title. Accordingly, the Court ruled that he was not the owner of the vehicles at the time he stole them, and the evidence was sufficient to support his larceny convictions.

Regarding the Money Laundering offenses, the Court first found that the fact that the defendant did not actually receive money from the third-party seller was not dispositive. The Court pointed out that the defendant initiated a financial transaction, made an agreement to sell the vehicles, and the third-party received money in exchange for auctioning the one of the cars. While the defendant did not receive any money as a result of his agreement, the Court found that he did initiate the transaction, thus the Court concluded that the evidence was sufficient to prove that he conducted a financial transaction in this case.

Regarding the “concealment” element of Money Laundering, the Court found the federal cases interpreting the federal money laundering statute to be instructive. In this case, the Court agreed that the evidence was sufficient to establish the defendant’s intent to conceal or disguise the source of the property involved. The Court found that, by employing a third party to sell the vehicles at auction, the defendant demonstrated his intent to structure the transaction so as to conceal the true source of the property involved in the transaction. The Court quoted an 8th Circuit case that “the money laundering statute does not require the jury to find that [accused] did a good job of laundering the proceeds.” In this case, the Court ruled that the defendant’s use of a third party constituted sufficient evidence to show that the transaction was designed in whole or in part to conceal or disguise the source of the property involved in the transaction.

Regarding the defendant’s intent to commit the Money Laundering offense, the Court again found sufficient evidence of intent to commit the offense by his agreement to sell the vehicles, the proceeds of his grand larcenies, at auction via the third party. As far as the conviction for Attempted Money Laundering, the Court also ruled that the defendant signing over the title and giving the vehicle to the third party was the direct act done toward the commission of the offense, one that was only ineffectual because the one of the cars was identified as stolen before the third-party could sell it. Accordingly, because the evidence established that the defendant conducted a financial transaction designed to conceal the source of one of the vehicles and that he attempted to do so for the other vehicle, the Court concluded that the trial court did not err in finding the evidence sufficient to support both convictions.

Regarding the defendant’s Claim of Right defense, the Court found that the defendant did not have a good faith belief that he owned the vehicles at issue because his obtaining of their titles was predicated on his fraudulent statements on the AVP documents that he was in possession of the vehicles. The Court reasoned that he could not have sincerely believed that he was in possession of the vehicles at the time he completed the applications for certificates of title because the vehicles were located on public streets and were regularly parked there by their true owners, and the Court specifically pointed to his false statements to DMV in support of his applications.

Lastly, regarding the defendant’s claim of Reliance on Official Authority, the Court concluded that the evidence clearly showed that the defendant failed to receive assurances from DMV employees that his use of the AVP was lawful. The Court warned that the mere acceptance of paperwork and the issuance of the titles does not qualify as an affirmative assurance that the conduct giving rise to his convictions was lawful. In this case, the Court pointed out that the defendant did not receive an affirmative assurance on the lawfulness of his use of the AVP from any DMV employee.

Full Case At:

Nuisances

Virginia Court of Appeals - Published

Muhammad et. al. v. Fatehi: February 20, 2024

Norfolk: Petitioner appeals the Imposition of Sanctions for her Petition for a Special Grand Jury.

Facts: The petitioner ran in the 2021 City of Norfolk Commonwealth’s Attorney primary election and is a current candidate for the 2025 Commonwealth’s Attorney election there. Alongside her announcement of candidacy for 2025, she posted online: “I am trying to file a document in order to hold the Commonwealth’s Attorney accountable . . . I need plaintiffs . . . I only need five people.”

The petitioner then, representing five Norfolk citizens, filed a complaint seeking the empanelment of a special grand jury pursuant to § 48-1.2. The complaint claimed that the current Commonwealth’s Attorney was “derelict in his [prosecutorial] duties to the general detriment of the people” of Norfolk. The petition made a series of allegations against the current Commonwealth’s Attorney.

The Commonwealth moved to dismiss the petition and sought sanctions under § 8.01-271.1. At the hearing, the petitioner conceded that the facts established that she had a political motivation behind the complaint but took issue with labeling it as an improper purpose under § 8.01-271.1. The petitioner argued that it was appropriate to bring criminal charges for a political purpose as “it happens all the time” and is “a part of our democracy.”

The trial court the Commonwealth’s motion to dismiss and imposed a \$500 sanction on the petitioner.

Held: Affirmed. The Court held that, because the complaint was not warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and because it was interposed for an improper purpose, the circuit court did not abuse its discretion in imposing sanctions against the petitioner.

The Court examined § 8.01-271.1(B), the code section concerning imposition of sanctions, and concluded that the imposition of sanctions is mandatory if an attorney fails to comply with the requirements of § 8.01-271.1.

The Court then ruled that the complaint was not warranted by existing law. The Court observed that no party could point to relevant controlling precedent from any U.S. court holding maladministration by a public officer to be a public nuisance. Furthermore, the Court concluded, Virginia statutes describing the doctrine of public nuisance provide no basis for the extension to “maladministration” claims. The Court rejected the defendant’s analogy to other jurisdictions that extended public nuisance to include opioid production and the manufacture of firearms.

The Court rejected the petitioner’s argument that the general and vague definition of nuisance allows for the inclusion of the alleged “repeated dereliction of duty as Commonwealth’s Attorney.” The Court found the petitioner’s argument for the extension of existing public nuisance law to the maladministration claim to be unreasonable.

The Court rejected the defendant’s claim that it was appropriate to bring criminal charges for a political purpose as “it happens all the time” and is “a part of our democracy,” writing “this, we simply cannot agree with. The court system exists to hear legitimate legal disputes, not to air political disputes and grievances. It is not acceptable for Matheny-Willard— or any other litigant—to use the judiciary to promote political agendas and file frivolous pleadings—especially in connection with criminal indictments.”

The Court then wrote: “The complaint appears to be less a “vindication of [plaintiffs’] legal rights” and more an attempt to gain political publicity by way of the judicial system... The solicitation of plaintiffs on social media and the publicity that stemmed from it clearly evidences an improper purpose, a conclusion reinforced by the fact that the complaint was filed just two days after Matheny-Willard’s announcement of her candidacy. Considering the purpose of Code § 8.01-271.1, sanctions are reasonable to “protect courts against those who would abuse the judicial process”—as is the case here.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0813231.pdf>

Obstruction of Justice & Resisting Arrest

Virginia Court of Appeals - Published

Hackett v. Commonwealth: July 25, 2023

78 Va. App. 92, 889 S.E.2d 672 (2023)

Lynchburg: Defendant appeals his conviction for Fleeing from a Law Enforcement Officer on sufficiency of the evidence.

Facts: An officer attempted to arrest the defendant on a felony arrest warrant when the defendant was standing 20 to 25 yards away. After making eye contact with the officer, however, the defendant took off running. The officer told the defendant to stop and said he was under arrest, but the defendant kept running. The defendant escaped into the woods.

About an hour later, the officer found the defendant again and from about 50 yards away, the officer told him to stop, but the defendant again ran away escaped again. Police later arrested the defendant and charged him with misdemeanor fleeing from a law-enforcement officer under § 18.2-460(E).

At trial, the defendant moved to strike, arguing that the Commonwealth had failed to prove under § 18.2-460(E)(ii) that the officer had the “immediate physical ability” to arrest him. The trial court denied the motion.

Held: Reversed. The Court found that, since the statute requires that the defendant flee from the officer's immediate span of control, under *Joseph* and *Peters*, the Commonwealth failed to satisfy that close- proximity requirement here. In this case, the Court noted that, although the defendant here knowingly fled from a law- enforcement officer attempting to arrest him, the officer got no closer than 20 yards. Finding as a matter of law that this distance is too great to satisfy the statutory proximity requirement, the Court reversed the defendant's conviction.

The Court examined § 18.2-460(E), which makes it a Class 1 misdemeanor to knowingly flee from a law- enforcement officer attempting to make a lawful arrest if the officer "applies physical force to the person" or has "the immediate physical ability to place the person under arrest." The Court repeated that under *Peters* and *Joseph*, this subsection requires flight from the officer's "immediate span of control." The Court examined the text, context, and drafting history of § 18.2-460(E), as well as the caselaw construing this statute and its predecessor, and concluded that the officer did not have the "immediate physical ability" to arrest the defendant because, at 20 yards away, the defendant was outside of the officer's "immediate span of control."

The Court pointed out that Virginia appears to be unique in requiring—as an element of the offense—that the officer have the "immediate physical ability" to arrest the defendant. The Court reasoned that "Virginia's statute presumably" includes that element "because our legislature made a policy decision . . . to include it."

The Court also explained that "This case does not require that we identify an outer limit. Just as 100 yards would be too great a distance as a matter of law, we are satisfied that 20 yards—60 feet—is also too far away as a matter of law to satisfy the "immediate" proximity requirement." In a footnote, the Court also wrote that "We likewise leave for another day the question of whether an officer can expand the range of the officer's immediate physical ability to arrest or immediate span of control by pointing a handgun, rifle, or taser at the defendant in the course of attempting the arrest."

Judge Fulton filed a concurring opinion.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1218223.pdf>

Virginia Court of Appeals -
Unpublished

Cunningham v. Commonwealth: December 19, 2023

Martinsville: Defendant appeals his convictions for Assault on Law Enforcement and Fleeing from a Law Enforcement Officer on sufficiency of the evidence.

Facts: An officer observed the defendant begging for money in violation of Martinsville's City Code. After approaching the defendant to arrest him for that violation, the officer could smell the odor of alcohol, and decided to arrest the defendant for public intoxication. The officer ordered the

defendant to place his hands on the patrol car and then attempted to grab the defendant's hands. However, the defendant twisted around and grabbed hold of the officer and pushed and shoved him. After the two spun around the front of the patrol car, the defendant pushed off of the officer and ran.

At trial, regarding fleeing a law enforcement officer under § 18.2-460(E), the defendant argued that if he was only detained pursuant to *Terry* when he fled, there was no arrest and this charge failed as a matter of law for lack of an arrest. Alternatively, he also argued that if he was arrested prior to his flight, the arrest was not lawful, and the charge failed for lack of a lawful arrest.

Regarding Assault on Law Enforcement, the defendant argued that the officer used excessive restraint for a *Terry* stop—specifically, he contended that the officer's attempt to use handcuffs on the defendant was unreasonable given the non-violent nature of the crimes.

Held: Affirmed.

Regarding fleeing a law enforcement officer under § 18.2-460(E), the Court explained that it did not matter that the officer had a subjective intent to arrest the defendant for public intoxication, for which he did not have probable cause. The Court found that the record objectively demonstrated that the officer had probable cause to lawfully arrest the defendant for several offenses before he fled. The Court noted that the officer specifically had observed the defendant begging for money in violation of Martinsville Code of Ordinances, obstructed the officer in the performance of his duties by wrestling with him over the patrol car in violation of § 18.2-460(A) or (B), and battering a law enforcement officer in violation of § 18.2-57(C).

The Court then pointed out that the officer applied physical force to the defendant and that the defendant fled. Therefore, the Court found that the evidence was sufficient to support the defendant's conviction for violating § 18.2-460(E).

Regarding assault on law enforcement, the Court acknowledged that under the common law, a citizen generally is permitted to use reasonable force to resist an illegal arrest. However, the Court also repeated that a citizen has no right to resist the investigatory detention. In this case, the Court concluded that the officer did not use excessive force during the momentary investigative detention converting the detention into an arrest. The Court noted that when the defendant initiated the battery, the officer had only ordered him to place his hands on the patrol car and then attempted to grab the defendant's hands. Therefore, the Court ruled that the investigatory detention did not become an unlawful arrest based on the officer's unreasonable use of force and the trial court did not err in rejecting the defense of resisting an unlawful arrest.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0141233.pdf>

Wolfe v. Commonwealth: September 19, 2023

Richmond: Defendant appeals his convictions for Trespassing, Picketing a Dwelling House, and Obstruction on grounds regarding Jury Instructions, Variance with the Indictment, and sufficiency of the evidence.

Facts: The defendant used an amplified sound system to conduct a protest outside the Governor's Mansion in Capitol Square. The defendant's broadcasts were heard inside a closed guard shack at the Governor's Mansion gate, and his protest instigated a crowd of 40-50 to amass despite law enforcement's commands.

An officer responded and asked the defendant if he had obtained the required permit for such a demonstration. The defendant stated that he did not have a permit. The officers advised that the defendant could air his grievances at the Patrick Henry Building nearby, where the Governor's office was located, and pointed out that building's location. The officer told the defendant to leave, but the defendant refused.

Ultimately, after several attempts to explain the regulations to the defendant, the defendant stated that he would not leave unless the officers arrested him. The defendant refused to accept a summons, so the officers arrested him. However, when officers attempted to process the defendant at the Richmond City Jail, the defendant refused to have his vitals checked as required for entry at the jail. Due to the defendant's repeated refusals to cooperate, officers took him to the hospital.

At the hospital, the defendant refused to exit the vehicle. Officers had to lift him from the vehicle and carry him, but while they did, the defendant wrapped his right leg around an officer's left leg; the officer had to move his leg to prevent falling. The officers moved the defendant into the medical facility with a wheelchair as he refused to walk, but the defendant again refused to cooperate. Finally the officers took the defendant to a different jail in a different jurisdiction.

At trial, the defendant was charged with three misdemeanors: trespassing in violation of § 18.2-119, unlawful picketing of a residence in violation of § 18.2-419, and obstruction of justice, by threats or force, in violation of § 18.2-460(B).

Regarding the picketing offense, the jury was only instructed on the charge of picketing a residence, not an assembly threatening to disrupt an individual's right to tranquility in his home. The jury instruction read in pertinent part:

The defendant is charged with the crime of picketing of a residence. The Commonwealth must prove beyond a reasonable doubt that the defendant engaged in picketing before or about the residence or dwelling place of any individual.

If you find from the evidence that the Commonwealth has proved this beyond a reasonable doubt, then you shall find the defendant guilty of picketing of a residence

The defendant objected to that instruction, arguing that the instruction must encompass the entire statute, including the exceptions. The defendant did not provide an alternative instruction when instructed by the court to do so, nor did he argue with specificity which omitted elements were relevant. The trial court overruled his objection.

The jury found the defendant guilty of trespassing and unlawful picketing, as charged, and of obstruction of justice, but without threats or force. The defendant objected to the jury's verdict, arguing that he had the right to resist an unlawful arrest and that the trial court erred in convicting him under § 18.2-460(A) when he was indicted under § 18.2-460(B).

Held: Affirmed.

Regarding the picketing offense, the Court noted that in this case, at trial, the defendant relied on one of the statutory exceptions listed in § 18.2-419, “Nothing herein shall be deemed to prohibit ... (3) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.” The defendant had argued that Capitol Square is “commonly used for the discussion of subjects of general public interest.”

The Court examined the statute and noted that exception (3) regarding assembly in a public forum notably omits the term “picketing” despite it being used in exceptions (1) and (2) within the same sentence. Therefore, the Court concluded that exception (3) does not apply to picketing, but only “the holding of a meeting or assembly.” In this case, that Court noted that the defendant used sound amplification equipment and signs to air his message directed at the Governor in front of the Governor’s Mansion. He also used a microphone to encourage a crowd to gather.

Additionally, the Court pointed out that regulations in place at the time specifically governed the time, place, and manner in which Capitol Square may be “used for the discussion of subjects of general public interest.” Those regulations state that no “assemblages or the displaying of flags, banners, or devices designed or adapted to bring into public notice any party, organization, or movement shall be permitted within Capitol Square” without a permit or prior written authorization. 1 VAC 30-100-10. In this case, the defendant never requested a permit for his demonstration in Capitol Square, nor did he receive any written authorization.

Accordingly, the Court concluded that the defendant’s demonstration was unlawful, and he was further prohibited from using such to picket the Governor’s Mansion under § 18.2-419, and the Code’s exception did not excuse his conduct.

Regarding the jury instruction, the Court, having concluded that the relied-upon exception did not apply to the defendant’s picketing conviction, and noting that the defendant never argued that any of the other exceptions set forth in the statute applied, found that the other exceptions’ inclusion in the jury instruction was neither required nor relevant, potentially even having the effect to confuse the jury.

The Court then rejected the defendant’s argument that his arrest was unlawful, finding that the officers’ arrest was lawful. The Court noted that the defendant lacked permission under the regulation to picket outside the Governor’s Mansion and thus violated the trespassing and picketing statutes “in the presence of the [arresting] officer[s].” 19.2-81(A)(11), (B). Therefore, the defendant did not have a right to resist a lawful arrest, and his conviction for obstruction was valid.

Finally, the Court addressed the variance in the Indictment. The Court ruled that: “Being that Code § 18.2-460(B) includes all of the same elements as Code § 18.2-460(A) with the additional element of “by threats or force,” Code § 18.2-460(A) thus qualifies as a lesser-included offense of Code § 18.2-460(B).”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0645222.pdf>

Probation Violation

Virginia Supreme Court

Browne v. Commonwealth: April 12, 2024

Rev'd Unpublished Ct. of App. Ruling of April 11, 2023

Page: Defendant appeals his Probation Revocation on violation of the Limits on Probation Revocations.

Facts: In early 2021, the defendant violated probation on his 2019 conviction for Assault on Law Enforcement. The trial court returned the defendant to probation and included a special condition that the defendant pay court costs. His probation was set to expire in 2024.

Later in 2021, the defendant violated probation again. The violations included (i) failure to maintain regular employment; (ii) failure to report to the probation officer three times; (iii) testing positive for controlled substances; and (iv) failure to comply with the order to pay his court costs, making no payments since his last court date. The trial court found the defendant in violation and sentenced him to serve more than a year of his original sentence.

In an unpublished ruling, the Court of Appeals reversed. The Court held that the trial court erred in imposing a sentence of active incarceration that exceeded the statutory maximum sentence under § 19.2-306.1(C). The Court further held that a revocation sentence imposed in excess of the statutory maximum sentence under § 19.2-306.1(C) exceeds the court's sentencing power and is void ab initio.

While this appeal was pending, the defendant incurred three additional revocations of his suspended sentences after he served the period of active incarceration at issue in this appeal. The additional revocations were based, at least in part, on technical violations set forth in § 19.2-306.1.

Held: Appeal Dismissed as Moot. The Court held that, as the defendant had already served the entire period of active incarceration that was the subject of this appeal and he had not suffered any ongoing injury as a collateral consequence of the alleged erroneous application of § 19.2-306.1, the present appeal was moot - notwithstanding the alleged erroneous application of the pertinent provisions of § 19.2-306.1. At this point, the Court observed, the defendant's incarceration cannot be "undone" by the Court; he cannot be ordered to serve a lesser period of incarceration based on the revocation of his suspended sentences because he has already served the entire period of incarceration imposed by the trial court. The Court vacated the memorandum opinion and judgment of the Court of Appeals, reinstated the judgment of the circuit court, and dismissed this case.

The Court also noted that the defendant's suspended sentences have already been revoked based on at least two technical violations. As the defendant has already committed more than two technical violations, the Court pointed out that the sentencing limitations set forth in § 19.2-306.1 will no longer apply to the defendant in subsequent revocation proceedings addressing the suspended sentences at issue. Thus, the Court concluded that the alleged misclassification of the violations at issue in this case can no longer affect the defendant in subsequent revocation proceedings.

In a footnote, the Court also agreed with Judge Athey's concurrence in the Court of Appeals, finding that an individual commits a technical violation under § 19.2-306.1 when he commits an act enumerated in subsection (A) of the statute—regardless of whether the violation is adjudicated simultaneously with a separate non-technical violation.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230379.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1373214.pdf>

Hannah v. Commonwealth: April 18, 2024

Aff'd Ct. of App. Ruling of April 4, 2023

Chesapeake: Defendant appeals the revocation of his probation on Jurisdiction alleging violation of the Limits on Probation Revocations.

Facts: In 2017, the trial court sentenced the defendant to twelve months in jail with eight months suspended and an indefinite two-year-minimum period of probation for misdemeanor false ID to law enforcement. The defendant began testing positive for illegal drugs in March 2021. In May 2022, the court found the defendant in violation of his probation for using illegal or unauthorized drugs. The defendant argued that the court should not revoke the suspended sentence because his probation should have already expired. The defendant argued that under § 19.2-303.1, once the defendant had served one year of probation, the trial court lost jurisdiction over the misdemeanor conviction, thus rendering its revocation and resuspension of that sentence a nullity.

The trial court rejected the defendant's argument. After revoking the defendant's misdemeanor sentence, the trial court resuspended the sentence and reimposed the same terms and conditions of the original sentence, including the two-year-minimum indefinite probationary period.

The Court of Appeals affirmed. The Court found that the defendant did not sufficiently object and articulate his grounds for appeal at the trial court level. The Court therefore only addressed whether the trial court had subject matter jurisdiction to hear the probation violation, rather than the direct merits of the defendant's arguments. The Court concluded that the 2021 amendments to those statutes merely place new limitations on a trial court's exercise of its "active" jurisdiction but do not strip it of subject matter jurisdiction over revocation proceedings generally.

Held: Affirmed. The Court held that the defendant's indefinite resuspension was lawful on these facts. Because the penalty applied was the penalty in existence at the time of the offense, the Court ruled that the judgment was of a character the court was able to render. The Court also held that Code § 19.2-303.1 did not abrogate the court's subject matter jurisdiction to decide the revocation.

The Court found that, on the first day when the defendant violated probation, in March 2021, the punishment applicable to the defendant's probation violation was subject to the provisions of the previous version of § 19.2-306(C), which allowed the circuit court to resuspend the sentence for "a reasonable period of time" and "without regard to the maximum period for which the defendant might have been sentenced." Thus, the Court concluded that the defendant's March 2021 positive drug screen and associated rule to show cause required the Court to apply the law in effect at the time of the offense.

The Court explained that errors in the application of § 19.2-303.1 do not create a fundamental infirmity which would strip a court's jurisdiction to preside over certain suspended sentences.

In a footnote, the Court also explained that, even if jurisdictional, § 19.2-303.1 would need to have retroactive effect if it were to divest a court of subject matter jurisdiction it already possessed. The Court reasoned that it would be a significant legislative act for the General Assembly to retroactively reopen and adjust every probation order entered prior to July 2021, "potentially cutting short probation periods for thousands of probationers. We see no such intent on the face of the statute or the bill, much less one expressly provided."

Full Case At:

<https://www.courts.state.va.us/opinions/opnscvwp/1230316.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0700221.pdf>

Delaune v. Commonwealth: December 14, 2023

Aff'd Court of Appeals Ruling in 76 Va. App. 372, 882 S.E.2d 27 (2023)

Virginia Beach: Defendant appeals her sentence for Probation Violation alleging violation of the New Probation Violation Limits

Facts: The defendant violated probation for various drug offenses by absconding and using drugs. The trial court had placed the defendant on probation and, on top of general language placing the defendant on supervised probation and requiring her to comply with all the rules, terms and requirements set by the probation officer, the sentencing court's order contained an additional condition: "The defendant shall be drug free."

At the probation violation hearing, the defendant argued that the maximum sentence the court could impose under the new § 19.2-306.1(C) was 14 days. The trial court disagreed, concluding that the mandate to "be drug free" was a special, not technical, condition of her probation and suspended sentences. As a result, the court revoked the remaining four years of the defendant's suspended sentences and re-suspended all but 60 days.

The Court of Appeals reversed. The Court ruled that a probationer's violation of a condition requiring her to "be drug free" is a "technical violation" as defined by § 19.2-306.1(A)(vii) to include "a violation based on the probationer's failure to . . . refrain from the use, possession, or distribution of controlled substances or related paraphernalia." The Court ruled that the trial court was required to group together the defendant's violation for using controlled substances with her violation for absconding from probation. Because the violation for absconding from probation is automatically treated as a "second technical violation," the maximum sentence the court could impose was 14 days of active incarceration.

Held: Court of Appeals Affirmed, Revocation Sentence Reversed. The Court acknowledged that the defendant violated the terms of her probation and suspended sentence when she used drugs and absconded from supervision. As the use of a controlled substance is defined as a technical violation in §

19.2-306.1(A), the Court ruled that the defendant's drug use constituted a technical violation under the statute. Therefore, the Court ruled that the trial court could not impose a term of active incarceration based on this violation, per § 19.2-306.1(C). As the defendant's absconding violation was automatically classified as a second technical violation under § 19.2-306.1(A), the Court concluded that the trial court could impose a maximum of 14 days of active incarceration based on this violation. Accordingly, the trial court erred when it ordered the defendant to serve 60 days of active incarceration in this case.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230127.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0328221.pdf>

**Virginia Court of Appeals –
Published**

Nalls v. Commonwealth: February 6, 2024

Accomack: Defendant appeals his sentence for Probation Revocation, alleging violation of the Limits on Technical Violations.

Facts: While on probation for possession of a firearm by felon, receiving a stolen firearm, larceny, and drug possession, the defendant violated probation twice. Each time, the trial court returned him to probation. The defendant then absconded from supervision.

At his violation hearing for absconding, the probation officer testified that the defendant's violation constituted the third technical violation of probation but that this was the first time he had absconded from supervision. The probation officer then testified that it was his understanding that the first absconding violation took precedence over the third technical violation per § 19.2-306.1 and therefore the potential sentence was capped at 14 days.

The defendant also argued that, under § 19.2-306.1, despite two previous technical violations of probation, he could not be sentenced to more than 14 days of incarceration because this was the first time he had violated his probation by absconding. The trial court rejected his argument and imposed a lengthier period of incarceration.

Held: Affirmed. The Court ruled that under § 19.2-306.1(C), a third technical violation, even if based upon a first instance of the probationer's absconding, may be punished as a third technical violation, which is to say, "[t]he court may impose whatever sentence might have been originally imposed."

The Court examined the language in the statute and concluded that the plain meaning is that there are three kinds of technical violations: first, second, and third. Regarding a "first" violation, the Court reasoned that the clause in § 19.2-306.1 describing instances in which the first time a defendant has violated probation is based upon a violation of clause (viii) or (x), not the first time a defendant

violates clauses (viii) or (x) regardless of how many times he has previously violated other technical terms of probation.

Rejecting the probation officer's and the defendant's reading of the Code, the Court wrote: "it is absurd to conclude that the General Assembly intends the same particularly offensive conduct to produce a less harsh penalty when following a train of previous violations."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1536221.pdf>

Canales v. Commonwealth: September 5, 2023

78 Va. App. 353, 891 S.E.2d 405 (2023)

Arlington: Defendant appeals his Probation Revocation alleging violation of the Limits on Technical Violations.

Facts: While on probation for Burglary and Grand Larceny, the defendant violated probation. The defendant's violations fell into two categories: first, failing to report to the probation office as instructed for appointments or drug testing and second, failing to refrain from illegal drug use. The defendant failed to report for drug testing on four times; he also failed to appear for a scheduled appointment with probation. The defendant also tested positive for drug tests twice.

The trial court decided to hold a separate revocation hearing for each reported violation event alleged in the violation report. The trial court assigned each date of an alleged violation a court case number relating to the defendant's probation for grand larceny and for statutory burglary.

The trial court held two revocation proceedings, one in March 2022, and one in May 2022. In March, the trial court found that the defendant violated some of his probation conditions but imposed no active sentence for the technical violations found at the hearings. In May, the trial court found that the defendant violated another condition, and for each of the violations, the trial court revoked the defendant's suspended sentences and resuspended all but 14 days.

The defendant contended that the trial court erred in refusing to hold a single revocation hearing upon a major violation report that alleged numerous technical violations of his probation. He further maintained that the procedure the trial court employed—holding multiple successive revocation hearings, each upon a single instance of an alleged technical violation—violated the separation of powers doctrine as well as the letter and spirit of recently enacted § 19.2-306.1. In addition, the defendant argued that the trial court erred in finding that he committed multiple technical violations when all the violations were part of a single course of conduct. The trial court rejected these arguments.

Held: Affirmed in Part, Reversed in Part. The Court affirmed the trial court's judgments in the March revocation hearings. The Court also affirmed the trial court's judgment that the defendant violated his probation in the revocation cases held in May but reversed the sentences that the trial court imposed and remand the sentencing decisions to the trial court for re-sentencing.

The Court concluded that the General Assembly, in limiting the scope of sentencing for multiple technical violations arising from "a single course of conduct," intended the trial court to focus upon the

overall conduct that formed the basis for the violation of a probation condition, regardless of whether the conduct occurred more than once. The Court defined “a single course of conduct” as “an ordered continuing process, succession, sequence, or series of acts or behavior.”

As § 19.2-306.1(A) states that “[m]ultiple technical violations arising from a single course of conduct or a single incident or considered at the same revocation hearing shall not be considered separate technical violations for the purposes of sentencing pursuant to this section,” the Court deduced that it must therefore be possible under the statute to commit multiple technical violations in a manner not constituting a single course of conduct, because to interpret it otherwise would negate the meaning of the words “single course of conduct” in the statute and render their inclusion superfluous.

In this case, the Court found that the defendant’s two positive drug tests were technical violations per § 19.2-306.1(A)(vii). The Court also found that the defendant’s failure to attend scheduled drug tests and meetings were technical violations per § 19.2-306.1(A)(v). The Court observed, though, that using controlled substances and missing appointments are not the same act or behavior. The Court cautioned that the defendant could not be sentenced separately for every instance of violation because the series of missed appointments is itself a continuing succession, sequence, or series of the same act; similarly, the Court found that the two positive drug screens indicated a series of the same act. Thus, the Court concluded that, in this case, the individual violations constituted two courses of conduct, each of which was to be treated on its own as a single course of conduct for sentencing purposes under § 19.2-306.1(C).

The Court rejected the defendant’s contention that the technical violations constituted one single course of conduct simply because they were brought before the trial court together. The Court explained that “If such were the case, then any set of technical violations would constitute a single course of conduct and, as we have discussed, “single course of conduct” may not be construed so broadly as to render the phrase’s inclusion in Code § 19.2-306.1(A) meaningless and make every series of violations a single course of conduct. As the statute clearly contemplates that not every series of technical violations is a single course of conduct, we cannot conclude that mere temporal proximity between Canales’s drug use and missed appointments constituted a single course of conduct. Nor does the bare assertion, offered by Canales, that such is the behavior of a drug addict convince us otherwise. While we do not rule out the possibility that under another set of facts actions constituting violations under more than one of Code § 19.2-306.1(A)’s categories might constitute a single course of conduct within the meaning of the statute, we cannot conclude that Canales’s drug use and missed probation appointments, without any greater demonstrated connection, constitute a single course of conduct.”

However, regarding sentencing, the Court then ruled that because § 19.2-306.1(A) requires that multiple technical violations arising out of a single course of conduct only count as one violation for purposes of sentencing, the trial court erred in sentencing the defendant at the May revocation proceedings as if there were more than two technical violations. The Court reasoned that one of the courses of conduct collectively constituted the defendant’s first technical violation; the other constituted his second technical violation, which was subject to a maximum sentence of 14 days’ incarceration, per § 19.2-306.1(C).

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1037224.pdf>

and

<https://www.vacourts.gov/opinions/opncavwp/0775224.pdf>

Burford v. Commonwealth: August 8, 2023

78 Va. App. 170, 890 S.E.2d 645 (2023)

Stafford: Defendant appeals his Probation Revocation claiming violation of the Limits on Technical Violations.

Facts: In General District Court, the court placed the defendant on probation for three misdemeanor convictions: Sexual Battery, Battery, and Stalking. The conviction orders entered by the district court required the defendant to report to the “local community-based probation agency” (“CBP”) and his suspended sentence of 30 months was conditioned on his good behavior, no contact with the victim, “a CBP referral for mental health evaluation,” and completion of “all recommendations.”

The defendant completed the court-ordered mental health evaluation which determined that he needed to complete a psychosexual evaluation. The defendant refused to comply, claiming that he thought he was on unsupervised probation, and stopped communicating with his probation officer. The district court found him in violation. The defendant appealed to the circuit court, where he argued that the trial court erred by determining he violated a condition of his previously suspended sentences, that it erred by refusing to find that the violation was but a “first technical violation” pursuant to § 19.2-306.1(A), and lastly that it erred by sentencing him to an active sentence “incommensurate” with his conduct. The trial court rejected all three arguments and revoked the defendant’s probation, imposing an active sentence of six months.

Held: Affirmed.

The Court first rejected the defendant’s defense that he mistakenly believed that he was on unsupervised probation and therefore was not required to comply with the court-ordered psychosexual evaluation. The Court agreed that the evidence demonstrated that the defendant unreasonably refused to obey the district court’s order to comply with any recommendations following the mental health evaluation.

The Court then examined § 19.2-306.1(A)(v), which states that it is a technical violation to fail to “follow the instructions of the probation officer.” In this case, the Court found that the “underlying conduct” that the defendant committed was not the failure “to follow the instructions of the probation officer,” but rather, the failure to follow the instructions of the court. The Court ruled that the condition to complete “a CBP referral” for mental health evaluation, and to follow all recommendations was therefore a special condition because the conduct underpinning this violation does not fall within any of the ten enumerated technical violations under § 19.2-306.1(A). Because the defendant’s suspended sentences were conditioned in part on a special condition, the Court concluded that his violation of the special condition was therefore a non-technical violation under § 19.2-306.1(B).

The Court pointed out that violating the district court's instruction to "follow all recommendations" was explicitly tied to the district court's requirement to complete the mental health evaluation. Further, the Court noted that the probation officer was not the one who recommended that the defendant complete the psychosexual evaluation. The Court reasoned that the district court effectively crafted a special condition that required follow-through on behalf of the defendant. The Court therefore found that the record supported the trial court's conclusion that the defendant violated his probation by refusing to comply with the district court's express special condition that he complete any recommendations following his mental health evaluation.

Lastly, the Court refused to reverse the trial court's sentence based on § 19.2-306.1, which states that when the probationer violates a condition other than "(i) a technical violation or (ii) a good conduct violation that did not result in a criminal conviction," the trial court has broad sentencing discretion and "may revoke the suspension and impose or resuspend any or all of that period previously suspended." The Court explained that, because the defendant's violation was not a technical violation, it was within the circuit court's discretion to impose or resuspend any or all of the previously suspended sentences.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1275224.pdf>

Virginia Court of Appeals

Unpublished

Holt v. Commonwealth: March 26, 2024

Fauquier: Defendant appeals his Probation Revocation on Admission of Hearsay testimony.

Facts: While on probation for child sexual assault, the defendant's probation conditions included a requirement that he shall "have no unsupervised contact with minors." The defendant obtained a job at a local restaurant, where he signed a "safety contract" in which he agreed he would not communicate with co-workers under the age of 18 unless it was for work purposes. The contract also stipulated that the defendant would not initiate casual conversation with any minors that enter the restaurant and that he would not be alone with any minors at work or stand next to co-worker minors during down times/breakroom at work.

The defendant later reported to his probation officer that he had been terminated from the restaurant, but claimed it was for making "inappropriate comments." The probation officer investigated and learned that, in fact, two minor boys provided the manager with written letters reporting that the defendant touched them sexually and showed them pornography. They also reported that the defendant made sexual advances on them and made them feel uncomfortable. The manager later testified that he did not ask the minors to write the letters. He testified that upon receipt of the letters, rather than contacting the police he "just went straight to termination" without questioning the boys or the defendant about the allegations depicted in them.

At the violation hearing, after the manager verified the authenticity of the letters, the trial court admitted the letters into evidence over the defendant's objection.

Held: Affirmed. The Court held that the letters were not testimonial hearsay because they were not prepared for the primary purpose of investigating or prosecuting a crime. Accordingly, under the circumstances of this case, the Court held that the trial court's admission of the letters and consideration of what they said did not violate the defendant's due process right of confrontation. Because the Court concluded that the letters were not testimonial, the Court did not address whether the trial court erred in finding they met the test for "reliability" that governs the admission of testimonial hearsay in probation violation hearings under *Henderson*.

The Court noted that the letters were not, in fact, written or created with the primary purpose of creating an out-of-court substitute for trial testimony. Instead, the Court pointed out, the letters were written to the manager, unsolicited, and clearly not the result of interrogation by anyone in the law enforcement community, including the probation officer or the Commonwealth's attorney, and not made with the primary purpose of proving events relevant to the probation violation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0343234.pdf>

Watts v. Commonwealth: March 19, 2024

Suffolk: Defendant appeals his Probation Revocation on exceeding the limits for Technical Violations.

Facts: The defendant was convicted of Malicious Wounding and Possession of a Firearm by Felon. His probation conditions included a requirement that the defendant comply with all the rules and requirements set by the probation officer. After his release, the defendant violated probation. The trial court found him in violation in 2021. The trial court revoked and resuspended his sentence, conditioning the suspended sentences on supervised probation under the same terms and conditions as previously ordered.

At the revocation sentencing, the trial court orally stated: "I also specifically incorporate as a special condition of your probation all the gang-related prohibitions that were in previous violation on your previous order that probation and parole puts on you. And so there's no confusion this is a special condition of probation. All those conditions that they put on you are going to be part and parcel of the order as a special condition of probation." However, the trial court did not include this oral ruling in the written order.

Instead, the revocation sentencing orders provided, as a condition of the suspended sentences and probation, that "[t]he defendant must comply with all the rules and requirements set by the probation officer. As part of the defendant's probation conditions, the defendant's probation officer imposed a condition to not associate with members of his criminal street gang and to not wear or display gang paraphernalia.

Within a matter of months, the defendant had repeated phone contact with multiple incarcerated gang members and posted on social media writings, photos, and a video showing his gang involvement. The probation officer reported the violation and identified the probation violation as a second technical violation.

The defendant argued that his failure to follow the probation officer's "special instructions" for gang members was a technical violation of probation under § 19.2-306.1. The trial court found that the defendant had violated the oral "special condition" that it had imposed, found the defendant in violation, and imposed an active sentence of three years of incarceration.

Held: Reversed. The Court held that the defendant's failure to follow the probation officer's "special instructions" for gang members was a technical violation of probation under § 19.2-306.1. The Court ruled that the trial court erred in imposing a sentence of active incarceration that exceeded the statutory maximum sentence for a second technical violation of probation under § 19.2-306.1(C). The Court found that the trial court's written sentencing orders did not impose the probation officer's special gang-related instructions as conditions of the defendant's probation and held that the trial court erred in ruling that the defendant's failure to follow these "special instructions" was not a technical violation of probation under § 19.2-306.1.

The Court explained that the defendant's failure to follow his probation officer's instructions to refrain from gang involvement was a technical violation because clause (v) of § 19.2-306.1(A) defines "technical violation" as "a violation based on the probationer's failure to . . . follow the instructions of the probation officer." The Court further explained that when a probationer fails to comply with a court-ordered probation condition to do or refrain from doing specified conduct that does not fall within any of the ten enumerated technical violations under § 19.2-306.1(A), the violation conduct is a "failure to follow the instructions of the court." The Court repeated that, under *Buford*, such a probation violation is a non-technical violation under § 19.2-306.1(A). Therefore, the Court distinguished, under circumstances where a probationer fails to follow a probation officer's instructions to comply with such a court-ordered condition of probation, the probationer's violation conduct is not properly described as "a failure to follow the instructions of the probation officer" for purposes of § 19.2-306.1.

However, in this case, the Court observed that the trial court's prior revocation sentencing order did not impose any condition on the defendant's suspended sentence and probation incorporating the gang-related instructions signed by the defendant at the direction of his probation officer. Therefore, the Court reasoned, but for the probation officer's instructions, the terms of the defendant's probation would not require his compliance with the special instructions for gang members. Under these circumstances, the Court found that the defendant's violation conduct was properly described as "failure to follow the instructions of the probation officer," and was a technical probation violation under § 19.2-306.1.

The Court observed that the trial court had multiple opportunities to issue written, gang-related conditions but did not do so. The Court concluded that the record did not show mere oversight or inadvertence under § 8.01-428(B).

The Court then found that the record supported a finding that the defendant's prior probation violation was a second technical violation, for which a court may impose not more than 14 days of active

incarceration. Therefore, the Court ruled, the trial court exceeded this limit by imposing a sentence of active incarceration for three years.

Judge Fulton filed a dissent.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1132221.pdf>

Lewis v. Commonwealth: November 21, 2023

Chesapeake: Defendant appeals his sentence for Probation Violation on violation of the Limits on Probation Violation Sentences.

Facts: While on probation for felony larceny, the defendant violated probation in 2020 by testing positive for cocaine repeatedly and not completing substance abuse treatment. The trial court found the defendant in violation and returned him to probation in 2022. A “special condition” of the revocation order included refraining from using illegal substances. Two months later, the trial court issued another *capias* after learning that the defendant again repeatedly tested positive for cocaine.

The trial court found the defendant in violation and imposed a sentence of “time served,” which was 39 days of incarceration. The defendant objected to the sentence, arguing that it exceeded the statutory maximum sentence for a second technical violation. The trial court ruled that the defendant’s cocaine use was punishable as a violation of a special condition of probation rather than a technical violation. [Note: At the time, the Court of Appeals had yet to issue its opinion in *Delaune v. Commonwealth*, 76 Va. App. 372 (2023)].

Held: Reversed. The Court held that the trial court erred in imposing a sentence of active incarceration that exceeded the statutory maximum sentence for a second technical probation violation under § 19.2-306.1(C). The Court reversed the trial court’s judgment, vacated the revocation sentencing order, and remanded the case for resentencing in accordance with § 19.2-306.1(C).

The Court held that, in light of *Delaune* as controlling precedent, the trial court erred in ruling that the defendant’s cocaine use was not a technical violation of probation. Because the defendant had only one prior probation revocation sentencing for a technical violation, the Court concluded that the trial court erred in sentencing him to active incarceration for more than 14 days, the statutory maximum sentence for a second technical violation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1285221.pdf>

Barb v. Commonwealth: October 3, 2023

Rockingham: Defendant appeals his Probation Revocation on sufficiency of the evidence.

Facts: While on probation for various drug and gang offenses, the defendant violated probation repeatedly. After his fourth violation, the trial court extended the defendant's supervised probation for a period of two years "upon his release from any and all incarceration," and ordered him to have no contact with gang members. Meanwhile, another court ordered the defendant into the Community Corrections Alternative Program (CCAP) and ordered the defendant to complete CCAP as a condition of his suspended sentence. After being released from incarceration on his sentences, the defendant entered the CCAP program.

Soon thereafter, the defendant's probation officer advised the trial court that the defendant had been removed from CCAP because he contacted a member of the Gangster Disciples, a recognized criminal street gang. The trial court found that he violated a condition of probation while enrolled in the CCAP. The court rejected the defendant's contention that CCAP was a form of incarceration and that he was on not on probation while he participated in CCAP.

Held: Affirmed. The Court agreed that the defendant had been released "from any and all incarceration" and was therefore subject to the conditions of probation at the time he was removed from CCAP.

The Court first observed that § 53.1-67.9, which established CCAP, authorized the Department of Corrections "to establish and maintain a system of residential community corrections alternative facilities for probationers and parolees whose identified risks and needs cannot be addressed by conventional probation or parole supervision and who are committed to the Department under § 19.2-316.4." The Court observed that these statutes describe CCAP as a form of probation. The Court further noted that, under the plain language of § 53.1-67.9, the program is only available to "probationers and parolees" and is described as a "component" of probation.

The Court distinguished the Supreme Court's ruling in *Charles*, noting that in that case, the Court found the Detention Center Incarceration Program to be a form of incarceration when it was specifically labeled as an "incarceration program" and described by the General Assembly as a "short-term period of incarceration." In this case, the Court noted that, instead of describing CCAP as an "incarceration program," § 19.2-316.4 describes it as a "community corrections alternative program." The Court concluded that the omission of the word "incarceration" in the CCAP statutes and the notable, advertent differences between the descriptions of CCAP and the Detention Center Incarceration Program are an "unambiguous manifestation" of the General Assembly's intent to create a program that differed from the Detention Center Incarceration Program considered in *Charles*.

Judge Lorish concurred in the result but objected to the scope of the panel's ruling.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1169223.pdf>

Shifflett v. Commonwealth: September 12, 2023

Buckingham: Defendant appeals his Probation Revocation, alleging violation of the Limits on Technical Violations.

Facts: The defendant committed an Aggravated Sexual Battery and, as part of his suspended sentence, the trial court placed the defendant on supervised probation. The Court ordered the defendant to “follow all the rules and regulations of probation,” “comply with all the rules and requirements set by the Probation Officer,” “complete any screening, assessment, testing, treatment and/or education as directed by the probation officer,” and “comply with a plan of 200 hours of community service coordinated through adult probation that shall all be completed by October 7, 2021.” Additionally, the trial court required the defendant to “register and reregister with the Sex Offender and Crimes Against Minors Registry” and to “immediately enroll in counseling” with “a licensed sex offender provider/counselor.”

One year after his release, the defendant was unsuccessfully discharged from sex offender treatment due to his “lack of progress and therapy-interfering behavior.” The defendant completed over 200 hours of community service several months before the deadline but did not do them at a location approved by the probation officer.

The trial court revoked his previously suspended sentence and imposed three months’ active incarceration. The defendant contended that his sentence violated § 19.2-306.1(C)’s prohibition on active incarceration for a “first technical violation.”

Held: Reversed. The Court held that the defendant’s failure to complete sex offender treatment and 200 community service hours at an approved location were failures to “follow the instructions of the probation officer,” which § 19.2-306.1(A)(v) defines as a “technical violation.” As both violations were “considered at the same revocation hearing,” the Court found that the trial court was obligated to treat them as a single violation under 19.2-306.1(A). Because the defendant’s probation violation was a “first technical violation,” § 19.2-306(C) prohibited the trial court from imposing active incarceration.

Regarding the sex offender condition, the Court distinguished this case from the *Burford* case, where the Court had found that a violation of sex offender treatment conditions was not a technical violation. The Court noted that in this case, the trial court did not require the defendant to complete a sex offender treatment program. Rather, in the Court’s view, the trial court delegated to the probation officer the authority to decide what treatment programs the defendant needed to complete, if any. The Court concluded that the defendant’s failure to complete the sex offender treatment program was a failure to follow his probation officer’s instruction and, therefore, a “technical violation” under § 19.2-306.1(A)(v).

Regarding the community service condition, the Court noted that that condition required the defendant “to do nothing more than follow his probation officer’s plan to complete a specific number of community service hours by a date certain.” Thus, the Court concluded, the defendant’s underlying conduct amounted to a failure to comply with his probation officer’s instructions.

In a footnote, the Court openly criticized the new law regarding “technical” violations, writing: “Now, circuit court judges, as here, are required to conduct nuanced interpretation of a complex statutory framework to discern legislative intent and separate “technical” from “non-technical” violations, when both are often intertwined. ‘Here, on the heels of a sea change in the applicable law,’”

the circuit court was ‘required to decipher a new sentencing scheme and make a ruling’ without “any guidance beyond the new additions to the statutory scheme itself.’ ... The legislature can resolve this maelstrom.”

Judge Ortiz filed a dissent regarding the Court’s ruling on the sex offender condition.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0675222.pdf>

Sherman v. Commonwealth: August 29, 2023

Arlington: Defendant appeals his sentence for Probation Revocation, alleging violation of the Limits on Technical Violations.

Facts: While on probation for Domestic Assault, 3rd Offense, the defendant violated probation. In 2020, the trial court dismissed the violation and returned the defendant to probation. Among the defendant’s conditions was a requirement that the defendant “remain drug and alcohol free.”

While on probation the second time, among other violations, the defendant was arrested for public intoxication and assault after he drunkenly attacked a restaurant employee, who sustained a concussion and facial injuries. The trial court issued another capias in 2022 for the defendant’s new probation violations.

The criminal charges related to the attack were later nolle pross’d. At the probation violation hearing, the defendant argued that his violations amounted to a “first technical violation” under newly enacted § 19.2-306.1(C), specifically arguing that his drinking amounted to a failure to refrain from the use of “alcoholic beverages to the extent that it disrupt[ed] or interfere[d] with [his] employment or orderly conduct,” which § 19.2-306.1(A)(vi) expressly defines as a technical violation. The trial court rejected his argument and revoked the balance of the defendant’s sentence.

Held: Affirmed. Assuming without deciding that § 19.2-306.1 applied to this revocation proceeding, the Court held that the defendant committed a non-technical violation for which the trial court had the authority to impose the balance of his previously suspended sentence.

The Court first repeated that § 19.2-306.1 does not apply at a violation hearing when a probationer committed the relevant violations before the change in law and when revocation proceedings began before the statute took effect—absent agreement of the parties otherwise. The Court acknowledged that it has not addressed whether the statute applies when, as here, some of the violation conduct occurred before July 1, 2021, but the trial court issued the capias after that date. In this case, however, the Court declined to do so here because even assuming § 19.2-306.1 applied to these revocation proceedings, the Court found that the defendant committed a non-technical violation for which the trial court was authorized to impose the balance of his previously suspended sentence.

In this case, the Court noted that the trial court had required the defendant to remain “alcohol free” as a special condition of his suspended sentence, which was more restrictive than § 19.2-306.1(A)(vi), which defines using alcohol as a technical violation only “to the extent that it disrupts or

interferes with” the probationer’s “employment or orderly conduct.” Thus, the Court concluded that the defendant’s conduct was a special condition violation and, therefore, a non-technical violation and therefore, the trial court was authorized to impose the balance of the defendant’s previously suspended sentence based on his violation of the “no alcohol” special condition.

The Court likened this case to the recent *Thomas* case and distinguished it from the *Delaune* case. The Court cautioned that “a sentencing court may not immunize its suspended sentences from the reach of Code § 19.2-306.1 by crafting ‘special conditions’ that encompass conduct defined by Code § 19.2-306.1(A) as a ‘technical violation.’”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1368224.pdf>

Johnson v. Commonwealth: August 1, 2023

Chesapeake: Defendant appeals the revocation of his probation, arguing the Retroactivity of the New Probation Restrictions.

Facts: The defendant was convicted of a drug possession in 2003 and received a ten-year suspended sentence with “an indeterminate period” of probation. In 2019, following a series of prior probation violations, the trial court revoked his nine-year suspended sentence, resuspended eight years and six months of that sentence, and again ordered that the defendant serve an indeterminate period of supervised probation.

Effective July 1, 2021, the General Assembly amended § 19.2-303.1 to provide: “In any case where a court suspends the imposition or execution of a sentence, it may fix the period of suspension for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned.” The General Assembly simultaneously amended and reenacted Code § 19.2-303 to include a corresponding limitation on a term of probation ordered as a condition of a suspended sentence: “The court may fix the period of probation for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned.”

In 2022, the trial court again found the defendant in violation of his probation for the fifth time, revoked the remaining suspended sentence of eight years and six months of imprisonment, and resuspended eight years of the sentence. The defendant argued that the court had no jurisdiction to find him in violation of his probation because his probationary period had already expired, contending that under the 2021 changes to § 19.2-303.1, the trial court was “limited to the amount of supervised probation that the [c]ourt can impose” and that the maximum period for which the sentence could be revoked expired in 2013, ten years from the original sentencing order. The trial court rejected his argument.

Held: Affirmed.

The Court repeated that, in the case of a procedural statutory change, an amended statute will apply prospectively to any procedure or process occurring after its effective date irrespective of when

any cause of action or criminal offense may occur. Assuming for argument that § 19.2-303.1 was a procedural statutory change, the Court concluded that it would only limit a court's authority in how long the court could suspend a sentence at hearings after July 2021.

The Court refused to find that the 2021 amendment to § 19.2-303.1 "withdrew jurisdiction" from the trial court, automatically changing the prior lawful order of the court that placed him on an indeterminate period of probation and amending the period of probation to only ten years. The Court rejected the defendant's argument that, when the General Assembly amended § 19.2-303.1, it amended the subject matter jurisdiction of the trial court over revocations.

The Court concluded that the trial court's actions revoking the defendant's suspended sentence in 2005, 2008, 2017, and 2019 followed the statutory directives of § 19.2-306. Thus, the Court ruled that the trial court was permitted to revoke the defendant's suspended sentence for any cause occurring through 2029—ten years (the statutory maximum penalty for the original offense) from the 2019 order last revoking his suspended sentence.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0820221.pdf>

Ogle v. Commonwealth: July 25, 2023

Stafford: Defendant appeals the revocation of his probation on the Limits on "Technical Violations."

Facts: In 2020, the trial court sentenced the defendant for offenses of possessing a controlled substance and distributing a controlled substance. The court sentenced him to twelve years and two months but suspended nine years on the condition that the defendant be on probation for an indefinite period of time not to exceed ten (10) years and that "[p]robation shall further include a mental health assessment and the defendant shall comply with all recommendations."

The defendant soon violated probation in several ways. His probation officer alleged that he used drugs without a prescription, twice testing positively for heroin, methamphetamine, fentanyl, and opiates, and that he had failed to complete the required mental health assessment. The trial court found the defendant in violation, revoked his remaining suspended sentences, and resuspended all but one year. The defendant that his failure to complete the required mental health assessment was not a "special condition" of his probation but instead was a "technical violation" under § 19.2-306.1. The trial court rejected his argument.

Held: Affirmed.

The Court pointed out that none of the specifically enumerated technical violations in § 19.2-306.1(A) include the requirement that a defendant participate in a "mental health assessment . . . and comply with all recommendations," which is what the court's order specifically required. The Court explained that "Probation did not decide that [the defendant] should complete a mental health assessment, the court did. Therefore, the court did not err in treating this violation as a special condition."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1613224.pdf>

Anderson v. Commonwealth: June 6, 2023

Arlington: Defendant appeals his sentence for Probation Violation on Exceeding the Statutory Limits on Probation Revocations.

Facts: While on probation for burglary, the defendant possessed a firearm in the District of Columbia, in violation of his probation. The violation was the defendant's first probation violation. At the time of the violation, the D.C. offense had not yet gone to trial. The trial court found the defendant in violation based on an affidavit from a police officer. Over the defendant's objection, the trial court revoked the original sentence and resuspended all but eight months of the original sentence.

Held: Reversed. The Court ruled that § 19.2-306.1 applies in this case because the conduct violating the defendant's probation took place after July 1, 2021, when § 19.2-306.1 went into effect. Given that the defendant's charge of possessing a firearm was a probation violation that is treated as "a second technical violation" under § 19.2-306.1, the Court ruled that the trial court could only handle revocation of the suspended sentence so as to sentence the defendant to a maximum of fourteen days of active incarceration in this case.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0660224.pdf>

Prostitution

Virginia Court of Appeals - Published

Thornton v. Commonwealth: August 22, 2023

78 Va. App. 321, 890 S.E.2d 861 (2023)

Chesterfield: Defendant appeals his conviction for Solicitation of a Minor for Prostitution on sufficiency of the evidence.

Facts: The defendant responded to an online advertisement for sexual services by a female "escort" on a well-known prostitution website. In fact, the person with whom the defendant communicated was an undercover police officer. During their text conversations, the officer told the defendant that she was sixteen years old. The defendant replied, "I don't do under 18." Seconds later,

the officer texted that she would keep their sexual transaction “just between us.” The defendant then continued to negotiate and agreed to meet and exchange sexual acts for money.

After the defendant arranged to meet the officer to exchange money for sex, he prepared for the meeting by equipping himself with condoms, obtaining marijuana and cigarettes to get a discounted price, buying the beer that the supposed child couldn’t buy for herself, and carrying over \$160 in cash to pay for the sexual encounter. Then the defendant drove for about 25 minutes to the arranged meeting place and arrived at the agreed time. Upon his arrival, the defendant notified the officer by text message that he was present. Officers then arrested the defendant.

At trial, the defendant argued that the facts failed to demonstrate that he (i) completed the required element of “a substantial act in furtherance” of an offer for prostitution and (ii) solicited prostitution from a minor.

Held: Affirmed.

The Court held that an act plays a significant role in furthering or advancing an offer for prostitution—and constitutes a substantial act in furtherance thereof—when the act is more than mere preparation and is strongly corroborative of a defendant’s intent to complete the proposed sexual transaction. The Court explained that whether an act is a substantial act in furtherance of an offer for prostitution is a question to be determined by the trier of fact upon consideration of the totality of the specific facts and circumstances of each case.

The Court further held that the trial court’s finding that the defendant committed a substantial act in furtherance of his offer for prostitution was supported by the evidence and not plainly wrong. The Court concluded that a rational factfinder could find that the defendant’s actions went beyond mere preparation and were strongly corroborative of an intent to complete the proposed sexual transaction. Therefore, considering the totality of the facts and circumstances, the Court found that a rational factfinder could conclude that the defendant’s drive to the arranged meeting place was a substantial act in furtherance of his offer of money for sex.

The Court rejected the defendant’s argument that he committed no act in furtherance of his offer for prostitution because he did not give anyone money and he did not engage in sexual touching with anyone, and therefore his conduct was no more than preparation. The Court explained that, although evidence of an exchange of money or of sexual touching may be sufficient to prove the requisite substantial act in furtherance of an offer for prostitution, such conduct is not necessary.

The Court also concluded that a rational factfinder could also find that if the officer had not been a decoy in a sting operation, the defendant would have been dangerously close to paying for and having sex with a minor when he parked at the arranged meeting place and notified the officer of his arrival. Thus, the Court ruled that the evidence supported a finding that the defendant’s drive to the arranged meeting place went beyond mere preparation and was strongly corroborative of an intent to complete the proposed sexual transaction. Therefore, the Court found that the evidence supported a finding that the defendant’s drive to the arranged meeting place was a substantial act in furtherance of his offer for prostitution.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0652222.pdf>

Protective Order

Virginia Court of Appeals – Unpublished

Pease v. Commonwealth: June 13, 2023

Norfolk: Defendant appeals his conviction for Unlawful Entry in Violation of a Protective Order and related charges on a Discovery Violation and sufficiency of the evidence.

Facts: The defendant broke into his estranged wife's home in violation of a protective order. The home had been the parties' home prior to their separation. The victim had stopped living there a month prior, and the landlord had given the parties notice that they would have to leave the residence and completely move out by the end of the following month. Initially, the victim gave the defendant "free rein" of the residence for two or three weeks so he could remove his personal property from the house. Although the victim had stopped living at the house, she had numerous personal property items still at the house on the date of the offense, including clothing and furniture. The landlord informed the victim that the defendant was done moving his belongings so the victim could proceed to moving her property out of the house.

After the landlord discovered evidence that the defendant had damaged the home repeatedly, the landlord changed the locks on the residence and gave the victim the only keys. The next day, the defendant broke into the home and violently assaulted the victim over an extended period, drugging, stabbing, tasing, and beating her repeatedly.

The discovery order in this case stated that: "The Commonwealth shall disclose to the defendant before trial, a written list of witnesses including names and addresses. . . expected to testify for the Commonwealth at trial or sentencing." Prior to trial, the Commonwealth provided thirty-three items of discovery to defense counsel, but no list of witnesses.

At voir dire of the jury pool, the Commonwealth announced the names of its expected witnesses to determine if the potential jurors were acquainted with them. After the jury was selected and sworn, the Commonwealth made its opening statement during which it again named its expected witnesses. As the Commonwealth called its first witness to testify, the defendant objected. He argued that a discovery order had been in place and that he just learned in the Commonwealth's opening statement "for the first time who the Commonwealth intends to call as witnesses." Defense counsel objected to testimony by "any witness who has not been disclosed, per the discovery order, prior to trial."

The Commonwealth conceded that it had inadvertently violated the discovery order. However, the Commonwealth pointed to the "massive amount of discovery" that it gave to defense counsel pursuant to the court's discovery order and argued that there was no bad faith in its failure to also produce the list of witnesses expected to testify for the Commonwealth. The prosecutor noted that he and defense counsel had been in contact with each other since the prosecutor received the case, and it would have been appropriate for defense counsel to just ask for the witness list or file a motion to

compel in advance of trial. The Commonwealth suggested the appropriate remedy was to adjourn the matter or grant a mistrial.

The defendant asserted that he was prejudiced because he was denied his right to prepare his defense, and due to the massive amount of information provided, he needed to know the list of expected witnesses to make effective use of that information. He also stated that the Commonwealth would have complied with the order if it handed the list to counsel immediately prior to the start of trial, even “30 seconds before trial.” Defense counsel argued that declaring a mistrial or adjourning the matter would prejudice the defendant and maintained that the remedy should be to prevent the Commonwealth from calling witnesses to testify who were not disclosed in accordance with the discovery order.

The trial court denied the motion and permitted the Commonwealth’s witnesses to testify. The trial court noted that the Commonwealth subpoenaed the witnesses it intended to call, and those subpoena returns were “in the public court file for the defendant to see,” except for the forensic nurse examiner. As for the nurse, the trial court found that she prepared two reports, the sexual assault nurse examination and the strangulation examination, which were provided to the defendant and he was thus on notice that she was a witness in the case. The trial court found “very little prejudice” to the defendant under the circumstances, because there was “no surprise to the defendant here.”

At trial, the defendant argued that the evidence affirmatively established that the element of entry into the home of a protected person under a protective order in violation of § 16.1-253.2(C) did not occur because the victim abandoned the dwelling as her abode, and this was affirmative proof that she was not residing at the residence.

Held: Affirmed.

Regarding the discovery issue, the Court first observed that the discovery order, Rule 3A:11(h), and § 19.2-265.4(B) all point to the trial court’s broad discretion in determining an appropriate remedy for a discovery order violation. The Court pointed out that, under *Davis*, “[w]hen a discovery violation does not prejudice the substantial rights of a defendant, a trial court does not err in admitting undisclosed evidence.”

In this case, the Court noted that the Commonwealth named its witnesses during voir dire of the jury pool, which occurred more than 30 seconds before the trial began. The Court wrote: “It is untenable to suggest that receiving a written list of expected witnesses 30 seconds before the trial began would have affected defense counsel’s trial strategy and preparation differently than hearing the names of the expected witnesses called aloud minutes prior to selection of the jury.” Instead, the Court repeated that the purposes of discovery relevant to a case are disclosure of “all relevant and material evidence before trial in order that the trial may be an effective method for arriving at the truth and not a battle of wits between counsel,” and to eliminate surprise at trial.

The Court agreed that the trial court’s factual finding that there was no surprise to the defendant was supported by the record. The Court ruled that the trial court did not abuse its discretion by denying the defendant’s motion to prohibit all the Commonwealth’s witnesses from testifying, the only remedy the defendant requested at trial.

Regarding sufficiency of the evidence of the Unlawful Entry in Violation of a Protective Order, the Court noted that various circumstances may enter the determination of whether a particular

dwelling place is the home of a protected party. In this case, the Court found that the evidence established that the victim had lived at the address for three years and continued to lease the property on the date of the offense. Furthermore, the Court explained that there is no requirement in the statute that the home involved in the offense be the only home of the protected party, or the permanent home of the protected party.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0846221.pdf>

Rape & Sexual Assault

Virginia Court of Appeals

Unpublished

Larue v. Commonwealth: June 6, 2023

Montgomery: Defendant appeals his life sentence for Sodomy of a Child on Eighth Amendment grounds.

Facts: The defendant was found guilty of forcible sodomy on a victim less than 13 years of age. He argued that the mandatory sentence of life in the penitentiary violated his constitutional right to be free from cruel and unusual punishment. He argued that a life sentence was disproportionate considering the applicable sentencing guidelines, which recommended a maximum sentence of 13 years and 7 months. The defendant also argued that the sentence violated the Eighth Amendment because the trial court was required to impose a life sentence, regardless of the mitigating evidence and the sentencing guidelines recommendation. The trial court overruled his argument.

Held: Affirmed. The Court held that the defendant's arguments had been squarely addressed in binding precedent, holding that a mandatory life sentence with the possibility of parole does not violate the parameters of the Eighth Amendment.

The Court noted that, under the precedent of both *Cole* and *Johnson*, the defendant was not entitled to proportionality review of his sentence. The Court also repeated the ruling from the U.S. Supreme Court's ruling in *Harmelin* that: "There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'"

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1108223.pdf>

Robbery

Virginia Court of Appeals – Published

Walker v. Commonwealth: February 6, 2024

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

Facts: The defendant knocked the victim down and stole her SUV while the handicap ramp on her vehicle was still extended. The victim did not see the defendant. A few minutes later, law enforcement spotted the defendant speeding down a highway in the SUV; the handicap ramp was still extended, shedding sparks as it dragged along the highway.

The defendant crashed while eluding police. The defendant was the sole occupant of the vehicle. The victim's valuables were still in the front seat. An envelope of cash that the victim had just obtained from the bank was in the vehicle, torn open, and cash was strewn around the front seat. The only thing of value on the defendant's person was a sum of cash that was stuffed into the defendant's pants pocket.

At trial, the defendant objected to the inference that he had carjacked the vehicle, contending that "being inside a stolen car" is not "evidence that you stole" the car.

Held: Affirmed. The Court agreed the evidence was sufficient.

However, the Court also clarified that the "larceny inference" does not apply to carjacking. The Court examined the history of the larceny inference, which is that possession of goods recently stolen creates a presumption that the person found in possession of them is the thief. The Court pointed out that, in recent years, courts have concluded that mandatory presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. Thus, the Court noted, the possession of recently stolen goods is now a permissive inference, not a mandatory presumption.

The Court applied the Virginia Supreme Court's 1969 ruling in *Bazemore*, which refused to extend the larceny inference to robbery. The Court ruled that the larceny inference also cannot be applied in cases of carjacking. Nevertheless, even though the larceny inference does not extend to robbery or carjacking, the Court agreed that the defendant's exclusive possession of the recently stolen vehicle (and the goods inside it) was a "circumstance" that the factfinder could properly consider in determining whether the defendant committed the crime.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1559222.pdf>

Virginia Court of Appeals – Unpublished

Roanoke: Defendant appeals her convictions for as a Principal in the Second Degree of Robbery and Malicious Wounding on Admission of Text Messages and sufficiency of the evidence.

Facts: The defendant's daughter sold marijuana and believed that the victim had stolen from her. The daughter recruited several people, including the defendant, to assist her in abducting and robbing the victim. During several text messages between the defendant and her daughter, the two discussed and planned aspects of the robbery.

For example, when the daughter told her mother that marijuana had been stolen from her and that she needed cameras and a safe, the defendant replied, "yeah." When her daughter asked the defendant to help her get a safe large enough to fit several mason jars to store marijuana, the defendant asked, "how big" and stated, "ok." When her daughter asked the defendant if her father still had a pistol set aside for her and said she wanted it, the defendant responded, "I know before he said he wanted you to take a safety class and go with him to go shoot."

During the robbery itself, one of the group members deceived the victim and convinced him to come to the defendant's residence, where others in the group repeatedly struck the victim and held him at gunpoint for over an hour while demanding money and marijuana. The defendant was not physically present and did not witness any of the violent assaults against the victim.

During the robbery, the daughter directed the defendant to "[g]o get a jar of marijuana so they could match it." Subsequently, her daughter texted the defendant, "You find it?" The defendant, by text message, responded, "I think it's the right one. Looks and smells [i]dential." Her daughter replied, "Thank you momma." The defendant then provided the marijuana to her daughter. The other members of the group tied up the victim, brought him back to his home in the trunk of his car, abandoned him, and then left in his car.

Police investigated and seized the daughter's mobile phone when she was arrested. Officers searched the phone's contents pursuant to a search warrant. The defendant objected to the admission of photos of the daughter's phone identifying the defendant as a contact and showing text messages between the daughter and the defendant. The photos were taken by the officer, who read some of the contact information and text messages into evidence at trial. Text messages from the daughter to the contact "mom" referred to the recipient as "momma."

The defendant objected that the photos of contact information and text messages were inadmissible because:

(1) the Commonwealth failed to establish a foundation showing that (a) the phone number alleged to be the defendant's phone number was, in fact, her phone number and (b) the messages alleged to be from the defendant were, in fact, from her;

(2) the messages from the daughter were hearsay; and

(3) the daughter's messages were irrelevant.

The trial court overruled the defendant's evidentiary objections.

Held: Affirmed.

The Court held that the trial court did not abuse its discretion in ruling that the challenged image of the contact “mom” referred to the defendant and that the defendant sent the text messages to her daughter. Regarding the screenshots of the defendant’s contact information and her identification in the phone, the Court agreed that the record supported the trial court’s finding that the emergency contact labeled “mom” in the phone referred to the defendant and that the defendant composed the text messages sent to the phone.

Because the Commonwealth did not offer the daughter’s statements for the truth of the assertions, the Court ruled that they were not hearsay, and the trial judge did not err in admitting them. The Court found that the defendant’s statements “you ok,” “what,” and “wow” to her daughter lack meaning without her daughter’s responses to provide context regarding the imminent attack on the victim. The Court agreed that the defendant’s responses to her daughter’s assertions—that the planned event would start in a few minutes, that she was armed, that the victim knew she was armed, and that she was excited that her confederate was almost there—tend to illustrate that the defendant knew of her daughter’s plan and encouraged her to continue.

Regarding admission of the text messages themselves, the Court found that the relevancy and evidentiary value of the defendant’s responses would be lost without her daughter’s statements. In context, the Court observed that the defendant’s responses indicate that she knew her daughter’s marijuana had been stolen and that she agreed her daughter needed cameras and a safe to continue her drug dealing operation. Further, the Court noted that the defendant agreed to obtain a safe to fit her daughter’s needs. For example, given the context of the defendant’s answer to her daughter’s question, the Court agreed that the defendant demonstrated she would provide her daughter with the firearm if she met the prerequisites.

The Court also agreed that her daughter’s responses to the defendant’s questions, “where’s his car,” and “where’s the gun,” show that the defendant was observing her daughter’s home. Furthermore, the Court explained that the defendant’s questions illustrated that the defendant knew her daughter had a gun and she wanted to know the victim’s identity.

Regarding sufficiency of the evidence, the Court held that the trial court did not err in finding the defendant guilty as a principal in the second degree in the malicious wounding and robbery. The Court agreed that the evidence demonstrated that the defendant knew about the planned confrontation before it occurred, knew that the daughter had a gun, was at her house during at least part of the attack, and assisted the daughter in identifying the marijuana. Thus, the Court concluded that the defendant assented and lent her countenance and approval to the operation, thereby aiding and abetting the same.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1762223.pdf>

Stalking and Threats

U.S. Supreme Court

Counterman v. Colorado: June 27, 2023

600 U.S. 66 (2023)

Colorado: Defendant appeals his conviction for Stalking on First Amendment grounds.

Facts: The defendant stalked the victim for many years, sending her hundreds of Facebook messages, despite her numerous attempts to block him. His messages ranged from friendly to threatening and implied that he had her under surveillance. The messages put the victim in fear and caused her to change her daily life for her safety.

Colorado charged the defendant with Stalking under a statute making it unlawful to “repeatedly . . . make any form of communication with another person” in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.” The only evidence the State introduced at trial were his Facebook messages.

The defendant moved to dismiss the charge on First Amendment grounds, arguing that his messages were not “true threats” and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an “objective ‘reasonable person’ standard.” Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. Because that was so, the court ruled, the First Amendment posed no bar to prosecution.

Held: Reversed. In a 7-2 ruling, the Court held that that the State must prove in true-threats cases that the defendant had some understanding of his statements’ threatening character. The Court then held that a recklessness mens rea standard suffices for the First Amendment purpose at issue. The Court explained: “Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.”

In this case, since the defendant was prosecuted in accordance with an objective standard, where the State had to show only that a reasonable person would understand his statements as threats and did not have to show any awareness on his part that the statements could be understood that way, the Court found his conviction to be a violation of the First Amendment.

The Court began by restating that true threats of violence are outside the bounds of First Amendment protection and punishable as crimes. However, the Court held that the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. The Court further held that a mental state of recklessness is sufficient. Thus, the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.

The Court explained that the First Amendment precludes punishment, whether civil or criminal, unless the speaker’s words were “intended” (not just likely) to produce imminent disorder. Thus, in an obscenity case, the Court elucidated, “Obscenity is obscenity, whatever the purveyor’s mental state. But we have repeatedly recognized that punishment depends on a “vital element of scienter”—often described as the defendant’s awareness of “the character and nature” of the materials he distributed.”

The Court insisted on a ban on an objective standard, “lest true-threats prosecutions chill too much protected, non-threatening expression.”

Explaining the recklessness standard that it was selecting, the Court described that a person acts recklessly, in the most common formulation, when he consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another. The Court found that recklessness is morally culpable conduct, involving a deliberate decision to endanger another. In the threats context, it means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway. The Court reasoned that the recklessness standard offers “enough ‘breathing space’ for protected speech,” without sacrificing too many of the benefits of enforcing laws against true threats.

In a footnote, the Court explained that the objective standard is akin to a negligence standard. The Court noted that a person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. The Court rejected that standard.

Justice Sotomayor filed a concurring opinion. Justices Barrett and Thomas both filed dissenting opinions.

Full Case At:

https://www.supremecourt.gov/opinions/22pdf/22-138_43j7.pdf

Virginia Court of Appeals - Published

Drexel v. Commonwealth: May 7, 2024

Alexandria: Defendant appeals his conviction for Threats to Damage a Building on First Amendment, Admission of Bad Acts, Jury Instruction, and sufficiency grounds.

Facts: Over a day, the defendant spoke with his therapist on the phone several times. As their conversations progressed, the defendant sounded more and more agitated. At first, he was angry and made some homicidal statements but did not express intent to act on them. Later, though, the defendant had some very specific ideas and plans for how to harm others, including bombing city hall and stated that he was going to act on these thoughts. The therapist contacted the police.

On the phone with police officers, the defendant told officers that he was “extremely angry” and “passionately upset about the fact that he felt like he was . . . being wronged by the City of Alexandria.” The defendant angrily stated he would burn down city hall. During this same conversation, he told the officers that “he was going to be the next Timothy McVeigh” because “he wanted to send a message.” He vowed he would kill “any law enforcement officers [who] approached him.” The defendant expressed a desire “to dismember Judges and their families.” One of the officers later testified that he was “very concerned” because he believed that the defendant “meant” “the words he was saying.”

At trial, the defendant objected to the admission of four of his statements that he made on the same phone call speaking with police in which he said he would burn down city hall: (1) his “threats against law enforcement” generally, (2) his statement “that if any law enforcement officers approached him, or saw him, he was going to kill them,” (3) his expressed desire “to dismember Judges and their families,” and (4) his statement “that if he were to douse himself in gasoline, law enforcement would be unable to tase him because he could light on fire.” The trial court overruled his objection and admitted the statements.

At trial, the defendant sought to have the jury instructed on the constitutional definition of threat for purposes of safeguarding his First Amendment protections of his freedom of speech. He also asked the court to instruct the jury that malice was an element of the crime under § 18.2-83. The trial court declined to give those instructions.

The defendant also requested a jury instruction defining “true threat” under the First Amendment, but the trial court refused the instruction. The rejected instruction read:

“The First and Fourteenth Amendments to the United States Constitution protect the right to free speech unless the speech constitutes a true threat, which is defined as those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

During trial, the jury sent a note that read: “What do we do if we cannot come to unanimous agreement? That is the stance of the jury at this time.” Over the defendant’s objection, the trial court instructed the jury as follows:

“As you’ve been told, your verdict must be unanimous. If you can possibly reach a verdict, it is your duty to do so. You should listen to the views and opinions of your fellow jurors with fairness and candor. And you should give consideration to what they say. However, you must decide the case for yourself and you should reach an agreement only if it can be done without sacrificing your individual judgment. During the course of your deliberations, each of you, whether in the majority or the minority, should not hesitate to reexamine your own views and change your opinion, if you are convinced that it was wrong. No juror however, should give up their honest opinion as to the evidence solely because the opinion of your fellow jurors, or for the mere purpose of returning a verdict. If you can reach a decision without surrendering your conscientious opinion, it is your duty to do so. So, I’d ask you to return to the jury room and give the matter your further consideration. Thank you.”

Held: Affirmed. The Court held that the trial court acted within its discretion by admitting the defendant’s challenged statements into evidence. The Court also held that the trial court acted within its discretion by rejecting his proposed jury instructions on threat and malice, as well as by giving the jury an “Allen charge.” Lastly, the Court held that the Commonwealth presented sufficient evidence to prove that he made a threat and that he had the requisite intent.

Regarding the defendant’s First Amendment instruction, the Court repeated that to constitute a threat, the communication must also “reasonably cause the receiver to believe that the speaker will act according to his expression of intent.” The Court then noted that the First Amendment protects the freedom of speech generally but does not protect “true threats of violence.” The Court explained that the speaker’s intent is irrelevant to determining whether the communication constitutes a true threat

under the First Amendment. The Court then pointed out that, for purposes of Code § 18.2-83, a threat is a communication conveying to a reasonable person a serious intent to “bomb, burn, destroy or in any manner damage” certain property, regardless of whether the actor subjectively intended to convey such a message.

The Court then examined the separate element of the intent of the person making the communication. The Court repeated that for a threat to be punishable from a constitutional standpoint, at a minimum, the offender must have “consciously disregarded a substantial risk that his communications would be viewed as threatening violence;” The speaker need not actually intend to carry out the threat.” In other words, the Court explained, as used in this context, the phrase “unlawful intent” does not define a specific level of mens rea but instead denotes the fact that some level of intent is required to make a particular act criminally punishable. The Court concluded that § 18.2-83 does not require that the offender acted with malice.

Regarding the defendant’s proposed instruction on “true threat,” the Court found that the defendant’s proposed instruction—defining a threat in part as an expression of intent to commit violence against an individual or group of individuals—was not relevant to the charge that he made a threat against any place of assembly, building, or other structure under § 18.2-83. Further, the Court found that the defendant’s proffered instruction attempted to incorporate the subjective intent of the speaker into the constitutional definition of a threat. The Court held, under *Counterman*, that a communication must be both a “true threat” and that the speaker must have acted with some subjective intent for the communication to fall outside of the umbrella of the First Amendment. Proving that a particular statement is a threat is separate from proving the speaker made it with the requisite mens rea. The Court concluded that the defendant’s requested instruction defining “true threat” was confusing and apt to mislead the jury. The Court also criticized the instruction because it conflated two separate elements of the offense—the threat and the required mens rea.

Regarding admission of the defendant’s statements, the Court found that the statements were relevant to the context in which he stated his intent and desire to burn down city hall. The Court held that the legitimate probative value of the challenged statements outweighed their incidental prejudice to the defendant. The Court reasoned that the similar statements made in a single conversation implicating violence against law enforcement, judges and judges’ families, and himself, in support of his cause, were probative to the elements of threat and intent. Therefore, the Court agreed that the trial court acted within its discretion by admitting evidence of the defendant’s other statements intimating related acts of violence.

Regarding the trial court’s “Allen charge,” the Court held that the trial court did not abuse its discretion by giving its instruction. The Court observed that in this case, the jury did not declare an inability to agree but asked what to “do if” they could not “come to a unanimous agreement,” expressing that was its current “stance.” The Court credited the trial court for instructing the jury to deliberate further in the case, noting that the trial court did not tell the jurors to go against their individual consciences.

Lastly, regarding sufficiency, the Court rejected the defendant’s contention that the evidence was not sufficient to prove that he made a threat under the statutory or constitutional definition. In this case, the Court agreed that the jury could conclude that the defendant’s statement that he would burn down city hall reasonably conveyed a serious intent and would cause a listener to believe that he would

act on that intent. The Court ruled that the evidence was therefore sufficient to support the jury's finding that the defendant's statement that he would burn down city hall was a threat.

Regarding sufficiency of intent under § 18.2-83, the Court repeated that in establishing the element of intent, the Commonwealth must show, at a minimum, that the offender consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The Court ruled that the evidence was sufficient for the jury to find that the defendant intended to make and communicate a threat to burn down city hall. Further, the Court agreed that the evidence supported a finding that, at a minimum, when speaking with the police, he "consciously disregarded a substantial risk that his" statement "would be viewed as threatening violence."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1805224.pdf>

Traffic

Virginia Court of Appeals - Published

Tatusko v. Commonwealth: February 6, 2024

Chesterfield: Defendant appeals his conviction for Reckless Driving on many grounds.

Facts: The defendant drove at 100 miles per hour or more in a 60 mile per hour zone. An officer observed the defendant speeding and visually estimated his speed to be in the "high 90s." The officer's LIDAR2 device yielded two readings: 103 and 100 miles per hour. The officer stopped the defendant and issued a summons for "reckless by speed 100/60 (LASER)," in violation of § 46.2-862. The General District Court convicted the defendant. He appealed to the circuit court.

In circuit court, the defendant first moved to suppress the stop, arguing that the officer lacked reasonable suspicion for the stop. During the motion, the defendant moved for a rule on witnesses. Over the defendant's objection, the trial court allowed the Commonwealth's trial expert, a police sergeant, to remain in the courtroom during the motion to suppress. The expert did not testify during the motion.

At the motion to suppress, over the defendant's objection, the officer testified to his visual estimate of the defendant's speed. He explained that he positioned himself on the highway, observed the flow of traffic, noticed the defendant's vehicle traveling faster than the flow of traffic, and estimated the defendant's speed. The trial court denied the motion to suppress.

Prior to trial, the Commonwealth moved to strike the words "100/60 (LASER)" from the summons so that it would just read "reckless by speed" under § 46.2-862. The court overruled the defendant's objection that the amendment materially altered the underlying charge. The court also

denied the defendant's motion to continue the trial date, rejecting his claim of "surprise" that the summons had been amended.

After the trial court re-arraigned the defendant, he demanded to be sentenced by a jury if convicted. However, the trial court denied the request as the defendant had failed to demand jury sentencing in writing at least 30 days prior to trial under § 19.2-295(A).

At trial, the defendant argued that the LIDAR calibration was invalid because the LIDAR was tested for distance, not speed. The Commonwealth offered an expert to testify about how LIDAR works, but the defendant objected that the expert could not testify before the facts were in evidence. The trial court overruled the objection.

The Commonwealth's expert explained that the LIDAR sends about 200 laser pulses per second to the target and measures the nanoseconds for the pulses to reflect, calculating speed by measuring the differential. The device is calibrated at certified locations using targets at distances of 50 and 100 feet. The officer testified that he calibrated the device that way before his shift.

At trial, on cross-examination, the defendant requested that the trial court take judicial notice of the stopping-distance table in § 46.2-880. The trial court declined to do so.

During closing argument, the defendant objected twice to the prosecutor's oration. At one point, the prosecutor said: "What I find interesting about this case is that," until interrupted by an objection. At another, the prosecutor remarked: "I found" defense counsel's questions of the two officers "confusing," drawing an objection. The trial court overruled the objections.

Held: Affirmed.

The Court first ruled that the trial court properly struck "100/60 (LASER)" from the summons. Interpreting §§ 16.1-129.2 and -137, the Court repeated that, on appeal, a circuit court may amend a warrant or a summons. The Court then noted that the amendment came before trial, and therefore a continuance was warranted only "upon a showing that such amendment operated as a surprise." In this case, the Court complained that the defendant never proffered what he would have done differently or what evidence he would have offered at trial if the continuance had been granted.

The Court also rejected the defendant's call for a Bill of Particulars, finding that the charging document gave the defendant notice of the nature and character of the offense charged so he could make his defense, and therefore a bill of particulars was not required.

The Court also ruled that the amendment did not reset the 30-day period before trial for the defendant to make written demand under § 19.2-295 for jury sentencing if convicted. The Court agreed that the trial court was right to proceed directly to trial after determining that a continuance was unwarranted.

The Court also found no reversible error in the trial court's decision to let the expert witness remain in the courtroom during the suppression hearing. Construing § 19.2-265.1 and Va. R. Evid. 2:615(a), the Court noted that the expert was not a witness at the suppression hearing.

The Court also agreed that the trial court properly permitted the officer to testify at the suppression hearing about his estimate of the defendant's speed, repeating that "anyone with a knowledge of time and distance is a competent witness to give an estimate." The Court also ruled that the officer's visual estimate of speed was sufficient alone to provide reasonable suspicion that the defendant was driving at speeds in violation of § 46.2-682.

The Court also found that the evidence supported the prosecution's claim that the LIDAR was properly calibrated. The Court rejected the defendant's argument that the calibration was invalid because the LIDAR was tested for distance, not speed. The Court pointed out that § 46.2-882 permits calibration by "any . . . method employed in calibrating or testing any laser speed determination device."

The Court then rejected the defendant's objection that the expert improperly testified first and before the fact witness. The Court concluded that the expert's description about how LIDAR devices work was fact testimony about how such devices work in general, how they are calibrated, and what an officer would see if a device malfunctioned.

Regarding the defendant's attempt to cross-examine the officer using the speed tables in § 46.2-880, the Court found no error in the trial court's ruling that it was irrelevant and would confuse the jury. The Court pointed out that the Va. Supreme Court has "repeatedly discouraged" instructing a jury "on the tables of speed and stopping distances unless it is clearly supported by the evidence."

Lastly, the Court examined the prosecutor's closing argument and agreed that the prosecutor's statements here did not cross the line into "injecting their own personal opinion of the evidence, or personal opinion as to the competency of witnesses and the weight to be accorded their testimony."

Regarding the defendant's 18 separate arguments on appeal, the Court stated: "We recognize that criminal defendants may sometimes insist that their lawyers raise as many arguments as possible, including arguments that, even though not frivolous, have virtually no chance of succeeding." The Court described the defendant's appellate strategy as a "blunderbuss approach" and wrote: "Appellate courts have sometimes lamented that 'the number of claims raised in an appeal is usually in inverse proportion to their merit.' ... When a party comes to us with nine grounds for reversing the [trial] court, that usually means there are none. ... Those predictions have been borne out here."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1500222.pdf>

Reckless Driving

Virginia Court of Appeals – Published

Konadu v. Commonwealth: January 30, 2024

Fairfax: Defendant appeals her conviction for Reckless Driving on sufficiency of the evidence.

Facts: While the defendant was driving down a highway, her daughter spilled a drink in the car. The defendant turned her attention to cleaning up the drink while continuing to drive. The defendant then drove across the median, through a bicycle lane, and into the opposite lanes of travel before proceeding onto the curb and colliding with a group of pedestrians who were volunteering to clean up the roadway. The defendant did not brake after the collision. Instead, she drove on—through a parking

lot and sign—until coming to a stop off the side of the opposite lanes, 300 feet after she first crossed the median. The defendant took no evasive actions to avoid the collision and did not seem to realize that she had struck pedestrians once her vehicle had come to a stop.

The collision injured four volunteers, killing one of them. The volunteers were wearing bright yellow safety vests at the time. Several surveillance cameras captured footage of the accident and its aftermath. A police officer responded and calculated the defendant's speed at approximately 31 miles per hour and did not observe any skid marks.

The defendant told the police that she lost control of her vehicle when she swerved to avoid a man in the middle of the road; there was no evidence that such a man existed.

Held: Affirmed. The Court agreed that a rational trier of fact could reasonably infer that the crash resulted not from a "split-second, momentary failure to keep a lookout," constituting only simple negligence, but rather a "'lengthy, total, and complete' failure to keep a lookout" in violation of §46.2-853. The Court found that the trial court had a sufficient basis to conclude that the defendant failed to exercise due care when she chose to concentrate on a non-emergency rather than the road.

The Court rejected the defendant's argument that steps taken—or not taken—in response to unexpected events cannot be considered by a court in measuring the exercise of due care.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0178234.pdf>

Trespassing

Virginia Court of Appeals - Unpublished

Kartozia v. Commonwealth: March 5, 2024

Arlington: Defendant appeals his Trespassing conviction on Denial of a Claim of Right Jury Instruction.

Facts: The defendant was on the property of a private apartment complex. Security officers told him that "if you're here for someone, we'll call them. If not, you're going to have to leave the property." The defendant claimed to be visiting a resident but told security that his phone was charging and that he would not call the resident until his phone was finished charging. Security called police but did not call that resident.

When police arrived, the officer told the defendant that he was not breaking any laws if he was there waiting for his friend and his friend came down. When the officer inquired whether the defendant could get in contact with the resident, the defendant said that "wasn't his responsibility. Security should do it" and refused to call the resident. Police then asked the defendant to leave several times, but the

defendant responded by using vulgar sexual terms when referring to the police. After fifteen more minutes of asking the defendant to leave, officers arrested the defendant.

At trial, the resident testified that the defendant was his friend and had visited him there upwards of seven times. Although he did not know that the defendant was visiting that night, he had previously welcomed the defendant without advance notice.

At trial, the defendant asked for the following jury instruction:

“A good faith belief that one has a right to be on the premises negates criminal intent.

If you find from the evidence that Mr. Kartoza believed he had a good faith claim of right to enter onto the property, even though this belief was mistaken, you shall find the defendant not guilty of trespass.

A good faith claim of right is a sincere, although perhaps mistaken, good faith belief that one has a legal right to be on the property. The claim need not be of title or ownership of the property, but it must rise to the level of authorization.”

The trial court denied the instruction.

Held: Reversed. The Court held that more than a scintilla of evidence supported the defendant’s claim that he had a bona fide belief that he was rightfully on the property. The Court ruled that the trial court’s failure to instruct the jury on the claim of right defense deprived the defendant of his right to acquittal if the jury, after considering all the evidence, had a reasonable doubt whether the defendant believed in good faith that he had a right to remain on the property that night.

The Court first found that the proposed instruction was an accurate statement of the relevant law. The Court then found that evidence supported the defendant’s claim that he believed in good faith that he had a right to remain at the property that night. The Court reasoned that the security officers’ instructions, in the light most favorable to the defendant, did not direct or require him to leave the property because he was there for a resident.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1633224.pdf>

Solem v. Commonwealth: November 28, 2023

Charlottesville: Defendant appeals her convictions for Trespassing, challenging to grounds for her Ban from the Property.

Facts: On four occasions, the defendant trespassed at a grocery store that had banned her from their property in 2020. The defendant had attempted to shop at the store without wearing a mask, in violation of store policy. The defendant insisted that she had “a medical exemption,” but provided no further details. After the defendant engaged in a significant disruption at the store, the store barred her from returning to the property. Nevertheless, the defendant returned repeatedly in violation of the ban.

The defendant argued that the store improperly banned her for refusing to wear a mask during the COVID-19 pandemic due to a medical condition and that the Virginia Governor’s Executive Order 72

invalidated the store's trespass notice. The defendant contended that the order "overrides any store policy regarding masks and disables the store from issuing a valid trespass notice when the basis is a claim of medical exemption." Though the defendant conceded that the store was a private entity, she argued that the company was acting as a state agent and that "all businesses . . . were acting as state actors" due to the executive order. The trial court rejected her argument.

Held: Affirmed. Because the record did not show that the defendant was banned for refusing to wear a mask or other face covering—and because a private business would be entitled to enforce a stricter face covering policy than the one required by Executive Order 72— the Court affirmed the trial court's judgment. The Court ruled that nothing about the executive order shielded the defendant from criminal prosecution.

The Court agreed that in Virginia, a defendant can contest her trespassing conviction by attacking the constitutionality of an underlying trespass notice, but the defendant bears the burden of proving that the trespass notice violated her constitutional rights. However, in this case, the Court complained that the defendant failed to explain how the store violated her constitutional rights.

The Court also explained that, even if it could infer from the evidence that the store barred the defendant for refusing to wear a face covering, that would not invalidate her trespass convictions because the store, as a private business, has the right to control who enters its property. The Court pointed out that, as long as the store did not violate existing constitutional or statutory law, it may control who enters—or does not enter—its property.

The Court also rejected the defendant's argument that the store was so "inextricably entangled" with the state that it was "not merely acting as a private actor, but as a state actor."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0884222.pdf>

Unlawful Picketing

Virginia Court of Appeals -

Unpublished

Wolfe v. Commonwealth: September 19, 2023

Richmond: Defendant appeals his convictions for Trespassing, Picketing a Dwelling House, and Obstruction on grounds regarding Jury Instructions, Variance with the Indictment, and sufficiency of the evidence.

Facts: The defendant used an amplified sound system to conduct a protest outside the Governor's Mansion in Capitol Square. The defendant's broadcasts were heard inside a closed guard

shack at the Governor's Mansion gate, and his protest instigated a crowd of 40-50 to amass despite law enforcement's commands.

An officer responded and asked the defendant if he had obtained the required permit for such a demonstration. The defendant stated that he did not have a permit. The officers advised that the defendant could air his grievances at the Patrick Henry Building nearby, where the Governor's office was located, and pointed out that building's location. The officer told the defendant to leave, but the defendant refused.

Ultimately, after several attempts to explain the regulations to the defendant, the defendant stated that he would not leave unless the officers arrested him. The defendant refused to accept a summons, so the officers arrested him. However, when officers attempted to process the defendant at the Richmond City Jail, the defendant refused to have his vitals checked as required for entry at the jail. Due to the defendant's repeated refusals to cooperate, officers took him to the hospital.

At the hospital, the defendant refused to exit the vehicle. Officers had to lift him from the vehicle and carry him, but while they did, the defendant wrapped his right leg around an officer's left leg; the officer had to move his leg to prevent falling. The officers moved the defendant into the medical facility with a wheelchair as he refused to walk, but the defendant again refused to cooperate. Finally the officers took the defendant to a different jail in a different jurisdiction.

At trial, the defendant was charged with three misdemeanors: trespassing in violation of § 18.2-119, unlawful picketing of a residence in violation of § 18.2-419, and obstruction of justice, by threats or force, in violation of § 18.2-460(B).

Regarding the picketing offense, the jury was only instructed on the charge of picketing a residence, not an assembly threatening to disrupt an individual's right to tranquility in his home. The jury instruction read in pertinent part:

The defendant is charged with the crime of picketing of a residence. The Commonwealth must prove beyond a reasonable doubt that the defendant engaged in picketing before or about the residence or dwelling place of any individual.

If you find from the evidence that the Commonwealth has proved this beyond a reasonable doubt, then you shall find the defendant guilty of picketing of a residence

The defendant objected to that instruction, arguing that the instruction must encompass the entire statute, including the exceptions. The defendant did not provide an alternative instruction when instructed by the court to do so, nor did he argue with specificity which omitted elements were relevant. The trial court overruled his objection.

The jury found the defendant guilty of trespassing and unlawful picketing, as charged, and of obstruction of justice, but without threats or force. The defendant objected to the jury's verdict, arguing that he had the right to resist an unlawful arrest and that the trial court erred in convicting him under § 18.2-460(A) when he was indicted under § 18.2-460(B).

Held: Affirmed.

Regarding the picketing offense, the Court noted that in this case, at trial, the defendant relied on one of the statutory exceptions listed in § 18.2-419, "Nothing herein shall be deemed to prohibit ... (3) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects

of general public interest.” The defendant had argued that Capitol Square is “commonly used for the discussion of subjects of general public interest.”

The Court examined the statute and noted that exception (3) regarding assembly in a public forum notably omits the term “picketing” despite it being used in exceptions (1) and (2) within the same sentence. Therefore, the Court concluded that exception (3) does not apply to picketing, but only “the holding of a meeting or assembly.” In this case, that Court noted that the defendant used sound amplification equipment and signs to air his message directed at the Governor in front of the Governor’s Mansion. He also used a microphone to encourage a crowd to gather.

Additionally, the Court pointed out that regulations in place at the time specifically governed the time, place, and manner in which Capitol Square may be “used for the discussion of subjects of general public interest.” Those regulations state that no “assemblages or the displaying of flags, banners, or devices designed or adapted to bring into public notice any party, organization, or movement shall be permitted within Capitol Square” without a permit or prior written authorization. 1 VAC 30-100-10. In this case, the defendant never requested a permit for his demonstration in Capitol Square, nor did he receive any written authorization.

Accordingly, the Court concluded that the defendant’s demonstration was unlawful, and he was further prohibited from using such to picket the Governor’s Mansion under § 18.2-419, and the Code’s exception did not excuse his conduct.

Regarding the jury instruction, the Court, having concluded that the relied-upon exception did not apply to the defendant’s picketing conviction, and noting that the defendant never argued that any of the other exceptions set forth in the statute applied, found that the other exceptions’ inclusion in the jury instruction was neither required nor relevant, potentially even having the effect to confuse the jury.

The Court then rejected the defendant’s argument that his arrest was unlawful, finding that the officers’ arrest was lawful. The Court noted that the defendant lacked permission under the regulation to picket outside the Governor’s Mansion and thus violated the trespassing and picketing statutes “in the presence of the [arresting] officer[s].” 19.2-81(A)(11), (B). Therefore, the defendant did not have a right to resist a lawful arrest, and his conviction for obstruction was valid.

Finally, the Court addressed the variance in the Indictment. The Court ruled that: “Being that Code § 18.2-460(B) includes all of the same elements as Code § 18.2-460(A) with the additional element of “by threats or force,” Code § 18.2-460(A) thus qualifies as a lesser-included offense of Code § 18.2-460(B).”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0645222.pdf>

DEFENSES

Duress

Virginia Court of Appeals - Unpublished

Turner v. Commonwealth: July 18, 2023

Lancaster: Defendant appeals his convictions for Eluding on Admission of Preliminary Hearing Testimony, Denial of his Duress Defense, and Double Jeopardy grounds.

Facts: The defendant dangerously eluded a police officer, escaped, and then again dangerously eluded another officer. Initially, an officer saw the defendant speeding and activated his lights to conduct a traffic stop. The defendant did not stop and, instead, turned off his headlights to avoid detection. The officer, being unable to find the vehicle on the dark roads, disengaged his pursuit. The defendant believed the officers were gone and reactivated his headlights.

Minutes later, a trooper observed the defendant's car and activated his lights and sirens. The defendant again disregarded the signals to stop and fled from the police for over an hour. The chase had begun late in the evening on September 15, 2020, and ended in the early morning hours of September 16, 2020. The Commonwealth charged two separate offenses of felony eluding.

At preliminary hearing, the Commonwealth presented evidence from a witness who had been inside the vehicle. After the preliminary hearing, the witness signed a return-to-court slip. The Commonwealth coordinated with his attorney to secure his presence at trial. The Commonwealth then learned on the morning of the trial that the witness would not attend.

At trial, the Commonwealth moved to declare the witness unavailable and admit his preliminary hearing testimony. The Commonwealth introduced the return-to-court slip signed by the witness indicating that he would testify at trial. The Commonwealth then called the witness' attorney to testify. The attorney testified that he and the witness had discussed planning for the witness to appear at trial. The attorney informed the witness the evening before trial that he "had not yet found a method to travel here and would update" the attorney. The next morning, before the trial started, the witness told the attorney that he "had been unable to arrange for transportation" and "was still waiting for the results of a COVID test."

The attorney admitted that he never asked the Commonwealth for assistance securing transportation and the Commonwealth did not offer any aid. The defendant objected to using the preliminary hearing testimony. The defendant contended that the Commonwealth failed to establish the witness' unavailability, as it did not exercise due diligence in attempting to secure his presence at trial.

The trial court found that the Commonwealth undertook the necessary precautions to secure the witness' appearance. It found the witness unavailable as a witness and admitted the preliminary hearing transcript. The attorney took the stand and read the transcript of the prior testimony.

At trial, the defendant testified and presented another witness, and both testified that the missing witness threatened them with two guns. The defendant argued that he was under duress, but

the trial court found that, even if the defendant was subject to duress, he had an opportunity to escape and seek protection when he was surrounded by four patrol vehicles. Because the defendant continued to evade the officers and did not take advantage of the opportunity to escape, the trial court found that the defendant failed to prove duress.

The defendant also argued that the evidence established, at most, one continuing offense instead of two separate acts of eluding. He contended that the charges differed only in the dates of the offense and argued that the difference was meaningless. The trial court rejected his argument.

Held: Affirmed. The Court found that the trial court did not abuse its discretion in admitting the witness' preliminary hearing testimony and that the evidence was sufficient to support the two felony eluding convictions.

The Court first found that the record demonstrated that the Commonwealth met the basic requirement of serving the missing witness while he was still in court and that it made reasonable efforts to secure his presence. Because the witness' preliminary hearing testimony was under oath, properly recorded, and subject to cross-examination, the Court ruled that the trial court did not err in admitting the witness' testimony.

The Court also agreed that the evidence showed that the defendant did not act under duress.

Lastly, the Court addressed the defendant's Double Jeopardy claim. The Court reasoned that the trial court did not violate the Double Jeopardy Clause because the defendant's acts constituted two eluding offenses rather than one continuing offense. The Court found that when the defendant successfully eluded the first officer, the first offense was complete. The Court then found that when the defendant fled from the second officer, the second eluding was complete.

Although the defendant drove continuously between the two chases, the Court reasoned that his failure to stop for the second officer was not a continuation of his failure to stop for the first one. Instead, the Court explained that the second act involved a new formation and execution of purpose. Thus, the evidence supported the trial court's finding that the defendant committed two separate and distinct acts of eluding.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0615222.pdf>

Entrapment

Virginia Court of Appeals – Unpublished

Hinton v. Commonwealth: September 5, 2023

Warren: Defendant appeals his convictions for Distribution and Possession with Intent to Distribute on Due Process, Entrapment, Accommodation, and Sentencing grounds.

Facts: The defendant resumed dealing heroin and cocaine upon his release from prison, where he had served an eight-year sentence for possession with the intent to distribute cocaine and heroin convictions. When a police informant contacted the defendant, the defendant agreed to connect the informant with drug sources he knew in Richmond. After the informant said he could not travel to Richmond, the defendant agreed to bring drugs to the informant.

Upon agreeing on a date and location, the defendant obtained both heroin and cocaine from his contacts in Richmond on “credit.” He met the informant for the purpose of packaging the drugs and selling them. The defendant distributed a quantity of heroin and cocaine to the informant, who then left the motel room ostensibly to deliver the drugs to an awaiting client. The defendant remained in the room with the remaining quantities of heroin and cocaine, which he continued to prepare for distribution to other purchasers, as the informant had told him that business would be “booming.” When law enforcement entered the defendant’s hotel room to arrest him, the defendant was packaging the drugs for sale. The defendant later admitted to police that he was a narcotics dealer and typically sold heroin.

Prior to trial, the defendant moved to quash the indictments against him because of “the government’s and informant’s egregious conduct” that he claimed resulted in a violation of his right to due process. The defendant complained of alleged “wide latitude” that the police afforded to the informant. He asserted that the informant set up the details for the transaction through contacts with the defendant that were unsupervised by the police. The defendant claimed that the informant was using drugs when he was working as an informant, a violation of his written agreement with the police. In addition, the defendant maintained the police ignored the requirement that they arrest the informant “forthwith” upon the outstanding warrant for his arrest by having the indictments sealed until after he concluded a transaction involving the defendant. The trial court denied the motion to quash.

At trial, in support of his claim of accommodation, the defendant testified that although his initial “intention[] was not to make a profit[,] . . . [he] ended up coming to make a profit.” The defendant also argued entrapment at trial.

At trial, the trial court rejected the defendant’s entrapment defense and found that the defendant distributed the two \$50 packages of cocaine and heroin to the informant as an accommodation. In addition, the trial court convicted the defendant of possessing with the intent to distribute the heroin and cocaine found in the motel room. The trial court refused to find that the defendant possessed the cocaine and heroin in the motel room with the intent to distribute as an accommodation.

The defendant also contended that the imposition of sentence for the distribution of drugs as an accommodation offenses violated the “doctrine” of *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985), which held that where the defendant “distributes a sample [of drugs] and retains the remainder for the purpose of making an immediate distribution to the same recipients at the same place and at the same time, verdicts of guilty may be returned on both counts but the defendant may be punished on only one.” The trial court rejected his argument.

Held: Affirmed.

Regarding the motion to quash, the Court complained that the defendant cited no opinion of a Virginia appellate court finding conduct by government agents was so “outrageous” as to violate due process. The Court noted that it could not find such a case either and “given the type of conduct necessary to establish the violation, this will not be the first.” The Court ruled that the facts and circumstances presented in this case were not so outrageous or egregious that law enforcement should be barred from obtaining a conviction against the defendant.

Regarding the defendant’s entrapment defense, the Court reaffirmed that entrapment is an affirmative defense. Employing the test laid out in *Howard*, where the Court held that police “trickery, persuasion, or fraud” only results in entrapment where the person who commits the crime “would not have perpetrated it” absent said coercion by the police or their agent, the Court examined whether the defendant was “predisposed to commit the crime.” The Court concluded that the facts and circumstances supported the trial court’s conclusion that the defendant was predisposed to engage in illegal narcotics activity, and the trial court did not err in rejecting his entrapment defense.

Regarding the defendant’s accommodation argument, the Court noted that even if the defendant did not expect to profit personally in the operation, he believed there would be “a commercial transaction in which there [wa]s a consideration involved,” and therefore concluded that the trial court did not err in finding that the drugs he possessed in the motel room were not merely to accommodate the informant.

Regarding the defendant’s reliance on the *Palafox* case, the Court noted that, unlike *Palafox*, in this case the defendant planned multiple sales to numerous purchasers and the heroin and cocaine the defendant distributed to the informant were not samples but the first of many sales contemplated by the defendant. The Court noted that the remainder in the defendant’s possession was intended for additional sales, and thus the distribution and possession with the intent to distribute offenses were not part of a single criminal undertaking but rather were distinct offenses.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1034224.pdf>

Intoxication

Virginia Court of Appeals - Unpublished

Bush v. Commonwealth: December 28, 2023

York: Defendant appeals his conviction for Murder on Fifth Amendment *Miranda* and sufficiency grounds, claiming intoxication and self-defense.

Facts: The defendant, while intoxicated, became angry at a man for backing into his car and attacked the man. The two fought and the man bit the defendant during the fight. The defendant

became angry and returned to his home, obtained a knife, declared that he was going to stab the victim, and then returned and attacked the man again, this time stabbing the victim repeatedly, killing the man.

An officer located the defendant in the hospital and spoke to him. The officer later described that the defendant “did not seem to be impaired” by alcohol during their conversation in the hospital. The officer questioned the defendant while the defendant was handcuffed to a hospital bed with a brace on his neck. The officer’s body camera recorded their conversation. The defendant told the officer that he had been hit in the head three times and was trying to remember the night’s events.

During the first conversation with the officer, the defendant said, “I should shut the fuck up until I talk to a lawyer.” The officer told the defendant that he was just trying to figure out the order of events and said, “That’s okay. You don’t have to talk to me.” Then the officer read the *Miranda* warnings aloud to the defendant and asked, “Do you understand your rights?” The defendant stated that he did. When the officer explained that another investigator was on his way, the defendant stated, “I think I’m going to say something stupid” and added, “My brother has told me, ‘Don’t say shit.’ He’s a police officer.” The first officer then stopped asking questions.

Another investigator soon arrived and asked the defendant more questions. The investigator stated: “I understand that the deputy over here read you your rights and stuff like that, and you said you wanted an attorney, okay? You’re well within your rights, that’s completely up to you.” The investigator continued, “Basically, I was going to come and read you your rights again. I mean, obviously, you’re handcuffed, you’re not free to go right now, but I’d like to sit down and try to figure out what the heck happened with this whole thing.” The defendant replied, “I would like to talk to you.” The investigator read the defendant *Miranda* warnings and the defendant stated that he understood his rights. He then made several incriminating statements.

Prior to trial, the defendant made a motion to suppress statements made to police while hospitalized. The trial court noted that the defendant had prior experience with law enforcement, including prior encounters with this investigator. The trial court denied the motion.

At the conclusion of trial, the defendant moved to strike, contending that his intoxication made him incapable of premeditation and that he acted in self-defense. The trial court denied the motion.

Held: Affirmed.

The Court first examined whether the defendant had invoked his right to an attorney. The Court found that his statements, including his statement about what he “should” do was not an unequivocal request for a lawyer that required the police to cease questioning. The Court then concluded that the defendant’s will was not overborne by police coercion when he made statements to the police. The Court specifically held that the trial court did not err in finding that the defendant’s injuries and intoxication did not render him incapable of voluntarily consenting to converse with the police.

The Court pointed out that the trial court found that in speaking with the police (i) the defendant’s speech was not slurred, (ii) his answers were responsive to the questions asked, (iii) he was “able to move without being unsteady,” and (iv) he frequently volunteered statements without being questioned. The trial court also noted that the defendant was “oriented to person, place, and time” according to his medical records. Because the evidence supported the trial court’s findings, the Court concluded the trial court did not err in finding that the defendant had the capacity to voluntarily consent to converse with the police, despite his injuries and intoxication.

Lastly, the Court concluded that a rational factfinder could find that the defendant was not so intoxicated that he was incapable of premeditation when he killed the victim. The Court noted that the video recordings of the defendant on the night of the stabbing support findings that the defendant was lucid and mentally alert that night. In one recording, the defendant stated that he did not drink much alcohol that day, and only “had a pint since noon.” The jurors also heard evidence that the defendant “drank every day” and that frequent alcohol users have more tolerance for alcohol.

Based on the evidence, the Court also agreed that a rational factfinder could find that the defendant reapproached and stabbed the victim when the victim posed no imminent threat, and therefore the Court ruled that it could not conclude as a matter of law that the defendant stabbed and killed the victim in self-defense.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0682221.pdf>

Mental Condition & Diminished Capacity

Virginia Court of Appeals - Published

Shaw v. Commonwealth: January 23, 2024

Arlington: Defendant appeals his conviction for Concealing a Dead Body on Bill of Particulars, Jury Instruction Issues, Vagueness, and Denial of Diminished Capacity Evidence.

Facts: The defendant, after working with an accomplice for three days to clean up the apartment and get rid of the deceased body of his romantic partner, lied to police when questioned about his partner’s whereabouts, telling a police officer that his partner was at the hospital recovering from a seizure. In fact, his partner had suffered multiple blunt-force traumas and had been dead for three days; the battered, bloody, and bruised corpse of the defendant’s romantic partner was concealed in the apartment they shared, wrapped up in a shower curtain and secured with duct tape that contained the defendant’s DNA. Although he did not tell the police, the defendant believed that his partner had been murdered.

The grand jury returned an indictment under § 18.2-323.02, for concealing a dead body “with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death.” The defendant filed a motion for a bill of particulars, seeking “what the unlawful act is or what the manner . . . and cause of death were [that] the Commonwealth believes that Mr. Shaw wanted to conceal or prevent the detection of.” The trial court denied the defendant’s motion. The trial court also denied the defendant’s motion to dismiss the indictment on the ground that the statute was unconstitutionally vague.

Prior to trial, the trial court granted the Commonwealth's motion to exclude the testimony of the defendant's expert, Dr. Sara Boyd, Ph.D., a licensed clinical psychologist, under § 19.2-271.6. The defendant proffered that Dr. Boyd would supply evidence tending to negate the mens rea for the offense. Dr. Boyd wrote:

"[The defendant's] overall pattern of behavior around the time of the alleged offense . . . is more consistent with a disorganized and highly stressed person with Complex-PTSD, whose limited mental resources were overwhelmed by the shock and pain of finding his partner dead, than it is with planful, intentional, and instrumental concealment to avoid detection of the dead body."

She said that the defendant's "symptoms impaired his ability to process the information about death in a reality-based way, to reason about his circumstances, and to independently formulate and execute organized planning." His "behaviors and responses during the roughly three-day period . . . are best characterized as reactive, impulsive, and instinctive, rather than planful." That is, he "engaged in unconsidered, impulsive behavior that was focused on the immediate moment rather than days or weeks ahead." The court asked: "So can you say that there were times during the three-day period where he had the ability to plan and act intentionally?" She answered, "I would say it's possible given the flux in his symptoms more than . . . I can say that it's affirmatively true."

The trial court excluded Dr. Boyd's testimony after determining that she failed to apply her description of the defendant's "mental illness to the distinct, separate statutory intent elements." The trial court found it "unclear whether Dr. Boyd's opinion [went] to the malicious intent requirement or the body concealment mens rea requirements of" § 18.2-323.02, or the time period.

At trial, the defendant argued that under § 18.2-323.02, the Model Jury Instruction for malice, was inappropriate because homicide and malicious wounding are malum in se—crimes that are "inherently immoral"—while maliciously concealing a dead body is only malum prohibitum—"a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." The trial court overruled his objection and used the Model Jury Instruction to define malice under § 18.2-323.02.

Held: Affirmed.

The Court first examined the meaning of "malicious intent" in § 18.2-323.02. The Court concluded that the trial court did not err in using the Model Jury Instruction to define malice under § 18.2-323.02. The Court also agreed that the evidence more than sufficed for a reasonable jury to conclude that the defendant intentionally concealed the body and that he did so "with malicious intent and to prevent detection of an unlawful act or to prevent the detection of the death or the manner or cause of death."

The Court rejected the defendant's facial challenge to the statute at the start because he did not claim that § 18.2-323.02 is unconstitutionally vague as applied to him. The Court noted that the defendant had not claimed, for instance, that ordinary people would not understand that the statute criminalizes what the defendant did here: conceal a battered corpse in his apartment for three days and lie to police when asked about it for fear of having his probation revoked.

Regarding the defendant's request for a Bill of Particulars, the Court ruled that the Commonwealth's indictment here satisfied the law. The Court ruled that the defendant was not entitled

to a bill of particulars requiring the Commonwealth to identify the evidence it planned to adduce in support of each element of that offense.

Regarding the defendant's diminished capacity evidence, the Court agreed that § 19.2-271.6 allows evidence of a mental disorder to explain why a defendant did not have a requisite mental state in a specific instance, whether or not the disorder prevented the defendant from forming culpable mental states altogether. However, the Court cautioned that the statute does not permit mental-condition evidence to support a diminished-capacity theory if such evidence does not show that the defendant lacked the state of mind to commit the offense.

The Court then conducted an extensive review of other jurisdictions' rulings regarding similar evidentiary rules. After the review, the Court concluded that to be "helpful" to the fact finder, it is not enough that a defendant may be diagnosed as suffering from a particular mental condition. Instead, the Court emphasized that the diagnosis "must be capable of forensic application" to help the trier of fact assess the defendant's mental state at the time of the crime." The Court quoted a 3rd Circuit ruling that cautioned:

"Psychiatrists are capable of supplying elastic descriptions of mental states that appear to but do not truly negate the legal requirements of mens rea." ... "Presenting defense theories or psychiatric testimony to juries that do not truly negate mens rea may cause confusion about what the law requires."

In this case, the Court complained that the Doctor did not explain how the defendant's mental condition showed that he was not knowingly hiding the body from the police. The Court wrote: "Missing from Dr. Boyd's many sworn statements was an explanation connecting Shaw's mental condition to how it negated the state of mind required to violate Code § 18.2-323.02... Dr. Boyd's testimony resembles that of other experts that courts have deemed inadmissible to negate mens rea: general psychiatric testimony that "may easily slide into wider usage that opens up the jury to theories of defenses more akin to justification.""

The Court ruled that the trial court did not abuse its discretion by excluding Dr. Boyd's testimony after concluding that she failed to show how the defendant's mental condition negated either of the two statutory state-of-mind requirements. In this case, the Court agreed that given the "separate missing variables" about which the trial court had complained, the jury would have "to speculate [about] which of Shaw's numerous mental health symptoms impaired the differing intent requirements and whether they did so in a manner significant enough to negate both intent requirements under the statute."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1349224.pdf>

Necessity

Virginia Supreme Court

Warren v. Commonwealth: March 14, 2024

Aff'd Court of Appeals Ruling of March 7, 2023

Chesapeake: Defendant appeals his conviction for DUI on Jury Selection issues and denial of his Defense of Necessity.

Facts: An officer stopped the defendant for driving 96 in a 60 mile-per-hour zone and learned that the defendant was intoxicated. The defendant claimed that he had just received a phone call from his cousin's girlfriend, who told him that his cousin had been shot, and was dying of a wound in front of his grandmother's home. The defendant told the officer that he got in his car and drove back to Portsmouth, because he had the belief that given the situation, it would take an ambulance quite a while to get to that scene to take his cousin to the hospital to receive medical treatment. The cousin died from that gunshot wound later that evening. The defendant's BAC was .12.

Prior to trial, the Commonwealth raised a pre-trial motion to object to the defendant's presentation of a necessity defense. The trial court required the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The defendant proffered the facts of the case and the trial court ruled that the facts were insufficient to support a defense of necessity and granted the Commonwealth's motion.

During voir dire of the jury pool, a juror stated that he had been convicted of felony DUI. However, the juror stated that the governor had restored his civil rights, although he did not know when or which governor restored his rights. The Commonwealth investigated and the evidence showed that the juror was twice convicted of felony DUI. The VCIN record reflected these convictions and did not show that his rights had been restored. When the court accessed the Governor's website for any clarifying information on the rights restoration, the website did not show records matching the juror's name, which he testified had never changed. The trial court struck the juror due to his felony conviction.

The Court of Appeals affirmed in a published opinion.

Held: Affirmed. The Supreme Court simply wrote: "the Court is of the opinion that there is no reversible error in the judgment of the Court of Appeals. Accordingly, the Court affirms the judgment of the Court of Appeals for the reasons stated in *Warren v. Commonwealth*, 76 Va. App. 788 (2023)."

In its ruling, the Court of Appeals had first ruled that under § 8.01-338, the fact of the juror's two felony convictions coupled with the lack of clear evidence that his rights had been subsequently restored supported the trial court's reasonable doubt as to the juror's qualifications to serve as a juror.

Regarding the defense of necessity, the Court of Appeals had ruled that the trial court did not err in requiring the defendant to lay a foundation for the testimony he intended to present to the jury by proffering evidence on each element of the necessity defense at the motion in limine. The Court repeated that the essential elements of this defense include:

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

In this case, the Court of Appeals ruled that the necessity defense failed because the defendant proffered no evidence to support the second element: a lack of other adequate means to avoid the threatened harm. The Court noted that the defendant did not proffer any evidence that he called 911 or anyone else to help his cousin and found them unavailable. The Court also complained that the defendant did not proffer that he called other family members to help his cousin; nor that he attempted to get someone else to drive him to his cousin to avoid his driving under the influence.

The Court of Appeals concluded that the trial court did not abuse its discretion by excluding the defendant's proffered "necessity" evidence because it lacked relevance. The Court observed that the evidence was only relevant to the necessity defense, and such evidence became immaterial to the case when he failed to proffer minimal evidence as to each element of the defense. The Court of Appeals wrote: "We are sympathetic to Warren's desire to be with his fatally wounded cousin. Nevertheless, his claimed unawareness of other adequate means to get aid to his cousin does not satisfy the requirement that no other adequate means were available to aid his cousin."

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230248.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0533221.pdf>

Virginia Court of Appeals –
Unpublished

Mubdi v. Commonwealth: May 7, 2024

Roanoke: Defendant appeals his convictions for Murder and Possession of a Firearm on Admission of Hearsay, Admission of Video Evidence, and Denial of a Necessity Defense.

Facts: The defendant is a convicted felon. During a couple of disputes arose at a bar involving the defendant and the victim, the defendant obtained a firearm. The victim decided to leave the bar. As the victim walked around his car to get inside and leave, however, the defendant followed behind, raised a gun to eye-level with the victim, and shot him in the front of his head.

During the incident, several people in the crowd were filming the fight on their cell phones, capturing the fight and the shooting with the corresponding muzzle flash. The Commonwealth introduced these videos into evidence at trial. A witness identified himself in the videos and photograph stills. Although he did not film the videos himself, he testified that he was present that night and "saw everything." He acknowledged that, though his vantage point differed from that of the camera in some instances, the videos were fair and accurate depictions of the events. Another witness also identified himself in several photos and videos and testified that the videos were fair and accurate depictions of the events. The witnesses both identified the defendant in the videos.

At trial, the defendant also objected to the introduction of two of the videos: one that showed the defendant holding a gun and walking toward the victim's car, the other that showed the second fight

at the side of the car and the crowd retreating at the sound of gunshots. The defendant argued that the witnesses' testimony was not sufficient to authenticate the videos. The trial court overruled the defendant's objections.

Police arrived at the scene of the shooting and later testified that people were "yelling and screaming" as well as filming with cell phones or fleeing the scene. Two minutes after police arrived, a woman called 911 at approximately. She stated that someone had been shot and killed at the bar. Her tone of voice was frantic and upset during the call. She asked the operator to "please help me out" and said, "I know who it was, I know who it was." The caller told the operator that she was leaving the scene but knew who committed the shooting. She then said, "he's dead, oh my god." The operator asked for the name of the shooter, and the caller answered that he goes by "cocaine," which was the defendant's alias. When asked if "cocaine" was still there, the caller answered, "yes," then "I don't know, I don't know." She described the shooter as having the defendant's appearance and clothing as seen in the videos. The caller refused to provide the 911 operator with her name.

At trial, the defendant objected to the introduction of the 911 call on Sixth Amendment confrontation grounds. The trial court overruled his objection.

At trial, the defendant argued that the evidence was insufficient to support his conviction for possession of a firearm by a convicted felon because his possession was justified under the necessity defense. The defendant argued that he needed to possess a firearm because people were fighting outside the bar. The trial court rejected his defense.

Held: Affirmed.

Regarding the videos, the Court concluded that the trial court did not abuse its discretion in denying the defendant's motion to exclude the videos, because the videos were properly authenticated by the witnesses' testimony. The Court pointed out that the witnesses identified themselves, the defendant, and the victim in the videos, and affirmed that the videos fairly and accurately represented what they observed on that date.

The Court rejected the defendant's argument that due to the lack of testimony establishing how the videos were made, who made them, and their chain of custody, the videos could not serve as a "silent witness." Instead, the Court explained that when a person who witnessed the events in a video testifies that it accurately represents what took place, it is not admitted under a silent witness theory, and thus the testimony of its maker is not required. In this case, the Court reasoned that the contested videos were not introduced as independent silent witnesses, but rather to illustrate the witnesses' eyewitness testimony. Accordingly, the Court ruled that the videos were properly authenticated, and the trial court did not abuse its discretion in admitting them.

Regarding the 911 call, the Court concluded that the trial court did not abuse its discretion in finding that the caller's statements during the 911 call were nontestimonial because they were in response to an ongoing emergency. The Court observed that the caller's demeanor and tone on the call was panicked, and she immediately asked for help. The Court pointed out that the caller called because of a shooting at a public place in which the caller believed somebody already died. The Court found that the 911 operator's questions about his identity and physical description were not objectively designed to create trial testimony but were instead a response to an ongoing emergency situation with an armed

shooter still in the area, intended to discover the identity of the shooter and quell the threat to the public and responding personnel.

The Court rejected the defendant's argument that because police were already on scene and the shooting was over, that there was no longer an ongoing emergency. Instead, the Court noted that when police arrived at the chaotic scene, groups of people remained nearby notwithstanding the shooting that had just occurred. The Court pointed out that officers did not know the identity of the shooter or if there were risks of further violence. Even with police already on scene, the Court reasoned that the emergency was ongoing, and the caller's statements on the 911 call reflected that continuing risk.

Regarding the defendant's necessity defense, the Court ruled that the trial court did not err in rejecting the defendant's necessity defense and finding the evidence sufficient to support his conviction for possession of a firearm by a convicted felon. The Court repeated that the necessity defense has three essential elements: (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 none of the elements of the necessity defense were met here.

The Court examined the facts and noted that the defendant armed himself after the first fight dispersed and before the second fight began. The Court found no evidence that the defendant faced an imminent risk of harm that necessitated arming himself at any point, and pointed out that his involvement in the second fight was the result of his own choice. The Court contended that the defendant had other reasonable means of protecting himself, including leaving the scene.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0071233.pdf>

Reliance on Official Authority

Virginia Court of Appeals - Published

Miner v. Commonwealth: March 12, 2024

Hampton: Defendant appeals his conviction for False Statement on a Firearms Form on the Defense of Reliance on Official Authority and sufficiency of the evidence.

Facts: While under indictment for burglary, the defendant attempted to purchase a firearm. Where the ATF Form 4473, question 11(b), inquired: "Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year?" the defendant answered "No." At the time, the defendant had entered into a plea agreement. Under

the agreement, adjudication of the felony charge would be deferred until the following year, upon which date it would be reduced to a misdemeanor subject to the defendant's compliance with the terms of the agreement.

When a police officer investigated and asked him why he answered the form falsely, the defendant stated that he thought his felony charge had been reduced to a misdemeanor "and that when he returned to court next year, all he would do is a few days in jail." The defendant stated that his "attorney said that he was good as far as trying to purchase a firearm." At trial, the defendant argued that when he attempted to purchase the firearm, he was relying on the advice of his attorney and that he was legally entitled to rely on such advice. The trial court rejected that defense.

At trial, the Commonwealth entered a copy of the indictment along with the defendant's signed plea agreement as evidence. The defendant unsuccessfully argued that § 18.2-308.2:2 "only criminalizes false statements to questions required or enumerated under Sections B and C and that "the legislative intent of [the statute] was to NOT criminalize any statement made under ATF question 11(b)" and "the answer to the question 'are you under indictment' was never meant to be criminalized."

Held: Affirmed.

The Court first agreed that the evidence proved the defendant was under indictment at the time he attempted to purchase the firearm. The Court also agreed that the defendant's denial of that fact on the ATF Form 4473 was a "materially false statement" made in violation of § 18.2-308.2:2(K).

Regarding the defendant's claim of reliance on official authority, the Court acknowledged that Virginia has not officially considered the question of whether a private attorney can constitute a government official under the rulings in the *Miller* and *Palmer* cases, although an unpublished decision in *Lott* opined that "a private attorney is not a government official." In this case, the Court explained that, although attorneys are "officers of the court," they are not officials of government by virtue of being lawyers. Thus, the Court concluded that the defendant's former attorney was not a public officer "charged by law with responsibility for defining the permissible conduct with respect to the offense at issue." Therefore, the Court ruled, the trial court did not err in denying the defendant's motion to strike on that basis.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1964221.pdf>

Northcraft v. Commonwealth: September 26, 2023

78 Va. App. 563, 892 S.E.2d 351 (2023)

Richmond: Defendant appeals his convictions for Larceny, Unlawfully Obtaining Documents from DMV, False Statement to DMV, Money Laundering, and Attempted Money Laundering on Jury Selection, Sufficiency of the Evidence, and Denial of his Defenses of Claim of Right and Reliance on Official Authority.

Facts: The defendant used Virginia's abandoned vehicle process ("AVP"), §§ 46.2-1200 through -1207, which allows applicants to dispose of an abandoned vehicles left on a highway, public property, or

private property, to steal at least five parked cars off the street and sell them at auction. The defendant first completed an online record request application for the five vehicles. The online record request application requires the applicant to state that they are in “possession of [the] motor vehicle” and indicate a reason for their possession. The defendant stated that the vehicles were located on public streets and that his claim was based on “possession of a motor vehicle... that was left unattended on public property for more than 48 hours in violation of a state law or local ordinance.”

The defendant then submitted applications for certificate of title for the vehicles in which he listed himself as the owner of the vehicles. On two occasions, DMV clerks recalled asking the defendant if he worked for a towing company or dealership. The defendant responded that he did not and said that the vehicles had been left on his property. At trial, the defendant objected to their testimony, but the trial court overruled the defendant’s objection.

After obtaining titles, the defendant took the vehicles off the street, in one case obtaining a replacement key for one of the vehicles. The defendant then enlisted a third-party to sell two of the vehicles at auction. At trial, the third-party testified that he entered an agreement to auction vehicles on behalf of the defendant and had an agreement to pay the defendant the money. However, when the owners noticed the vehicles missing, they notified police, who learned of the defendant’s scheme. Police were able to stop one of the two sales from taking place and the defendant did not receive the proceeds of the other sale.

At trial, the owners of the vehicles testified that they did not know the defendant, did not give him possession or ownership of their cars, and instead regularly parked their vehicles themselves during the relevant time.

During voir dire, defense counsel asked potential jurors about whether the number of charges would influence their decision-making. One juror agreed that her initial reaction to the number of charges was that “he must have done something wrong.” She then stated that she would be able to set aside that initial reaction and “would have to listen to the evidence....But it kind of would still be in my head.”

The trial court then gave the juror a clarifying instruction, informing her that she could only find the defendant guilty based on the evidence and could not infer guilt from the fact that he had been charged with an offense. When asked by the court if she could apply that fairly, she stated, “Yes” and further stated, “That is your rule, and I have to do it the way you say do it.” When the trial court told her that it did not “want to put words in [her] mouth” and wanted her “to understand that that’s the process,” the juror told the court, “I understand.”

The trial court denied the defendant’s motion to strike the juror for cause, rejecting the defendant’s argument that her voir dire demonstrated that she could not set aside the number of charges that the defendant was facing and the implication that this meant he must have done something wrong.

At trial, the defendant argued that the evidence was insufficient to support his convictions under § 46.2-105.2(A) for Unlawfully Obtaining Documents from DMV because there was no evidence in the record that he did not “satisf[y] all legal and procedural requirements” to receive title to the vehicles; he contended that he met all of the requirements set out in the AVP at the time of the offense. The defendant argued that the only sensible interpretation of the statute was that an individual possesses a vehicle under the statute if the person knows where the vehicle is located and also knows

that the vehicle was abandoned on the side of the road for more than 48 hours, in violation of a state or local ordinance.

The defendant also argued that the evidence was insufficient regarding False Statement to DMV, noting that, at the time, the application for certificate of title itself did not ask whether the applicant is in possession of the vehicle for which title is sought. The defendant further argued that there was insufficient evidence of the fraudulent intent necessary for his convictions under § 46.2-605.

Regarding the offense of Grand Larceny, the defendant argued that because he took the vehicles after he obtained titles to them, they were not taken without their owners' permission, as he was their owner after obtaining the titles.

Regarding the Money Laundering offense, the defendant argued that the evidence failed to establish that a financial transaction occurred. The defendant also argued that there was insufficient evidence of an attempt to conceal or disguise the ownership of the property involved under § 18.2-246.2.

Lastly, at trial, the defendant raised two defenses, a good faith claim-of-right defense and a good faith reliance defense. First, the defendant asserted that he had a good faith belief that he was entitled to the vehicles, because he found the AVP, a legitimate process through the DMV, utilized that process, and subsequently received titles to the vehicles from the DMV. The defendant asked the trial court to instruct the jury on a good faith claim-of-right defense in relation to the three grand larceny offenses. His proposed instruction stated, "If you find that [the defendant], in good faith, believed that the [vehicle] belonged to him at the time of the taking then you shall find [the defendant] not guilty of grand larceny." The trial court refused the instruction.

Second, the defendant also asked the trial court to instruct the jury on the defense of good faith reliance on authority, pursuant to *Miller v. Commonwealth*, 25 Va. App. 727 (1997), for the unlawfully obtaining documents from the DMV charges. The court refused the instruction, noting that it thought "it is misleading of the law in the case" and that "more importantly, there is no affirmative evidence provided in accordance with Miller."

[Note: DMV has since changed the AVP procedure to avoid this situation – EJC].

Held: Affirmed. The Court held that the trial court did not err in failing to strike a juror for cause, in denying the defendant's motions to strike the evidence, or in denying jury instructions on good faith claim-of-right and good faith reasonable reliance.

Regarding jury selection, the Court found that the voir dire, viewed in its entirety, did not demonstrate that the juror's opinion—that the number of charges that the defendant faced was indicative of his guilt—was a fixed opinion. The Court concluded that the juror's own responses, which were not merely "yes" answers to the trial court's questioning, provided evidence that her initial reaction upon hearing the number of charges against the defendant was not fixed. Rather, the Court found that she indicated in her own words that she understood the legal instruction regarding the presumption of innocence after being instructed on it and could set aside her prior opinion. Contrary to the defendant's assertion, the Court ruled that the record demonstrated that the trial court's questioning and instruction of the juror constituted clarification and not improper rehabilitation.

Regarding sufficiency of the offense of Unlawfully Obtaining Documents, the Court first ruled that the statutory scheme clearly sets out that to utilize the AVP, the applicant must be in possession of

the abandoned vehicle. The Court then addressed the question of whether the defendant was in possession of the vehicles for which he obtained titles from the DMV.

The Court noted that § 46.2-1200 does not provide a definition for the term “in possession of.” The Court concluded that the plain meaning of “possession” in § 46.2-1202(A) is neither ambiguous nor creates absurd results when applied in the context of the statute. Rather, under this definition, the Court found that the evidence established that the defendant did not have possession of the vehicles in question. The Court noted there had been no indication that anyone but the owners had control of or held at their disposal the vehicles prior to the defendant using the AVP to obtain the vehicles’ titles. Because the vehicles were not in the defendant’s possession, the Court concluded that he was not entitled to use the AVP to obtain their titles. Thus, the Court agreed that the defendant obtained the titles from the DMV without “satisfy[ng] all legal and procedural requirements for the issuance thereof,” or “otherwise [being] legally entitled thereto,” in violation of § 46.2-105.2(A).

Regarding the offense of False Statement to DMV, the Court noted that, although the application for certificate of title itself does not ask whether the applicant is in possession of the vehicle for which title is sought supporting documentation included his record request receipts and vehicle removal certificates, both documents require an applicant to state who is in possession of the vehicle. In this case, the Court found that the defendant provided the false information that he was in possession of the vehicles on both the online record request applications and the vehicle removal certificates. Because the defendant provided false information on his supporting documentation, while certifying on the applications for certificate of title that his supporting documentation was true and accurate, the Court agreed that the evidence established that he provided false information on his applications for certificate of title.

Regarding the element of intent for False Statement to DMV, the Court found that the defendant’s conduct and representations plainly indicated his fraudulent intent in making false statements on his applications for certificate of title in violation of § 46.2-605.13. While the Court acknowledged that the defendant did not attempt to conceal his identity on the applications for certificate of title, the Court explained that this fact alone did not negate the other evidence in the record indicating his fraudulent intent in his use of the AVP.

In a footnote, the Court also found that it was proper to admit the statements that the defendant made to the two DMV employees. The Court concluded that the fact that the defendant lied to two different DMV employees regarding the location of vehicles for which he sought title was relevant to show his fraudulent intent, because it demonstrated his intent to conceal the fact that he was not actually in possession of the vehicles and therefore was using the AVP unlawfully.

Regarding the Grand Larceny offense, the Court concluded that because his titles to the vehicles were procured through his fraudulent actions, they did not convey legal title to him. The Court explained that the defendant’s fraudulent use of the AVP to obtain the vehicles’ titles was the first part of his larcenous scheme to deprive the rightful owners of their vehicles. The Court observed that the defendant committed an initial larceny in obtaining the titles themselves—he used the AVP to fraudulently take another’s property, namely the titles to the vehicles that were issued to him by the DMV, but which legally belonged to the vehicles’ true owners. He then committed the charged larcenies of the three vehicles themselves, physically taking the vehicles from the streets and later attempting to sell two of them at auction.

Because the defendant obtained the titles and vehicles through his larcenous actions, at the time he took the vehicles, the Court ruled that the defendant did not have “legal title” to them under § 46.2-100; he merely had the physical certificates of title. Accordingly, the Court ruled that he was not the owner of the vehicles at the time he stole them, and the evidence was sufficient to support his larceny convictions.

Regarding the Money Laundering offenses, the Court first found that the fact that the defendant did not actually receive money from the third-party seller was not dispositive. The Court pointed out that the defendant initiated a financial transaction, made an agreement to sell the vehicles, and the third-party received money in exchange for auctioning the one of the cars. While the defendant did not receive any money as a result of his agreement, the Court found that he did initiate the transaction, thus the Court concluded that the evidence was sufficient to prove that he conducted a financial transaction in this case.

Regarding the “concealment” element of Money Laundering, the Court found the federal cases interpreting the federal money laundering statute to be instructive. In this case, the Court agreed that the evidence was sufficient to establish the defendant’s intent to conceal or disguise the source of the property involved. The Court found that, by employing a third party to sell the vehicles at auction, the defendant demonstrated his intent to structure the transaction so as to conceal the true source of the property involved in the transaction. The Court quoted an 8th Circuit case that “the money laundering statute does not require the jury to find that [accused] did a good job of laundering the proceeds.” In this case, the Court ruled that the defendant’s use of a third party constituted sufficient evidence to show that the transaction was designed in whole or in part to conceal or disguise the source of the property involved in the transaction.

Regarding the defendant’s intent to commit the Money Laundering offense, the Court again found sufficient evidence of intent to commit the offense by his agreement to sell the vehicles, the proceeds of his grand larcenies, at auction via the third party. As far as the conviction for Attempted Money Laundering, the Court also ruled that the defendant signing over the title and giving the vehicle to the third party was the direct act done toward the commission of the offense, one that was only ineffectual because the one of the cars was identified as stolen before the third-party could sell it. Accordingly, because the evidence established that the defendant conducted a financial transaction designed to conceal the source of one of the vehicles and that he attempted to do so for the other vehicle, the Court concluded that the trial court did not err in finding the evidence sufficient to support both convictions.

Regarding the defendant’s Claim of Right defense, the Court found that the defendant did not have a good faith belief that he owned the vehicles at issue because his obtaining of their titles was predicated on his fraudulent statements on the AVP documents that he was in possession of the vehicles. The Court reasoned that he could not have sincerely believed that he was in possession of the vehicles at the time he completed the applications for certificates of title because the vehicles were located on public streets and were regularly parked there by their true owners, and the Court specifically pointed to his false statements to DMV in support of his applications.

Lastly, regarding the defendant’s claim of Reliance on Official Authority, the Court concluded that the evidence clearly showed that the defendant failed to receive assurances from DMV employees that his use of the AVP was lawful. The Court warned that the mere acceptance of paperwork and the

issuance of the titles does not qualify as an affirmative assurance that the conduct giving rise to his convictions was lawful. In this case, the Court pointed out that the defendant did not receive an affirmative assurance on the lawfulness of his use of the AVP from any DMV employee.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1067212.pdf>

King v. Commonwealth: June 6, 2023

77 Va. App. 748, 887 S.E.2d 766 (2023)

Chesapeake: Defendant appeals his conviction for Possession of a Firearm by Felon on the Defense of Reliance on Official Authority.

Facts: In 2010, the defendant was adjudicated delinquent in Pennsylvania, when he was seventeen years old, for receiving stolen property. The adjudicatory order described this charge as “a felony of the third degree” under Pennsylvania law. The defendant claimed his Pennsylvania probation officer told him that “any loss of rights would be fully restored under Pennsylvania law upon his release from juvenile probation.”

In 2021, the defendant possessed a firearm in Virginia. At trial, the defendant stated, “My probation officer, when I was on probation for that charge, told me that I could possess my guns. I couldn’t use them until I got off probation because it was a stipulation, not the law.” According to the defendant, the probation officer visited his home, where firearms were openly displayed. The defendant acknowledged that he was not allowed to hunt without prior permission as a condition of his probation but claimed that he thought or assumed that he did not lose his “rights to bear arms” because he was a juvenile at the time of the offense.

At trial, the defendant relied on *Miller v. Commonwealth*, which established a due process defense for an individual “who takes measures to learn what conduct the government has proscribed but is misadvised by the government itself.” The defendant also argued that *Miller* should be extended to include “situations where a person is permitted to possess a firearm in the state in which they are convicted.” The trial court rejected his defense.

Held: Affirmed.

The Court reviewed the two steps in the due process defense from *Miller*. First, “the defendant must establish, as a threshold matter, the legal sufficiency of the content and source of the information received.... As to the source of the information, it must be established that the information was received from a government official. It is not enough to prove that the source was a state actor; the defendant must show that the source was “a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue... Second, the trial court must make “a factual determination whether the defendant’s reliance upon the information received was reasonable and in good faith.” ... This due process defense is an affirmative defense, and the defendant bears the burden of establishing it.”

The Court explained that *Miller*, which dealt with a Virginia probation officer advising his probationer on a question of Virginia law, explicitly limited its holding to advice received from Virginia state actors. The Court pointed out that the *Miller* Court specifically declined to extend its holding to advice from out-of-state actors.

In this case, the Court noted that the defendant did not testify that his probation officer told him that he could possess firearms in Virginia, nor did he show that a Pennsylvania probation officer is “charged by law with responsibility for defining permissible conduct with respect to” possession of firearms in Virginia. Further, the Court found that the defendant failed to demonstrate that his reliance on his probation officer’s advice was reasonable and in good faith. The Court explained that this requirement is not met by simply assuming advice given regarding gun possession in Pennsylvania would apply to gun possession in Virginia or any other state.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0397221.pdf>

Self-Defense

Virginia Court of Appeals - Unpublished

Pough v. Commonwealth: May 28, 2024

Portsmouth: Defendant appeals his conviction for Murder on Fourth Amendment, Fifth Amendment *Miranda*, Jury Instruction, and sufficiency grounds.

Facts: The defendant saw a man chase his girlfriend into their house over allegedly stolen marijuana. The defendant stabbed the man over sixty times in the back and side. The defendant disposed of the victim’s body in a trash can and drove the victim’s car for two days.

Two days after the murder, however, after seeing officers in the place where the defendant had last parked the stolen car, the defendant called 911 and reported that he was in possession of a stolen automobile and that the automobile’s owner was dead and “stored in a nearby trash can.” In response, officers went to the defendant’s home. Both were wearing uniforms and displaying their badges and had guns visible in their holsters. When they first encountered the defendant on the sidewalk in front of his home, they asked if he had any weapons and briefly patted him down. An officer told the defendant to take a deep breath, relax, “sit down,” and explain the situation. The officers did not give the defendant any *Miranda* warnings at this time.

After the defendant confessed to the murder, officers discovered the body and arrested the defendant. He told the officers that his father was inside the home. Officers then entered the home and did a protective sweep of the house. Officers later explained that they did that “to secure it so there [were] no other people inside.” Officers located the defendant’s father and girlfriend inside the home.

They secured the home, obtained a search warrant, and executed the warrant. Police also interrogated the defendant at the police station after informing him of his *Miranda* rights.

Prior to trial, the defendant moved to suppress. The defendant moved to suppress the evidence due to the protective sweep on Fourth Amendment grounds and moved to suppress his statements to police on Fifth Amendment grounds. In support of his argument that the conversation amounted to a custodial interrogation, the defendant noted that he was underage at the time of the conversation, there were multiple officers present, the officers never told him that he was free to leave, and they did not question him in his father's presence. The defendant further argued that the post-*Miranda* statement he gave at the police station should be suppressed, because it was the "natural outflow of the prior statements" he made "without the benefit of *Miranda* warnings."

The Court denied the motions to suppress.

At trial, the Commonwealth did not call the defendant's girlfriend as a witness. The Commonwealth asserted that it could not make her incriminate herself in court and the girlfriend was not a material witness. As a result, the defendant proffered a jury instruction that "[t]he unexplained failure of the prosecution to produce a material witness raises a presumption that the testimony of that witness would have been adverse to the prosecution, and beneficial to the defendant." The trial court denied the instruction.

At trial, the defendant claimed self-defense, citing the 2018 *Lienau* ruling to support his argument that "a violent, unwanted entry can constitute an overt act that may reasonably place a party in fear for their own life." The trial court rejected that defense.

Held: Affirmed.

Regarding the Fourth Amendment challenge to the officers' "protective sweep" of the home, the Court ruled that the protective sweep was justified as a warrantless search under the Fourth Amendment. The Court reasoned that the warrantless entry was a reasonable response to police perception of possible danger based on the defendant's statement that someone else, appellant's father, was inside the home. The Court explained that the fact that the defendant indicated his father was not aware of the situation did not automatically negate the threat the father may have posed; instead, it was reasonable for police to secure the premises in case other occupants posed a similar danger. The Court contended that the fact that police detained the defendant before entering did not render the sweep unreasonable, because they had reason to believe that the house harbored at least one other person.

Regarding the defendant's Fifth Amendment *Miranda* argument, the Court concluded that the defendant was not subject to a custodial interrogation when he made his initial, pre-*Miranda* statements, because his freedom of movement was not restrained to the degree associated with formal arrest. The Court observed that the conversation took place at the defendant's home. The Court pointed out that there was no evidence that officers were intentionally blocking him or physically restraining him until the conversation concluded. The Court noted that although officers patted the defendant down for weapons, it was not prolonged and did not restrict the defendant's freedom of movement. The Court also noted that the defendant volunteered most of the information with only minimal prompting by police. The Court also pointed out that the tone remained casual the entire five-minute conversation.

Regarding the defendant's post-*Miranda* statements, the Court pointed out that, unlike in *Seibert*, there was no evidence suggesting that police used a deliberate, two-step strategy to obtain the defendant's second statement. The Court agreed that in their initial interview, officers were "simply trying to find out what happened" and that *Miranda* warnings were not required as a result.

Regarding the defendant's proposed jury instruction, the Court ruled that because the jury instruction was not a clear statement of the law and was not supported by the evidence, the trial court did not err in rejecting it. The Court explained that a missing witness presumption instruction would be improper in a criminal case, regardless of which party it would favor.

Regarding sufficiency, the Court pointed out that the defendant followed directly behind the victim going up the stairs and stabbed him primarily in his left side and back, so the fact finder could reasonably infer that the victim was not facing the defendant head-on in an act of aggression. The Court also noted that the victim did not have anything in his hands, did not say anything to the defendant directly, and did not even look in the defendant's direction. In a footnote, the Court rejected the defendant's reliance on the *Lienau* ruling, noting that the victim did not use force or violence to enter the defendant's home but simply came through the door that the girlfriend had left open. For these reasons, the Court explained that *Lienau* does not support the defendant's self-defense argument.

Further, the Court contended that the defendant's use of a deadly weapon was not reasonable in relation to the harm threatened. Instead, the Court found that the defendant's reaction was grossly disproportionate in light of the harm threatened. Consequently, the Court ruled that the evidence was sufficient to permit a rational fact finder to reject the defendant's self-defense theory.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0236231.pdf>

Huffman v. Commonwealth: March 12, 2024

Spotsylvania: Defendant appeals his conviction for Murder and Use of a Firearm on Refusal to Admit Victim's Criminal History and Denial of a Self-Defense Jury Instruction.

Facts: During an apparent road-rage incident, the defendant walked over to the victims' car and shot them both almost twenty times while they sat in their car. At trial, the defendant claimed self-defense.

Prior to trial, the Commonwealth moved the trial court to exclude evidence of the victims' prior criminal convictions. These convictions included a 22-year-old conviction for forcible sodomy and convictions of assault, theft, fraud, failure to appear, various drug-related charges, and traffic matters—including hit and run and eluding the police.

With the exception of the hit and run, the trial court excluded all of the victims' convictions, finding they were not "relevant in any way" to the case. In doing so, the trial court determined that the defendant had not shown that the decades-old conviction could "characterize" his conduct toward the victim on the evening of the killing. Applying the same logic to the other convictions, the trial court determined that it had "heard nothing" to believe that most of the prior convictions were relevant to his

conduct towards the victim just before his death. The trial court withheld a determination with respect to the hit and run conviction, pending additional evidence of its “violent” circumstances.

At trial, the defendant sought a jury instruction on “imperfect self-defense.” The text of the proposed instruction read: “If fear was adequately and in fact provoked, but is insufficient for self-defense, the resultant killing is voluntary manslaughter. Thus, the fearful killer is a manslaughterer when his fear is produced by facts insufficient to make him a self-defender, e.g., the deadly response was unnecessary, or the fear was unreasonable.”

The trial court rejected this instruction. During deliberations, the jury asked, “what if we believe there was heat of passion that was provoked by words, can it still be malicious?” The trial court instructed the jury on the distinction between murder and manslaughter, the definitions of malice and heat of passion, and that words alone cannot serve as justification for a heat of passion.

During sentencing, the defendant again attempted to introduce evidence of the victims’ prior bad acts. The court excluded the evidence.

Held: Affirmed. The Court held that the trial court did not err in excluding evidence of the victims’ criminal histories at trial. The Court also held that any error in excluding such evidence at sentencing was harmless. The Court lastly held that the trial court did not abuse its discretion in rejecting the defendant’s proposed jury instruction.

Regarding the victims’ prior bad acts, the Court also saw nothing in the record creating a nexus between the decades-old conviction and the victims’ conduct on the night of the killing. The Court also agreed that the prior conduct was not proper mitigation evidence at sentencing.

Regarding the defendant’s self-defense instruction, in view of the trial court’s instructions, the Court found that the defendant’s proposed instruction would have served only to include more terminology. Rather than clarify matters for the jury, the Court found it likely that the defendant’s proposed instruction would itself create confusion, by providing the jury with seemingly disparate standards such as considering an “adequate,” rather than a “reasonable” fear.

The Court rejected the defendant’s assertion that the jury’s verdict could be inferred from questions it asked during its deliberations. For the Court, the jury’s question carried no probative value.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0765222.pdf>

Bush v. Commonwealth: December 28, 2023

York: Defendant appeals his conviction for Murder on Fifth Amendment *Miranda* and sufficiency grounds, claiming intoxication and self-defense.

Facts: The defendant, while intoxicated, became angry at a man for backing into his car and attacked the man. The two fought and the man bit the defendant during the fight. The defendant became angry and returned to his home, obtained a knife, declared that he was going to stab the victim, and then returned and attacked the man again, this time stabbing the victim repeatedly, killing the man.

An officer located the defendant in the hospital and spoke to him. The officer later described that the defendant “did not seem to be impaired” by alcohol during their conversation in the hospital. The officer questioned the defendant while the defendant was handcuffed to a hospital bed with a brace on his neck. The officer’s body camera recorded their conversation. The defendant told the officer that he had been hit in the head three times and was trying to remember the night’s events.

During the first conversation with the officer, the defendant said, “I should shut the fuck up until I talk to a lawyer.” The officer told the defendant that he was just trying to figure out the order of events and said, “That’s okay. You don’t have to talk to me.” Then the officer read the *Miranda* warnings aloud to the defendant and asked, “Do you understand your rights?” The defendant stated that he did. When the officer explained that another investigator was on his way, the defendant stated, “I think I’m going to say something stupid” and added, “My brother has told me, ‘Don’t say shit.’ He’s a police officer.” The first officer then stopped asking questions.

Another investigator soon arrived and asked the defendant more questions. The investigator stated: “I understand that the deputy over here read you your rights and stuff like that, and you said you wanted an attorney, okay? You’re well within your rights, that’s completely up to you.” The investigator continued, “Basically, I was going to come and read you your rights again. I mean, obviously, you’re handcuffed, you’re not free to go right now, but I’d like to sit down and try to figure out what the heck happened with this whole thing.” The defendant replied, “I would like to talk to you.” The investigator read the defendant *Miranda* warnings and the defendant stated that he understood his rights. He then made several incriminating statements.

Prior to trial, the defendant made a motion to suppress statements made to police while hospitalized. The trial court noted that the defendant had prior experience with law enforcement, including prior encounters with this investigator. The trial court denied the motion.

At the conclusion of trial, the defendant moved to strike, contending that his intoxication made him incapable of premeditation and that he acted in self-defense. The trial court denied the motion.

Held: Affirmed.

The Court first examined whether the defendant had invoked his right to an attorney. The Court found that his statements, including his statement about what he “should” do was not an unequivocal request for a lawyer that required the police to cease questioning. The Court then concluded that the defendant’s will was not overborne by police coercion when he made statements to the police. The Court specifically held that the trial court did not err in finding that the defendant’s injuries and intoxication did not render him incapable of voluntarily consenting to converse with the police.

The Court pointed out that the trial court found that in speaking with the police (i) the defendant’s speech was not slurred, (ii) his answers were responsive to the questions asked, (iii) he was “able to move without being unsteady,” and (iv) he frequently volunteered statements without being questioned. The trial court also noted that the defendant was “oriented to person, place, and time” according to his medical records. Because the evidence supported the trial court’s findings, the Court concluded the trial court did not err in finding that the defendant had the capacity to voluntarily consent to converse with the police, despite his injuries and intoxication.

Lastly, the Court concluded that a rational factfinder could find that the defendant was not so intoxicated that he was incapable of premeditation when he killed the victim. The Court noted that the

video recordings of the defendant on the night of the stabbing support findings that the defendant was lucid and mentally alert that night. In one recording, the defendant stated that he did not drink much alcohol that day, and only “had a pint since noon.” The jurors also heard evidence that the defendant “drank every day” and that frequent alcohol users have more tolerance for alcohol.

Based on the evidence, the Court also agreed that a rational factfinder could find that the defendant reapproached and stabbed the victim when the victim posed no imminent threat, and therefore the Court ruled that it could not conclude as a matter of law that the defendant stabbed and killed the victim in self-defense.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0682221.pdf>

Horne v. Commonwealth: December 28, 2023

Norfolk: Defendant appeals his convictions for Aggravated Malicious Wounding, Use of a Firearm and Malicious Shooting on Refusal to grant his tendered “Castle Doctrine” jury instruction.

Facts: The victim visited the home of the mother of his children, but the defendant, who was dating her, became angry and shot the victim in the neck, paralyzing him from the neck down. The defendant had already armed himself when the victim approached. The defendant confronted the victim inside the home, called the victim a name and struck him in the mouth before shooting him.

At trial, the court instructed the jury on self-defense. However, the trial court rejected the defendant’s so-called “Castle Doctrine” instruction, which stated, in its entirety, that “when a party is assaulted in his own home, that party as a homeowner or tenant, as the case may be, has a right to use whatever means necessary to repel the aggressor even to the taking of life.”

Held: Affirmed. The Court concluded that the defendant’s proffered instruction, standing alone, was not supported by the evidence in this case.

The Court quoted the *Fortune* and *Hines* cases, noting that Virginia has long recognized that an individual has the right to defend himself in his home under the “Castle Doctrine.” However, the Court cautioned, the amount of force that may be used against a trespasser is not without limits. Additionally, “a defendant could not use the Castle Doctrine as a shield against prosecution for using deadly force against a toddler who had wandered uninvited into the home.”

Examining the defendant’s proposed instruction, the Court warned: “A literal interpretation of [the defendant’s] snippet of case language could lead to chaotic results... by simply labeling the recipient of the repelling attack as “the aggressor,” the instruction does not require that the “aggressor” be an intruder or uninvited guest. It could be a friend or neighbor or anyone who is properly in the house—including the father of three children who reside in the home who was invited to be there by the owner,” i.e. the victim in this case. “In short, while the snippet of case law may be a correct statement of law in the context of a blameless homeowner and a dangerous, unknown intruder—standing alone

without reference to blame or any right to be present—the language is confusing, misleading and problematic here.”

The Court also complained that the defendant put on no evidence that he was the “homeowner” or a “tenant” at the home. In a footnote, the Court continued: “standing alone it would justify lethal force among co-residents or siblings living under one roof. Taken literally the instruction would allow a host to use lethal force on a drunken, invited party guest who pushes the host.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1267221.pdf>

Martin v. Commonwealth: December 28, 2023

Alexandria: Defendant appeals his convictions for malicious wounding, using a firearm in the commission of a felony, and maliciously shooting at an occupied vehicle on sufficiency grounds, claiming self-defense.

Facts: While visiting a convenience store, the defendant saw a rival of his, who was in a vehicle in the parking lot. The rival was entering the parking lot. The defendant exited the convenience store, obtained a firearm from a vehicle, and shot at his rival, even after the man retreated into a car, shooting a total of ten times. The defendant’s bullets struck a bystander in the face, severely injuring her jaw.

Held: Affirmed.

The Court noted that the record contained no evidence that the defendant’s opponent ever produced a gun or otherwise provoked or threatened the defendant. The Court also repeated that a defendant may not claim he had a right to arm himself for self-protection when he obtained a gun before he had a reasonable belief another person intended to injure or harm him.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0128234.pdf>

EVIDENCE

Approbate and Reprobate

Virginia Supreme Court

Commonwealth v. Holman: April 4, 2024

King William: Defendant appeals his conviction for Use of a Firearm on sufficiency of the evidence.

Facts: The defendant, a convicted felon, became angry at the mother of his child and shot her in the face, permanently blinding her. At trial, the defendant acknowledged in opening statements that he was not challenging the defendant's possession of a firearm as a person convicted of a felony, or the fact that he discharged the firearm. Instead, the defendant's counsel argued that he did not act maliciously, that "[i]t was an accident, plain and simple." The defendant's counsel explained that the defendant "does not want to walk away free of charge. He doesn't. He understands he has to be punished. He expects the Court to punish him appropriately."

At the motion to strike, defense counsel reiterated that he was "not arguing about the fact that [the defendant] had a firearm. I'm not arguing about the use of a firearm. I'm not arguing about any other thing, but the specific intent of the malicious wounding." The trial court stated that it would grant the motion to strike the aggravated malicious wounding charge, but that it would proceed on the unlawful wounding charge. Defense counsel then immediately stated that the defendant was changing his plea to guilty on the unlawful wounding charge.

The trial court stated that the defendant had "stipulated to the other charges" even though he had entered a plea of not guilty. Defense counsel responded "[y]es, sir." The trial court, without conducting a plea colloquy, then found the defendant guilty of unlawful wounding, use of a firearm in the commission of a felony, discharging a firearm in a public place, and possession of a firearm after having been convicted of a felony.

Several days after the entry of his sentencing order, the defendant filed a pro se motion to reconsider, arguing that he could not be convicted of discharge of a firearm during the commission of unlawful wounding. The trial court did not rule on that motion.

A panel of the Court of Appeals affirmed the defendant's conviction for unlawful wounding, finding the evidence sufficient for that conviction, but it reversed his conviction for use of a firearm in the commission of a felony. The panel reasoned that the "ends of justice" exception to Rule 5A:18 applied to Holman's conviction for use of a firearm in the commission of a felony. The Court of Appeals further concluded that the approbate and reprobate doctrine did not bar the application of the ends of justice exception.

Held: Court of Appeals reversed, conviction reinstated. The Court held that the defendant approbated and reprobated on the charge of use of a firearm in the commission of a felony. The Court found that the approbate and reprobate doctrine precluded the defendant from challenging his

conviction for use of a firearm in the commission of a felony. The Court repeated that, under the approbate and reprobate doctrine, “No one should be permitted, in the language of the vernacular, to talk through both sides of his mouth.”

The Court acknowledged that the statute setting forth the crime of use of a firearm in the commission of a felony specifically delineates the felonies to which the statute applies, § 18.2-53.1. Among others, the Court noted, the statute applies to aggravated malicious wounding and malicious wounding, but not to unlawful wounding. Therefore, the Court noted, the trial court convicted the defendant of use of a firearm in the commission of a felony, without convicting defendant of one of the listed predicate felonies.

The Court observed that “The statements of Holman’s attorney were part of a deliberate and well-crafted trial strategy designed to forestall a conviction for the charge of aggravated malicious wounding. Based on these statements, the circuit court afforded the defendant the relief he desired, by granting his motion to strike the aggravated malicious wounding charge he had been facing and accepting his plea of guilty to use of a firearm in the commission of a felony. Having approbated to the charge of use of a firearm in the commission of a felony, Holman now seeks to reprobate by challenging the sufficiency of the evidence for that charge. The approbate and reprobate doctrine forecloses precisely this kind of conduct. Moreover, under settled law, the approbate and reprobate doctrine precludes resort to the ends of justice exception.”

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1230343.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0629222.pdf>

Authentication

Virginia Court of Appeals - Published

Baez v. Commonwealth: November 14, 2023

Lynchburg: Defendant appeals her conviction for Drug Possession on Admission of Video Evidence and Chain of Custody issues.

Facts: The defendant possessed drugs while driving a car. Officers stopped the defendant for speeding and a dog alerted on her vehicle. After finding drug paraphernalia in the vehicle, a female backup officer searched the defendant and found cocaine. Her body-worn camera captured the moment where she found the container with the defendant’s drugs and opened the container, before walking them over to the hood of a police vehicle to conduct a field test of the substance. Several officers’ videos also captured the officers conducting a field test and the primary officer handing the drugs to his

partner, who put the drugs in the primary officer's vehicle to be taken to the police department, packaged, and sent to DFS. Later, a DFS forensic scientist confirmed that DFS received the drugs in a sealed condition.

At trial, the female backup officer who searched the defendant did not testify. Instead, the Commonwealth introduced her body-worn camera footage. The date and time stamp on the video was inaccurate but the primary officer confirmed the actual time of the stop. The primary officer also testified about how the body-worn cameras work generally, how the videos are created, and that they were uploaded automatically when an officer places his or her camera on its charger at the end of each day. The primary officer testified that he was present at the scene and that the body-worn camera footage accurately depicted the events that took place the night of the traffic stop. He identified the defendant and the other officers and explained that he assisted in placing the drugs found in an evidence bag.

At trial, the two officers gave inconsistent and vague testimony about who collected the drugs, who packaged them on scene, and who sent the drugs to the lab. For example, while the primary officer incorrectly testified that he was the one who took the evidence and checked it into property, the body camera footage revealed that it was the officer's partner who did that. However, the officer's partner testified that he did not remember who packaged the drugs; the partner explained that when he and the primary officer returned to the police department, either officer, or both officers together, would have processed the evidence. He affirmed that neither officer tampered with the evidence.

The defendant objected to the admission of the body-worn camera footage, arguing that it violated the Confrontation Clause, contending that the female backup officer's actions, recorded in the video, qualify as hearsay because they were intended as assertions, and the video itself was a testimonial assertion, given an officer's "unique" ability to control and manipulate a body camera.

The defendant also argued that the video was not properly authenticated under Virginia Rule of Evidence 2:901. She argued that the officer did not create the video, and therefore could not authenticate it. The defendant also objected that each officer who testified did not observe the entirety of the events depicted on the video, including, most importantly, the search itself. Lastly, the defendant complained that the date and time stamp on the video did not match the officers' testimony about when the video was recorded, and therefore the video did not comport with the officers' personal observations on the scene.

The trial court overruled the objections and admitted the body-worn camera video. The Commonwealth "muted" the backup officer's video so that only the video played, without any dialogue.

The defendant also objected to the certificate of analysis, contending that argues that the first "vital link" in the chain of custody of the drugs was not properly established due to insufficient evidence of the initial collection of the evidence. The trial court overruled the objection and admitted the certificate of analysis.

The trial court deferred a finding of guilt pursuant to § 18.2-251. However, after the defendant violated the conditions of her first-time offender disposition, the trial court found her guilty of drug possession.

Held: Affirmed.

Regarding the defendant's Confrontation Clause argument, the Court first repeated that camera video itself does not implicate the Confrontation Clause. Instead, the Court explained, the Confrontation Clause will only be implicated by conduct or actions depicted within the video. In this case, the Court concluded that the video did not depict any conduct by the officers intended to be an assertion. Instead, the Court observed, it merely depicted the occurrence of a search.

In a footnote, the Court noted that was not foreclosing the possibility that in certain cases involving body-worn camera footage, where the video evidence is shown to have been so overwhelmingly manipulated, edited, and controlled by the officer that it is inherently unreliable, such evidence may be inadmissible under the principles of Rule 2:901.

Regarding authentication of the video, the Court repeated the general rule that the content of the video is admissible either to illustrate a witness' testimony or to serve as an "independent silent witness" of matters depicted in the video. The Court emphasized that a proponent need only satisfy one of the two avenues to properly authenticate a video or photograph. In this case, the Court found that the officers' testimony was sufficient to satisfy the authentication requirements contained in Rule 2:901, to illustrate the officers' testimony. The Court affirmed that the trial court was entitled to find that the video was continuous, as indicated by the lack of gaps in the time stamps and the passage of time. The Court concluded that these factors, coupled with testimony confirming the accuracy of portions of the events depicted in the video, were enough to also find that the Commonwealth had satisfied the authentication requirements contained in Rule 2:901, for admission as a silent witness.

The Court made clear that a witness does not have to personally create a video or photograph to properly authenticate it. In addition, the Court found nothing to suggest that a witness must personally observe every detail of a proffered video to authenticate it. In this case, the Court found that the portions of the video that the primary officer could verify as accurate and representative of the events during the evening of the traffic stop served to establish the authenticity of the entire recording. The Court explained that whether a witness observed enough of the scene depicted on a video to properly authenticate it under Rule 2:901 is a determination within the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion.

Regarding the certificate of analysis, the Court agreed that the footage from the female backup officer's body-worn camera was necessary for the Commonwealth to properly establish, with reasonable certainty, that the narcotics were in the same condition when analyzed as they were when taken from the defendant. However, the Court found that the backup officer's testimony was not necessary for the Commonwealth to introduce the video footage of her body-worn camera. Further, the Court explained that her footage spoke for itself, as a silent witness, in proving the first vital link in the chain of custody of the narcotics found.

Regarding the inconsistencies in the officers' testimony about who handled the drugs and when, the Court ruled that any issues involving the chain of custody went to the weight of the evidence, and those fact questions were properly submitted to the finder of fact.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0073233.pdf>

Virginia Court of Appeals -
Unpublished

Coles v. Commonwealth: February 27, 2024

Pittsylvania: Defendant appeals his convictions for Possession with Intent, 3rd Offense, Possession of a Firearm and Possession of Ammunition on Admission of Hearsay, Sixth Amendment Confrontation, and Authentication grounds.

Facts: The defendant sold drugs after multiple previous convictions for that offense. Police responded to a call for a woman, partially clothed, yelling for help from under a mobile home. Police interviewed the woman and learned that the defendant had threatened the woman and her friend, accusing them of having taken his drugs. At gunpoint, he forced them to remove their clothes and told them that he would kill them unless they returned his drugs. The woman explained that she escaped and hid under the mobile home until police arrived. She provided a description of the defendant's vehicle.

Police later located the vehicle stopped on a roadway. When officers approached, the truck suddenly pulled away and police pursued it. However, one officer saw a woman, the witness in this case, lying face down where the truck had been stopped. That officer stayed behind to assist the witness. Near the witness, officers discovered a bag containing several different drugs, money, digital scales, and other paraphernalia. This witness indicated that the defendant had thrown the bag along with a handgun out of the truck. Police later located that firearm as well.

Police took a statement from the witness while she was being treated at the hospital. The officer wrote out the statement as the witness recounted the events.

Later, while both the defendant and the witness were incarcerated, they spoke over the phone. Officers obtained several recorded jail phone calls where the defendant told the witness not to testify at trial and to recant her testimony; "[y]ou just keep your mouth closed, and you gonna be alright." The witness then reached out to the Commonwealth and voiced her desire to no longer testify against the defendant.

The Commonwealth moved in limine to admit the victim's written statement at trial. The Commonwealth contended that the defendant had forfeited his right under the Sixth Amendment to confront the witness at trial due to his wrongdoing which led to her unavailability as a witness.

The Court examined the witness. The witness stated that she did not want to testify against the defendant due to the possibility of self-incrimination and her lack of memory. The witness confirmed that the defendant "knew [her] mom and [her family]." During cross examination, the witness agreed with defense counsel that the Commonwealth had made threats to the witness of prosecution if she did not cooperate. The witness claimed that the defendant did not make any threats towards her. Additionally, the witness denied that the defendant had procured or caused or brought about her refusal to testify.

After her testimony, the trial court found that the witness was refusing to testify and was therefore unavailable due to some wrongdoing by the defendant. Thus, the court found that the witness was unavailable for purposes of forfeiture by wrongdoing. At trial, the witness' various written and

recorded statements were presented to the jury. Portions of the recorded jail calls were also played to the jury at trial, including those between the witness and the defendant.

The officer who testified about the witness' written statement identified the four-page handwritten document as the statement that the witness gave him. The officer testified that the statement had not been altered or "messed with in any way." The defendant objected to the officer's handwritten statement of the witness' account of events, arguing that the statement was not properly authenticated. The defendant contended that the officer should have recorded the statements by audio or video, not handwriting. The trial court overruled his objection.

Held: Affirmed.

The Court agreed that the statements, including the written statement, that the witness made were testimonial because the primary purpose of the conversation was "to establish or prove past events potentially relevant to later criminal prosecution." Thus, the Court agreed that the Confrontation Clause of the Sixth Amendment applied to her statements to law enforcement.

The Court noted that the U.S. Supreme Court has articulated two exceptions to a defendant's right to confront witnesses against him: dying declarations and forfeiture by wrongdoing. The Court explained that the forfeiture-by-wrongdoing exception permits the introduction of uncontroverted testimonial statements only when the defendant engaged in conduct designed to prevent the witness from testifying.

To establish forfeiture by wrongdoing, the Commonwealth must show by a preponderance of evidence that the defendant intended to prevent a witness from testifying and that the witness is unavailable to testify at a defendant's criminal trial. Where a witness is physically available but "legally" unavailable to testify, the Court repeated that unavailability can only be determined when the witness is actually called to testify and, if they decline to do so, the reasons must be ascertained in the record.

In this case, the Court explained that having established that the witness was unavailable, the question was whether the Commonwealth established by a preponderance of the evidence that the defendant intended to cause the witness to become "unavailable" within the meaning of the forfeiture doctrine and whether the defendant's actions constitute "wrongdoing" as a matter of law. The Court concluded that the defendant's actions fell within the broad category of wrongdoing applicable to the forfeiture by wrongdoing doctrine.

The Court explained that, when conducting the forfeiture-by-wrongdoing analysis, the trial court was entitled to consider the defendant's statements to the witness. Although the defendant did not make any direct threats towards her, the Court observed that the witness was afraid of the defendant and didn't know what he was capable of, and stated that he "knows my mom, where's [sic] my, where my family lives." In sum, the Court agreed that the trial judge was not plainly wrong when she found the witness was unavailable to testify because of the defendant's wrongdoing.

Regarding the authenticity of the written statement, the Court ruled that the officer's testimony established that the document was what it purported to be and therefore his testimony properly authenticated the statement. The Court rejected the defendant's argument that the statement could only be considered authentic if it was recorded by audio or video, finding that it was unsupported by legal authority. The Court explained that any concerns about the statement's reliability went to the weight a jury may give the statements contained within the transcription.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0110233.pdf>

Certificates of Analysis

Virginia Court of Appeals - Published

Baez v. Commonwealth: November 14, 2023

Lynchburg: Defendant appeals her conviction for Drug Possession on Admission of Video Evidence and Chain of Custody issues.

Facts: The defendant possessed drugs while driving a car. Officers stopped the defendant for speeding and a dog alerted on her vehicle. After finding drug paraphernalia in the vehicle, a female backup officer searched the defendant and found cocaine. Her body-worn camera captured the moment where she found the container with the defendant's drugs and opened the container, before walking them over to the hood of a police vehicle to conduct a field test of the substance. Several officers' videos also captured the officers conducting a field test and the primary officer handing the drugs to his partner, who put the drugs in the primary officer's vehicle to be taken to the police department, packaged, and sent to DFS. Later, a DFS forensic scientist confirmed that DFS received the drugs in a sealed condition.

At trial, the female backup officer who searched the defendant did not testify. Instead, the Commonwealth introduced her body-worn camera footage. The date and time stamp on the video was inaccurate but the primary officer confirmed the actual time of the stop. The primary officer also testified about how the body-worn cameras work generally, how the videos are created, and that they were uploaded automatically when an officer places his or her camera on its charger at the end of each day. The primary officer testified that he was present at the scene and that the body-worn camera footage accurately depicted the events that took place the night of the traffic stop. He identified the defendant and the other officers and explained that he assisted in placing the drugs found in an evidence bag.

At trial, the two officers gave inconsistent and vague testimony about who collected the drugs, who packaged them on scene, and who sent the drugs to the lab. For example, while the primary officer incorrectly testified that he was the one who took the evidence and checked it into property, the body camera footage revealed that it was the officer's partner who did that. However, the officer's partner testified that he did not remember who packaged the drugs; the partner explained that when he and the primary officer returned to the police department, either officer, or both officers together, would have processed the evidence. He affirmed that neither officer tampered with the evidence.

The defendant objected to the admission of the body-worn camera footage, arguing that it violated the Confrontation Clause, contending that the female backup officer's actions, recorded in the video, qualify as hearsay because they were intended as assertions, and the video itself was a testimonial assertion, given an officer's "unique" ability to control and manipulate a body camera.

The defendant also argued that the video was not properly authenticated under Virginia Rule of Evidence 2:901. She argued that the officer did not create the video, and therefore could not authenticate it. The defendant also objected that each officer who testified did not observe the entirety of the events depicted on the video, including, most importantly, the search itself. Lastly, the defendant complained that the date and time stamp on the video did not match the officers' testimony about when the video was recorded, and therefore the video did not comport with the officers' personal observations on the scene.

The trial court overruled the objections and admitted the body-worn camera video. The Commonwealth "muted" the backup officer's video so that only the video played, without any dialogue.

The defendant also objected to the certificate of analysis, contending that argues that the first "vital link" in the chain of custody of the drugs was not properly established due to insufficient evidence of the initial collection of the evidence. The trial court overruled the objection and admitted the certificate of analysis.

The trial court deferred a finding of guilt pursuant to § 18.2-251. However, after the defendant violated the conditions of her first-time offender disposition, the trial court found her guilty of drug possession.

Held: Affirmed.

Regarding the defendant's Confrontation Clause argument, the Court first repeated that camera video itself does not implicate the Confrontation Clause. Instead, the Court explained, the Confrontation Clause will only be implicated by conduct or actions depicted within the video. In this case, the Court concluded that the video did not depict any conduct by the officers intended to be an assertion. Instead, the Court observed, it merely depicted the occurrence of a search.

In a footnote, the Court noted that was not foreclosing the possibility that in certain cases involving body-worn camera footage, where the video evidence is shown to have been so overwhelmingly manipulated, edited, and controlled by the officer that it is inherently unreliable, such evidence may be inadmissible under the principles of Rule 2:901.

Regarding authentication of the video, the Court repeated the general rule that the content of the video is admissible either to illustrate a witness' testimony or to serve as an "independent silent witness" of matters depicted in the video. The Court emphasized that a proponent need only satisfy one of the two avenues to properly authenticate a video or photograph. In this case, the Court found that the officers' testimony was sufficient to satisfy the authentication requirements contained in Rule 2:901, to illustrate the officers' testimony. The Court affirmed that the trial court was entitled to find that the video was continuous, as indicated by the lack of gaps in the time stamps and the passage of time. The Court concluded that these factors, coupled with testimony confirming the accuracy of portions of the events depicted in the video, were enough to also find that the Commonwealth had satisfied the authentication requirements contained in Rule 2:901, for admission as a silent witness.

The Court made clear that a witness does not have to personally create a video or photograph to properly authenticate it. In addition, the Court found nothing to suggest that a witness must personally observe every detail of a proffered video to authenticate it. In this case, the Court found that the portions of the video that the primary officer could verify as accurate and representative of the events during the evening of the traffic stop served to establish the authenticity of the entire recording. The Court explained that whether a witness observed enough of the scene depicted on a video to properly authenticate it under Rule 2:901 is a determination within the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion.

Regarding the certificate of analysis, the Court agreed that the footage from the female backup officer's body-worn camera was necessary for the Commonwealth to properly establish, with reasonable certainty, that the narcotics were in the same condition when analyzed as they were when taken from the defendant. However, the Court found that the backup officer's testimony was not necessary for the Commonwealth to introduce the video footage of her body-worn camera. Further, the Court explained that her footage spoke for itself, as a silent witness, in proving the first vital link in the chain of custody of the narcotics found.

Regarding the inconsistencies in the officers' testimony about who handled the drugs and when, the Court ruled that any issues involving the chain of custody went to the weight of the evidence, and those fact questions were properly submitted to the finder of fact.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0073233.pdf>

Virginia Court of Appeals -
Unpublished

Hamlin v. Commonwealth: May 14, 2024

Dinwiddie: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Fourth Amendment and Chain of Custody grounds.

Facts: The defendant, a convicted felon, possessed fentanyl, cocaine, heroin, and methamphetamine in his vehicle for distribution along with several firearms. Police received two calls about a vehicle traveling the wrong direction on a highway and a third call that the vehicle had stopped in the middle of the highway. Around midnight, an officer approached the stopped vehicle after discovering it in the middle of the highway on top of the center dotted line with its brake lights on. When the officer first approached the vehicle, the defendant was not alert despite the officer shining his flashlight inside. The vehicle started rolling when the officer roused the defendant by repeatedly knocked on the driver's side window.

The officer told the defendant to put his vehicle in park and to step out of the car. After multiple instructions from the officer, the defendant complied. An unfired round of ammunition fell from the defendant when he moved to the rear of the vehicle with the officer. The defendant did not have any

identification. Dispatch reported back by radio that the defendant was not licensed to drive and warned the officer to use caution. The defendant told the officer that he was a felon.

Another officer, from the roadway, looked through the open driver's side window of the vehicle and observed firearms. There was an AR-15 rifle standing straight up in the passenger side seat with a double drum magazine as well as a handgun with an extended magazine laying on the driver's side floorboard. In front of the defendant, the officer radioed dispatch to confirm the defendant's felon status. Without being asked, the defendant said, "I got felonies." Dispatch then reported that the defendant had been convicted of numerous felonies.

Officers searched the vehicle and recovered six bags of suspected narcotics, the AR-15 rifle, two handguns containing ammunition magazines with ammunition inside, and seven additional boxes of ammunition from inside the car.

The defendant moved to suppress, arguing that there was no probable cause for the search and that the officers only knew he was a felon because of information they gained when he was questioned while being detained without the benefit of *Miranda* warnings. The trial court denied the motion.

Prior to trial, pursuant to and in compliance with § 19.2-187, the Commonwealth provided written notice that it intended to use a certificate of analysis showing that the laboratory had tested various substances and determined them to contain fentanyl, cocaine, heroin, and methamphetamine. The defendant did not file an objection as required by the statute.

At trial, the arresting officer testified that he sealed, initialed, and locked the evidence in a secure facility. He then testified that someone from the sheriff's office was responsible for transporting that evidence to the laboratory, and that the certificate of analysis described sealed envelopes containing evidence exactly like that which the officer collected. The person who transported the drugs to the lab did not testify.

The defendant objected to the certificate of analysis on the ground that the Commonwealth did not establish the chain of custody for the drug evidence. He argued that there was no evidence about where those substances were in the days between collection and testing. The defendant stated that he was challenging only how the drugs were transported to the lab. The trial court overruled the defendant's objection.

Held: Affirmed.

Regarding the motion to suppress, the Court agreed with the trial court that the police had probable cause to search the vehicle. The Court agreed that the firearms that the officers saw, coupled with their knowledge that the defendant was a felon, gave the police probable cause to search the vehicle, even independent of the bullet that fell from the defendant's person.

Regarding the defendant's *Miranda* argument, the Court found that binding case law foreclosed the defendant's argument that the physical evidence obtained from the car was "the fruit of the poisonous tree" because the search stemmed from the defendant's unwarned admission that he had a felony conviction. The Court cited the US Supreme Court's *Patane* ruling that the Self-Incrimination Clause is not implicated by the admission into evidence of the physical fruit of a voluntary statement, even if that statement is obtained through custodial interrogation conducted without *Miranda* warnings. Accordingly, the Court explained, even if it agreed that the defendant was in custody at the

time he admitted to having a felony conviction, the physical evidence obtained from the vehicle cannot be the fruit of the poisonous tree.

Lastly, regarding chain of custody, the Court agreed that the Commonwealth met its burden of proof. The Court acknowledged that the Commonwealth did not establish exactly who transported the evidence from the evidence lockup to the laboratory for testing. The Court ruled that the officer's testimony was enough to establish with reasonable certainty that the laboratory tested the same evidence that the officer collected.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0441232.pdf>

Ward v. Commonwealth: April 8, 2024

Washington: Defendant appeals his conviction for Drug Distribution on Speedy Trial and Chain of Custody issues.

Facts: The defendant twice sold cocaine to a police informant. The defendant was arrested in February 2021, on both counts. The defendant was held in jail continuously until the trial in August 2022. The initial trial date was in May 2021, but the defendant requested a continuance where he agreed to waive his statutory and constitutional rights to a speedy trial. Trial was then set to August 2021, but just before trial the defendant again requested a continuance to request a jury trial; the defendant again waived his statutory and constitutional speedy trial rights. The trial was set for December 2021, but just before trial, the trial court granted defense counsel's motion to withdraw, and new counsel was appointed.

The trial court set a new trial date in January 2022. The defendant objected to the continuance, but the trial court ordered it to give new counsel adequate time to prepare for trial. The trial court also issued an order that speedy trial shall be held in abeyance pursuant to the Supreme Court of Virginia's Order of Judicial Emergency in Response to the COVID-19 Emergency. Just prior to the January trial, the court learned that a court in a neighboring jurisdiction had ordered the defendant to complete a psychological evaluation. Based on the competency evaluation, the Commonwealth moved for, and the trial court granted, a continuance request, over the defendant's objection. After the defendant failed to comply with the competency evaluation in the other jurisdiction, the trial court continued the matter for a jury trial in May 2022.

However, before the May trial date, defense counsel filed another motion to withdraw. The trial court granted the motion and assigned new counsel. The parties then jointly moved to continue the matter until June 2022, due to defense counsel's recent appointment and due to counsel's unexpected medical issues. In June 2022, the parties jointly moved again to continue the case because the Commonwealth's expert witness from the Department of Forensic Science was unavailable and because defense counsel had surgery scheduled. The trial was set for August 2022 and the order specified that the "time period shall not count against the Commonwealth for purposes of speedy trial computation," citing § 19.2-43(4).

Before trial, the defendant filed a motion to dismiss alleging a violation of his statutory right to a speedy trial. The trial court denied the motion.

At trial, the evidence technician that submitted the cocaine to the lab did not testify during the trial. Instead, the investigating officer testified that after each controlled purchase, he packaged and submitted the substance to the evidence locker for transport to DFS. Then, a different evidence custodian testified about procedures that the department followed when receiving evidence and submitting it for analysis. Using business records, the then-current evidence custodian testified that no one accessed the evidence, besides the investigating officer, transport office, and the lab.

The DFS forensic analyst then testified that DFS received the evidence in sealed bags. Using records and logs from the lab, he testified when the items were received, how they were stored, and what identifying numbers they bore. He testified that what he received and tested were what were described on the request for analysis prepared by the investigating officer.

The defendant objected to the admission of the certificates of analysis, arguing that the transport officer was an essential link in the chain of evidence. The trial court overruled the objection and admitted the certificates.

Held: Affirmed.

Regarding statutory speedy trial, the Court first examined each continuance and ruled that the trial court did not violate the defendant's statutory speedy trial rights. For example, the Court ruled that the continuance due to the defendant's failure to comply with a competency evaluation was imputed to him, not the Commonwealth, explaining that "a defendant may not invoke speedy trial protections where his conduct caused the delay."

Regarding the certificates of analysis, the Court found that, given the witness testimony, the trial court did not need to hear from "every witness who physically handled the samples for the evidence to be admissible." The Court found that the prosecution provided reasonable assurance that the evidence obtained by the police was the same evidence tested.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1664223.pdf>

Kao v. Commonwealth: March 5, 2024

Fairfax: Defendant appeals his conviction for Violation of a Protective Order on Admission of Prior Bad Acts and Chain of Custody grounds.

Facts: The defendant, while a protective order was in place ordering him to stay away from the victim business, visited the victim business and threatened to set the building on fire. Years before, the defendant had briefly been an employee at the company. Following his resignation, the defendant spent several years contacting employees; his contact often scared them. On one instance, he brought a loaded gun to the business, frightening employees.

The company obtained a two-year protective order prohibiting the defendant from contacting its employees and requiring him to stay at least one mile away from the business. Despite the protective order, the defendant returned to the business with a can of gasoline and a lighter.

The next year, the defendant again brought a lighter with him and doused himself with gasoline directly in front of the entrance to the company. Security notified police, who responded. Officers observed the defendant actively trying to light himself on fire when they arrived. The officers restrained the defendant and took him into custody.

Prior to trial, the Commonwealth notified the trial court that it intended to introduce evidence of the defendant's prior bad acts. The Commonwealth noted that the defendant had an "M.O. of dousing himself in gasoline on or near the property." The defendant objected, but the trial court overruled his objection.

During the trial, the Commonwealth also sought to introduce the gas can that police found next to the defendant's car on the previous incident. The defendant objected, arguing that the Commonwealth had not laid a proper foundation because it had not established a chain of custody. Initially, the trial court agreed. The Commonwealth asked the witness more questions to establish that he observed the gas can, took the gas can into custody, and the gas can in the courtroom was the same gas can the witness observed by the car. Then Commonwealth then sought to introduce the gas can. The defendant conducted a voir dire establishing that the witness did not seal the gas can in the box and the witness had not seen the gas can for 11 months. The defendant objected arguing that the Commonwealth still had not properly established chain of custody. The trial court overruled the objection.

Held: Affirmed. The Court ruled that the trial court did not commit reversible error by admitting evidence of the defendant's prior bad acts or by admitting the gas can recovered next to his car.

Regarding the defendant's prior bad act, the Court noted that to prove threat to burn, the Commonwealth had to prove that the defendant's conduct constituted a threat to burn the company's property in violation of § 18.2-83. In this case, the Court agreed that the defendant's prior actions were relevant to the attempted arson charge because it tended to prove whether he intended to set the business on fire, as opposed to only himself. The Court also found that it was relevant to the threat to burn charge because it was relevant to the context and whether his conduct was a "threat" to the company and its employees. Moreover, the Court observed, the probative value of the defendant's prior bad acts was greater than the incidental prejudice to him.

Regarding chain of custody, the Court observed that the officer identified the gas can as the same gas can he collected at the scene. The Court explained that such testimony was sufficient to "afford reasonable assurance" that it was the same gas can that the officer collected and that it was in the same condition at trial as when the officer collected it.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0310234.pdf>

Spinner v. Commonwealth: August 15, 2023

Lynchburg: Defendant appeals his convictions for Involuntary Vehicular Manslaughter, Hit and Run, and DUI on Admission of Witness Testimony, Video Evidence, a Certificate of Analysis, and HGN testimony.

Facts: The defendant drove while intoxicated and struck and killed a woman who was crossing the street. The video recording of the crash reflects that the car did not slow down after impact with the victim, nor did it stop at the scene. Instead of stopping immediately, the defendant circled the block, parked the car a block away, smoked a cigarette, and then returned to the collision scene on foot.

Despite the obvious damage to the driver's windshield, headlamp, and side mirror, the defendant first lied and told the responding officer that someone else hit the victim. On further questioning, he admitted to having hit the victim, but claimed that he did not stop sooner because he did not know he had hit someone. He also testified at trial that he knew he hit "something" but did not realize at the time "it was a person."

The defendant told the investigating officer that he had consumed alcohol in the early morning hours but none since he fell asleep at 5:00 a.m. that morning. The defendant failed FSTs, and the officer arrested the defendant. The officer first conducted a breath test, and then obtained a search warrant for the defendant's blood.

One of the field sobriety tests that the officer administered was an HGN test. At trial, the officer testified that bodies are affected by alcohol consumption. Specifically, he testified that with a nystagmus field sobriety test, he looked for involuntary eye movement that can be present due to alcohol consumption. The defendant objected to this testimony, arguing that only a medical expert could testify about the effects of alcohol on the body. The trial court overruled the objection and allowed the testimony. The officer described how he conducted the nystagmus test and explained it was the "standard way that the test is administered." He stated that he noticed a mild "nystagmus and jerking motion of the eye" during the test.

During the breath test, the officer forgot to inform the defendant of his right to observe the breath test process, the blood alcohol reading it produced, and the equipment used to perform the breath test, even though he attested on the certificate that he had in fact done so. However, the defendant was physically present during that entire process until the end of the process when the test results printed out on the printer of the machine. The officer observed the defendant for twenty minutes before conducting the breath test to ensure that the defendant did not burp or belch before the test, which would affect the test's accuracy. The defendant was present through the entire procedure and was provided with a copy of the printout of the results. The officer also allowed the defendant to observe the test results and gave him a copy of those results.

At trial, the officer testified about his qualifications, the process, and the equipment he used for the test. He explained that he was a licensed breath test operator and used equipment approved by the Department of Forensic Science. The defendant objected to the admission of the certificate based on the officer's failure to inform the defendant of his rights to observe, but the trial court overruled the objection and admitted the breath certificate.

At trial, DFS toxicologist Trista Wright testified. She had analyzed the defendant's blood specimen and found a BAC of .038%. Dr. Wright also explained that she could calculate what the defendant's BAC was at the time of the crash through a "retrograde extrapolation," an analysis that

determines an individual's BAC at an earlier time based on specific information. To determine the appellant's BAC using this method, Wright needed to know when he last consumed alcohol and that no alcohol was consumed after the accident. Over the defendant's objection, Wright opined, based on the breath test certificate, the blood analysis result, and the information about the defendant's last drink of alcohol, that the defendant's BAC was between .08 to .13% by weight by volume at the approximate time of the crash.

The defendant argued that Dr. Wright's retrograde extrapolation testimony was inadmissible under Rule 2:702(b), which provides that speculative testimony is not admissible. He suggested that the extrapolation was based on the unproven assumption that he did not consume alcohol after the accident. The trial court overruled his objection.

At trial, the defendant's cousin testified. The defendant objected because the cousin had not been on the Commonwealth's witness list and instead the Commonwealth only disclosed his name and identity two days before trial, rather than 21 days before trial as ordered. According to the prosecutor, she was unable to contact the cousin until two days before trial. She argued that there was "no surprise" because the defendant had originally subpoenaed the cousin as his own witness. The court allowed the testimony over the defendant's objection.

At trial, the Commonwealth also introduced a surveillance video from a nearby store. The store owner testified that she had video surveillance cameras at her store. Her son programmed the surveillance system, which included a date and time stamp synchronized to the internet clock. She noted that she and her son were the only ones with access to the video recordings. Following the incident, the owner saved the parking lot video from the relevant time to a DVD and provided it to the police. The surveillance system allowed the owner to download segments of the video but not to edit the recordings.

The defendant objected that the video was inadmissible under the "silent-witness theory" because the witness was unable to testify as to "the process by which the video was made." The trial court overruled his objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the cousin's testimony, the surveillance video, Dr. Wright's expert testimony on retrograde extrapolation, or the officer's HGN testimony, and it agreed that the evidence supported the findings that the defendant had knowledge someone was injured as a result of the crash and that he failed to stop immediately as required by statute.

The Court first addressed the admission of the cousin's testimony, despite the pretrial order. The Court rejected the defendant's contention that the lack of notice deprived him of the "opportunity to research, vet, and discuss with" with witness what he knew and why the Commonwealth called him as a witness, finding that his claim of alleged prejudice was both general and speculative. The Court complained that the defendant did not specify any portion of the cousin's testimony that surprised him, nor did he explain how an earlier disclosure would have benefited his defense or altered the course of the trial.

Regarding the video, the Court ruled that the owner's testimony provided the trial court with a sufficient basis to find that the video was what the Commonwealth claimed it to be: an accurate recording of the traffic accident that occurred outside her convenience store on the date of the crash.

The fact that the owner did not have formal training on the computer recording system and was unaware precisely how the software worked did not change the Court's analysis.

Regarding the breath certificate, the Court ruled that the officer substantially complied with § 18.2-268.9 when he administered the breath test. The Court noted that the officer conducted everything in the defendant's presence and provided him with a copy of the results. The Court concluded that the officer's failure to specifically tell the defendant that he could watch the test and see the equipment did not render the certificate of analysis inadmissible. Instead, the procedural deficiency went to the weight of the evidence rather than its admissibility.

Regarding Dr. Wright's testimony, the Court found that under the evidence, a reasonable jurist could conclude that the defendant did not have any alcohol after the crash and before the BAC testing. Consequently, the Court ruled that Dr. Wright's testimony on retrograde extrapolation of the BAC at the time of the collision was based on facts in evidence.

Regarding the officer's HGN testimony, the Court ruled that the officer was not offering a medical opinion. Instead, the Court noted that he simply explained how he conducted the nystagmus field sobriety test and that his execution of the test comported with the standard for test administration. Hertzog described the involuntary eye motion he looked for when conducting the test and noted that such motion can be present if the subject has consumed alcohol. Because this testimony was not a medical opinion, the Court ruled that the defendant's argument necessarily failed. The Court explained that, once the threshold for admissibility of the testimony was met, it was up to the jury to determine what weight to give it and the trial court did not abuse its discretion in permitting the testimony.

Lastly, regarding sufficiency, the Court agreed that the evidence was sufficient that the defendant, after striking a pedestrian, did not immediately stop as close to the scene of the accident as possible to do safely.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0725223.pdf>

Allen v. Commonwealth: August 15, 2023

Pittsylvania: Defendant appeals his conviction for Felony DUI on Fourth Amendment grounds, Implied Consent, and Admission of the Certificate of Analysis.

Facts: The defendant drove while intoxicated, with several prior convictions for that offense, passing out in a stranger's driveway. The defendant left his vehicle running, left the radio on, and blocked the driveway. The residents summoned the police, who noted that the defendant's vehicle was registered to a different vehicle that was registered to a different address. After several loud attempts to awaken the defendant, officers finally woke the defendant up after significant effort. The defendant was disoriented, claimed that he was in his family's driveway, smelled of alcohol, had glassy eyes, and spoke with slurred speech.

The officer asked him for identification and inquired whether he had any “weapons” or “anything like that” in his pockets. The defendant said that he did not. The officer asked for and retrieved the defendant’s wallet from his pants pocket. While removing the wallet, the officer saw a syringe in the pocket. The defendant removed the syringe, which contained an unknown liquid.

The defendant’s explanation for his possession of the syringe evolved. He first denied any knowledge of it, then claimed he was a “borderline” diabetic, and finally admitted that he did not have a prescription for any medications or “needles.” The officer searched the same pocket where he found the syringe and discovered a folded piece of paper. It contained a tan powder that he suspected was an illegal drug. When the officer asked the defendant when he had last used drugs, the defendant replied that “this [was] the first time” he had “used” in years.

After discovering the suspected drugs, the officers searched the car and found two cold beer cans. The defendant admitted that he had consumed alcohol before driving. The officer then performed the horizontal gaze nystagmus (HGN) test and found that his eyes were “really jumping” on all six parts of the test, indicating intoxication. The officer arrested the defendant. The officer obtained a search warrant for the defendant’s blood. At the hospital, a nurse drew the defendant’s blood using the DFS blood test kit that the officer provided to her. DFS determined his BAC to be .185.

The defendant moved to suppress, but the trial court denied the motion. At trial, the court rejected the defendant’s argument that, because his car was on private property, he was not required to submit to a blood test and forcing him to do so, without advising him of Virginia’s implied consent law, required exclusion of the test result, despite the fact that the police had a warrant.

At trial, the trial court admitted evidence of the blood test result over the defendant’s chain-of-custody objection. The officer’s body camera and his testimony showed that the nurse who drew the defendant’s blood used the white DFS test kit that the officers provided. The nurse also completed a certificate of blood withdrawal for alcohol determination and attached the certificate to the vial as required by § 18.2-268.6. From the officers’ body-worn camera footage and the notations on that blood withdrawal form, the trial court found that the blood was taken by “Lori A. Crouch RN,” a registered nurse and therefore an authorized person under § 18.2-268.5. Then, when the blood was tested at the DFS laboratory, the certificate of blood withdrawal was affixed to the certificate of analysis produced by the lab, as directed by § 18.2-268.7(A).

The officers’ body-worn camera footage also indicated that the nurse used “Betadine” on the defendant’s arm. Betadine is a brand name for povidone-iodine, a “topical anti-infective,” which is one of the cleaning solutions specifically authorized for use by § 18.2-268.5. The defendant argued that the blood draw procedure was deficient because the evidence did not “meet the authentication requirement as to [the] qualifications” of the person who drew his blood “and how she did the draw,” but the trial court rejected his arguments.

Regarding the DFS lab certificate, Mika Smith, a DFS employee at the time she signed the certificate’s attestation clause as the examiner, testified at trial. Smith provided a detailed explanation of how evidence was received in and processed by the DFS lab where the blood sample was tested. She explained that the toxicology section “work[ed] kind of like . . . an assembly line” and that “different people c[ould] do different analyses.” Smith further testified that only eight or nine people worked in that section. Any of them could have performed the test, and all of them had “undergo[ne] a rigorous training program,” including competency and proficiency testing.

Smith additionally confirmed that no one else would have had access to the blood or the test results. Specifically, Smith explained that her job as the signer of the certificate was to look at all the data “with the [specific] case” and “generate” the certificate “based [on] that data.” Although Smith did not know whether she personally tested the blood, she was the official “examiner” for this case. Smith explained that she could have been the person who performed the blood alcohol test but that she could not be certain because she no longer had access to the file containing that information. She examined the data produced as a result of the laboratory’s analysis and “ma[d]e sure all of the data ma[d]e sense” and “passe[d] all of [DFS’s] quality control criteria.”

The defendant contested the proof of the chain of custody at the DFS lab due to “doubts” about who analyzed the blood. He noted that the examiner who testified at trial “did not bring [the] file since she was no longer working for the lab,” and he suggested that without the file, the certificate of analysis was “useless.” He argued that the certificate and any derivative evidence must be excluded. Based on Smith’s testimony, the trial court admitted the certificate over the defendant’s objection.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress or admitting the certificate of blood alcohol analysis over the defendant’s chain-of-custody objections.

The Court first examined the officer’s initial interaction with the defendant, which the Court ruled provided the officers with reasonable suspicion, at the very least, to investigate further to determine whether the defendant was committing a variety of offenses, including trespassing, a vehicle licensing violation, and a DUI offense. The Court then ruled that, based on the discovery of the syringe and tan powder, as well as the defendant’s admissions, the officers had probable cause to arrest him for illegal drug possession. The Court found that the probable cause to arrest provided the officers with justification to search the car for additional evidence of that crime, during which they discovered two cold cans of beer, evidence of a DUI offense. The Court also ruled that the same probable cause that supported the arrest for driving under the influence of alcohol also supported the issuance of the search warrant to draw and test the defendant’s blood.

The Court also found that the results from the horizontal gaze nystagmus test supplied additional evidence of intoxication. The Court concluded that these facts, as well as the officers’ observations that he smelled of alcohol, had “glossy” eyes, and was either passed out or asleep and disoriented upon waking, provided probable cause to arrest him for driving while intoxicated.

Regarding the defendant’s Implied Consent argument, the Court found that nothing in Virginia’s implied consent statute states or even suggests that law enforcement may obtain a breath or blood sample from an individual only by means of that statute and no other statute or authorizing legal principle. Instead, the Court pointed out, since 2017, § 18.2-269(A) has expressly recognized the admissibility of test results from blood drawn pursuant to a search warrant in certain DUI prosecutions.

The Court explained that implied consent statute does not supplant the ability of an officer to obtain a search warrant for a defendant’s blood or breath in circumstances not covered by implied consent, such as when an individual has been detained for his behavior on private property rather than a public highway. Therefore, the Court ruled that the alleged failure to advise the defendant of implied consent principles when his blood was obtained pursuant to a valid warrant did not render the court’s ruling on the motion to suppress erroneous.

Regarding the certificate of analysis itself, the Court found that the record contained sufficient evidence to support the trial court's factual finding that the person who drew the defendant's blood was a registered nurse, who met the statutory qualification requirement under § 18.2-268.5. The Court agreed that the trial court properly found that the Commonwealth substantially complied with the statutory scheme, and the certificate was properly admitted.

The Court then held that the challenged certificate of analysis was properly admitted under substantial compliance over the defendant's chain-of-custody objection. The Court noted that, although the defendant highlighted the absence of evidence regarding who actually performed the BAC analysis, he did not request a continuance to obtain the laboratory's records or articulate any specific claim of prejudice. The Court held that under these circumstances, the certificate was admissible, and it was up to the trier of fact to determine what weight to give it.

In a footnote, the Court noted that the defendant did not argue that the Confrontation Clause or any constitutional or statutory principle other than those in §§ 18.2-268.5 and -268.11 supported his contention, so the Court did not address those issues.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1247223.pdf>

Lopez-Ramirez v. Commonwealth; August 1, 2023

Chesterfield: Defendant appeals his convictions for Possession with Intent to Distribute, Possession of a Firearm, and Concealed Weapon on Admission of the Certificate of Analysis and Refusal to Apply the Exception for Carrying a Concealed Handgun.

Facts: An officer stopped the defendant, who was carrying a concealed handgun and drugs intended for sale, for a traffic violation. The defendant drove for a mile and a half before stopping. When the officer asked the defendant to exit the vehicle, his passenger ran away. The officer patted the defendant down and discovered the barrel to a firearm in the defendant's pocket, contained in a plastic bag. The officer then searched the vehicle and found the rest of the firearm underneath the driver's seat, along with another firearm, drugs, and paraphernalia, including a digital scale with drug residue.

The officer collected the evidence from the vehicle and handed it to a backup officer. Although the officer did not observe the backup officer package the evidence, the property storage report stated that the backup officer was the one who relinquished the items to the property section on the same day. The evidence was secured in a police locker and could only be accessed thereafter by officers assigned to the property division.

Later, a property and evidence unit technician retrieved the evidence from a secured locker and transported them to DFS. When she reviewed the certificate of analysis during trial, the technician confirmed that the items listed on the certificate were the same items she delivered to the lab for testing. The lab's description of the evidence was consistent with the officer's description of the evidence seized from the vehicle.

At trial, the investigating officer and the technician testified, but the backup officer who packaged and delivered the evidence did not testify. The defendant argued that the evidence failed to prove the chain because no testimony established “how the evidence was initially packaged, who actually packaged the evidence, or who transported the property to evidence.” The trial court overruled the objection and admitted the certificate of analysis.

In his defense, the defendant asked the trial court to apply the “carve out exception for concealed weapons secured within containers” referenced in § 18.2-308, but the trial court refused.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in admitting the certificate of analysis into evidence and that it did not err in refusing to apply the container exception to § 18.2-308.

Regarding the certificate of analysis, the Court found that the evidence provided reasonable assurances that the items collected from the defendant’s vehicle were the same items sent to DFS. The Court noted that the officer’s description of the evidence collected at the scene was the same description as the evidence that was submitted to the lab. The Court repeated that a trial court need not hear from every witness who physically handled the samples for the certificate to be admissible. Instead, the Commonwealth need only provide “reasonable assurance” that the evidence obtained by the police was the same evidence tested.

In this case, although the backup officer did not testify, the Court concluded that the circumstantial evidence provided reasonable assurances that the items collected by the investigating officer were the same items transported to DFS. The Court pointed out that there was no evidence that the items were tampered with before their analysis and no evidence to call into question the presumption that the evidence was properly handled. Accordingly, the Court ruled that the Commonwealth established every vital link in the chain of possession, thereby demonstrating with reasonable certainty that the evidence was not altered, substituted, or contaminated. Therefore, the trial court did not abuse its discretion in admitting the certificate of analysis.

Regarding the defendant’s appeal to the exception to the Concealed Handgun statute for handguns stored in containers in a vehicle, the Court distinguished this case from *Myers*, noting that in this case, the cylinder of the handgun was located on the defendant’s person inside a plastic bag. The Court noted that there was no evidence that the cylinder was “secured,” because there was no evidence that the cylinder was “latched or otherwise fastened” inside the plastic bag; the cylinder was merely “wrapped up in a plastic bag” and partially sticking out of the defendant’s pocket. The Court also pointed out that there was no evidence that the remaining part of the gun, which was under the driver’s seat and within arm’s reach of the defendant, was secured in any way contemplated by the statute. Because the handgun was not entirely secured inside a container or compartment inside the defendant’s vehicle, the Court ruled that the statutory exception in § 18.2-308 did not apply.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0839222.pdf>

Reynolds v. Commonwealth: July 18, 2023

Henry: Defendant appeals his convictions for Distribution, 3rd Offense, on Admission of the Certificate of Analysis.

Facts: On two separate occasions, police monitored controlled purchases of cocaine from the defendant conducted by two paid criminal informants. Officers thoroughly searched the informants before and after each drug transaction and confirmed that neither informant had withheld any cash or narcotics. They also searched the informants' vehicle before and after each drug deal and verified that it did not contain drugs. Officers then followed them to and from the controlled buy and ensured that the informants did not deviate from their mission.

In each case, the informants carried video and audio recording devices. The video recorded the defendant holding and packaging the cocaine he sold to the informant. However, the video was "blacked out" for portions of the transactions.

At trial, the defendant asserted that chain of custody was not established because the informant's testimony that he did not alter the drugs he purchased from the defendant was inherently incredible due to the informant's criminal history, motive to fabricate the allegations, and inconsistencies in his account. The trial court overruled his objection and admitted the certificates of analysis.

Held: Affirmed. The Court ruled that the evidence presented by the Commonwealth was sufficient to lay a foundation of admissibility and the trial court properly rejected the defendant's "speculative attack" on the chain of custody.

The Court repeated that, as to chain of custody, the party offering the evidence must show with reasonable certainty that there has been no alteration or substitution of the evidence, but the burden is not absolute that "all possibility of tampering" be eliminated. The Court criticized the defendant's argument that there was a possibility of tampering because there was a time when the informant was monitored by law enforcement via audio, rather than video, as "mere speculation."

In this case, the Court reviewed the evidence and noted the thorough steps taken by investigators to search both informants before and after each purchase as well as the steps taken to monitor them as they travelled to and from the controlled buys.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0508223.pdf>

Cross-Examination and Impeachment

Virginia Court of Appeals - Published

Welsh v. Commonwealth: August 15, 2023

78 Va. App. 287, 890 S.E.2d 845 (2023)

Loudoun: Defendant appeals his convictions for Murder, Use of a Firearm, and related charges on Admission of Expert Testimony, Limitation of Cross-Examination, and Speedy Trial grounds.

Facts: The defendant murdered a man and the man's mother in their home, shooting them both in the head repeatedly. During a forensic examination, Cara McCarthy of DFS was able to determine with "a very high level of certainty" that the defendant's handgun was the firearm that was used to kill the victims.

Prior to trial, the defendant moved to exclude McCarthy's testimony at a pretrial hearing and argued that her methodology was not sound. At a pretrial hearing, the defendant questioned McCarthy on two studies, the National Academy of Forensic Science Report ("NAS report") and the President's Council of Advisors on Science and Technology Report ("PCAST report"). McCarthy critiqued both reports and specifically stated that "numerous organizations and agencies have discredited the PCAST report on the grounds that they have statistical errors in their report." Ultimately, the trial court denied the defendant's motion to exclude McCarthy's expert testimony.

At trial, the defendant again attempted to question McCarthy on the NAS report and the PCAST report that she critiqued at the pretrial hearing, but the trial judge prevented this line of questioning because McCarthy "does not recognize the PCAST report or the NAS." Outside the presence of the jury, the defendant asked McCarthy about both reports, and she stated the studies were not standard authorities in the field of firearm and toolmark identification. McCarthy specifically stated that the PCAST report was rejected by the Department of Justice, AFTE, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").

After sentencing, the defendant moved to dismiss the proceedings on speedy trial grounds, but the trial court denied the motion.

Held: Affirmed.

Regarding the Commonwealth's expert testimony, the Court repeated that the Supreme Court has long recognized firearm and ballistics testing as a reliable method used by expert witnesses to explain how a particular firearm can leave individualized markings on discarded ammunition shell casings. The Court ruled that the trial court did not err when it prohibited the defendant from cross-examining McCarthy on the NAS report and the PCAST report, given that she never acknowledged either study as a standard authority in her field. The Court applied Virginia Rule of Evidence 2:706(b), and found that, given that the expert rejected both the NAS report and the PCAST report as standard authorities in the field of firearm identification, the trial court properly limited cross-examination under Rule 2:706(b).

Regarding the defendant's speedy trial motion, the Court noted that § 19.2-266.2 requires defendants – absent good cause – to make motions for dismissal of charges for constitutional and statutory speedy trial violations in writing within the later of seven days before trial or as soon as the grounds for the motion arise prior to trial, and Rule 3A:9 dictates that a motion that "raises speedy trial" must be made at least 7 days before the day fixed for trial, or at such time prior to trial as the grounds for the motion or objection shall arise, whichever occurs last." The Court found that the defendant failed to comply with those rules.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0860214.pdf>

Virginia Court of Appeals -
Unpublished

Garten v. Commonwealth: May 21, 2024

Henry: Defendant appeals her conviction for Felony Child Endangerment on Cross-Examination regarding Prior Bad Acts and sufficiency of the evidence.

Facts: The defendant drove recklessly with her child in the vehicle. An off-duty officer saw her driving and followed the defendant. The officer saw that the defendant was “driving all over the road,” swerving and braking, and driving into oncoming traffic. She almost collided with the officer’s truck three or four times and nearly hit the guardrails several times.

A state trooper responded and found the defendant stopped in the middle of the road. After stopping, the defendant continued to behave erratically with the trooper. After the trooper arrested the defendant, she later acted erratically with a CPS employee in jail, refusing to explain her actions or provide basic information about her child.

At trial, the defendant testified in her own defense. The defendant testified that her car malfunctioned, and she attributed her driving behavior and demeanor to feeling “a little bit tired” and to the “harrowing experience” of being followed by the unfamiliar truck. The defendant testified that she “would never intentionally put [her] child in any danger” and she “would never endanger [her children’s] lives.”

During cross-examination, the Commonwealth sought to impeach the defendant with questions about her previous involvement with CPS. The defendant objected and argued that the questions were not relevant because “someone doesn’t have to have done anything to endanger their child to have a run-in with” CPS. The court overruled the objection, finding that the defendant had “put her credibility at issue.” The trial court admitted this evidence only to the extent it would discredit the defendant’s prior statement about never endangering her child’s life. The evidence was not admitted as proof that the defendant acted in conformity on the night of the incident, but instead to rebut her character evidence that she would never endanger her children.

On cross-examination the defendant admitted that CPS had investigated her for “truancy issues” related to her other children. The trial court then reiterated it would only allow “evidence that would discredit” the defendant’s prior statement about never endangering her child’s life and excluded as irrelevant any testimony concerning “truancy or some other menial issues.” At that point, the defendant acknowledged that CPS removed two of her other children because her home was in “poor condition” and that she had tested positive for drugs both at the time of the CPS investigation and approximately one week after the arrest.

The trial court convicted the defendant of reckless driving and of child neglect in violation of § 18.2-371.1(B)(1).

Held: Affirmed. The Court held that the evidence was sufficient to prove felony child endangerment under § 18.2-371.1(B)(1), and that the trial court did not err in allowing the challenged cross-examination.

Regarding the cross-examination, the Court found that the trial court did not abuse its discretion in finding that the defendant put at issue a character trait relevant to the offense and “opened the door” to cross-examination concerning that subject.

Regarding sufficiency, the Court noted that § 18.2-371.1(B)(1) required proof that (1) she committed a “willful act or omission in the care” of a child; and (2) the act or omission was “so gross, wanton, and culpable as to show a reckless disregard for human life.” The Court agreed that an objectively reasonable person would understand that this reckless and dangerous driving behavior would probably result in an injury to her child in the back seat. Although the record did not establish the defendant’s intoxication or impairment, the Court repeated that criminally negligent driving behavior does not require a specific finding of intoxication or impairment. The Court agreed that the totality of her conduct and surrounding circumstances were sufficient to satisfy the “gross, wanton, and culpable” standard of criminal negligence.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0258233.pdf>

Heverin v. Commonwealth: May 14, 2024

Mecklenburg: Defendant appeals his convictions for Attempted Aggravated Murder, Conspiracy to Commit Murder by Mob, and related offenses on Denial of Cross-Examination, Double Jeopardy, Jury Instruction, and sufficiency of the evidence grounds.

Facts: The defendant conspired with a group of individuals to invade a home and steal a collection of guns. The defendant and his coconspirators discussed the plan to burglarize the home and cased the house. On the night of the attempted robbery, they wore dark clothing to conceal themselves to enter the home, took guns to the property, drove to the house, approached the house, and came within 20 feet of the home.

However, a confidential informant had alerted police to the plan. On the night of the attempted robbery, officers hid at the targeted home awaiting the defendant and the three other armed men. When one member of the defendant’s group reached the porch of the house, someone in the group said, “that’s twelve,” a slang term for the police. After the officers yelled “freeze,” someone fired a gun, and the group fled. A shootout ensued between the defendant, his accomplices, and the officers. One of the defendant’s accomplices was killed, and another was injured. None of the officers were injured or killed. The officers subsequently arrested the defendant and the other man at the scene.

The defendant later told another inmate that he had a gun and that he fired it while running to escape in the woods. The defendant said he “shot till his clip was empty.” Afterward, he tried to hide his gloves, mask, and gun.

Prior to trial, the Commonwealth argued during a motions hearing that the defendant should be prohibited from inquiring into or presenting evidence regarding the lack of officer body camera footage from the shootout. The Commonwealth explained that the officers followed policy in turning off their cameras and that the officers were concerned with following appropriate policy and federal law while carrying out a tactical maneuver that included communications based on classified and confidential information.

The defendant unsuccessfully argued that the trial court violated his constitutional rights by limiting his presentation of evidence and cross-examination regarding the lack of body-worn camera recordings from the night of the attempted burglary. He contended that he should have been allowed to present evidence and cross-examine the deputies to challenge their credibility or to establish bias. The trial court granted the Commonwealth’s motion to exclude the evidence.

At trial, over the defendant’s objection, the trial court granted the Commonwealth’s “Concert of Action” jury instruction. The defendant argued that this was error for two reasons: (1) that the jury instruction did not apprise the jury that the Commonwealth must prove the defendant’s specific intent, and (2) the Commonwealth was required to prove that the defendant was a triggerman to secure an attempted aggravated murder conviction.

At trial, among other charges, the trial court found the defendant guilty of six counts of attempted aggravated murder of a law enforcement officer. The defendant unsuccessfully argued that he could not be convicted of attempted aggravated murder as a principal in the second degree because of the “Triggerman” rule. The defendant also unsuccessfully argued that he lacked the required specific intent for each of the six attempted aggravated murder charges, because he did not intend to kill each of the six deputies. Lastly, the defendant unsuccessfully argued that the multiple convictions for attempted aggravated murder violated his constitutional protections against multiple punishments.

Held: Affirmed.

The Court first ruled that the “triggerman rule” does not apply to Attempted Aggravated Murder. The Court found, therefore, that the defendant could be (and was) found guilty as a principal in the second degree based on the concert of action theory of conspiracy, as there was evidence that the defendant’s group fired far more than six shots at the officers. As a result, the Court explained, the Commonwealth did not need to prove that the defendant was individually responsible for each of the six attempted aggravated murders, even though the evidence supported that inference. Instead, through the concert of action theory, the defendant was liable for his coconspirators’ actions as well as his own.

Regarding intent for Attempted Aggravated Murder of an Officer, the Court explained that the intent required is merely that the defendant intended to kill someone, not a particular person. In this case, because the defendant and the coconspirators were engaging in criminal activity, the Court agreed that the jury could also infer that the defendant shot at the officers to interfere with their official duties. The Court reaffirmed that it is “entirely permissible to infer that every person intends the natural and probable consequences of his or her acts.”

Regarding the conviction for Conspiracy to Commit Murder by Mob, the Court found that a reasonable jury could find, based on all this evidence together, that the group had either a spoken or unspoken agreement to commit murder by mob if they received any resistance to their burglary plans.

Regarding the cross-examination about the lack of body camera footage, the Court complained that the defendant did not explain how the proposed evidence would go to the issue of bias of the witness or motive of the witness to fabricate. In this case, the Court noted that the Commonwealth gave an explanation regarding the lack of body camera footage and the defendant failed to offer any evidence refuting that explanation. The Court concluded that the fact that the body camera footage was absent does not, by itself, prove any wrongdoing or bias by the deputies, especially because the Commonwealth argued that the department followed its policies. Thus, the Court ruled that it was neither unconstitutional nor an abuse of discretion for the trial court to exclude evidence of the lack of body camera footage, especially given the unique circumstances of this case.

Regarding the defendant's double jeopardy argument, the Court ruled that because the evidence was sufficient to convict the defendant of all six attempted murder charges, the trial court did not violate the defendant's constitutional protections. The Court explained that there was enough evidence to support the defendant firing his gun six times and thus there were six separate criminal acts by the defendant, all punishable without violating double jeopardy.

Regarding the defendant's jury instruction argument, the Court repeated that "concert of action" is an accepted theory of culpability for attempted murder. In this case, the Court agreed that the Commonwealth put on more than enough evidence to support the theory that the defendant was working with his coconspirators to commit a burglary and in the course of the commission of that crime he and his coconspirators engaged in a shootout with the deputies. Thus, the Court ruled that it was not error for the trial court to give this instruction.

The Court again rejected the defendant's "triggerman" argument. The Court explained that §18.2-18 excludes principals in the second degree to aggravated murder from the rule by stating "principal[s] in the second degree to an aggravated murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree." The Court found that the statute does not exclude principals in the second degree to attempted aggravated murder from being punished as a principal in the first degree.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1239222.pdf>

Palka v. Commonwealth: February 20, 2024

Waynesboro: Defendant appeals his conviction for DUI Manslaughter on Exclusion of Victim's Intoxication and Pretrial Screening of Voir Dire Questions.

Facts: One evening, the victim and a motorcyclist crashed into one another. After the crash, the victim ran into the road to engage the motorcyclist in an argument in the roadway about the crash. The defendant, who was driving while intoxicated, then struck the victim and the motorcyclist with his car

without slowing down or trying to evade the collision. The defendant continued driving and left the scene. The victim died due to her injuries.

Police soon located the defendant, who admitted to drinking approximately 15 minutes prior to the collision. After the defendant failed multiple field sobriety checks, police arrested the defendant driving under the influence of alcohol. His BAC was .20.

Prior to trial, the defendant moved to introduce a certificate of analysis showing that the victim had ethanol (0.082 by volume), amphetamines, tetrahydrocannabinol (“THC”), and THC carboxylic acid in her blood on the night of her death. The defendant’s theory was that the victim’s intoxication was an “intervening cause” because the victim, while intoxicated, ran in front of the defendant’s car without time for him to stop, causing her death independent of any fault by the defendant. The Commonwealth objected arguing that such evidence was irrelevant. The trial court excluded this certificate.

Prior to trial, the defendant objected to the trial court’s order that he submit his voir dire questions for advance review by the trial court. He argued that the 2020 legislative amendments to §19.2-262.01 do not permit the trial court to screen these questions because the statute “gives counsel . . . the right to ask any person or juror directly any relevant question . . . but it does not permit the court to intervene.” The trial court overruled his objection.

Held: Affirmed.

The Court first ruled that the trial court did not abuse its discretion in excluding the certificate of analysis pertaining to the victim. The Court noted that, at trial, the Commonwealth did not dispute that the victim ran into the road shortly before appellant hit her. Thus, the parties informed the jury of the victim’s relevant conduct that formed the crux of the defendant’s defense. The Court concluded that the trial court properly held that why the victim ran into the street—whether due to intoxication or something else—was irrelevant to any jury consideration about the legal effect of her actions. The Court distinguished the *Hubbard*, *Williams*, and *Miller* cases.

The Court then addressed the defendant’s argument that § 8.01-358, which governs voir dire in civil cases, prohibits the trial court from screening counsel’s jury questions before voir dire. The Court ruled that the trial court did not commit reversible error by requiring the parties to submit their voir dire questions before the trial date. The Court examined the statute and concluded that it permits a trial court to prohibit irrelevant questions. The Court ruled that nothing in § 19.2-262.01 requires that opposing counsel only object during voir dire to any potentially problematic questions. The Court complained that the defendant could not articulate why the trial court’s practice of addressing concerns about specific voir dire questions before voir dire impaired his rights more than if the trial court addressed these same concerns during voir dire.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1716223.pdf>

Greene v. Commonwealth: December 28, 2023

Chesterfield: Defendant appeals his convictions for Robbery and Conspiracy on grounds including Speedy Trial, Mistrial, and Retroactivity of the new Robbery statute.

Facts: The defendant and his confederate robbed the victim. During the robbery, they shot and killed the victim. The defendant was charged by direct indictment on August 12, 2020. He was then arrested on October 23, 2020, and he was held without bail. On January 4, 2021, counsel for the defendant and the attorney for the Commonwealth made a joint motion to continue the case for trial to August 23, 2021. On June 25, 2021, the defendant filed a motion to dismiss, alleging that his constitutional and statutory speedy trial rights were violated. The trial court denied the motion.

At trial, the defendant made a motion for a mistrial after the attorney for the Commonwealth questioned the defendant about a potential alibi witness and then commented on the absence of that potential alibi witness during closing arguments. The prosecutor specifically asked, “[S]o based on what you said today, you didn’t think to give the police the name of the person who could exonerate you from this whole incident, correct?” The defendant then acknowledged that he did not tell the police during an interview that he was with his girlfriend on the night of the murder. The attorney for the Commonwealth stated during closing arguments, “For the first time in two and a half years, he’s claimed that he was with his girlfriend. Which, again, by his own admission today, he admits he did not tell Detective Bates. He also doesn’t have her here today. She’s not testified in defense.” The trial court denied the mistrial motion.

At sentencing, the defendant contended that the trial court should have sentenced him under the newly amended version of § 18.2-58 for his robbery conviction. The trial court refused.

Held: Affirmed. The Court held that the defendant’s statutory and constitutional speedy trial rights were not violated because both the defendant and the Commonwealth sought the continuance and agreed to the trial date that resulted in most of the delay leading up to the trial. In addition, given clear precedent from the Supreme Court, the Court ruled that it was entirely proper for the attorney for the Commonwealth to question the defendant about (and to comment on) the defendant’s failure to call his girlfriend as an alibi witness. Finally, the Court ruled that the trial court did not err when it applied the penalty under § 18.2-58 that was in effect at the time that the defendant committed the robbery.

Regarding statutory speedy trial, the Court noted that, given that the mutually agreed-upon continuance tolled the running of the statutory speedy trial clock for all but 73 of the 152 allowable days, the defendant’s statutory speedy trial rights clearly were not violated. Regarding constitutional speedy trial, the Court concluded that, given that the defendant was responsible for most of the delay and given that the defendant had not shown that he suffered any specific prejudice, the constitutional speedy trial factors weighed in favor of the Commonwealth.

Regarding the defendant’s motion for a mistrial, the Court pointed out that the defendant chose to testify in his own defense and, therefore, subjected himself to cross-examination and potential impeachment. The Court agreed that the Commonwealth lawfully impeached the defendant’s testimony by questioning the defendant about his prior inconsistent statement to the police. The Court noted that the Supreme Court has held that a defendant’s failure to call an alibi witness “‘was the legitimate subject of comment by the Commonwealth’s attorney’ and ‘a circumstance to be considered by the

jury.” Consequently, the Court concluded that the attorney for the Commonwealth did not improperly comment during closing argument on the absence of the defendant’s girlfriend from testifying at trial. In addition, given that the absence of the girlfriend at trial was “a circumstance to be considered by the jury,” the attorney for the Commonwealth could also impeach the defendant’s credibility on this point during cross-examination.

Lastly, the Court explained that “§ 18.2-58, like many other newly amended statutes recently analyzed by this Court, simply does not have retroactive effect.” Because Code § 18.2-58 did not have retroactive application and because the defendant committed the robbery offense in 2019, the Court ruled that the trial court did not err when it sentenced the defendant according to the law that was in effect at the time that the relevant offense was committed.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0931222.pdf>

Kincaid v. Commonwealth: December 19, 2023

Albemarle: Defendant appeals his conviction for DUI Maiming on Fourth Amendment, Fifth Amendment *Miranda*, and Cross-Examination grounds.

Facts: The defendant drove while intoxicated and became angry at his girlfriend. The defendant stated “[F]uck you, I’ll kill us both. I’ll drive into a tree and kill us both.” The ensuing crash paralyzed the victim from the neck down. Rescue workers found the defendant in the driver’s seat and the victim in the passenger’s seat.

An officer responded and investigated the crash. He also spoke with the defendant at the hospital, both after the crash and the next day. On both occasions, the defendant admitted to driving the vehicle. During the interviews, the defendant was neither handcuffed nor restrained in any way. Neither his, nor anyone else’s, movements into or out of his exam or hospital room were restricted by law enforcement. While the officer was in uniform, with his badge and weapon displayed, but not drawn, he was the only law enforcement officer at the scene of either questioning.

Both encounters were very brief and consisted of very few questions. No one took the defendant into custody at the conclusion of either interview. The officer ended the first interview when he saw that the defendant was exhibiting pain. At the time, the defendant had a criminal history that included a prior felony, two recent misdemeanor offenses for assault and battery, and one misdemeanor charge for violating a protective order.

The officer obtained a search warrant for the defendant’s medical records. The affidavit contained a detailed description of the single car crash. It identified the driver as the defendant and the passenger as the victim, as related to the officer by emergency personnel on the scene. It described an odor of alcohol coming from the passenger compartment of the vehicle and the observation of containers of alcohol within the vehicle. Finally, the affidavit contained a description of the defendant not long following the crash as having glassy and bloodshot eyes. Using the records, the officer learned that the defendant’s BAC was .15.

The defendant moved to suppress both his statements to the officer and the results of the search warrant. Regarding his statements to the officer, the defendant argued that he had been in custody for purposes of *Miranda* and that he had been administered sedatives and had been in a medically induced coma during his time in the hospital.

Regarding the search warrant, the defendant argued that the officer deliberately misrepresented the defendant's admission that he was driving the vehicle that night. The defendant further asserted that the officer intentionally omitted material information about the defendant's medical condition during the two interviews with him.

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

At trial, the defendant's mother testified that before the crash, she saw the victim driving the vehicle with the defendant in the passenger seat. On cross-examination, the mother admitted that she was convicted of filing a false police report regarding "a certain event involving [her] son." After the prosecutor played a portion of a 911 call where the mother identified herself, she eventually admitted that she gave information to a law enforcement officer and stated that the defendant "needs to go back to jail." An assault and battery charge and a protective order had been initiated against the defendant based on that incident. The mother later altered her complaint and told police that she did not want to press charges against her son.

The defendant objected to the Commonwealth's cross-examination of his mother, but the trial court denied the motion. The trial court did not, however, admit the 911 call into evidence.

Held: Affirmed.

The Court first examined whether the defendant was in custody when the officer questioned him and determined that he was not. Considering the facts, the Court agreed that the encounters did not amount to the custodial nature that would trigger the *Miranda* requirement. The Court also rejected the defendant's argument that his medical condition rendered his statement involuntary, noting that he did not argue that law enforcement used coercive tactics or engaged in flagrant police misconduct. The Court noted that the officer was able to demonstrate gestures made by the defendant and observed that the defendant was very coherent. The Court also found the defendant's experience with the criminal justice system to be relevant.

The Court then turned to the search warrant. The Court repeated that, under *Franks*, a defendant is entitled by the Fourth Amendment to a hearing that challenges what appears to be a valid search warrant only in limited circumstances. In addition, the defendant has the burden to make a "substantial preliminary showing" of a false statement that was "knowingly and intentionally included in the warrant affidavit or included with reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." Even if the trial court finds that the defendant has made the substantial preliminary showing, the trial court must "determine whether the allegedly false statement is necessary to the finding of probable cause."

In this case, the Court noted that the only statement that the defendant alleged to be false is that he admitted to the officer to being the driver of the vehicle. The Court concluded that sufficient content in the affidavit remained to support the finding of probable cause even after removing the allegedly false part of the statement. The Court ruled that the defendant's admission that he was the

driver of the vehicle was not necessary to the finding of probable cause for the issuance of the search warrant, and therefore no *Franks* hearing was required.

Lastly, the Court addressed the mother's cross-examination. The Court noted that the mother testified that the victim was driving at the time of the crash, contrary to all the evidence presented in the Commonwealth's case. The Court observed that, while any witness who testifies at trial places his or her credibility at issue, the mother's testimony was especially important for the jury's consideration of the case. The Court then quoted the 1936 *Haney* case regarding cross-examination and bias, where the Virginia Supreme Court had written: "The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness. . . . [O]n cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out." The Court agreed that the trial court properly limited the details of the assault and battery allegation that could be heard by the jury but permitted the jury to consider the mother's recantation on the issue of bias.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1381222.pdf>

Jenkins v. Commonwealth: October 10, 2023

Arlington: Defendant appeals her Juvenile Adjudication for Assault on Law Enforcement on Refusal to Admit Video Evidence, Refusal of Jury Instructions, and Revocation of her Deferred Disposition.

Facts: Officers stopped the defendant, then a juvenile, for a metro fare evasion. The officers sought to advise her of the offense, identify her and her parents, and then release her. However, the defendant refused to cooperate and pushed the officer away. The officer continued to try to reason with the defendant for several minutes. Soon, however, the defendant balled up her fist and lunged at one of the officers. The defendant then bit an officer on his arm and spit on him.

At trial, the defendant moved to strike the evidence, challenging the lawfulness of her arrest and arguing that she bit and spat on the officer in self-defense. The trial court denied the motion, finding that the defendant was lawfully arrested because the officer had probable cause to arrest her after she pushed him.

The defendant then offered a video her friend recorded showing a portion of the physical struggle with the three officers on the train platform while handcuffing the defendant. In response to the Commonwealth's relevance objection, the defendant argued that the video contradicted the officers' testimony regarding the number of bites and when exactly they occurred. The trial court excluded the video, holding that it was not relevant as impeachment of the officers' testimony because the record was ambiguous on the purported point of impeachment—whether the officer stated that the defendant had bit him, and if so, how many times. The trial court found that any "possible" impeachment value was "speculative" and that the narrated video contained inadmissible hearsay.

Before submitting the case to the jury, the trial court rejected two jury instructions that the defendant offered to explain her defense of justification. The first proposed instruction read:

“A person has a common law right to use reasonable force to resist arrest, if the arresting officer does not have probable cause for the arrest.”

The second proposed instruction read:

“Where an officer attempts an unlawful arrest, the officer is the aggressor which gives the arrestee the right to use self-defense to resist so long as the force used is reasonable. The amount of force used must be reasonable in relation to the harm threatened.”

The trial court refused both instructions, finding that its earlier ruling that the arrest was lawful rendered the instructions irrelevant.

The jury found the defendant guilty of assault and battery of a law enforcement officer, but the trial court deferred the finding and ordered the defendant to comply with probation until her eighteenth birthday. Over the next three years, the trial court held numerous review hearings to follow the defendant’s progress pursuant to her deferred disposition. However, the defendant’s noncompliance with the terms of her supervision lasted several years and culminated in defiant statements at her dispositional hearing. Finally, the trial court found that the defendant had been noncompliant with the terms of her deferred disposition and formally entered the felony adjudication.

Held: Affirmed. The Court held that the trial court did not err in excluding the defendant’s proposed video evidence or jury instructions, nor in entering a felony adjudication.

Regarding the video, the Court first pointed out that the trial court had already ruled that the officer had probable cause to arrest the defendant before the events recorded on the video transpired. The Court repeated that if an officer has probable cause to arrest a suspect, that person has no legal right to resist the arrest. Viewed in the context of the trial court’s probable cause ruling settling that the defendant’s arrest was lawful, the Court ruled that the defendant’s claim of unlawful arrest was no longer properly at issue in the case; therefore, the trial court properly excluded the video so far as it was offered to prove the claim of unlawful arrest.

The Court also rejected the defendant’s argument that the video contradicted the officer’s testimony concerning whether she bit him and therefore was admissible to generally question his credibility. Because the video did not capture the beginning of the physical struggle between the officers and the defendant, the Court noted that it did not reveal what was said or done prior to the start of the recording. Also, the Court found that from the vantage point of the recording it did not show the defendant’s face or the officer’s hands leading up to the point when he stated, “she bit me.” Therefore, the Court ruled, the video was not clarifying on the points of alleged inconsistency and there was nothing in the video that appeared to impeach the officer’s testimony.

Regarding the defendant’s jury instructions, the Court again noted that the trial court’s uncontested probable cause ruling rendered the defendant’s proffered instructions inapplicable as a matter of law. The Court confirmed that it was the court’s prerogative to rule on the legal question of probable cause, and if probable cause existed, the defendant had no legal right to resist the lawful arrest. The Court reasoned that accepting the proposed instructions would have wrongly invited the jury to address questions of law disposed of by the court and not challenged.

Lastly, regarding the trial court's revocation of her deferred disposition, the Court agreed that the defendant's defiant statements at her dispositional hearing were consistent with the well-documented history of her noncompliance with supervision and supported the trial court's finding that she had violated the conditions of the deferred disposition order.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1110224.pdf>

Zimmerman v. Commonwealth: August 15, 2023

Page: Defendant appeals his convictions for Murder and Child Abuse on Voir Dire, Witness Testimony, Denial of Character Evidence, and Expert Testimony issues.

Facts: The defendant killed his girlfriend's ten-month old child through abusive head trauma.

At a pretrial hearing, the court granted the Commonwealth's motion in limine to preclude the defendant from eliciting specific instances of conduct from his character witnesses to show that he was not a violent person, including any "reference to [the defendant's] specific interaction with children or actions not on the date of the offense." The trial court rejected his argument that Rule 2:405(b) permitted him to introduce specific instances of conduct to establish his character for non-violence.

The court also considered the parties' proposed voir dire questions. The defendant objected to three questions proposed by the Commonwealth:

1. The defendant argued that the first proposed question—"Do you understand that reasonable doubt does not require proof beyond all possible doubt[,] nor is the Commonwealth required to disprove every conceivable circumstance of innocence?"—was argumentative and incorrectly instructed the jury that the Commonwealth could "prove the case with some doubt in [the jury's] minds."
2. The defendant argued that the second proposed question—"If you hear two expert witnesses testify in [c]ourt and they give contradictory opinions[,] [i]s there anyone that would automatically not feel comfortable deciding to believe one over the other regardless of the evidence?"—improperly gave jurors the impression that they had "to make a decision[,] when the jury doesn't have to make a decision between two experts."
3. The defendant argued that the third proposed question—"Are any of you uncomfortable about accepting the responsibility to determine who is telling the truth?"—failed to capture instances where "both people are telling . . . slightly different stories but they're both telling the truth." The court overruled the objection.

The trial court overruled the defendant's objections.

During voir dire, a juror who was a former police officer, advised that the assistant Commonwealth's attorney had prosecuted cases in which he had been involved, and he also had "called [the prosecutor] like two years ago on a civil case." The juror asserted that his previous interaction with the prosecutor would not affect his "ability to impartially decide [the] case based solely on the law and

the evidence.” The juror also stated that he currently works at a medical facility, which would not affect his ability to be impartial.

The defendant asked to strike the former police officer for cause, arguing that because the former police officer had worked on cases with the prosecutor, that made him the prosecutor’s “client.” He contended that denying his motion to strike “creat[ed] a lack of confidence by the public in the integrity of the process.” The trial court refused to strike the juror.

During voir dire, the defendant raised a *Batson* challenge to the Commonwealth’s peremptory strikes eliminating all four prospective jurors under the age of 40 and striking the only Hispanic individual in the venire. The Commonwealth responded that age is not a “valid challenge” under *Batson* but explained its reasons for striking the four jurors. The Commonwealth also explained that the Hispanic juror made “vulgar statements on social media” and had a “large [collection] of traffic tickets,” which could influence his attitude toward law enforcement. The trial court overruled the challenges, finding that the Commonwealth had offered “appropriate reason[s]” for the strikes.

At trial, several Commonwealth witnesses testified that the injuries were “consistent with abusive head trauma” and were not consistent with a 17-inch fall, pneumonia, or a stroke, as the defendant’s experts opined. The defendant objected to the Commonwealth’s witness’ statements that the victim suffered abusive head trauma, arguing that this testimony established the “ultimate issue” in the case and therefore invaded the province of the jury. The trial court overruled his objection.

At trial, the Commonwealth elicited testimony from a doctor that the victim’s injuries were “highly suspicious for non-accidental trauma,” not consistent with falling from a couch, not consistent with a child his age, and “highly concerning for child abuse.” The doctor testified as a fact witness for the prosecution regarding her examination and assessment of victim’s injuries and the photographs she took. The doctor also explained that her team’s “NAT protocols” referred to “non-accidental trauma” protocols “that need to be completed when there’s a suspicion of non-accidental trauma.” On cross-examination, the trial court precluded the defendant from qualifying the doctor as an expert on cross-examination, over the defendant’s objection.

Held: Affirmed. The Court held that the court did not err by denying the defendant’s *Batson* challenges or by overruling the defendant’s objections to the Commonwealth’s voir dire questions. As for the evidentiary issues, the Court ruled that the trial court did not err by allowing witnesses to testify to conclusions about the victim’s injuries, by excluding “specific instances” of the defendant’s nonviolent character, or by not designating the Commonwealth’s lay witness as an expert on child abuse during cross-examination.

Regarding the defendant’s proffered character evidence, the Court agreed that a defendant may introduce evidence of his reputation for pertinent character traits on the theory that it is improbable that a person who has a good reputation for such traits would be likely to commit the crime charged against him. However, the Court explained, a defendant, in order to establish good character, is not permitted to prove specific acts, custom, or course of conduct.

In this case, the Court noted that the defendant’s character was not an “essential element” of a charge, claim, or defense. Further, the trial court allowed the defendant to present evidence that he had a reputation not only for truthfulness and peacefulness, but also for practicing good childcare—a character trait directly related to the charges against him. In this case, because having a violent

character was not an “essential element” of the charges against him, the Court ruled that the trial court did not abuse its discretion in precluding evidence of “specific instances of conduct” under Rule 2:405(b).

Regarding the former police officer potential juror, the Court accepted the trial court’s determination that the juror could be fair and impartial. Additionally, the Court explained that “a police officer is not a “client” of the Commonwealth Attorney’s office; there is no attorney-client relationship between the officer and a prosecutor in a criminal case. The prosecutor represents the Commonwealth, not the officer.”

Regarding the defendant’s *Batson* challenge, the Court refused to extend *Batson* to age-discrimination claims, noting that the Court has long-allowed age-based peremptory strikes. The Court then held that the court did not err by accepting the Commonwealth’s race-neutral explanation for the peremptory strike of the one Hispanic juror.

Regarding the three voir dire questions, the Court held that the questions were proper under § 19.2-262.01, and the court did not abuse its discretion in allowing the three challenged questions. The Court observed that the questions tracked common legal principles. The Court pointed out that the first challenged question, addressing reasonable doubt mirrors language in Model Jury Instruction 2.100.3. The Court agreed that this question was relevant because it would “disclose or clearly lead to the disclosure” of a juror’s opinion or bias against the reasonable-doubt standard.

Turning to the expert-witness question, the Court ruled that the question did not foreclose a juror’s option to decide not to believe either expert. Instead, it sought to reveal whether any juror would automatically view evidentiary conflicts as inconsistent with guilt. Lastly, the Court concluded that the third challenged question assessed the jurors’ willingness to determine witness credibility and that the question was designed to reveal whether prospective jurors had any resistance to their factfinding role.

Regarding the Commonwealth’s witness’ testimony, the Court ruled that the lay and expert testimony that the victim’s injuries were consistent with abusive head trauma did not invade the province of the jury. The Court noted that the witnesses did not identify the defendant as the criminal agent, and their testimony merely tended to show that the child was intentionally, rather than accidentally, injured. Furthermore, the Court noted that the Commonwealth’s opinion evidence contradicted the defendant’s defense that the victim died from pneumonia or a stroke, not from abusive head trauma. In other words, the purpose of the opinion evidence was to prove an element of the offense and eliminate other theories about the cause of death. The Court repeated that the mere fact that a witness’s opinion provides proof of an ultimate issue of fact does not preclude the evidence.

For example, the Court pointed to the Commonwealth’s forensic physician’s testimony at trial, which never identified the defendant as the criminal agent; instead, the Court noted that it was evidence that the child was intentionally injured, making the defendant’s defense that pneumonia or stroke caused the child’s death less probable.

Lastly, regarding the doctor that the defendant wanted to qualify as an expert, the Court noted that the doctor’s testimony was within the doctor’s realm of direct and personal knowledge as a member of the UVA forensics team that documented the victim’s injuries. The Court did not find that the trial court abused its discretion by denying the defendant’s request to designate the doctor as an expert witness for cross-examination purposes.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0507224.pdf>

Newberger v. Commonwealth: June 27, 2023

Orange: Defendant appeals his conviction for Child Sexual Assault on Discovery Issues, Best Evidence, and Admission of Prior Consistent Statements.

Facts: The defendant raped and sexually assaulted a six-year-old child. Prior to trial, the Commonwealth moved for the victim to testify by closed-circuit. In support of its motion, the Commonwealth called a licensed professional counselor who specialized in childhood trauma. She testified that she had been treating the victim and testified to the effects of trauma on the victim. for almost two years following the incidents that led to these charges. The trial court granted the Commonwealth's motion.

On the day of trial, the defendant filed a motion in limine to exclude any expert testimony because the Commonwealth failed to make the required disclosures regarding expert evidence. The trial court found that the Commonwealth had not complied with the disclosure requirements of the discovery order but ruled that the expert could testify because her existence and the content of her opinions were known to the defense from the closed-circuit hearing. However, the trial court also ruled that the expert would not be permitted to opine on the victim's credibility or the source of her trauma.

Upon confirming that the Commonwealth intended to call the expert, the defendant did not request a continuance or an opportunity to question her outside the jury. Nor did he question the expert about the basis for her expert opinion during cross-examination.

The Commonwealth's trauma expert testified that she was a licensed professional counselor who specializes in treating both child and adult trauma. The trial court recognized her as an expert in child sexual trauma. The expert testified that, in her professional opinion, the victim displayed symptoms of childhood trauma. She described typical symptoms of childhood trauma and the specific signs of sexual trauma that therapists look for in children. The expert also testified that it was not unusual for children to make inconsistent statements about traumatic events because of the way a child's brain works and processes trauma.

At trial, the Commonwealth introduced a screenshot of text messages that the defendant sent to a witness. The defendant objected on best evidence grounds, contending that the screenshots were duplicates and "no explanation was given for why the originals were unavailable." The trial court overruled the objection.

During defense evidence, the defendant called a detective to testify regarding previous statements that the victim had made to the detective that were inconsistent with her trial testimony. During cross-examination, the Commonwealth sought to elicit the victim's prior consistent statements to rehabilitate her credibility. The defendant objected, maintaining that the trial court should exclude any statements beyond the scope of the prior inconsistent statements he elicited to impeach the victim's credibility.

The trial court overruled the objection. On cross-examination, the witness testified to numerous statements that the victim made during the original police interview that were consistent with her statements at trial. The court issued a jury instruction requiring the jury to consider the evidence only for the purpose of rehabilitation.

Held: Affirmed.

Regarding the discovery violation, the Court began by noting that Rule 3A:11 and Code § 19.2-265.4 authorize the trial court to tailor the remedy for a discovery order violation to meet both the nature and degree of prejudice incurred by a defendant and the flagrancy of the violation. In this case, the Court found that the defendant failed to show prejudice from the late disclosure of the expert witness, and the trial court did not abuse its discretion in allowing her limited testimony.

Regarding admission of the victim's prior consistent statements, the Court examined Rule 2:801(d)(2)(A). The Court also noted that the trial court issued a limiting instruction. In this case, the Court found that, although some of the detective's testimony went beyond the victim's prior statements, the trial court did not err in allowing the testimony because the statements were not outside the scope of rehabilitation.

Regarding the defendant's best evidence objection, the Court acknowledged that text messages on a cell phone constitute "writings" for purposes of the best evidence rule. However, the Court then applied the concept of "duplicate originals," which concerns mechanically reproduced copies of writings. The Court noted that a screenshot, sometimes called a screen capture, is an image of a cell phone's screen that is saved as a graphic file in the phone's photographs. The Court wrote: "It is no different than photocopying or "carbon copying" the cell phone screen. The screenshot of text messages from [the witness'] phone logically qualifies as a "duplicate original" and may be treated as the original for purposes of the best evidence rule."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0677222.pdf>

Digital, Electronic, Photo & Video Evidence

Virginia Court of Appeals – Published

Diaz v. Commonwealth: February 27, 2024

Virginia Beach: Defendant appeals his convictions for Murder, Use of a Firearm, and Defiling a Dead Body on Admission of Electronic Evidence and sufficiency grounds.

Facts: The defendant shot and killed her boyfriend while the two were staying at a hotel. After shooting the victim, the defendant placed the victim's body on an ironing board and wrapped it in many

layers of various materials. She then conscripted the unwitting aid of two other people in attempting to secret the body away from the hotel so that she could unlawfully dispose of it without alerting the authorities. In doing so, she told her companions that the body was a grandfather clock.

The defendant and one of the companions had sex in the hotel room while the body was wrapped and stashed nearby. Both the companions then attempted to help move the body into the trunk of the defendant's car under the guise that the body was merely a piece of furniture and could be treated as such. Police later found the victim's body in a vehicle, with a moving dolly lying on top of it in the back of the car.

After the murder, the defendant used the victim's Facebook account to send messages back and forth with her Facebook account, attempting to make it appear that the victim was still alive. Police obtained screenshots of the communications and confronted the defendant with the screenshots. Although the officer had spent about five to ten minutes reading all of the messages at issue in their entirety, during the interview he never read the messages aloud to the defendant; instead, during the interrogation, he only showed her the screen of his phone for "less than ten seconds." The defendant then admitted that she made the posts after killing the victim.

The Commonwealth moved to admit the screenshots at trial. The defendant objected that she never had a chance to read the contents of the posts during the interview. The defendant also objected on authenticity grounds, arguing specifically that "there's nobody here from Facebook to authenticate that these messages were sent from where to whom, so there's nothing—there's no foundation laid as far as authentication." Lastly, the defendant objected on the ground that the screenshots violated the best evidence rule. The trial court overruled the objection and allowed the screenshots of the Facebook posts into evidence.

At trial, regarding the offense of Defiling a Dead Body, the defendant unsuccessfully argued that there was insufficient evidence to support her conviction of defiling a human body, under § 18.2-126(B), because the evidence showed that the victim's body was not disfigured beyond ordinary decomposition.

Held: Affirmed.

The Court first considered the Facebook evidence. The Court ruled that the best evidence rule applies to Facebook posts, as they are clearly "writings" within the scope of the rule. The Court then endorsed the rationale contained in the recent unpublished ruling in *Newberger*, where the Court had applied the concept of duplicate originals to screenshots of text messages, reasoning that the act of screenshotting a text message on the screen of a cell phone "is no different than photocopying or 'carbon copying' the cell phone screen." In this case, the Court also found that screenshots qualify as duplicate originals for purposes of the best evidence rule.

The Court then ruled that the Facebook posts were properly authenticated. The Court noted that the defendant had recognized the posts and admitted that she had surreptitiously posted the messages, herself, from the victim's account in an attempt to make it seem like he was still alive. The Court found that testimony to be sufficient to satisfy the authentication requirements contained in Rule 2:901.5. In a footnote, the Court explained that the defendant's complaint about how long she reviewed the screenshots during her interview went to the weight of the evidence, not its admissibility.

Regarding the conviction for Defiling a Dead Body, the Court held that the evidence was sufficient. The Court first noted that § 18.2-126(B) requires that a perpetrator physically defile a dead

human body. The Court then concluded that the defendant's physical actions with regard to the victim's corpse—including putting it on an ironing board, wrapping it with miscellaneous items including trash bags, enlisting the aid of people who believed they were moving a piece of furniture, packing it into the back of a crowded car, and putting a dolly on top of it—"did not comport with the typical respect and reverence with which our society ordinarily treats dead bodies."

The Court agreed that the jury was entitled to find, based on the facts presented, that the evidence proved that the defendant physically treated the victim's body with disrespect and dishonor as prohibited by the statute. The Court reasoned that the defendant's argument would frustrate the legislative aim of § 18.2-126 to protect the sanctity of both a burial place and a dead body, wherever situated. In a footnote, the Court stated that the fact that the defendant may have acted with an intent to conceal the body and escape detection did not prevent a finding that she also had the necessary intent to physically defile the body.

Judge Ortiz dissented from the majority's ruling on the conviction for defiling a dead body. In a footnote in the majority opinion, the Court acknowledged and agreed with the dissent's contention that the fact that the defendant had sexual relations near the dead body involved no contact with the body and therefore could not be sufficient to demonstrate that she physically defile[d the body. The Court explained that its holding regarding the sufficiency of the evidence was based entirely on the facts surrounding the defendant's physical treatment of the body.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0056231.pdf>

Virginia Court of Appeals -
Unpublished

Mubdi v. Commonwealth: May 7, 2024

Roanoke: Defendant appeals his convictions for Murder and Possession of a Firearm on Admission of Hearsay, Admission of Video Evidence, and Denial of a Necessity Defense.

Facts: The defendant is a convicted felon. During a couple of disputes arose at a bar involving the defendant and the victim, the defendant obtained a firearm. The victim decided to leave the bar. As the victim walked around his car to get inside and leave, however, the defendant followed behind, raised a gun to eye-level with the victim, and shot him in the front of his head.

During the incident, several people in the crowd were filming the fight on their cell phones, capturing the fight and the shooting with the corresponding muzzle flash. The Commonwealth introduced these videos into evidence at trial. A witness identified himself in the videos and photograph stills. Although he did not film the videos himself, he testified that he was present that night and "saw everything." He acknowledged that, though his vantage point differed from that of the camera in some instances, the videos were fair and accurate depictions of the events. Another witness also identified

himself in several photos and videos and testified that the videos were fair and accurate depictions of the events. The witnesses both identified the defendant in the videos.

At trial, the defendant also objected to the introduction of two of the videos: one that showed the defendant holding a gun and walking toward the victim's car, the other that showed the second fight at the side of the car and the crowd retreating at the sound of gunshots. The defendant argued that the witnesses' testimony was not sufficient to authenticate the videos. The trial court overruled the defendant's objections.

Police arrived at the scene of the shooting and later testified that people were "yelling and screaming" as well as filming with cell phones or fleeing the scene. Two minutes after police arrived, a woman called 911 at approximately. She stated that someone had been shot and killed at the bar. Her tone of voice was frantic and upset during the call. She asked the operator to "please help me out" and said, "I know who it was, I know who it was." The caller told the operator that she was leaving the scene but knew who committed the shooting. She then said, "he's dead, oh my god." The operator asked for the name of the shooter, and the caller answered that he goes by "cocaine," which was the defendant's alias. When asked if "cocaine" was still there, the caller answered, "yes," then "I don't know, I don't know." She described the shooter as having the defendant's appearance and clothing as seen in the videos. The caller refused to provide the 911 operator with her name.

At trial, the defendant objected to the introduction of the 911 call on Sixth Amendment confrontation grounds. The trial court overruled his objection.

At trial, the defendant argued that the evidence was insufficient to support his conviction for possession of a firearm by a convicted felon because his possession was justified under the necessity defense. The defendant argued that he needed to possess a firearm because people were fighting outside the bar. The trial court rejected his defense.

Held: Affirmed.

Regarding the videos, the Court concluded that the trial court did not abuse its discretion in denying the defendant's motion to exclude the videos, because the videos were properly authenticated by the witnesses' testimony. The Court pointed out that the witnesses identified themselves, the defendant, and the victim in the videos, and affirmed that the videos fairly and accurately represented what they observed on that date.

The Court rejected the defendant's argument that due to the lack of testimony establishing how the videos were made, who made them, and their chain of custody, the videos could not serve as a "silent witness." Instead, the Court explained that when a person who witnessed the events in a video testifies that it accurately represents what took place, it is not admitted under a silent witness theory, and thus the testimony of its maker is not required. In this case, the Court reasoned that the contested videos were not introduced as independent silent witnesses, but rather to illustrate the witnesses' eyewitness testimony. Accordingly, the Court ruled that the videos were properly authenticated, and the trial court did not abuse its discretion in admitting them.

Regarding the 911 call, the Court concluded that the trial court did not abuse its discretion in finding that the caller's statements during the 911 call were nontestimonial because they were in response to an ongoing emergency. The Court observed that the caller's demeanor and tone on the call was panicked, and she immediately asked for help. The Court pointed out that the caller called because

of a shooting at a public place in which the caller believed somebody already died. The Court found that the 911 operator's questions about his identity and physical description were not objectively designed to create trial testimony but were instead a response to an ongoing emergency situation with an armed shooter still in the area, intended to discover the identity of the shooter and quell the threat to the public and responding personnel.

The Court rejected the defendant's argument that because police were already on scene and the shooting was over, that there was no longer an ongoing emergency. Instead, the Court noted that when police arrived at the chaotic scene, groups of people remained nearby notwithstanding the shooting that had just occurred. The Court pointed out that officers did not know the identity of the shooter or if there were risks of further violence. Even with police already on scene, the Court reasoned that the emergency was ongoing, and the caller's statements on the 911 call reflected that continuing risk.

Regarding the defendant's necessity defense, the Court ruled that the trial court did not err in rejecting the defendant's necessity defense and finding the evidence sufficient to support his conviction for possession of a firearm by a convicted felon. The Court repeated that the necessity defense has three essential elements: (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 none of the elements of the necessity defense were met here.

The Court examined the facts and noted that the defendant armed himself after the first fight dispersed and before the second fight began. The Court found no evidence that the defendant faced an imminent risk of harm that necessitated arming himself at any point, and pointed out that his involvement in the second fight was the result of his own choice. The Court contended that the defendant had other reasonable means of protecting himself, including leaving the scene.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0071233.pdf>

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim's brother called 911 and told the dispatcher that the victim had called him and told him that "her boyfriend had shot her and they were trying to kill her." The brother stated that the victim

could barely speak. He also stated that he “d[idn’t] know what to do” because he doesn’t live near the victim. He stated that “she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster.” On the recording, the brother said it sounded like the victim “was hiding” while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver’s seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions like, “You doing all right man?” and, “you still tired?” The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, “how was your day, though?” to which the officer responded, “It was good, how was yours?” The defendant answered: “It was horrible,” to which the officer reiterated, “horrible day?” The defendant also asked the officer, “you know, I found evidence of her almost burning me?” to which the officer responded, “[b]urning you?”

The defendant also asked the officer “hey, is that Michael Kors bag going to go . . . in my evidence file?” The officer asked, “what’s that?” The defendant clarified, “the Michael Kors bag in the car,” to which the officer responded, “I’m not sure what you’re talking about.” The defendant also asked, “did you guys search the vehicle?” to which the officer responded, “I’ve been with you the entire time.”

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim’s social media. The detective asked, “What’s her Facebook page?” to which the defendant responded. The defendant then talked about the victim cheating on him, saying, “I caught her!” The detective asked, “was it one of your boys?” to which the defendant responded that he doesn’t know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim’s first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that “only recently, on January 20th . . . received a letter from the

Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse.” The trial court further stated that there was an “inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen.” The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness “is the father of a former classmate.” Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church “on a personal level.” All three of the jurors indicated that they would not credit the witnesses’ testimony simply based on the jurors’ familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors’ assurances that they would not necessarily credit the officers’ testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant’s objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant’s Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant’s objection. An officer testified that the gun depicted in the defendant’s Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers’ questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did violate the defendant’s Miranda rights.

Regarding the defendant’s request for an expert witness, the Court ruled that the trial court did not err in denying the defendant’s motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant’s arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that

the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that “a number of things” had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court’s approval. The Court noted that this delay was not intentional or due to the Commonwealth’s negligence. The Court then held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother’s statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother’s call was to ask for help responding to an ongoing emergency—getting medical care for the victim’s gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant’s social media posts, the Court reasoned that evidence from the defendant’s Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*, the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Harris v. Commonwealth: April 8, 2024

Henrico: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Admission of Text Messages and Refusal to Admit a Co-Defendant’s Guilty Plea.

Facts: The defendant possessed a firearm, heroin, cocaine, suboxone, marijuana, and Fentanyl with the intent to distribute. Officers discovered his contraband and arrested him during a traffic stop.

The Department of Forensic Science analyzed the defendant's cellphones, finding various text messages and a photograph of a handgun. In one text, a number associated with "Aaron" texted the defendant, "Ya I'll do 40 worth 25 and 15 powder." The defendant responded, "Ok 20min." In another exchange, the defendant asked a person identified as "Tiffany," "Did u like the smoke"? Tiffany replied "yesss that shit was gasss" and later texted the defendant, "I need some weed," to which the defendant responded, "How much money u got"?

Before trial, the defendant objected to the admission of all incoming text messages, arguing that they were all hearsay. The trial court overruled his objection and admitted the incoming text messages.

At trial, the defendant asked the trial court to admit his co-defendant's guilty plea to drug possession and possession of a firearm regarding the same incident. The trial court refused to admit that evidence.

Held: Affirmed.

The Court first found that clear Virginia precedent permits the admission of statements made to a defendant to provide context for his responses. The Court noted that in the 2020 *Jones* case, it held that out-of-court statements are not hearsay when offered to provide context for the defendant's admissions in response. The Court, citing the *Bennett* and *Swain* cases, explained that the incoming text messages to the defendant's phone were admissible because without the incoming messages, the outgoing messages would lack context and be incomprehensible.

The Court then found that the co-defendant's guilty plea did not fall into one of the few exceptions to the general rule that a co-defendant's guilty plea is inadmissible. In this case, the Court explained that the co-defendant pleading guilty to possession did not exonerate the defendant because possession of a drug need not be exclusive but may instead be joint. The Court reasoned that the fact that the co-defendant pleaded guilty did not make it "more probable," under Rule 2:401, that her possession was exclusive, rather than joint.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1653222.pdf>

Nester v. Commonwealth: April 8, 2024

Roanoke: Defendant appeals her convictions for as a Principal in the Second Degree of Robbery and Malicious Wounding on Admission of Text Messages and sufficiency of the evidence.

Facts: The defendant's daughter sold marijuana and believed that the victim had stolen from her. The daughter recruited several people, including the defendant, to assist her in abducting and robbing the victim. During several text messages between the defendant and her daughter, the two discussed and planned aspects of the robbery.

For example, when the daughter told her mother that marijuana had been stolen from her and that she needed cameras and a safe, the defendant replied, “yeah.” When her daughter asked the defendant to help her get a safe large enough to fit several mason jars to store marijuana, the defendant asked, “how big” and stated, “ok.” When her daughter asked the defendant if her father still had a pistol set aside for her and said she wanted it, the defendant responded, “I know before he said he wanted you to take a safety class and go with him to go shoot.”

During the robbery itself, one of the group members deceived the victim and convinced him to come to the defendant’s residence, where others in the group repeatedly struck the victim and held him at gunpoint for over an hour while demanding money and marijuana. The defendant was not physically present and did not witness any of the violent assaults against the victim.

During the robbery, the daughter directed the defendant to “[g]o get a jar of marijuana so they could match it.” Subsequently, her daughter texted the defendant, “You find it?” The defendant, by text message, responded, “I think it’s the right one. Looks and smells [i]dential.” Her daughter replied, “Thank you momma.” The defendant then provided the marijuana to her daughter. The other members of the group tied up the victim, brought him back to his home in the trunk of his car, abandoned him, and then left in his car.

Police investigated and seized the daughter’s mobile phone when she was arrested. Officers searched the phone’s contents pursuant to a search warrant. The defendant objected to the admission of photos of the daughter’s phone identifying the defendant as a contact and showing text messages between the daughter and the defendant. The photos were taken by the officer, who read some of the contact information and text messages into evidence at trial. Text messages from the daughter to the contact “mom” referred to the recipient as “momma.”

The defendant objected that the photos of contact information and text messages were inadmissible because:

- (1) the Commonwealth failed to establish a foundation showing that (a) the phone number alleged to be the defendant’s phone number was, in fact, her phone number and (b) the messages alleged to be from the defendant were, in fact, from her;
- (2) the messages from the daughter were hearsay; and
- (3) the daughter’s messages were irrelevant.

The trial court overruled the defendant’s evidentiary objections.

Held: Affirmed.

The Court held that the trial court did not abuse its discretion in ruling that the challenged image of the contact “mom” referred to the defendant and that the defendant sent the text messages to her daughter. Regarding the screenshots of the defendant’s contact information and her identification in the phone, the Court agreed that the record supported the trial court’s finding that the emergency contact labeled “mom” in the phone referred to the defendant and that the defendant composed the text messages sent to the phone.

Because the Commonwealth did not offer the daughter’s statements for the truth of the assertions, the Court ruled that they were not hearsay, and the trial judge did not err in admitting them. The Court found that the defendant’s statements “you ok,” “what,” and “wow” to her daughter lack meaning without her daughter’s responses to provide context regarding the imminent attack on the

victim. The Court agreed that the defendant's responses to her daughter's assertions—that the planned event would start in a few minutes, that she was armed, that the victim knew she was armed, and that she was excited that her confederate was almost there—tend to illustrate that the defendant knew of her daughter's plan and encouraged her to continue.

Regarding admission of the text messages themselves, the Court found that the relevancy and evidentiary value of the defendant's responses would be lost without her daughter's statements. In context, the Court observed that the defendant's responses indicate that she knew her daughter's marijuana had been stolen and that she agreed her daughter needed cameras and a safe to continue her drug dealing operation. Further, the Court noted that the defendant agreed to obtain a safe to fit her daughter's needs. For example, given the context of the defendant's answer to her daughter's question, the Court agreed that the defendant demonstrated she would provide her daughter with the firearm if she met the prerequisites.

The Court also agreed that her daughter's responses to the defendant's questions, "where's his car," and "where's the gun," show that the defendant was observing her daughter's home. Furthermore, the Court explained that the defendant's questions illustrated that the defendant knew her daughter had a gun and she wanted to know the victim's identity.

Regarding sufficiency of the evidence, the Court held that the trial court did not err in finding the defendant guilty as a principal in the second degree in the malicious wounding and robbery. The Court agreed that the evidence demonstrated that the defendant knew about the planned confrontation before it occurred, knew that the daughter had a gun, was at her house during at least part of the attack, and assisted the daughter in identifying the marijuana. Thus, the Court concluded that the defendant assented and lent her countenance and approval to the operation, thereby aiding and abetting the same.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1762223.pdf>

Jackson v. Commonwealth: November 8, 2023

Newport News: Defendant appeals his conviction for Murder on Fifth Amendment *Miranda* grounds, Admission of Text Messages, Refusal of a Jury Instruction, and sufficiency grounds.

Facts: The defendant and her confederate murdered a man. Over the next few weeks, the defendant and her confederate exchanged numerous text messages which the parties deleted from their phones, but that law enforcement obtained from the providers. Of note, one exchange involved her response to her confederate's comments, "I don't do back stabbing shit. I take head shots. I'm coming to u face to face," and "I'm terrible in a late [sic] of ways but far from weak male." The defendant responded that she "loved" those comments. The victim had suffered shots to his head and torso.

The second text message of note was the confederate's response to the defendant's comment, "It made me realize I really did but u was there for me when I couldn't count on nobody else u didn't hesitate." The confederate responded that he "loved" that comment.

Police arrested the defendant. While she was in custody, an officer informed the defendant of her right to counsel and right to remain silent. When she invoked her right to remain silent, the officer left the interrogation room to complete the booking process and to seek search warrants. About an hour later, the officer returned and gave the defendant a business card, expressed her understanding that the defendant did not wish to talk, and then offered to hear the defendant's side of the story because she knew that the defendant "was there" and that "there was a lot of" acrimony between the defendant and the victim's friend.

When the defendant clarified, "you mean at the restaurant, is that what you're talking about," the officer responded, "yeah, I know that was part of it, I know you were jumped." The officer explained that she wanted to hear the defendant's side of it and that she knew there were a lot of issues between the two women, but she was not going to push. The defendant then made a series of statements to the officer but did not confess to the murder.

Prior to trial, the defendant moved to suppress her statements. The defendant argued that the officer violated her constitutional right to have an attorney present before questioning by re-initiating conversation with her after she unequivocally invoked her *Miranda* right to remain silent. The trial court denied the motion.

Prior to trial, the defendant moved to exclude the text messages she and her confederate exchanged following the murder. The trial court found that the text messages were adoptive admissions of criminal behavior.

At the end of the trial, the defendant submitted a proposed jury instruction on concert of action, utilizing the Virginia Criminal Model Jury Instruction for that phrase but adding the language: "[t]he resulting crime must be the natural and probable result of the crime originally contemplated by the parties." The Commonwealth objected to the use of the word "must" in the instruction and argued that the additional language imposed a higher burden upon the Commonwealth than the law demands. The trial court agreed with the Commonwealth.

The defendant also submitted a proposed jury instruction on shared criminal intent, which stated that the defendant "must have either known or had reason to know of [her confederate's] criminal intention and must have intended to encourage, incite, or aid [his] commission of the crime." The Commonwealth objected to the instruction, arguing that it incorrectly provided that both shared criminal intent and an intent to aid in the commission of the crime were necessary for one to be a principal in the second degree, when the law required only one or the other. The trial court agreed and denied the instruction.

Held: Affirmed.

Regarding the *Miranda* issue, the Court examined whether the statements the defendant made to the officer were the result of interrogation and, if so, whether the continued questioning was appropriate after an initial refusal to answer questions. The Court applied the five factors articulated in the 1995 case of *Weeks v. Commonwealth*. The Court agreed that the first three factors favored the

Commonwealth, while the last two factors favored the defense. The Court found that under the *Weeks* factors that the defendant's initial invocation of her right to remain silent was not violated.

The Court first concluded that the defendant's initial invocation of her right to remain silent was not violated. The Court acknowledged that when the officer returned, the officer did not give the defendant fresh Miranda warnings and the interrogation was on the same subject matter. However, the Court repeated that "the failure to offer defendant a new set of warnings does not render the second interview unconstitutional."

Regarding the admission of the text messages, the Court found no error in the trial court's admission of the text messages, finding that they were admissible as adoptive admissions and statements against penal interest, probative, and relevant to the defendant's guilt. The Court ruled that the trial court did not abuse its discretion in admitting the two messages under the adoptive admission exception to the hearsay rule. The Court found that the text messages were relevant to both the conspiracy and to the relationship between the defendant and her confederate, and they confirmed the defendant's participation in the murder. The Court agreed that the messages were relevant to the Commonwealth's theory of the case and their probative value outweighed the prejudice to the defendant.

Regarding the jury instruction on "concert of action," the Court ruled that the Virginia model jury instruction sufficiently instructed the jury on concert of action in plain terms. The Court complained that the defendant's proposed added language was unnecessarily repetitive and imposed a higher burden upon the Commonwealth than the law required. Thus, the Court found that the trial court did not abuse its discretion in refusing the defendant's proposed instruction on concert of action.

Regarding the jury instruction on "principal in the second degree," the Court noted that the model jury instruction clearly provides that the defendant acted as a principal in the second degree if the evidence proved she shared in her confederate's criminal intent or if she intended to assist him in his commission of the crime. The Court found that the defendant's instruction was therefore inconsistent with the model jury instruction. Thus, the Court ruled that the trial court did not err in refusing the defendant's proffered instruction on shared criminal intent.

The Court also ruled that the evidence sufficiently proved that the defendant conspired with her confederate to kill the victim and that she was present at the scene of the crime assisting in and encouraging the commission of the offense.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1182221.pdf>

Morris v. Commonwealth: October 3, 2023

Prince William: Defendant appeals her conviction for Abuse and Neglect of an Incapacitated Adult on Admission of Video evidence.

Facts: The defendant, who was a caretaker at a group home, attacked and repeatedly struck the victim, who was one of the residents. The victim suffered from various intellectual and other disabilities,

fracturing one of the victim's occipital bones and leaving severe bruises and hematoma. The defendant claimed that she was acting in self-defense.

An investigator for the home reviewed video surveillance of the incident. At trial, the investigator explained that she recorded the surveillance videos with her cell phone on the same day as the altercation, and she stated that the system was functioning properly that day. While the recording was temporarily stored in a cloud-based system, the investigator recorded the surveillance video with her own phone's camera and burned the copies to DVD.

At trial, the investigator testified that the system required a username and password to obtain system access, and while she did not know how many people possessed credentials to access the system, she believed it was more than one and less than ten. The investigator testified that the "date and time stamp" displayed in the surveillance videos could not be altered and that the recording system was functioning properly on the date of the incident.

The investigator explained that she made the cell phone videos by recording the playback of the surveillance videos on the system's computer because "[t]hat was the only way [she] knew how to get the footage." She also confirmed that the DVD of her cell phone videos that was played in court was a "copy of the [surveillance video] footage that [she] examined" and that she had not altered the cell phone videos before burning them to the DVD. The investigator further testified that she had reviewed the cell phone videos contained on the DVD, and agreed that they "appear[ed] the same on th[e] DVD as [they] did on the server and . . . computer" when she first reviewed the surveillance videos.

At trial, the videos showed the investigator adjusting the playback speed of the surveillance video. Accordingly, although the total length of the first cell phone video that was admitted into evidence was 10 minutes and 26 seconds, the surveillance video's time stamps indicated that a total of almost 15 minutes had elapsed in the underlying surveillance video. Another cellphone video also was 33 seconds, although the surveillance video's timestamps indicated that 50 seconds had elapsed in the underlying surveillance video.

The defendant objected that the investigator was unable to testify about how the underlying surveillance videos had been "kept, stored, or whether it's digital or analog," and noted that the proffered evidence was "a recording of a recording" and the "time stamps on the video do not sync up to how much time . . . actually elapsed." Accordingly, the defendant contended, the cell phone videos failed to satisfy the authentication requirement of Virginia Rule of Evidence 2:901.

The defendant also objected that because of the discrepancy between the playback speeds of the underlying surveillance videos and the cell phone videos admitted into evidence, the videos seen by the jury "d[id] not present a clear picture of what happened" or "reflect reality." The trial court overruled her objections.

Held: Affirmed. The Court held that under the particular facts and circumstances of this case, the trial court did not abuse its discretion by admitting the Commonwealth's video evidence.

The Court first ruled that the cell phone videos satisfied the authentication requirement of Rule 2:901. The Court noted that, although the investigator did not herself record the surveillance videos, she did record them in the cell phone videos. Based on the investigator's testimony, despite discrepancies in the playback speeds between the cell phone videos and the underlying surveillance videos, the Court found that a preponderance of the evidence supported that the cell phone videos' contents. Thus, the

Court ruled that the videos were reliably genuine and what the Commonwealth represented them to be and were properly authenticated as required by Rule 2:901.

Regarding the defendant's claim of unfair prejudice due to the playback speed, the Court ruled that the cell phone video evidence of the altercation was relevant and highly probative of whether the defendant had abused or neglected the victim. The Court concluded that nothing about the differential in playback speed prevented the jury from comparing the uncontested images they witnessed with the defendant's own account of the altercation and determining the credibility of the defendant's testimony and the weight to accord that testimony and the cell phone videos.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1075224.pdf>

Lindsey v. Commonwealth: October 3, 2023

Norfolk: Defendant appeals his conviction for Unlawful Wounding on Admission of Victim Injury Photos.

Facts: The defendant and the victim engaged in a dispute at a convenience store, resulting in a police response. The defendant left the store. While the victim was speaking with a police officer inside the store, the defendant re-entered and struck the victim in the head with a bottle.

At trial, a detective who responded to the hospital testified that he photographed the victim's face when he first saw him in the hospital. The detective testified that that when he saw him, the victim had recently undergone procedures on his eye. The detective's photographs include depictions of an unsutured wound over the victim's eye and reflected swelling and bruising around the victim's eye and his blood-stained face.

At trial, the defendant objected that the photographs of the victim's injuries at the hospital lacked a foundation to establish that the depicted injuries resulted from the defendant striking him with the bottle, and therefore, the images were "irrelevant." The defendant also argued that the photos were unfairly prejudicial. The trial court overruled the defendant's objections.

Held: Affirmed.

The Court reasoned that the detective's photos permitted a fair inference that the victim's injury had occurred a short time earlier. The Court noted that the officer's body-worn camera footage showed the defendant striking the side of the victim's face with the bottle, consistent with the location of the injuries depicted in the photographs. Based on the detective's testimony, the footage of the assault, and the nature of the injuries, the Court agreed that the Commonwealth established by a preponderance of the evidence that the photographs depicted injuries sustained from the defendant's assault.

Regarding the defendant's claim of prejudice, the Court ruled that the degree and scope of the victim's injuries were probative of the force that the defendant used, and thus probative of whether the defendant struck the victim with the intent to maim, disfigure, disable, or kill. The Court found that the photographs of the victim's injuries were not so inflammatory that their prejudicial impact substantially

outweighed their probative value. Accordingly, the Court held that the trial court did not abuse its discretion in deciding that the probative value of the evidence was not substantially outweighed by any unfair prejudice and thus admitting the photographs.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0987221.pdf>

Spinner v. Commonwealth: August 15, 2023

Lynchburg: Defendant appeals his convictions for Involuntary Vehicular Manslaughter, Hit and Run, and DUI on Admission of Witness Testimony, Video Evidence, a Certificate of Analysis, and HGN testimony.

Facts: The defendant drove while intoxicated and struck and killed a woman who was crossing the street. The video recording of the crash reflects that the car did not slow down after impact with the victim, nor did it stop at the scene. Instead of stopping immediately, the defendant circled the block, parked the car a block away, smoked a cigarette, and then returned to the collision scene on foot.

Despite the obvious damage to the driver's windshield, headlamp, and side mirror, the defendant first lied and told the responding officer that someone else hit the victim. On further questioning, he admitted to having hit the victim, but claimed that he did not stop sooner because he did not know he had hit someone. He also testified at trial that he knew he hit "something" but did not realize at the time "it was a person."

The defendant told the investigating officer that he had consumed alcohol in the early morning hours but none since he fell asleep at 5:00 a.m. that morning. The defendant failed FSTs, and the officer arrested the defendant. The officer first conducted a breath test, and then obtained a search warrant for the defendant's blood.

One of the field sobriety tests that the officer administered was an HGN test. At trial, the officer testified that bodies are affected by alcohol consumption. Specifically, he testified that with a nystagmus field sobriety test, he looked for involuntary eye movement that can be present due to alcohol consumption. The defendant objected to this testimony, arguing that only a medical expert could testify about the effects of alcohol on the body. The trial court overruled the objection and allowed the testimony. The officer described how he conducted the nystagmus test and explained it was the "standard way that the test is administered." He stated that he noticed a mild "nystagmus and jerking motion of the eye" during the test.

During the breath test, the officer forgot to inform the defendant of his right to observe the breath test process, the blood alcohol reading it produced, and the equipment used to perform the breath test, even though he attested on the certificate that he had in fact done so. However, the defendant was physically present during that entire process until the end of the process when the test results printed out on the printer of the machine. The officer observed the defendant for twenty minutes before conducting the breath test to ensure that the defendant did not burp or belch before the test, which would affect the test's accuracy. The defendant was present through the entire

procedure and was provided with a copy of the printout of the results. The officer also allowed the defendant to observe the test results and gave him a copy of those results.

At trial, the officer testified about his qualifications, the process, and the equipment he used for the test. He explained that he was a licensed breath test operator and used equipment approved by the Department of Forensic Science. The defendant objected to the admission of the certificate based on the officer's failure to inform the defendant of his rights to observe, but the trial court overruled the objection and admitted the breath certificate.

At trial, DFS toxicologist Trista Wright testified. She had analyzed the defendant's blood specimen and found a BAC of .038%. Dr. Wright also explained that she could calculate what the defendant's BAC was at the time of the crash through a "retrograde extrapolation," an analysis that determines an individual's BAC at an earlier time based on specific information. To determine the appellant's BAC using this method, Wright needed to know when he last consumed alcohol and that no alcohol was consumed after the accident. Over the defendant's objection, Wright opined, based on the breath test certificate, the blood analysis result, and the information about the defendant's last drink of alcohol, that the defendant's BAC was between .08 to .13% by weight by volume at the approximate time of the crash.

The defendant argued that Dr. Wright's retrograde extrapolation testimony was inadmissible under Rule 2:702(b), which provides that speculative testimony is not admissible. He suggested that the extrapolation was based on the unproven assumption that he did not consume alcohol after the accident. The trial court overruled his objection.

At trial, the defendant's cousin testified. The defendant objected because the cousin had not been on the Commonwealth's witness list and instead the Commonwealth only disclosed his name and identity two days before trial, rather than 21 days before trial as ordered. According to the prosecutor, she was unable to contact the cousin until two days before trial. She argued that there was "no surprise" because the defendant had originally subpoenaed the cousin as his own witness. The court allowed the testimony over the defendant's objection.

At trial, the Commonwealth also introduced a surveillance video from a nearby store. The store owner testified that she had video surveillance cameras at her store. Her son programmed the surveillance system, which included a date and time stamp synchronized to the internet clock. She noted that she and her son were the only ones with access to the video recordings. Following the incident, the owner saved the parking lot video from the relevant time to a DVD and provided it to the police. The surveillance system allowed the owner to download segments of the video but not to edit the recordings.

The defendant objected that the video was inadmissible under the "silent-witness theory" because the witness was unable to testify as to "the process by which the video was made." The trial court overruled his objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the cousin's testimony, the surveillance video, Dr. Wright's expert testimony on retrograde extrapolation, or the officer's HGN testimony, and it agreed that the evidence supported the findings that the defendant had knowledge someone was injured as a result of the crash and that he failed to stop immediately as required by statute.

The Court first addressed the admission of the cousin's testimony, despite the pretrial order. The Court rejected the defendant's contention that the lack of notice deprived him of the "opportunity to research, vet, and discuss with" with witness what he knew and why the Commonwealth called him as a witness, finding that his claim of alleged prejudice was both general and speculative. The Court complained that the defendant did not specify any portion of the cousin's testimony that surprised him, nor did he explain how an earlier disclosure would have benefited his defense or altered the course of the trial.

Regarding the video, the Court ruled that the owner's testimony provided the trial court with a sufficient basis to find that the video was what the Commonwealth claimed it to be: an accurate recording of the traffic accident that occurred outside her convenience store on the date of the crash. The fact that the owner did not have formal training on the computer recording system and was unaware precisely how the software worked did not change the Court's analysis.

Regarding the breath certificate, the Court ruled that the officer substantially complied with § 18.2-268.9 when he administered the breath test. The Court noted that the officer conducted everything in the defendant's presence and provided him with a copy of the results. The Court concluded that the officer's failure to specifically tell the defendant that he could watch the test and see the equipment did not render the certificate of analysis inadmissible. Instead, the procedural deficiency went to the weight of the evidence rather than its admissibility.

Regarding Dr. Wright's testimony, the Court found that under the evidence, a reasonable jurist could conclude that the defendant did not have any alcohol after the crash and before the BAC testing. Consequently, the Court ruled that Dr. Wright's testimony on retrograde extrapolation of the BAC at the time of the collision was based on facts in evidence.

Regarding the officer's HGN testimony, the Court ruled that the officer was not offering a medical opinion. Instead, the Court noted that he simply explained how he conducted the nystagmus field sobriety test and that his execution of the test comported with the standard for test administration. Hertzog described the involuntary eye motion he looked for when conducting the test and noted that such motion can be present if the subject has consumed alcohol. Because this testimony was not a medical opinion, the Court ruled that the defendant's argument necessarily failed. The Court explained that, once the threshold for admissibility of the testimony was met, it was up to the jury to determine what weight to give it and the trial court did not abuse its discretion in permitting the testimony.

Lastly, regarding sufficiency, the Court agreed that the evidence was sufficient that the defendant, after striking a pedestrian, did not immediately stop as close to the scene of the accident as possible to do safely.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0725223.pdf>

Newberger v. Commonwealth: June 27, 2023

Orange: Defendant appeals his conviction for Child Sexual Assault on Discovery Issues, Best Evidence, and Admission of Prior Consistent Statements.

Facts: The defendant raped and sexually assaulted a six-year-old child. Prior to trial, the Commonwealth moved for the victim to testify by closed-circuit. In support of its motion, the Commonwealth called a licensed professional counselor who specialized in childhood trauma. She testified that she had been treating the victim and testified to the effects of trauma on the victim for almost two years following the incidents that led to these charges. The trial court granted the Commonwealth's motion.

On the day of trial, the defendant filed a motion in limine to exclude any expert testimony because the Commonwealth failed to make the required disclosures regarding expert evidence. The trial court found that the Commonwealth had not complied with the disclosure requirements of the discovery order but ruled that the expert could testify because her existence and the content of her opinions were known to the defense from the closed-circuit hearing. However, the trial court also ruled that the expert would not be permitted to opine on the victim's credibility or the source of her trauma.

Upon confirming that the Commonwealth intended to call the expert, the defendant did not request a continuance or an opportunity to question her outside the jury. Nor did he question the expert about the basis for her expert opinion during cross-examination.

The Commonwealth's trauma expert testified that she was a licensed professional counselor who specializes in treating both child and adult trauma. The trial court recognized her as an expert in child sexual trauma. The expert testified that, in her professional opinion, the victim displayed symptoms of childhood trauma. She described typical symptoms of childhood trauma and the specific signs of sexual trauma that therapists look for in children. The expert also testified that it was not unusual for children to make inconsistent statements about traumatic events because of the way a child's brain works and processes trauma.

At trial, the Commonwealth introduced a screenshot of text messages that the defendant sent to a witness. The defendant objected on best evidence grounds, contending that the screenshots were duplicates and "no explanation was given for why the originals were unavailable." The trial court overruled the objection.

During defense evidence, the defendant called a detective to testify regarding previous statements that the victim had made to the detective that were inconsistent with her trial testimony. During cross-examination, the Commonwealth sought to elicit the victim's prior consistent statements to rehabilitate her credibility. The defendant objected, maintaining that the trial court should exclude any statements beyond the scope of the prior inconsistent statements he elicited to impeach the victim's credibility.

The trial court overruled the objection. On cross-examination, the witness testified to numerous statements that the victim made during the original police interview that were consistent with her statements at trial. The court issued a jury instruction requiring the jury to consider the evidence only for the purpose of rehabilitation.

Held: Affirmed.

Regarding the discovery violation, the Court began by noting that Rule 3A:11 and Code § 19.2-265.4 authorize the trial court to tailor the remedy for a discovery order violation to meet both the nature and degree of prejudice incurred by a defendant and the flagrancy of the violation. In this case, the Court found that the defendant failed to show prejudice from the late disclosure of the expert witness, and the trial court did not abuse its discretion in allowing her limited testimony.

Regarding admission of the victim's prior consistent statements, the Court examined Rule 2:801(d)(2)(A). The Court also noted that the trial court issued a limiting instruction. In this case, the Court found that, although some of the detective's testimony went beyond the victim's prior statements, the trial court did not err in allowing the testimony because the statements were not outside the scope of rehabilitation.

Regarding the defendant's best evidence objection, the Court acknowledged that text messages on a cell phone constitute "writings" for purposes of the best evidence rule. However, the Court then applied the concept of "duplicate originals," which concerns mechanically reproduced copies of writings. The Court noted that a screenshot, sometimes called a screen capture, is an image of a cell phone's screen that is saved as a graphic file in the phone's photographs. The Court wrote: "It is no different than photocopying or 'carbon copying' the cell phone screen. The screenshot of text messages from [the witness'] phone logically qualifies as a 'duplicate original' and may be treated as the original for purposes of the best evidence rule."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0677222.pdf>

Experts

Virginia Supreme Court

Smith v. Commonwealth: February 29, 2024

Rev'd Unpublished Ct. of App. Ruling of May 17, 2022

Richmond: Defendant appeals his convictions for Rape and Sexual Assault of a Child on Denial of Expert Testimony, Prosecutorial Misconduct, and Eighth Amendment grounds.

Facts: For several years, the defendant raped and sexually assaulted a child under the age of 13. He later confessed to law enforcement. Prior to trial, the defendant requested expert funds for two experts. The first expert was for a neuropsychological evaluation, alleging that he may be suffering from HIV-Associated Neurocognitive Disorder ("HAND"). The defendant proffered evidence, including that his longtime HIV doctor believed he "fit the profile" for HAND, that "half of all treated HIV patients have cognitive impairment," and that cognitive impairments caused by HAND "cannot be reversed" by "antiretroviral therapy."

The second expert he sought was an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. He

proffered that he wanted to inform the jury as to the intrinsic (personal) and extrinsic (circumstantial) factors that render an individual particularly susceptible to falsely confess under the pressure of interrogation techniques. The trial court denied the motion for both experts.

The defendant also requested funds for an expert in the police “Reid Technique” and a “police interrogation expert.” The trial court denied those requests as well. The trial court excluded testimony from the defendant’s proposed interrogation expert on “the surprising frequency of false confessions” because the science of false confession work was not sufficiently reliable and because the proposed expert had insufficient experience.

While the defendant was incarcerated, the jail recorded his phone calls and video recorded his movements in the jail. The video system’s software automatically recorded all audio and video calls, including with counsel but the deputies could change a setting to indicate the visit was professional and thereby prevent the video call from being recorded. Later, however, the Commonwealth provided discovery that included a disc containing recordings of the defendant’s phone calls and video visits, including privileged videos of two meetings with his own attorneys.

Although several police recruits listened to some of the phone calls for training purposes, no investigator, police officer, or prosecutor listened to or watched privileged materials, including the video recordings of the trial strategy meetings. The defendant moved to dismiss the indictments or, in the alternative, exclude at trial all recordings of his communications from the jail. The trial court denied the motion.

The jury convicted the defendant of two counts of raping a child under the age of 13, as well as object sexual penetration of a child under the age of 13, and he received a life sentence on each of his three convictions. The defendant filed a post-trial motion in which he argued that his mandatory life sentence was unconstitutional. The trial court denied the motion.

The Court of Appeals Reversed and Remanded. The Court first found that the trial court erred in denying the defendant’s request for funds for an expert to testify that mental illness, including such disorders as major depression and anxiety, render a person more susceptible to confessing falsely. The Court found that the defendant’s “many proffers of proposed expert testimony made clear that mental illness and cognitive impairment, among other things, render a person more susceptible to interrogation techniques.”

Regarding the HAND expert, the Court noted that the defendant’s evidence was that he suffered from major depression and anxiety and had not been taking his anxiety medications for some time before the interrogation. The Court concluded that the defendant was therefore entitled to present expert testimony from a qualified expert on the susceptibility of a person suffering from major depression and unmedicated anxiety to making a false confession.

The Court agreed, however, that the trial court properly denied the defendant’s requests for experts in the “Reid Technique” and police interrogation. The Court found that the defendant’s expert’s proposed testimony on the “false confessions” was unreliable under *Spencer*. The Court wrote that “Simply watching many interrogations does not give a person experience in understanding whether those confessions are false in the same way that arresting drug users and distributors teaches a police officer what quantities are kept for personal use and what quantities are kept for distribution, or in the same way that working with tracking dogs for years makes a person aware of how accurate those dogs are at tracking.”

The Court continued, “The science or field of false confessions work is narrow in scope and is still in the early stages of development. The peculiar difficulties of verifying the truth or falsity of confessions have not yet been resolved in any way that allows observers in the field of false confessions to gather sufficient samples of empirical data from which to draw sufficiently reliable conclusions about how likely the Reid Technique is, in general, to produce a false confession in the context of an accusation of a serious crime such as murder or child abuse.” “An additional empirical problem arises from the need to compare false confessions to the total number of confessions, and to then compare true and false confessions secured by interrogation techniques to those secured by purely investigative techniques. In light of these uncertainties in a developing field of knowledge, we cannot say that no reasonable jurist could have reached the same conclusion as the trial court on this point.”

Regarding the jail recordings, the Court explained that *Gheorghiu* required the defendant to show that the recording and disclosure of his privileged trial strategy meetings harmed him during the criminal proceedings. In this case, just as in *Weatherford*, prosecutors and investigators never learned or used any confidential information. The Court concluded, “Even if we were to hold that Smith’s Sixth Amendment right to counsel had been violated, we would still conclude that he is not entitled to any remedy because he failed to show that he was prejudiced.”

Lastly, the Court of Appeals rejected the defendant’s contention that his sentence violated the Eighth Amendment.

Held: Conviction Affirmed. Court of Appeals Ruling Affirmed in Part, Reversed in Part.

The Court concluded that the trial court did not abuse its discretion in the manner in which it addressed the defendant’s multiple requests for expert assistance and, accordingly, the Court reversed the judgment of the Court of Appeals on those holdings. The Court affirmed the Court of Appeals’ refusal to dismiss the defendant’s indictment on the basis of the inadvertently recorded video conferences between the defendant and his counsel because the record establishes that the defendant suffered no prejudice. Finally, the Court concluded that the defendant’s mandatory life sentence for the rape of a young child did not infringe the Eighth Amendment.

Regarding the defendant’s request for a HAND expert, the Court reversed the Court of Appeals’ holding that the trial court abused its discretion in refusing to permit expert testimony to challenge the defendant’s confession on the basis of his major depression and failure to take medication before his interrogation. The Court complained that the defendant had not contended in the Court of Appeals that the trial court erred in failing to provide funds for an expert to testify concerning the effects of “major” depression and “unmedicated” anxiety on his interrogation. Instead, his argument had centered around a potential HAND diagnosis and the use of the Reid method.

The Court then noted that the trial court had repeatedly indicated that it was open to allocating funds for an expert if the defendant found a qualified expert who could reach a diagnosis of HAND or demonstrate a specific diagnosis beyond the understanding of the jury, and who could then “connect the dots” to demonstrate a link between the defendant’s mental condition and the possibility of a false confession. The Court pointed out that the trial court granted the defendant funds to hire an expert, Dr. Jeffrey Aaron, and determine whether his testimony was admissible during a pretrial hearing. The Court wrote: “Strikingly, Dr. Aaron did not appear, either to testify outright or proffer what his evaluation or testimony may have been.”

The Court concluded that the trial court's rulings on the defense motions for expert assistance, whether for evaluation or potential trial testimony, did not constitute an abuse of discretion. The Court agreed that the trial court could sensibly conclude that allegations of a potential diagnosis of HAND, combined with commonly experienced circumstances such as depression and anxiety, did not rise to the level of a particularized need under *Husske*. The Court found that the trial court's insistence on an expert or experts who were qualified to make a complex diagnosis, and who could then relate that diagnosis to the potential for making a false confession, were within the bounds of the circuit court's discretion.

Regarding the defendant's "false confession" expert, the Court agreed with the trial court that empirical data did not support the conclusion about the "surprising frequency of false confessions." The agreed with the trial court's statement that "regardless of whether I used the Spencer or the Daubert, or the 2:702 standard, I just don't think it meets the test for that based on this proffer."

The Court ruled that the trial court did not abuse its discretion in declining to allow expert testimony on the "false confession" aspect of the expert's testimony because the jury could see for itself how the police interrogated the defendant. The Court pointed out that the trial court admitted a great deal of evidence of the defendant's potential susceptibility to manipulation. For example, the jury heard evidence that the defendant suffered from anxiety and depression, had some memory problems, and heard from his daughter about his difficulties in handling bills and stressful situations. The trial court also admitted the defendant's medical records into evidence. Lastly, the jury also saw the interrogation itself.

Regarding the inadvertent recordings of attorney-client communications, the Court agreed with the Court of Appeals that there was no evidence the recordings caused the defendant any prejudice and affirmed the Court of Appeals' ruling on this issue.

Lastly, regarding the defendant's Eighth Amendment challenge, the Court concluded that the life sentence imposed did not violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Court repeated that under the Eighth Amendment, there are two paths to review a sentence as cruel and unusual and, therefore, "grossly disproportionate" to the convicted offense. First, a court "considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." On that question, the Court explained that it had no difficulty in concluding that the sentence imposed did not lead to an inference of gross disproportionality.

The second approach is to look at "categorical" rules to define Eighth Amendment standards. In determining whether a sentence is unconstitutional, a Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine whether there is a national consensus against the sentencing practice at issue. The court must then determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. Here, the Court acknowledged that few States impose a mandatory life sentence for the rape of a young child. However, the Court stated that it does not understand the Eighth Amendment to require uniformity in punishment, nor could such uniformity be expected in a union of sovereign States.

The Court examined the statutes of our other States that involve a crime analogous to § 18.2-61(B)(2), writing "The most salient fact is that many of our sister States punish the rape of a young child by an older adult with great severity." The Court was unable to conclude that objective indicia establish a national consensus against a severe punishment for the rape of a young child by an older adult.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220382.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0680212.pdf>

**Virginia Court of Appeals -
Published**

Cappe v. Commonwealth: January 16, 2024

Newport News: Defendant appeals his conviction for Murder and related offenses on Refusal to Admit Lay Expert Identification Testimony.

Facts: The defendant and his confederate shot and killed a man. A surveillance video captured the murder. Police investigated and found incriminating text messages, cartridge casings, and a car at the murder scene which was traced back to the defendant.

At trial, the defendant sought to introduce testimony from a witness that he was not the shooter in the video. The witness was a close family friend who had known the defendant from his birth; she had spent considerable time with him over the years. She based her opinion on his size, physique, and the shape of his head—features with which she was familiar based on her personal knowledge.

The witness’ knowledge of the defendant’s appearance, however, was somewhat affected by the fact that she had not seen him for several months before the video was taken. During this time certain features relating to his appearance were subject to change; for example, when the defendant was arrested, he no longer wore the braided hair with which the witness was familiar. His hair was cut short.

The Commonwealth objected that such negative evidence or “non-identification” evidence is unreliable and inadmissible. The trial court observed that no Virginia case law has previously permitted admission of this species of “non-identification” lay opinion. Accordingly, the trial court excluded the testimony.

Held: Affirmed. The Court found that the trial court erred in ruling that a lay witness cannot offer opinion testimony that a defendant is not the person shown in a video. Under *Bowman* and Rule 2:701, the Court found that such testimony is admissible lay opinion relating to “identity” as long as the testimony is based on the witness’ personal knowledge of the subject and will aid the jury in understanding the witness’ perceptions. Nonetheless, in light of the extensive evidence tying the defendant to the murder, the Court concluded that the jury’s verdict would not have been affected by the admission of the non-identification testimony.

The Court first explained that the trial court erred in ruling that such non-identification testimony is per se inadmissible. Using the same logic that allows a lay witness to identify a person in a video or photo, the Court found that a lay witness’ testimony that a person is not pictured in the video

or photo is equally reliable, so long as the lay opinion testimony is based on that witness' personal knowledge and will assist the trier of fact in understanding the witness' perceptions.

In this case, the Court found that, although the witness had not seen the defendant in the three months prior to this incident, she did have the personal knowledge necessary to form an opinion as to whether the defendant was depicted in the surveillance footage. The Court pointed out that she had known the defendant since birth, she saw him regularly, and she gave a detailed description of his physical appearance and the attributes that caused him to stand out to her. Given her substantial and sustained contact with the defendant, the Court ruled that her testimony should have been admitted.

In a footnote, the Court explained that, especially given the changes in the defendant's appearance, while the witness' lay opinion was relevant and admissible, the Court did not believe its exclusion could have influenced the verdict in light of the substantial evidence against the defendant.

Judge Chaney filed a dissent, contending that the Court should have reversed the conviction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1161221.pdf>

Welsh v. Commonwealth: August 15, 2023

78 Va. App. 287, 890 S.E.2d 845 (2023)

Loudoun: Defendant appeals his convictions for Murder, Use of a Firearm, and related charges on Admission of Expert Testimony, Limitation of Cross-Examination, and Speedy Trial grounds.

Facts: The defendant murdered a man and the man's mother in their home, shooting them both in the head repeatedly. During a forensic examination, Cara McCarthy of DFS was able to determine with "a very high level of certainty" that the defendant's handgun was the firearm that was used to kill the victims.

Prior to trial, the defendant moved to exclude McCarthy's testimony at a pretrial hearing and argued that her methodology was not sound. At a pretrial hearing, the defendant questioned McCarthy on two studies, the National Academy of Forensic Science Report ("NAS report") and the President's Council of Advisors on Science and Technology Report ("PCAST report"). McCarthy critiqued both reports and specifically stated that "numerous organizations and agencies have discredited the PCAST report on the grounds that they have statistical errors in their report." Ultimately, the trial court denied the defendant's motion to exclude McCarthy's expert testimony.

At trial, the defendant again attempted to question McCarthy on the NAS report and the PCAST report that she critiqued at the pretrial hearing, but the trial judge prevented this line of questioning because McCarthy "does not recognize the PCAST report or the NAS." Outside the presence of the jury, the defendant asked McCarthy about both reports, and she stated the studies were not standard authorities in the field of firearm and toolmark identification. McCarthy specifically stated that the PCAST report was rejected by the Department of Justice, AFTE, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF").

After sentencing, the defendant moved to dismiss the proceedings on speedy trial grounds, but the trial court denied the motion.

Held: Affirmed.

Regarding the Commonwealth's expert testimony, the Court repeated that the Supreme Court has long recognized firearm and ballistics testing as a reliable method used by expert witnesses to explain how a particular firearm can leave individualized markings on discarded ammunition shell casings. The Court ruled that the trial court did not err when it prohibited the defendant from cross-examining McCarthy on the NAS report and the PCAST report, given that she never acknowledged either study as a standard authority in her field. The Court applied Virginia Rule of Evidence 2:706(b), and found that, given that the expert rejected both the NAS report and the PCAST report as standard authorities in the field of firearm identification, the trial court properly limited cross-examination under Rule 2:706(b).

Regarding the defendant's speedy trial motion, the Court noted that § 19.2-266.2 requires defendants – absent good cause – to make motions for dismissal of charges for constitutional and statutory speedy trial violations in writing within the later of seven days before trial or as soon as the grounds for the motion arise prior to trial, and Rule 3A:9 dictates that a motion that "raises speedy trial" must be made at least 7 days before the day fixed for trial, or at such time prior to trial as the grounds for the motion or objection shall arise, whichever occurs last." The Court found that the defendant failed to comply with those rules.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0860214.pdf>

Virginia Court of Appeals -
Unpublished

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim's brother called 911 and told the dispatcher that the victim had called him and told him that "her boyfriend had shot her and they were trying to kill her." The brother stated that the victim could barely speak. He also stated that he "d[idn't] know what to do" because he doesn't live near the victim. He stated that "she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster." On the recording, the brother said it sounded like the victim "was hiding" while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver's seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions like, "You doing all right man?" and, "you still tired?" The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, "how was your day, though?" to which the officer responded, "It was good, how was yours?" The defendant answered: "It was horrible," to which the officer reiterated, "horrible day?" The defendant also asked the officer, "you know, I found evidence of her almost burning me?" to which the officer responded, "[b]urning you?"

The defendant also asked the officer "hey, is that Michael Kors bag going to go . . . in my evidence file?" The officer asked, "what's that?" The defendant clarified, "the Michael Kors bag in the car," to which the officer responded, "I'm not sure what you're talking about." The defendant also asked, "did you guys search the vehicle?" to which the officer responded, "I've been with you the entire time."

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim's social media. The detective asked, "What's her Facebook page?" to which the defendant responded. The defendant then talked about the victim cheating on him, saying, "I caught her!" The detective asked, "was it one of your boys?" to which the defendant responded that he doesn't know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim's first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that "only recently, on January 20th . . . received a letter from the Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse." The trial court further stated that there was an "inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen." The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness “is the father of a former classmate.” Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church “on a personal level.” All three of the jurors indicated that they would not credit the witnesses’ testimony simply based on the jurors’ familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors’ assurances that they would not necessarily credit the officers’ testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant’s objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant’s Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant’s objection. An officer testified that the gun depicted in the defendant’s Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers’ questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did violate the defendant’s Miranda rights.

Regarding the defendant’s request for an expert witness, the Court ruled that the trial court did not err in denying the defendant’s motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant’s arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that “a number of things” had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court’s approval. The Court noted that this delay was not intentional or due to the Commonwealth’s negligence. The Court then

held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother's statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother's call was to ask for help responding to an ongoing emergency—getting medical care for the victim's gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant's social media posts, the Court reasoned that evidence from the defendant's Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*, the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Phillips v. Commonwealth: April 16, 2024

Prince Edward: Defendant appeals his conviction for Rape on *Batson* Jury Selection grounds and Admission of Expert Testimony

Facts: The defendant raped a woman. At trial, the Commonwealth used peremptory challenges to strike four women from the venire. The defendant objected that the Commonwealth had “intentionally us[ed] sex as a basis to discriminate in picking a jury,” arguing that “the inference would be that a woman on a jury might treat the victim [more] harsh[ly] than a man would.”

The Commonwealth argued that its strikes were not based on sex and provided a gender-neutral reason for each. The defendant accepted the Commonwealth's gender-neutral reasons for two of the strikes but persisted in his objection to the others. For one of the strikes the Commonwealth explained that the potential juror did not pay attention during voir dire, sat in the back corner of the jury box, reclined in her seat, rested her head on her hand, raised her hand in response to voir dire questions only after everyone else did, and did so "flippantly."

As to the other strike, the Commonwealth stated that the challenged juror had testified at a bail hearing on behalf of a defendant in a previous sexual assault case and one of the defendant's counsel had represented that defendant.

The trial court overruled his objections to the strikes.

At trial, the Commonwealth offered testimony from a trauma expert, Aimee Stockenstrom. The trial court recognized her as an expert in how the brain processes trauma and how people experience trauma, over the defendant's objection that her testimony about how people react to and remember traumatic events falls within the common knowledge of the ordinary person. The trial court rejected the defendant's argument that her testimony merely provided a "more scientific and elaborate explanation" of what ordinary people already understand — "that people may react in different ways [to trauma] or [may] remember only vague details" about traumatic events.

At trial, the expert testified about the role various parts of the brain play in relation to fear and traumatic events. She explained the function of the amygdala in the activation of the "fight or flight response." If fighting or fleeing fails to neutralize the perceived threat, the amygdala protects the brain and body activating the body's "freeze" response, and these responses are involuntary. And, because the amygdala is near the hippocampus—the portion of the brain responsible for memory formation—when a person experiences trauma the hippocampus is impaired, impacting the individual's formation and communication of memories about the event.

Held: Affirmed. The Court ruled that the trial court's finding that the Commonwealth did not use its peremptory strikes in a discriminatory manner was not clearly erroneous and that the trial court did not abuse its discretion in admitting the expert's testimony.

Regarding the strikes, the Court agreed that the Commonwealth's proffered reasons for striking the two jurors were valid, gender-neutral reasons.

Regarding the Commonwealth's trauma expert, the Court repeated that testimony about the functioning of the brain does not invade the province of the jury. In this case, the Court ruled that the expert's testimony about the structure and functioning of the human brain could have assisted the trier of fact in understanding evidence concerning matters that are not within the jury's ordinary knowledge.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1546222.pdf>

Holmes v. Commonwealth: March 19, 2024

Augusta: Defendant appeals his convictions for Strangulation and Assault and Battery on Expert Testimony and Jury Instruction grounds.

Facts: The defendant attacked the mother of his child and her teenage daughter on multiple occasions, strangling and striking them repeatedly over several months, once in front of a pastor's wife.

At trial, over the defendant's objection, the Commonwealth called Renee Pullen, a forensic nurse, as an expert on strangulation. The expert testified that strangulation is a form of asphyxia that occurs when an external pressure on the neck induces pressure in the veins, arteries, or airway impeding oxygen or blood. She explained how the victim can be rendered unconscious from about 4 pounds and 10 seconds of pressure to the jugular veins in the neck—or 33 pounds of pressure applied to the airway. She also testified that although strangulation victims may sustain visible injuries, about half do not.

The defendant objected to the expert's testimony, contending that the subject matter was not beyond a lay person's common knowledge and did not help the jury understand the evidence or determine a fact in dispute. He also argued that the expert did not conduct a physical examination of either victim.

During the charging conference, the Commonwealth proposed instructing the jury, among other things, "You may infer that every person intends the natural and probable consequences of his acts." The defendant objected, arguing that the instruction created a "presumption" that would "short circuit" the jury's fact-finding function and relieve the Commonwealth of its burden to prove the defendant's intent beyond a reasonable doubt.

The defendant asked the trial court either to refuse the instruction or to give his alternative instruction: "You may infer that every person intends the natural and probable consequences of his acts, unless, from all the evidence, you have a reasonable doubt as to whether the consequences that resulted were in fact intended." The court rejected the defendant's instruction and granted the Commonwealth's.

Held: Affirmed.

Regarding the expert testimony, the Court found no abuse of discretion in the trial court's decision to admit the expert's testimony. The Court agreed that the time and pressure to render a person unconscious from strangulation are matters unlikely to be commonly known. The Court found that information to be useful to the jury in understanding the victims' testimony about being choked. The Court also noted that the expert's testimony that a visual mark is not left behind in about half of the cases in which a person has been strangled was also a matter beyond common knowledge and was relevant to understanding the strangulation incidents involving the victims.

Regarding the jury instruction, the Court reaffirmed its holdings in *Kelly*, *Schmitt*, and *Tizon* that repeatedly rejected the assertion that the "natural and probable consequences of his acts" instruction unconstitutionally shifts the burden of proof to the defendant. In this case, the Court pointed out that the trial court had already given the "presumption of innocence" instruction. Because that instruction fully and fairly covered the presumption of innocence and the Commonwealth's burden of proof on every element of the crime, the Court ruled that it was unnecessary to append a variation of that instruction to the permissive-inference instruction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0097233.pdf>

Thomas v. Commonwealth: March 12, 2024

Fairfax: Defendant appeals his convictions for Rape and Child Sexual Assault on Fifth Amendment *Miranda* and Expert Testimony grounds.

Facts: The defendant repeatedly raped and sexually assaulted a child at a day care center while the child was between four and eight years old. A year after the assaults, the defendant was convicted of an earlier child sexual assault. In 2019, about a decade after the assaults, the victim in this case disclosed the assaults to police. Police located the defendant and arrested him. The defendant was on probation at the time and had been for about five years.

While the defendant was in custody at the police station, the defendant's probation officer introduced him to the investigating officers. The probation officer told the defendant: "This is Detective Carter, Detective Gadell. They need to talk to you about some things. I'm going to be here for a little bit, but just go ahead and chat with them today, okay?" The probation officer then left the room.

The officers then reviewed the defendant's *Miranda* rights, stating "I know you're going to have questions about everything, and I'm happy to talk about that stuff with you, but we have to go over this form first." After waiving his rights, the defendant confessed to raping and sexually assaulting the child. The defendant moved to suppress his statements, but the trial court denied the motion.

Prior to trial, the Commonwealth provided notice of expert testimony from Anissa Tanksley, the forensic interviewer who had interviewed the victim. The expert testified that abused children often delay disclosing their abuse, but she did not suggest that delayed disclosures by child victims were more or less credible than contemporary disclosures or disclosures by adult victims. She testified that she does not evaluate the credibility of the children she interviews and expressly stated she does not know how often allegations turn out to be true. The defendant objected to this testimony, but the trial court admitted it over his objection.

At trial, the defendant also objected to the expert's repeated references to what the "research suggested" on hearsay grounds, arguing that this testimony was "tantamount to admitting the articles themselves." The trial court overruled the objection.

Held: Affirmed in Part, Reversed in Part. The Court held that, based on the totality of the circumstances presented in this case, the defendant's *Miranda* waiver was not the product of a free and unconstrained choice, and the trial court erred in reaching a contrary conclusion. The Court also ruled that the trial court did not abuse its discretion by allowing the Commonwealth's expert testimony.

In this case, the Court concluded that the specific facts and circumstances of this case demonstrated that the detectives employed coercive tactics. The Court argued that the defendant's probation obligation included not only being truthful with his probation officer, but also following all his probation officer's instructions. The Court noted that the defendant had signed a form at the outset of

his probation acknowledging that condition and his understanding that failure to comply with his probation conditions could result in his probation being revoked. The Court reasoned that the defendant thus could not simultaneously comply with his probation officer's instruction to "chat with" the detectives "today" and invoke his Fifth Amendment right to remain silent.

The Court repeated that incriminating statements made to a probation officer are admissible when not made by someone in custody. The Court also rejected the contention that this situation was a "classic penalty situation," as in *Garrity*. Nevertheless, the Court emphasized that in an inherently coercive custodial interrogation setting the defendant need not invoke his Fifth Amendment privilege; rather, in that circumstance, the privilege is self-executing. In other words, if the surrounding circumstances show that the *Miranda* warnings were ineffective to safeguard the privilege, the resulting *Miranda* waiver is not voluntary.

The Court also complained that the officers did not provide any assurance that no penalty would be exacted if he disregarded the probation officer's instruction to "chat with" the officers. The Court also complained that the officers' recital of the *Miranda* warnings was ineffective to cure the coercive circumstances; the Court complained that the warnings did not clarify that the probation officer's instruction that the defendant "chat with" the detectives had no bearing on the defendant's right to remain silent. The Court also complained that neither the probation officer nor the detectives clarified that the defendant would not suffer any adverse probationary consequences if he chose to stand on his self-executing right to remain silent even though doing so would violate the probation officer's express instruction.

Thus, the Court concluded that the defendant reasonably could have understood, based on the literal meaning of his probation officer's words, that he was required as a condition of his probation to talk to the detectives "today." The Court also contended that the defendant reasonably could have interpreted his probation officer's statement that he would remain at police headquarters "for a little bit" to indicate that he would know if the defendant had not obeyed his instruction to speak with the detectives, further raising the specter of revocation for non-compliance.

The Court repeated that a confession, even if obtained in full compliance with *Miranda*, may be inadmissible if it was not voluntary, and that *Miranda* warnings may be ineffective because of law enforcement conduct during or preceding the warnings. The Court explained that "special caution" should be applied in circumstances where pre-warning conduct obscures both the practical and legal significance of the admonition when finally given. Instead, in this case, the Court complained that the officer's review of the defendant's *Miranda* rights repeatedly deemphasized its importance and presented it as a mere formality. The Court contended that the officer's characterization of the *Miranda* rights as a mere formality, in the context of the doubly coercive environment the officers had created, rendered the warnings ineffective to resolve the apparent conflict between the defendant's rights and the probation officer's instruction.

Lastly, the Court concluded that the totality of the circumstances presented here demonstrated that the defendant's waiver was not the product of a free and unconstrained choice. Although the trial court made no findings concerning the defendant's education or intellectual ability, the Court determined that the record demonstrated that the defendant's background and experience made him particularly vulnerable to the coercion applied in this case. The Court pointed to the evidence that the defendant was "intellectually disabled." The Court also argued that the defendant's experience with the

criminal justice system was dominated by compelled disclosures and acquiescence to the probation officer's instructions, even regarding the most intimate areas of his life.

The Court wrote: "Thomas is a man of limited intellectual functioning who for years had obeyed his probation officer's instructions because he knew that failure to do so could result in the loss of the "grace" the prior sentencing court had extended to him ... The detectives subjected Thomas to an inherently coercive custodial interrogation exacerbated by the tacit pressure of a possible probation revocation. The detectives' subsequent reading of the *Miranda* warnings—presented to Thomas as a mere formality—failed to cure the coercive circumstances presented here, which overbore Thomas's ability to make a free and unconstrained choice. We thus conclude that, under the unique circumstances of this case, Thomas's *Miranda* waiver was involuntary, and his incriminating statements were inadmissible."

The Court emphasized that "No new per-se rule follows from our recognition that the unique and specific facts of this case demonstrate Thomas was subjected to coercive pressures to waive his *Miranda* rights."

Regarding the Commonwealth's delayed disclosure expert, the Court acknowledged that the previous cases have been unclear and wrote: "We now clarify our case law. An expert may provide general testimony about memory formation and common post-abuse behavior but may not directly comment on the credibility of any witness. Expert testimony that child abuse victims often delay disclosing their abuse may make it more likely that the jury believes a victim's testimony, but that consequence is different from an expert opining that the victim is credible. Thus, expert testimony about memory formation and the reason for and frequency of delayed disclosures can help the jury contextualize the victim's testimony without usurping the jury's ultimate role in determining credibility."

The Court repeated that experts can possess knowledge in delayed disclosure above that possessed by the average juror. The Court explained that although the average juror may understand that delayed reporting sometimes occurs, they can still benefit from context about why and how often provided by an expert in the field. In this case, the Court found that the expert's testimony was materially different from the expert's testimony in *Davison*, where the expert witness testified that "the majority of the times kids don't lie about" being abused and that the most common reason for a victim to recant "may apply directly to this case."

The Court also ruled that the expert's reliance on studies not entered into evidence did not render her testimony impermissible hearsay. The Court rejected the defendant's contention that the expert's repeated references to what the "research suggested" was "tantamount to admitting the articles themselves" because it clashed with the relevant precedents and would overly restrict expert testimony. The Court cautioned, however, that the Commonwealth may not enter those studies into evidence. The Court repeated that hearsay materials on which an expert relies are not admissible in a criminal case.

Judge Raphael dissented from the Court's ruling suppressing the defendant's statement. Justice Raphael explained that he would have held that the invocation requirement recognized in *Murphy* applies equally to a probationer in a custodial setting, provided he is given proper *Miranda* warnings, is not coerced into confessing, and is not expressly or implicitly threatened with probation revocation for exercising his privilege against self-incrimination. Judge Raphael wrote: "It is also difficult to see how, under the majority's logic, law-enforcement officers could ever involve a probation officer in a custodial

interrogation without being required to give special warnings going beyond Miranda. Although the majority denies imposing such a per-se warning requirement, its opinion repeatedly implies that the probation officer or the detectives here had to tell Thomas that he could invoke his Fifth Amendment privilege without jeopardizing his probation.”

Judge Raphael continued: “the majority commits a grave error by tacking a codicil onto standard Miranda warnings for cases involving probationers in custodial settings. This new exception to the invocation requirement finds no support in our caselaw or that of any other jurisdiction. The cost of that error here is to vacate Thomas’s four life sentences for his vile crimes against A.R. That is bad enough. What is worse—and incalculable—is the disruption the majority’s stealth rule will inject into future cases in which probation officers have any involvement in custodial interrogations.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1429224.pdf>

Faust v. Commonwealth: March 5, 2024

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on Jury Selection, Hearsay, and Expert Witness grounds.

Facts: The defendant sexually assaulted an 11-year-old child. The child’s father had invited the defendant to live with him, his wife, and their seven children in their home. Thereafter, the defendant assaulted the children.

At trial, during jury selection, one juror disclosed that her father had abused her and her sister when they were young. Following this disclosure, the defendant asked the juror if that experience would “make it hard for [her] to give a fair trial today?” She answered, “No,” and explained that her father “did the right thing” after the abuse by getting “help” and by “acknowledg[ing].” The juror also expressed that she had forgiven her father. The trial court denied the defendant’s motion to strike the juror for cause based on her statement that her experience would not interfere with her ability to provide a fair trial.

At trial, the Commonwealth asked the child’s father “Why did you call the police to the house on that day?,” The father responded, “When [the defendant] came back to get the U- Haul, he was packing up, and [the victim] asked me—.” At that point, the defendant objected. The Commonwealth explained that it was not offering the testimony for the truth of the matter but rather to explain why the defendant called the police. The trial court overruled the objection.

The father then testified that the child asked if the defendant was leaving “because he touched us.” The father further testified that, following this statement by the child, he “brought the girls into the room, and we immediately asked them, questioned them on that.” Thereafter, the father called the police.

At trial, over the defendant’s objection, social worker Marcella Rustioni testified as an expert in “delayed reporting and the dynamics of child abuse.” Rustioni cited several reasons that a child might not disclose sexual abuse right away. She explained the dynamics of child abuse and how children

process and articulate that abuse. The trial court overruled the defendant's objections that her testimony was inadmissible because it constituted a direct comment on the victims' veracity and served to bolster their credibility. The trial court also rejected the defendant's claims that her testimony invaded the province of the jury.

Held: Affirmed.

Regarding the juror, the Court ruled that the trial court did not abuse its discretion by refusing to strike the juror for cause. The Court observed that the juror evinced such an ability to lay aside any preconceived views in rendering a verdict.

Regarding the father's testimony about the child's statement, the Court ruled that the trial court did not err by admitting the child's extrajudicial statements to her father. The Court agreed with the trial court that the Commonwealth offered the evidence not for the truth of the matter—i.e., that the defendant touched the child—but rather, to explain what the father did next. The Court explained that the fact that the child made the statement was relevant to explain why the father spoke with her and her cousin about the abuse that day and reported it to the police.

Regarding Marcella Rustioni's expert testimony, the Court ruled that the trial court did not err in admitting Rustioni's testimony. The Court distinguished the *Davison* case, explaining that in this case, the expert testimony cleared a threshold admissibility requirement that the *Davison* child therapist did not. Further, the Court observed, Rustioni did not opine, either directly or indirectly, on a specific witness's veracity or credibility. Instead, her testimony focused generally on the reasons for delayed reporting by child sexual abuse victims. The Court concluded that the expert testimony did not invade or otherwise impermissibly encroach upon the province of the jury.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1345222.pdf>

Zimmerman v. Commonwealth: August 15, 2023

Page: Defendant appeals his convictions for Murder and Child Abuse on Voir Dire, Witness Testimony, Denial of Character Evidence, and Expert Testimony issues.

Facts: The defendant killed his girlfriend's ten-month old child through abusive head trauma.

At a pretrial hearing, the court granted the Commonwealth's motion in limine to preclude the defendant from eliciting specific instances of conduct from his character witnesses to show that he was not a violent person, including any "reference to [the defendant's] specific interaction with children or actions not on the date of the offense." The trial court rejected his argument that Rule 2:405(b) permitted him to introduce specific instances of conduct to establish his character for non-violence.

The court also considered the parties' proposed voir dire questions. The defendant objected to three questions proposed by the Commonwealth.

1. The defendant argued that the first proposed question—"Do you understand that reasonable doubt does not require proof beyond all possible doubt[,] nor is the Commonwealth required to disprove every conceivable circumstance of innocence?"—was

argumentative and incorrectly instructed the jury that the Commonwealth could “prove the case with some doubt in [the jury’s] minds.”

2. The defendant argued that the second proposed question—“[I]f you hear two expert witnesses testify in [c]ourt and they give contradictory opinions[,] [i]s there anyone that would automatically not feel comfortable deciding to believe one over the other regardless of the evidence?”—improperly gave jurors the impression that they had “to make a decision[,] when the jury doesn’t have to make a decision between two experts.”
3. The defendant argued that the third proposed question—“Are any of you uncomfortable about accepting the responsibility to determine who is telling the truth?”—failed to capture instances where “both people are telling . . . slightly different stories but they’re both telling the truth.” The court overruled the objection.

The trial court overruled the defendant’s objections.

During voir dire, a juror who was a former police officer, advised that the assistant Commonwealth’s attorney had prosecuted cases in which he had been involved, and he also had “called [the prosecutor] like two years ago on a civil case.” The juror asserted that his previous interaction with the prosecutor would not affect his “ability to impartially decide [the] case based solely on the law and the evidence.” The juror also stated that he currently works at a medical facility, which would not affect his ability to be impartial.

The defendant asked to strike the former police officer for cause, arguing that because the former police officer had worked on cases with the prosecutor, that made him the prosecutor’s “client.” He contended that denying his motion to strike “creat[ed] a lack of confidence by the public in the integrity of the process.” The trial court refused to strike the juror.

During voir dire, the defendant raised a *Batson* challenge to the Commonwealth’s peremptory strikes eliminating all four prospective jurors under the age of 40 and striking the only Hispanic individual in the venire. The Commonwealth responded that age is not a “valid challenge” under *Batson* but explained its reasons for striking the four jurors. The Commonwealth also explained that the Hispanic juror made “vulgar statements on social media” and had a “large [collection] of traffic tickets,” which could influence his attitude toward law enforcement. The trial court overruled the challenges, finding that the Commonwealth had offered “appropriate reason[s]” for the strikes.

At trial, several Commonwealth witnesses testified that the injuries were “consistent with abusive head trauma” and were not consistent with a 17-inch fall, pneumonia, or a stroke, as the defendant’s experts opined. The defendant objected to the Commonwealth’s witness’ statements that the victim suffered abusive head trauma, arguing that this testimony established the “ultimate issue” in the case and therefore invaded the province of the jury. The trial court overruled his objection.

At trial, the Commonwealth elicited testimony from a doctor that the victim’s injuries were “highly suspicious for non-accidental trauma,” not consistent with falling from a couch, not consistent with a child his age, and “highly concerning for child abuse.” The doctor testified as a fact witness for the prosecution regarding her examination and assessment of victim’s injuries and the photographs she took. The doctor also explained that her team’s “NAT protocols” referred to “non-accidental trauma” protocols “that need to be completed when there’s a suspicion of non-accidental trauma.” On cross-examination, the trial court precluded the defendant from qualifying the doctor as an expert on cross-examination, over the defendant’s objection.

Held: Affirmed. The Court held that the court did not err by denying the defendant's *Batson* challenges or by overruling the defendant's objections to the Commonwealth's voir dire questions. As for the evidentiary issues, the Court ruled that the trial court did not err by allowing witnesses to testify to conclusions about the victim's injuries, by excluding "specific instances" of the defendant's nonviolent character, or by not designating the Commonwealth's lay witness as an expert on child abuse during cross-examination.

Regarding the defendant's proffered character evidence, the Court agreed that a defendant may introduce evidence of his reputation for pertinent character traits on the theory that it is improbable that a person who has a good reputation for such traits would be likely to commit the crime charged against him. However, the Court explained, a defendant, in order to establish good character, is not permitted to prove specific acts, custom, or course of conduct.

In this case, the Court noted that the defendant's character was not an "essential element" of a charge, claim, or defense. Further, the trial court allowed the defendant to present evidence that he had a reputation not only for truthfulness and peacefulness, but also for practicing good childcare—a character trait directly related to the charges against him. In this case, because having a violent character was not an "essential element" of the charges against him, the Court ruled that the trial court did not abuse its discretion in precluding evidence of "specific instances of conduct" under Rule 2:405(b).

Regarding the former police officer potential juror, the Court accepted the trial court's determination that the juror could be fair and impartial. Additionally, the Court explained that "a police officer is not a "client" of the Commonwealth Attorney's office; there is no attorney-client relationship between the officer and a prosecutor in a criminal case. The prosecutor represents the Commonwealth, not the officer."

Regarding the defendant's *Batson* challenge, the Court refused to extend *Batson* to age-discrimination claims, noting that the Court has long-allowed age-based peremptory strikes. The Court then held that the court did not err by accepting the Commonwealth's race-neutral explanation for the peremptory strike of the one Hispanic juror.

Regarding the three voir dire questions, the Court held that the questions were proper under § 19.2-262.01, and the court did not abuse its discretion in allowing the three challenged questions. The Court observed that the questions tracked common legal principles. The Court pointed out that the first challenged question, addressing reasonable doubt mirrors language in Model Jury Instruction 2.100.3. The Court agreed that this question was relevant because it would "disclose or clearly lead to the disclosure" of a juror's opinion or bias against the reasonable-doubt standard.

Turning to the expert-witness question, the Court ruled that the question did not foreclose a juror's option to decide not to believe either expert. Instead, it sought to reveal whether any juror would automatically view evidentiary conflicts as inconsistent with guilt. Lastly, the Court concluded that the third challenged question assessed the jurors' willingness to determine witness credibility and that the question was designed to reveal whether prospective jurors had any resistance to their factfinding role.

Regarding the Commonwealth's witness' testimony, the Court ruled that the lay and expert testimony that the victim's injuries were consistent with abusive head trauma did not invade the

province of the jury. The Court noted that the witnesses did not identify the defendant as the criminal agent, and their testimony merely tended to show that the child was intentionally, rather than accidentally, injured. Furthermore, the Court noted that the Commonwealth's opinion evidence contradicted the defendant's defense that the victim died from pneumonia or a stroke, not from abusive head trauma. In other words, the purpose of the opinion evidence was to prove an element of the offense and eliminate other theories about the cause of death. The Court repeated that the mere fact that a witness's opinion provides proof of an ultimate issue of fact does not preclude the evidence.

For example, the Court pointed to the Commonwealth's forensic physician's testimony at trial, which never identified the defendant as the criminal agent; instead, the Court noted that it was evidence that the child was intentionally injured, making the defendant's defense that pneumonia or stroke caused the child's death less probable.

Lastly, regarding the doctor that the defendant wanted to qualify as an expert, the Court noted that the doctor's testimony was within the doctor's realm of direct and personal knowledge as a member of the UVA forensics team that documented the victim's injuries. The Court did not find that the trial court abused its discretion by denying the defendant's request to designate the doctor as an expert witness for cross-examination purposes.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0507224.pdf>

Spinner v. Commonwealth: August 15, 2023

Lynchburg: Defendant appeals his convictions for Involuntary Vehicular Manslaughter, Hit and Run, and DUI on Admission of Witness Testimony, Video Evidence, a Certificate of Analysis, and HGN testimony.

Facts: The defendant drove while intoxicated and struck and killed a woman who was crossing the street. The video recording of the crash reflects that the car did not slow down after impact with the victim, nor did it stop at the scene. Instead of stopping immediately, the defendant circled the block, parked the car a block away, smoked a cigarette, and then returned to the collision scene on foot.

Despite the obvious damage to the driver's windshield, headlamp, and side mirror, the defendant first lied and told the responding officer that someone else hit the victim. On further questioning, he admitted to having hit the victim, but claimed that he did not stop sooner because he did not know he had hit someone. He also testified at trial that he knew he hit "something" but did not realize at the time "it was a person."

The defendant told the investigating officer that he had consumed alcohol in the early morning hours but none since he fell asleep at 5:00 a.m. that morning. The defendant failed FSTs, and the officer arrested the defendant. The officer first conducted a breath test, and then obtained a search warrant for the defendant's blood.

One of the field sobriety tests that the officer administered was an HGN test. At trial, the officer testified that bodies are affected by alcohol consumption. Specifically, he testified that with a nystagmus field sobriety test, he looked for involuntary eye movement that can be present due to alcohol

consumption. The defendant objected to this testimony, arguing that only a medical expert could testify about the effects of alcohol on the body. The trial court overruled the objection and allowed the testimony. The officer described how he conducted the nystagmus test and explained it was the “standard way that the test is administered.” He stated that he noticed a mild “nystagmus and jerking motion of the eye” during the test.

During the breath test, the officer forgot to inform the defendant of his right to observe the breath test process, the blood alcohol reading it produced, and the equipment used to perform the breath test, even though he attested on the certificate that he had in fact done so. However, the defendant was physically present during that entire process until the end of the process when the test results printed out on the printer of the machine. The officer observed the defendant for twenty minutes before conducting the breath test to ensure that the defendant did not burp or belch before the test, which would affect the test’s accuracy. The defendant was present through the entire procedure and was provided with a copy of the printout of the results. The officer also allowed the defendant to observe the test results and gave him a copy of those results.

At trial, the officer testified about his qualifications, the process, and the equipment he used for the test. He explained that he was a licensed breath test operator and used equipment approved by the Department of Forensic Science. The defendant objected to the admission of the certificate based on the officer’s failure to inform the defendant of his rights to observe, but the trial court overruled the objection and admitted the breath certificate.

At trial, DFS toxicologist Trista Wright testified. She had analyzed the defendant’s blood specimen and found a BAC of .038%. Dr. Wright also explained that she could calculate what the defendant’s BAC was at the time of the crash through a “retrograde extrapolation,” an analysis that determines an individual’s BAC at an earlier time based on specific information. To determine the appellant’s BAC using this method, Wright needed to know when he last consumed alcohol and that no alcohol was consumed after the accident. Over the defendant’s objection, Wright opined, based on the breath test certificate, the blood analysis result, and the information about the defendant’s last drink of alcohol, that the defendant’s BAC was between .08 to .13% by weight by volume at the approximate time of the crash.

The defendant argued that Dr. Wright’s retrograde extrapolation testimony was inadmissible under Rule 2:702(b), which provides that speculative testimony is not admissible. He suggested that the extrapolation was based on the unproven assumption that he did not consume alcohol after the accident. The trial court overruled his objection.

At trial, the defendant’s cousin testified. The defendant objected because the cousin had not been on the Commonwealth’s witness list and instead the Commonwealth only disclosed his name and identity two days before trial, rather than 21 days before trial as ordered. According to the prosecutor, she was unable to contact the cousin until two days before trial. She argued that there was “no surprise” because the defendant had originally subpoenaed the cousin as his own witness. The court allowed the testimony over the defendant’s objection.

At trial, the Commonwealth also introduced a surveillance video from a nearby store. The store owner testified that she had video surveillance cameras at her store. Her son programmed the surveillance system, which included a date and time stamp synchronized to the internet clock. She noted that she and her son were the only ones with access to the video recordings. Following the

incident, the owner saved the parking lot video from the relevant time to a DVD and provided it to the police. The surveillance system allowed the owner to download segments of the video but not to edit the recordings.

The defendant objected that the video was inadmissible under the “silent-witness theory” because the witness was unable to testify as to “the process by which the video was made.” The trial court overruled his objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting the cousin’s testimony, the surveillance video, Dr. Wright’s expert testimony on retrograde extrapolation, or the officer’s HGN testimony, and it agreed that the evidence supported the findings that the defendant had knowledge someone was injured as a result of the crash and that he failed to stop immediately as required by statute.

The Court first addressed the admission of the cousin’s testimony, despite the pretrial order. The Court rejected the defendant’s contention that the lack of notice deprived him of the “opportunity to research, vet, and discuss with” with witness what he knew and why the Commonwealth called him as a witness, finding that his claim of alleged prejudice was both general and speculative. The Court complained that the defendant did not specify any portion of the cousin’s testimony that surprised him, nor did he explain how an earlier disclosure would have benefited his defense or altered the course of the trial.

Regarding the video, the Court ruled that the owner’s testimony provided the trial court with a sufficient basis to find that the video was what the Commonwealth claimed it to be: an accurate recording of the traffic accident that occurred outside her convenience store on the date of the crash. The fact that the owner did not have formal training on the computer recording system and was unaware precisely how the software worked did not change the Court’s analysis.

Regarding the breath certificate, the Court ruled that the officer substantially complied with § 18.2-268.9 when he administered the breath test. The Court noted that the officer conducted everything in the defendant’s presence and provided him with a copy of the results. The Court concluded that the officer’s failure to specifically tell the defendant that he could watch the test and see the equipment did not render the certificate of analysis inadmissible. Instead, the procedural deficiency went to the weight of the evidence rather than its admissibility.

Regarding Dr. Wright’s testimony, the Court found that under the evidence, a reasonable jurist could conclude that the defendant did not have any alcohol after the crash and before the BAC testing. Consequently, the Court ruled that Dr. Wright’s testimony on retrograde extrapolation of the BAC at the time of the collision was based on facts in evidence.

Regarding the officer’s HGN testimony, the Court ruled that the officer was not offering a medical opinion. Instead, the Court noted that he simply explained how he conducted the nystagmus field sobriety test and that his execution of the test comported with the standard for test administration. Hertzog described the involuntary eye motion he looked for when conducting the test and noted that such motion can be present if the subject has consumed alcohol. Because this testimony was not a medical opinion, the Court ruled that the defendant’s argument necessarily failed. The Court explained that, once the threshold for admissibility of the testimony was met, it was up to the jury to

determine what weight to give it and the trial court did not abuse its discretion in permitting the testimony.

Lastly, regarding sufficiency, the Court agreed that the evidence was sufficient that the defendant, after striking a pedestrian, did not immediately stop as close to the scene of the accident as possible to do safely.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0725223.pdf>

Lumpkin v. Commonwealth: July 18, 2023

Danville: Defendant appeals his convictions for Child Sexual Assault on Refusal to Appoint an Expert, Sentencing him via Video on Sixth Amendment Confrontation grounds, and Eighth Amendment grounds.

Facts: The defendant raped and sexually assaulted an 11-year-old child. Prior to trial, the defendant made motions for the appointment of two experts: a urologist and for urine testing for semen content before trial.

In support of his motion for a urologist, the defendant testified that since 2004 he has been unable to have an erection or ejaculate. He claimed that he saw a physician for this issue in 2004 and 2005, but initial treatment was unsuccessful. The defendant was unable to remember where he received treatment or the name of the physician who provided treatment. The defendant also moved for testing of a urine sample for semen content, based on the proffer that a test could show semen seeping into his urine which can be indicative of a male who has not ejaculated in some time. The trial court denied both motions.

At sentencing, the defendant appeared by video because of COVID issues. The defendant objected to appearing remotely, contending that doing so was a violation of the confrontation clause and his due process rights. The trial court overruled the objection.

The trial court sentenced the defendant to life plus 120 years. The defendant objected on Eighth Amendment grounds, but the trial court overruled the objection.

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion in refusing to appoint an expert, order medical testing, nor in sentencing the defendant. The Court also ruled that the trial court did not violate the defendant's Sixth Amendment right to confrontation.

Regarding the denials of experts, the Court ruled that the trial court did not abuse its discretion in concluding that the defendant failed to present a particularized need for an expert. The Court noted that the defendant had no documentation of his impotency, a problem he claimed existed since 2004. Nor did he assert that the condition, once diagnosed, would have persisted to the date of the offenses and beyond. Additionally, the Court pointed out that he was unable to otherwise identify the diagnosing physician and had failed to mention the condition to any subsequent physicians for eighteen years. Lastly, the Court also noted that the crimes for which he was convicted occurred roughly two years before he made the request to appoint a urologist.

The Court concluded that any finding that the defendant was impotent at the time of testing would therefore not necessarily prove that he was impotent at the time the crimes occurred. The Court wrote: “Although Lumpkin hoped that expert assistance would develop mitigating evidence that would lead to acquittal, ‘a mere hope or suspicion that favorable evidence may result from an expert’s services does not create a constitutional mandate.’”

Regarding his sentencing via video, the Court rejected the defendant’s assertion that the trial court violated his Confrontation rights under the Sixth Amendment when it required him to appear via video conference at his sentencing hearing. The Court repeated that Confrontation is a trial right, and the Confrontation Clause of the Sixth Amendment does not apply to sentencing.

Lastly, the Court rejected the defendant’s argument that his sentence was unconstitutionally disproportionate. The Court restated that it declines to engage in a proportionality review in cases that do not involve life sentences without the possibility of parole. The Court explained that “The only reason that the aggregate sentences exceeded [Lumpkin’s] life expectanc[y] [is] because [he] committed so many separate crimes.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0129223.pdf>

Moore v. Commonwealth: June 20, 2023

Pittsylvania: Defendant appeals his conviction for Strangulation on the Judge’s Refusal to Recuse, Refusal to Disqualify the Prosecutor, Admission of Other Bad Acts, and Admission of Expert Testimony

Facts: In 2016, the defendant attacked and strangled his wife. The victim did not report this incident to the police until May 2020. At the time of the trial in 2022, the defendant and the victim were separated, and the victim was seeking a divorce.

The defendant moved for the judge in the matter to recuse herself. The defendant asserted that until recently, the judge’s former law firm bore her name; the firm was founded by the judge’s father, and the judge was married to a named partner. Until his death many years earlier, a partner in the firm had been representing the victim in the divorce proceedings against the defendant. The defendant alleged that the judge’s son, a law school student, had interned with the firm, where the judge’s brother also practiced. Commenting upon a jury’s prior acquittal of the defendant of strangulation from an incident that occurred with the victim in 2019, the victim’s father had told the prosecutor that they needed a “win” in the present case to strengthen her position in the divorce. The defendant maintained that the judge should recuse herself because of her close ties with the law firm, as well as the victim’s parents’ beliefs that the civil and criminal matters were intertwined.

The trial court denied the motion to recuse herself. At the time of the ruling, it had been almost nineteen years since the judge had practiced at the firm. The judge noted that the victim’s civil attorney was not involved in the criminal matter, the firm was not named for her, and there was no conflict of interest.

The defendant also moved to recuse the entire Office of the Commonwealth's Attorney because members of the office were potential fact witnesses to the victim's father's statement about needing a "win." The Commonwealth offered to stipulate to the statement at trial. The trial court found that no conflict of interest then existed and denied the motion to recuse the Commonwealth's Attorney's office.

At trial, over the defendant's objection, the trial court admitted evidence of other incidents of alleged domestic violence occurring in March 2019, January 2020, and May 2020, ruling at a pretrial motion in limine that evidence of those other assaults would be admissible "for explaining timeline and context" so long as the Commonwealth laid a proper foundation for the evidence. The defendant had been acquitted of some of these charges in a previous trial.

During trial, the court restricted the March 2019 evidence to show the timing of the victim's reporting of the abuse to her family. The court allowed the victim to testify regarding the January 2020 incident, finding that it was "admissible and relevant with regard to state of mind," and instructed the jury to consider that testimony only "with regard to state of mind." The Commonwealth introduced photographs of the victim's injuries from the January 2020 incident, and the court admitted them "with regard to just the effect on her mindset at that time." The victim also testified regarding the May 2020 incident, and the Commonwealth introduced photographs of her injuries from that incident over the defendant's objection. The court admitted those photographs "with regard to state of mind."

The Court also admitted, over the defendant's objection, an audio recording of the victim speaking to her brother after the May 2020 incident. The recording, of which the victim was unaware at the time, contained her detailed description of the defendant's assault that night. The victim also spoke about how difficult it would be to leave the defendant since the couple shared three children, and she cited her religious beliefs as one reason she had not left the relationship. Again, the trial court instructed the jury to consider the recording only insofar as it showed the victim's state of mind as to why she did not report the defendant's abuse or leave the marriage.

In addition, the Court admitted photographs from the January 2020 incident, over the defendant's objection, and allowed the victim to testify about the injuries depicted in those photos "with regard to just the effect on her mindset at that time." Similarly, the trial court admitted the photographs from the May 2020 incident "as noted previously with regard to state of mind and circumstantial evidence" over the defendant's objection.

At trial, the Commonwealth also called Sandy Dawson, an outreach prevention specialist at the Southside Survivor Response Center with fourteen years of experience in counseling victims of domestic violence, to testify as an expert witness in "victimology" and the pattern of "female victim responses to domestic assault and abuse." The defendant objected to Dawson's qualification as an expert witness, arguing that she was not "licensed" or "certified" and that Dawson had not spoken with the victim and was "just being asked to make generalized statements based upon her training and experience." The trial court overruled this objection, finding that Dawson had specialized knowledge that would assist the trier of fact.

Dawson opined that it was uncommon for a female victim of domestic violence to leave the relationship after the first instance of abuse. She stated that many victims blame themselves for the abuse and do not flee because they believe that the situation will improve. Dawson further stated that victims who had minor children with their abusers tended to remain in the relationship.

[Note: Sandy Dawson has since passed away – EJC].

[Great job to CA Bryan Haskins and ACA Mary Katherine Pendleton in this case – EJC].

Held: Affirmed.

First, regarding recusal of the judge, the Court found that the defendant failed to show that the trial judge had a personal bias or prejudice in this case. The Court also found that the defendant did not show that the civil attorney “personally and substantially participated in the matter as a lawyer while associated with the judge.” The Court pointed out that even the defendant had agreed that the trial judge could, after 19 years on the bench, hear a case that the civil attorney was handling.

Next, regarding the recusal of the prosecutor, the Court noted that the Commonwealth agreed to stipulate that the comments had been made, thus negating the need to call the prosecutors as witnesses. The Court ruled that the defendant had failed to make a showing that disqualification of the prosecutor or the Commonwealth’s Attorney’s office would have been required under Rule 3.7 of the Rules of Professional Conduct.

Third, regarding the other bad acts evidence, the Court found that, given the limiting instructions to the jury and our presumption that the jury followed those instructions, the admission of this other bad acts evidence was not an abuse of discretion. The Court concluded that the defendant’s violent behavior toward the victim in 2019 and 2020 was admissible. The Court reasoned that it was relevant under Rule 2:404(b) to show the relationship between the parties and to explain the victim’s long delay in reporting the December 2016 incident. The Court found that the victim’s state of mind and her delay in reporting were made relevant by the defendant’s arguments that the delay made the victim’s testimony less credible. The Court also noted that the trial court properly limited the jury’s consideration of this evidence only to show the victim’s state of mind during this time period, thus avoiding exclusion under Rule 2:403.

Regarding the recording in particular, the Court pointed out that the audio recording was not offered for the truth of the matter asserted. Instead, the Court agreed that the recording was relevant to explain the delay in the victim’s reporting of the abuse and ruled that it was not error to admit it into evidence.

Regarding the photographs, the Court also ruled that the trial court did not abuse its discretion in ruling that the photos were relevant, and therefore admissible under Rules 2:401 and 2:402, to show why the victim was reluctant to report the defendant’s abuse, as well as the reasons for her ultimately deciding to come forward. The Court agreed that the photos were consistent with and relevant to the Commonwealth’s position that her delay related to her desire to preserve her marriage and to avoid legal trouble for her husband—until she reached a breaking point when the incidents continued and escalated.

Lastly, regarding the Commonwealth’s DV expert, the Court noted that the trial court found that the expert had “specialized knowledge” that would “assist the trier of fact.” The court also found that the expert’s knowledge was in “a specialized area in which not the average individual would know.” While the expert was not licensed by the state as a counselor, nor did she testify to having any other state licensures, the Court pointed out that no such license is required by Rule 2:702. The Court agreed that the expert had knowledge and experience in a specialized field, and the trial court did not abuse its discretion in qualifying her as an expert witness.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0724223.pdf>

Hearsay

United States Supreme Court

Samia v. U.S.: June 23, 2023

599 U.S. 635 (2023)

2nd Circuit: Defendant appeals his conviction for Murder for Hire and Kidnapping on Sixth Amendment Confrontation Clause grounds.

Facts: The defendant and his co-defendant worked in the Philippines for a crime boss and, on his orders, kidnapped and murdered a woman. Agents interviewed the co-defendant, who confessed but claimed that he was only the driver and that the defendant had shot the victim.

The Government tried the defendants jointly. Prior to trial, the Court granted the Government's motion to admit the co-defendant's confession through an agent, who would testify as to the content of the confession in a way that eliminated the defendant's name while avoiding any obvious indications of redaction. The agent then testified, over the defendant's objection, that the co-defendant described a time when "the other person he was with pulled the trigger on that woman in a van that he ...was driving."

During the agent's testimony, the trial court instructed the jury that his testimony was admissible only as to the co-defendant and should not be considered as to the defendant. The trial court later provided a similar limiting instruction before the jury began its deliberations. The defendant objected that that the admission of the confession—even as altered and with a limiting instruction—was constitutional error because other evidence and statements at trial enabled the jury to immediately infer that the "other person" described in the confession was the defendant himself. The trial court overruled the objection.

Held: Affirmed. In a 6-3 ruling, the Court determined that the Confrontation Clause does not bar the admission of a non-testifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the non-confessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant.

The Court first agreed that the co-defendant's formal, Mirandized confession to authorities, which the Government sought to introduce at trial, was testimonial, and therefore it fell within the Confrontation Clause's ambit. However, the Court pointed out that, under *Crawford*, the Confrontation Clause applies only to witnesses "against the accused," and ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness against a defendant if the jury is instructed to consider that testimony only against a codefendant.

The Court then examined the history of the Confrontation Clause in this context, and then reviewed the 1968 *Bruton* case, that held that a defendant is deprived of his rights under the Confrontation Clause when his non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. However, the Court then examined its other cases and concluded that the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so "indirectly." Thus, the *Bruton* rule applies only to "directly accusatory" incriminating statements, as distinct from those that do not refer directly to the defendant and become incriminating only when linked with evidence introduced later at trial.

In this case, the Court concluded that the "Confrontation Clause ensures that defendants have the opportunity to confront witnesses against them, but it does not provide a freestanding guarantee against the risk of potential prejudice that may arise inferentially in a joint trial. Here, the Clause was not violated by the admission of a non-testifying codefendant's confession that did not directly inculcate the defendant and was subject to a proper limiting instruction."

In a footnote, the Court pointed out that the Court had never opined as to whether rewriting a confession may serve as a proper method of redaction and did not reach this issue in this case.

Justice Barrett filed a concurring opinion. Justice Kagan filed a dissenting opinion, as did Justice Jackson.

Full Case At:

https://www.supremecourt.gov/opinions/22pdf/22-196_p8k0.pdf

Virginia Court of Appeals - Published

Davis v. Commonwealth: November 21, 2023

Spotsylvania: Defendant appeals his convictions for Possession of a Controlled Substance, Possession of a Firearm by Felon, Transportation of a Firearm by a Felon, Carrying a Concealed Weapon by a Felon, and related charges on Double Jeopardy, Admission of Court Records, Jury Instruction, and sufficiency grounds.

Facts: The defendant possessed fentanyl and two handguns while he was driving a car. Police stopped him because his vehicle was reported as stolen. The defendant then ran on foot from law enforcement, taking a firearm with him as he fled into the woods. Thirty minutes later, police apprehended him and discovered that he was carrying the gun concealed. The defendant admitted to being a convicted felon. An officer searched the defendant and found pills, which the defendant stated were Percocet.

Prior to trial, the defendant moved to dismiss one of the two charged offenses under § 18.2-308.2, to wit: Possession of a Firearm by Felon and Carrying a Concealed Weapon by a Felon, on Fifth Amendment double jeopardy grounds. The trial court denied the motion.

At trial, the officers testified about the firearms that they recovered. One officer testified that the item he found in the front seat of the vehicle was a nine-millimeter Smith and Wesson pistol. He explained that he had experience with firearms and could tell if a gun was “real.” The officer said that the item was a “real gun” and recited its serial number.

The other officer testified that he had experience with firearms, testified that the item he found on the defendant’s person was a “forty-caliber Smith and Wesson handgun semiautomatic with an extended mag and . . . one round in the chamber.” He specified that this item was a “real gun.” The officer explained that after he recovered the gun, he “rack[ed] it” to expel the bullet that was “in the chamber.” The officer provided its serial number and also described it as a “real gun.” The juries watched the video recording from the officer’s body-worn camera that showed one of the guns when officers found it on the defendant’s person. The video also recorded the officer clearing the cartridge from the chamber of that gun.

At trial, the defendant argued that the Commonwealth did not lay the proper foundation to allow testimony that the items were firearms under the statute. He suggested that the testimony of the officers did not exclude the possibilities that the items were toys or replicas.

To prove the defendant’s previous felony conviction, at trial, the Commonwealth introduced documents from the Circuit Court of Prince George’s County, Maryland, which identified the defendant by his full name and date of birth. They reflected that the Maryland court accepted the defendant’s guilty plea to the charge of “Robbery with a Dangerous Weapon” and that he was convicted of that offense. They also include a copy of the grand jury indictment, which charged that the defendant committed robbery in violation of Maryland Criminal Law Code § 3-403 and recited the elements of that offense. Maryland Criminal Law Code § 3-403, robbery with a dangerous weapon, is a felony. The Commonwealth presented a copy of that code section to the trial court, and the trial court admitted a copy into evidence.

The officer also testified that the NCIC report listed the defendant’s felony conviction for robbery with a deadly weapon in violation of “CR3403MD,” indicating Maryland Criminal Law Code § 3-403. The officer also recited the case number, which matched the case number provided on the Maryland court documents. Although the officer did not explain who maintains the NCIC database during his testimony, he stated that he routinely relied on information contained within it for police matters.

At trial, the defendant argued that the documents failed to meet the relevancy standard because they did not satisfy the requirements of a judgment order.

At trial, a forensic scientist testified that percocet contains oxycodone, a Schedule II controlled substance. In fact, however, the scientist testified that she located fentanyl, a different Schedule II controlled substance, in the pills. The defendant argued that the Commonwealth failed to prove that he knew the nature of the controlled substance in his possession.

Lastly, the defendant objected to the language in the jury instructions that referred to him as the “defendant.” The defendant contended that the use of the term “defendant” in the jury instructions instead of his surname biased the juries against him and therefore did not comport with the tenet that he was innocent until proven guilty. The defendant argued that by referencing him as “the defendant” in the jury instructions, the trial court improperly shifted the burden of proof to him and away from the Commonwealth.

Held: Affirmed. The Court held that the two convictions under § 18.2-308.2 involving the same gun do not violate the defendant's constitutional protection against double jeopardy. The Court also ruled that the trial court acted within its discretion by admitting officer testimony that the guns were "real." The Court held that the trial court also properly admitted the Maryland court documents. The Court held that the evidence was sufficient to prove that the defendant had previously been convicted of a felony, that each gun in his possession met the applicable legal definition of a firearm, and that his possession of a controlled substance was knowing. Finally, the Court held that the trial court did not err by rejecting the defendant's suggested jury instruction wording to refer to him by name instead of as "the defendant."

Regarding the defendant's double jeopardy argument, the Court repeated that, under *Baker*, each separate act or occurrence violating § 18.2-308.2 constitutes a separate offense. The gravamen of each of the firearm offenses proscribed by the statute is placing the community in "heightened danger," so consequently, each separate instance resulting in a heightened danger to the community may be punished separately. In this case, although he ultimately was caught not far from his car, the Court found that the defendant's act of taking the firearm with him, concealing it, and keeping it with him for the thirty minutes during which he evaded police created a heightened danger to the community separate and distinct from the danger when the officer first encountered him in the car. Therefore, the Court ruled that the trial court did not err by denying the defendant's pre-trial motion to dismiss one of the charges on double jeopardy grounds.

In a footnote, the Court pointed out that *Baker* addressed three convictions for possessing a firearm under § 18.2-308.2. This case, the Court pointed out, involved two alternative ways in which the Commonwealth can establish a violation of § 18.2-308.2: possession of a firearm and carrying it in a concealed manner. The Court explained that, just as someone can possess the same firearm in separate instances, giving rise to separate offenses, it concluded that someone could possess a firearm in one instance and carry it in a concealed manner in a second instance, similarly supporting separate charges and punishments.

Regarding the sufficiency of the evidence about the firearms, the Court repeated that the Commonwealth was not required to show that the items were operable at the time of the offenses. The Court also explained that the testimony did not have to exclude all possibility that the items were toys or replicas in order to be admissible. In this case, the Court ruled that the juries could reasonably conclude that the items in question were "designed, made, and intended to fire or expel a projectile by means of an explosion" and therefore, the Commonwealth presented evidence sufficient to prove that the items were firearms within the meaning of § 18.2-308.2.

Regarding the evidence of the defendant's previous felony conviction, the Court ruled that the documents, viewed together as a single exhibit, provided enough information to permit a fact finder to conclude that the defendant was previously convicted of a felony. The Court also agreed that the defendant's admission, the Maryland documents, and the NCIC information met the Commonwealth's burden of proving that the defendant had a previous felony conviction.

Regarding the nature of the controlled substance, the Court repeated that in proving the offense of illegal drug possession, the knowledge requirement may be met by showing that the defendant knew the identity of the substance he possessed, regardless of whether he knew it was

illegal. In this case, the Court noted that the evidence that the defendant believed he had Percocet was enough to show that he had knowledge of the pills' nature and character as a Schedule II controlled substance.

In a footnote, the Court pointed out that the trial court had also instructed the jury that "the defendant does not need to know precisely what controlled substance" he possessed, although this issue is pending an *En Banc* hearing in *Camann v. Commonwealth*, which had yet to be decided as of this ruling.

Regarding the defendant's complaint about using the word "defendant" in jury instructions, the Court complained that the defendant cited no authority holding that a trial court must refer to a defendant by name in the jury instructions, and the Court itself did not find any authority either. The Court explained that the term "defendant," in a criminal proceeding, means nothing more than the "person . . . accused" of the crime or crimes. Accordingly, the Court ruled that the trial court did not abuse its discretion by referring to the defendant as "the defendant" in the jury instructions.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0903222.pdf>

Baez v. Commonwealth: November 14, 2023

Lynchburg: Defendant appeals her conviction for Drug Possession on Admission of Video Evidence and Chain of Custody issues.

Facts: The defendant possessed drugs while driving a car. Officers stopped the defendant for speeding and a dog alerted on her vehicle. After finding drug paraphernalia in the vehicle, a female backup officer searched the defendant and found cocaine. Her body-worn camera captured the moment where she found the container with the defendant's drugs and opened the container, before walking them over to the hood of a police vehicle to conduct a field test of the substance. Several officers' videos also captured the officers conducting a field test and the primary officer handing the drugs to his partner, who put the drugs in the primary officer's vehicle to be taken to the police department, packaged, and sent to DFS. Later, a DFS forensic scientist confirmed that DFS received the drugs in a sealed condition.

At trial, the female backup officer who searched the defendant did not testify. Instead, the Commonwealth introduced her body-worn camera footage. The date and time stamp on the video was inaccurate but the primary officer confirmed the actual time of the stop. The primary officer also testified about how the body-worn cameras work generally, how the videos are created, and that they were uploaded automatically when an officer places his or her camera on its charger at the end of each day. The primary officer testified that he was present at the scene and that the body-worn camera footage accurately depicted the events that took place the night of the traffic stop. He identified the defendant and the other officers and explained that he assisted in placing the drugs found in an evidence bag.

At trial, the two officers gave inconsistent and vague testimony about who collected the drugs, who packaged them on scene, and who sent the drugs to the lab. For example, while the primary officer incorrectly testified that he was the one who took the evidence and checked it into property, the body camera footage revealed that it was the officer's partner who did that. However, the officer's partner testified that he did not remember who packaged the drugs; the partner explained that when he and the primary officer returned to the police department, either officer, or both officers together, would have processed the evidence. He affirmed that neither officer tampered with the evidence.

The defendant objected to the admission of the body-worn camera footage, arguing that it violated the Confrontation Clause, contending that the female backup officer's actions, recorded in the video, qualify as hearsay because they were intended as assertions, and the video itself was a testimonial assertion, given an officer's "unique" ability to control and manipulate a body camera.

The defendant also argued that the video was not properly authenticated under Virginia Rule of Evidence 2:901. She argued that the officer did not create the video, and therefore could not authenticate it. The defendant also objected that each officer who testified did not observe the entirety of the events depicted on the video, including, most importantly, the search itself. Lastly, the defendant complained that the date and time stamp on the video did not match the officers' testimony about when the video was recorded, and therefore the video did not comport with the officers' personal observations on the scene.

The trial court overruled the objections and admitted the body-worn camera video. The Commonwealth "muted" the backup officer's video so that only the video played, without any dialogue.

The defendant also objected to the certificate of analysis, contending that argues that the first "vital link" in the chain of custody of the drugs was not properly established due to insufficient evidence of the initial collection of the evidence. The trial court overruled the objection and admitted the certificate of analysis.

The trial court deferred a finding of guilt pursuant to § 18.2-251. However, after the defendant violated the conditions of her first-time offender disposition, the trial court found her guilty of drug possession.

Held: Affirmed.

Regarding the defendant's Confrontation Clause argument, the Court first repeated that camera video itself does not implicate the Confrontation Clause. Instead, the Court explained, the Confrontation Clause will only be implicated by conduct or actions depicted within the video. In this case, the Court concluded that the video did not depict any conduct by the officers intended to be an assertion. Instead, the Court observed, it merely depicted the occurrence of a search.

In a footnote, the Court noted that was not foreclosing the possibility that in certain cases involving body-worn camera footage, where the video evidence is shown to have been so overwhelmingly manipulated, edited, and controlled by the officer that it is inherently unreliable, such evidence may be inadmissible under the principles of Rule 2:901.

Regarding authentication of the video, the Court repeated the general rule that the content of the video is admissible either to illustrate a witness' testimony or to serve as an "independent silent witness" of matters depicted in the video. The Court emphasized that a proponent need only satisfy one of the two avenues to properly authenticate a video or photograph. In this case, the Court found that

the officers' testimony was sufficient to satisfy the authentication requirements contained in Rule 2:901, to illustrate the officers' testimony. The Court affirmed that the trial court was entitled to find that the video was continuous, as indicated by the lack of gaps in the time stamps and the passage of time. The Court concluded that these factors, coupled with testimony confirming the accuracy of portions of the events depicted in the video, were enough to also find that the Commonwealth had satisfied the authentication requirements contained in Rule 2:901, for admission as a silent witness.

The Court made clear that a witness does not have to personally create a video or photograph to properly authenticate it. In addition, the Court found nothing to suggest that a witness must personally observe every detail of a proffered video to authenticate it. In this case, the Court found that the portions of the video that the primary officer could verify as accurate and representative of the events during the evening of the traffic stop served to establish the authenticity of the entire recording. The Court explained that whether a witness observed enough of the scene depicted on a video to properly authenticate it under Rule 2:901 is a determination within the sound discretion of the trial court and will be disturbed only upon a showing of a clear abuse of discretion.

Regarding the certificate of analysis, the Court agreed that the footage from the female backup officer's body-worn camera was necessary for the Commonwealth to properly establish, with reasonable certainty, that the narcotics were in the same condition when analyzed as they were when taken from the defendant. However, the Court found that the backup officer's testimony was not necessary for the Commonwealth to introduce the video footage of her body-worn camera. Further, the Court explained that her footage spoke for itself, as a silent witness, in proving the first vital link in the chain of custody of the narcotics found.

Regarding the inconsistencies in the officers' testimony about who handled the drugs and when, the Court ruled that any issues involving the chain of custody went to the weight of the evidence, and those fact questions were properly submitted to the finder of fact.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0073233.pdf>

Cheripika v. Commonwealth: September 19, 2023

78 Va. App. 480, 891 S.E.2d 754 (2023)

Fluvanna: Defendant appeals his convictions for Child Sexual Assault Under 13 on admission of Prior Bad Acts, Admission of Medical Records, Prohibiting Access to the Internet in Discovery, a Jury Instruction, and the Constitutionality of his Mandatory Life Sentence.

Facts: The defendant repeatedly sexually assaulted his own stepchild from age eight to age twelve. The child disclosed the years of abuse to her mother and revealed the abuse but could not remember specific dates because it happened at least two or three times a week for a long period of time. The mother contacted the police, who immediately investigated, along with CPS.

After speaking with police and CPS, the defendant left the family home and admitted himself into a hospital in New Jersey. While receiving mental health treatment, the defendant admitted that he had sexually assaulted a child who was a member of his family. The medical records also indicated that

“everything seemed normal” when the defendant’s mother saw him for Easter, but a couple days later, he wanted to go to New Jersey for treatment. A police investigator obtained and executed a search warrant for the defendant’s medical records.

Before trial, the defendant moved to exclude from the evidence his medical records from the hospital in New Jersey that contained his admission that he had sexually assaulted a child who was a member of his family. He argued that admitting the records would violate his right to confront his accusers. The trial court denied the motion, finding that the statements were not testimonial because he was at the hospital seeking treatment.

The defendant elected to proceed pro se despite having several attorneys appointed for him. During discovery, the defendant asked the trial court to allow him to access the internet to “try and receive defense information” and “print off other materials as part of [his] defense.” The defendant asserted that he needed internet access to retrieve exculpatory evidence from cloud storage. He also argued that his lack of internet access violated his First Amendment rights. The defendant did not proffer what information was in the cloud storage, or what the nature of the purportedly exculpatory evidence was; he stated only that “they’re documents.” The trial court denied the defendant’s motion, finding that there was “nothing specific enough” for it to act upon.

The defendant had also sexually assaulted the victim’s sister, who was three years younger. At trial, over the defendant’s objection, the sister testified as well that the defendant sexually abusing her when she was eight years old. The defendant objected that the testimony served no purpose other than to prove his propensity to commit sexual offenses, but the trial court rejected his argument. Nonetheless, the Court instructed the jury that it could consider the other child’s testimony “only as evidence of [the defendant’s] motive or intent or as evidence of [his] scheme or plan as evidenced by his conduct and feelings toward the victim.”

At trial, the trial court gave the Flight instruction, over the defendant’s objection. The defendant had asserted that the record was devoid of evidence that he fled the scene of the crime to avoid detection, apprehension, arrest, or criminal prosecution.

During sentencing, the trial court appointed the defendant’s standby counsel for the sentencing phase of the trial. The defendant’s convictions for object sexual penetration of a victim under the age of 13 carried mandatory minimum terms of life imprisonment per § 18.2-67.2. The trial court sentenced him to the mandatory minimum of life imprisonment for each of two charges.

The defendant unsuccessfully asserted that the mandatory life sentences were grossly disproportionate to his crimes, arguing that he was a first-time offender with no criminal record. He also argued that the mandatory sentences violated his Sixth Amendment right to counsel because although represented, his attorney could do nothing to change the mandatory sentences. The trial court rejected the defendant’s argument that the mandatory life sentences were unconstitutional.

Held: Affirmed.

Regarding the defendant’s prior sexual assaults against the other child, the Court repeated that when the prior sexual abuse was committed against another victim, evidence of the abuse may be admissible to demonstrate a defendant’s common motive, method, plan, or scheme, particularly in prosecutions for crime involving “a depraved sexual instinct.” The Court repeated that acts “showing a

perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character.”

In this case, the Court reasoned that when the two daughters provided substantially similar testimony that described the defendant’s same pattern of abuse, each daughter’s testimony had significant probative value of demonstrating the defendant’s incestuous disposition toward his daughters and that his offenses against both were “inspired by one purpose.” The Court found that the other child’s testimony describing the sexual abuse was highly probative of the nature of the defendant’s relationship with both children and established the parallel conduct of his abuse with both girls.

The Court pointed out that the children were siblings in the same household and close in age. Both testified that the defendant began abusing them when they were eight years old, which the Court reasoned demonstrated that he was sexually attracted to children of that age. The Court also noted that the defendant employed the same method of abuse with both children. Thus, the Court concluded that their testimony highlighting the defendant’s parallel conduct was highly probative of the common scheme and method he employed to abuse the victim in this case.

The Court also relied on the trial court’s jury instruction, repeating that it would presume the jury followed the trial court’s limiting instruction.

Regarding the defendant’s medical records, the Court found that the circumstances surrounding the challenged records demonstrated that the defendant was seeking medical treatment, during the defendant’s treatment for his suicidal ideation. The Court applied *Crawford* and concluded that the primary purpose of the statements was not to create an out-of-court substitute for trial testimony. Rather, the statements were made to properly document the defendant’s medical chart for his treatment. Accordingly, the Court found that the statements in the defendant’s medical records were not testimonial, and the trial court did not abuse its discretion by admitting them.

Regarding the defendant’s request for Internet access in discovery, the Court complained that the defendant failed to provide any proffer—let alone an adequate one—of the information he sought to obtain from the internet. On this record, the Court found no basis to determine whether the trial court committed reversible error by denying him that access.

Regarding the flight instruction, the Court agreed that there was sufficient evidence for the jury to have concluded that the defendant travelled to New Jersey to avoid detection, apprehension, arrest, or prosecution. The Court noted that there was no evidence that demonstrated that he could not seek treatment within the Commonwealth, a circumstance from which a rational factfinder could conclude he sought to distance himself from apprehension.

Regarding the constitutionality of the defendant’s life sentences, the Court again declined to engage in a proportionality review, as the defendant’s life sentence does not lack the possibility of parole. The Court noted that the defendant’s convictions were not Class 1 felonies, so he will be eligible for geriatric release under § 53.1-40.01. Therefore, although the defendant was sentenced to life in prison, he was not sentenced to life without parole.

The Court also rejected the defendant’s argument that the mandatory sentences deprived him of counsel who could advocate on his behalf. The Court found that the record demonstrated that despite the predetermined sentences, the defendant’s counsel challenged the validity of the mandatory sentences, argued that the sentences should not have been imposed, addressed the Commonwealth’s

arguments, and cross-examined a witness. The Court noted that counsel's actions during the sentencing hearing preserved the defendant's arguments for appeal. Thus, the Court concluded that the defendant's Sixth Amendment right to counsel was fully vindicated at the sentencing hearing.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1153222.pdf>

Bista v. Commonwealth: September 12, 2023 (En Banc)

78 Va. App. 391, 891 S.E.2d 711 (2023)

Aff'd Panel Ruling of December 6, 2022

Fairfax: Defendant appeals his convictions for Child Sexual Assault on Hearsay grounds.

Facts: The defendant sexually assaulted a child who was eleven years old at the time and suffered from autism. The child's mother discovered the assault after personally witnessing the defendant assaulting the victim. After police began an investigation, a forensic interviewer conducted a recorded interview with the victim. The child described several assaults by the defendant. Police also obtained DNA evidence that identified the defendant as the perpetrator.

The victim then testified at a preliminary hearing. At the preliminary hearing, the defendant extensively cross-examined her specifically about her testimony during the subsequent competency hearing and introduced that transcript into evidence.

Prior to trial, the defendant asked the trial court to evaluate the victim's competency to testify. After a hearing, the trial court determined that the victim did not have the "capacity to comprehend the legal significance of an oath," "distinguish truth from a falsehood," or "understand the questions propounded and make intelligent answers." Accordingly, the trial court concluded that the victim was "not competent to testify at this time."

Before trial, the Commonwealth moved the trial court to admit the victim's out-of-court disclosures to her parents, teacher, and the forensic interviewer under § 19.2-268.3. The interviewer was no longer employed at the forensic facility, but the executive director authenticated the video from the forensic interview. The defendant objected, but the trial court overruled the objection.

The defendant then moved to exclude the video of the forensic interview from trial under the Sixth Amendment's Confrontation Clause. Although the defendant acknowledged that he had a prior opportunity to cross examine the victim at preliminary hearing, he argued that the examination was defective because at the time:

- (1) the defendant "did not face a rape charge;"
- (2) "[n]either complete discovery nor all of [the victim's] school records had been disclosed";
- (3) the defendant was unaware of additional statements "to the victim's parents and her teacher" admitted at trial;
- (4) the victim "purposefully" lied regarding certain facts; and
- (5) the victim's autism—"the condition that rendered her incompetent"—made her cross-examination "meaningless."

The trial court overruled the defendant's objection and admitted the video interview.

The Court of Appeals affirmed. As a matter of first impression, the Court held that that §19.2-268.3 does not condition admissibility on the declarant's competency to testify. Thus, the Court held that the trial court correctly concluded that the victim's incompetency to testify did not automatically render her hearsay statements inadmissible.

Held: Affirmed. In a 10-7 ruling, the Court ruled that the trial court did not err by admitting the victim's out-of-court statements under § 19.2-268.3 after she had been declared incompetent to testify at trial, and the admission of the victim's forensic interview video did not violate the defendant's Confrontation Clause right.

The Court first ruled that a child's incompetence to testify does not categorically bar the admissibility of the child's out-of-court statements under § 19.2-268.3. The Court pointed out that §19.2-268.3(B)(2)(b) expressly contemplates that some children will be unavailable and addresses that circumstance by requiring "corroborative evidence of the act" giving rise to the charged offense.

The Court then held that that the trial court did not abuse its discretion when weighing the statutory factors and finding the victim's statements "inherently trustworthy" under § 19.2-268.3. The Court examined the facts and agreed that the record supported the trial court's conclusion that the victim's statements were inherently trustworthy. The Court found that although the victim made some false statements, which impacted the competency determination, the trial court had discretion to find that her out-of-court statements were inherently trustworthy when considering the totality of circumstances under § 19.2-268.3(B)(1).

Assuming without deciding that the victim's statements during the forensic interview were testimonial, the Court ruled that the victim's statements were admissible because the defendant's Sixth Amendment confrontation right was satisfied at the preliminary hearing when he cross-examined the victim regarding substantially similar testimony.

The Court repeated that a statement is testimonial if, viewed objectively and in full context, it was given with the primary purpose of creating an out-of-court substitute for trial testimony. The Court also repeated that this "primary purpose" test considers, among other factors, the intent of the declarant under the circumstances. The Court quoted the U.S. Supreme Court, though, that "Statements by very young children will rarely, if ever, implicate the Confrontation Clause."

In this case, the Court found that the opportunity for constitutionally adequate cross-examination did not require the Commonwealth to affirmatively introduce or elicit testimony concerning the forensic interview video at the preliminary hearing. The Court also rejected the defendant's argument that he did not have a prior opportunity to cross-examine the victim before trial. The Court responded that even if the defendant's cross-examination at the preliminary hearing was less thorough than the defendant might desire, the defendant had not identified anything in the record that rendered the examination constitutionally infirm. The Court also noted that the defendant never challenged the victim's competency to testify at the preliminary hearing.

The Court also ruled that the record contains corroborative evidence of the defendant's crimes, satisfying § 19.2-268.3(B)(2)(b).

Judge Humphreys filed a concurring opinion, joined by Judge AtLee. Judge Lorish dissented, joined by judges Ortiz, Causey, Friedman, Chaney, Raphael, and Callins.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0904214.pdf>

Original Panel Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0904214.pdf>

Virginia Court of Appeals -
Unpublished

Ali v. Commonwealth: May 28, 2024

Chesterfield: Defendant appeals his convictions for Abduction on Fifth Amendment *Miranda*, Hearsay, and sufficiency of the evidence grounds.

Facts: The defendant, a Lyft ride-sharing driver, picked up the victim, who was intoxicated and had requested a ride using a ride-sharing app. The defendant arrived at the victim's home and then provided notice to Lyft that he had arrived at the agreed destination. However, instead of leaving the victim at her home as agreed, the defendant then drove her to a nearby church parking lot while the victim was unconscious. While in the parking lot, the victim awoke, discovered that her pants and underwear had been pulled out of place, and the defendant was "close to" her. The victim immediately began striking the defendant while demanding that he take her home. The defendant finally took the victim home.

Officers investigated and spoke to the defendant at the police station. There, the officers explained to the defendant that he was not under arrest and that he could leave the interview whenever he wanted. That interview took place in English, although the defendant's brother translated some statements for him into Arabic. The defendant made various false statements, including denying that he brought the victim to the church at all.

Later the same day, an officer arrested the defendant and conducted a second interview. The officer began that interview by both reading the defendant his *Miranda* rights in English from a printed card and by explaining in greater detail the various *Miranda* rights he possessed. The defendant advised the officer that he had no questions about his rights and continued the interview. The officer used the language line to conduct the interview in Arabic.

Prior to trial, the defendant moved to suppress his statements to the police. The defendant argued that he had not validly waived his *Miranda* rights prior to being interrogated, based on his alleged lack of knowledge of the English language which he alleged prevented him from understanding the *Miranda* warnings given him by the officer. As a result, he asserted that he neither knowingly nor voluntarily waived his constitutional rights. After reviewing the videotaped statements, the trial court determined that the defendant was able to communicate in English.

The defendant also argued that the officer employed "a number of devious and deceptive tactics to attempt to coerce a confession from" him. He first contended that the officer's failure to advise him of his rights during the first interview followed by a second interrogation the same day

constituted coercion. The defendant then asserted that the officer lied to him about having proof that a sexual assault occurred during the interrogation and that the officer repeatedly told the defendant that he was a “good and honorable man.” The trial court overruled the defendant’s motion to suppress and ruled that the defendant voluntarily waived his *Miranda* rights when the officer interviewed him.

During trial, the defendant objected to the responding officer’s testimony, in which the officer described the victim’s statements to him indicating that the defendant had touched or attempted to touch her sexually. The victim had testified that she could not recall any sexual assault or touching of any kind. The trial court overruled the objection and admitted the officer’s testimony.

At trial, the defendant unsuccessfully argued that the evidence presented by the Commonwealth was insufficient to support a conviction for abduction because there was no evidence that he used force, intimidation or deceit to transport or confine the victim, nor was there any evidence that he intended to deprive her of her personal liberty. He contended that since the victim voluntarily entered the vehicle and then failed to exit it, his driving beyond her destination cannot constitute “force” within the meaning of the statute.

Although the defendant was indicted and tried by a jury for abduction with intent to defile, the jury convicted him only of the lesser-included offense of abduction.

Held: Affirmed.

Regarding the motion to suppress, the Court agreed that the record supported the trial court’s factual determination that the defendant was able to communicate in English. The Court complained that the defendant provided no citation to any authority nor argument that two interviews on the same day constituted coercion that overbore his will.

Regarding the responding officer’s testimony relating statements that the victim made indicating that the defendant had touched or attempted to touch her sexually, the Court concluded that although the admission of this hearsay testimony was in error, the error was harmless. The Court noted that although Rule 2:801(d)(2) expressly allows for admission of a “prior statement that is consistent with the hearing testimony of the witness,” the victim testified at trial that she could not recall any sexual assault or touching of any kind. Hence, the Court pointed out, the prior hearsay statements admitted through the responding officer were not consistent with the victim’s testimony at trial. Thus, the Court ruled that the statements were not admissible pursuant to Rule 2:801(d)(2), and the trial court erred in concluding that they were.

However, since the totality of the evidence submitted at trial was overwhelmingly indicative of guilt, the Court concluded that any influence the officer’s testimony might have had upon the jury’s determination was insignificant and slight, especially given that the defendant was convicted of the lesser-included offense of abduction.

Regarding sufficiency, the Court noted that in this case, the defendant took a woman to an unwanted location after arriving at the agreed destination. The Court found that the evidence that the victim was unconscious, intoxicated, and unaware that she had reached her destination also supported the jury’s conclusion that the evidence met the degree of force required to support the conviction for simple abduction.

Full Case At:

Hartsfield v. Commonwealth: May 21, 2024

Chesterfield: Defendant appeals his conviction for Aggravated Sexual Battery on Hearsay grounds.

Facts: The defendant sexually assaulted the mentally disabled daughter of his girlfriend. Police investigated and interviewed the victim a few weeks after the incident.

At trial, over the defendant's hearsay objection, the officer testified that the victim was unable to correctly identify body parts in an anatomical diagram he provided her during the interview.

At trial, the victim's case manager testified. She explained that the victim had been diagnosed with an intellectual disability. During her testimony, the case manager referenced documentation she had collected about the victim's mental condition. The exhibit included contemporaneously recorded entries noting developmental services the Community Services Board provided to the victim over a period of time. The entries included the date and time of the services, the name of the provider, and the date the report was prepared and reviewed. At trial, the case manager identified the records, testified that she was the victim's case manager, and established that she was the custodian of the records. As part of her duties, the case manager collected documentation regarding the victim's mental conditions, including the disability evaluation prepared by her colleague.

Among the documents that the case manager offered was a survey that was recorded on the same day that the data about the victim was collected. The survey stated that it included routine intake information. Over the defendant's objection, the trial court admitted the documentation.

[Great job to Jennie Nesbitt, ACA, for her work on this case – EJC]

Held: Affirmed.

Regarding the officer's testimony, the Court noted that the officer stated only that the victim could not identify body parts from the anatomical drawing he presented her. The Court pointed out that the officer did not testify about any statements that the victim made or may have made regarding the drawing. Instead, the officer only testified about what he observed from the victim during her interview. Consequently, the Court ruled that the officer's testimony about the victim's response to the drawing did not contain hearsay as the officer did not provide any out-of-court statement used to prove the truth of the matter asserted. Therefore, the Court ruled that the trial court did not abuse its discretion in admitting the officer's testimony.

Regarding the survey from the case worker, the Court examined the business records exception set forth in Rule 2:803(6). The Court found that the case manager's testimony demonstrated that the survey was prepared as part of regularly conducted business activity. The Court agreed that the facts and circumstances support the trial court's conclusion that the survey was a properly authenticated business record.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0750232.pdf>

Mubdi v. Commonwealth: May 7, 2024

Roanoke: Defendant appeals his convictions for Murder and Possession of a Firearm on Admission of Hearsay, Admission of Video Evidence, and Denial of a Necessity Defense.

Facts: The defendant is a convicted felon. During a couple of disputes arose at a bar involving the defendant and the victim, the defendant obtained a firearm. The victim decided to leave the bar. As the victim walked around his car to get inside and leave, however, the defendant followed behind, raised a gun to eye-level with the victim, and shot him in the front of his head.

During the incident, several people in the crowd were filming the fight on their cell phones, capturing the fight and the shooting with the corresponding muzzle flash. The Commonwealth introduced these videos into evidence at trial. A witness identified himself in the videos and photograph stills. Although he did not film the videos himself, he testified that he was present that night and “saw everything.” He acknowledged that, though his vantage point differed from that of the camera in some instances, the videos were fair and accurate depictions of the events. Another witness also identified himself in several photos and videos and testified that the videos were fair and accurate depictions of the events. The witnesses both identified the defendant in the videos.

At trial, the defendant also objected to the introduction of two of the videos: one that showed the defendant holding a gun and walking toward the victim’s car, the other that showed the second fight at the side of the car and the crowd retreating at the sound of gunshots. The defendant argued that the witnesses’ testimony was not sufficient to authenticate the videos. The trial court overruled the defendant’s objections.

Police arrived at the scene of the shooting and later testified that people were “yelling and screaming” as well as filming with cell phones or fleeing the scene. Two minutes after police arrived, a woman called 911 at approximately. She stated that someone had been shot and killed at the bar. Her tone of voice was frantic and upset during the call. She asked the operator to “please help me out” and said, “I know who it was, I know who it was.” The caller told the operator that she was leaving the scene but knew who committed the shooting. She then said, “he’s dead, oh my god.” The operator asked for the name of the shooter, and the caller answered that he goes by “cocaine,” which was the defendant’s alias. When asked if “cocaine” was still there, the caller answered, “yes,” then “I don’t know, I don’t know.” She described the shooter as having the defendant’s appearance and clothing as seen in the videos. The caller refused to provide the 911 operator with her name.

At trial, the defendant objected to the introduction of the 911 call on Sixth Amendment confrontation grounds. The trial court overruled his objection.

At trial, the defendant argued that the evidence was insufficient to support his conviction for possession of a firearm by a convicted felon because his possession was justified under the necessity defense. The defendant argued that he needed to possess a firearm because people were fighting outside the bar. The trial court rejected his defense.

Held: Affirmed.

Regarding the videos, the Court concluded that the trial court did not abuse its discretion in denying the defendant's motion to exclude the videos, because the videos were properly authenticated by the witnesses' testimony. The Court pointed out that the witnesses identified themselves, the defendant, and the victim in the videos, and affirmed that the videos fairly and accurately represented what they observed on that date.

The Court rejected the defendant's argument that due to the lack of testimony establishing how the videos were made, who made them, and their chain of custody, the videos could not serve as a "silent witness." Instead, the Court explained that when a person who witnessed the events in a video testifies that it accurately represents what took place, it is not admitted under a silent witness theory, and thus the testimony of its maker is not required. In this case, the Court reasoned that the contested videos were not introduced as independent silent witnesses, but rather to illustrate the witnesses' eyewitness testimony. Accordingly, the Court ruled that the videos were properly authenticated, and the trial court did not abuse its discretion in admitting them.

Regarding the 911 call, the Court concluded that the trial court did not abuse its discretion in finding that the caller's statements during the 911 call were nontestimonial because they were in response to an ongoing emergency. The Court observed that the caller's demeanor and tone on the call was panicked, and she immediately asked for help. The Court pointed out that the caller called because of a shooting at a public place in which the caller believed somebody already died. The Court found that the 911 operator's questions about his identity and physical description were not objectively designed to create trial testimony but were instead a response to an ongoing emergency situation with an armed shooter still in the area, intended to discover the identity of the shooter and quell the threat to the public and responding personnel.

The Court rejected the defendant's argument that because police were already on scene and the shooting was over, that there was no longer an ongoing emergency. Instead, the Court noted that when police arrived at the chaotic scene, groups of people remained nearby notwithstanding the shooting that had just occurred. The Court pointed out that officers did not know the identity of the shooter or if there were risks of further violence. Even with police already on scene, the Court reasoned that the emergency was ongoing, and the caller's statements on the 911 call reflected that continuing risk.

Regarding the defendant's necessity defense, the Court ruled that the trial court did not err in rejecting the defendant's necessity defense and finding the evidence sufficient to support his conviction for possession of a firearm by a convicted felon. The Court repeated that the necessity defense has three essential elements: (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 none of the elements of the necessity defense were met here.

The Court examined the facts and noted that the defendant armed himself after the first fight dispersed and before the second fight began. The Court found no evidence that the defendant faced an imminent risk of harm that necessitated arming himself at any point, and pointed out that his involvement in the second fight was the result of his own choice. The Court contended that the defendant had other reasonable means of protecting himself, including leaving the scene.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0071233.pdf>

Curtis v. Commonwealth: April 23, 2024

Stafford: Defendant appeals her convictions for Child Cruelty, Child Neglect, and Domestic Assault and Battery on Hearsay grounds concerning the Tender Years exception.

Facts: The defendant severely beat her four-year-old child with a belt, cut the child with a knife, and otherwise assaulted the child numerous occasions. During one examination, medical personnel observed well over 70 scars on the child's body.

A child forensic interviewer conducted several recorded interviews with the victim. Because of the child's age and traumatic experiences, the forensic interviewer met him over multiple sessions. At trial, the victim testified; the victim was seven years old at the time of trial. The Commonwealth also introduced the recorded forensic interview. The defendant objected, maintaining that the trial court erred in admitting the recording under § 19.2-268.3(B) "without ensuring that the statements had the required indicia of reliability."

At a pretrial hearing concerning the admissibility of the forensic interview, the forensic interviewer testified to her extensive experience in conducting forensic interviews of children. She stated that her interview conformed with best practices in the field to be a neutral fact-finding interaction. The trial court watched the recorded video at the pretrial hearing. Considering the statutory factors, the trial court found that the child had personal knowledge of the events as the victim. The trial court found no indication that the child's mental state was compromised during the interview. The trial court further found that the forensic interviewer was a credible witness and that there was no indication that the child was biased, coerced, or had a motive to fabricate his statements. The child did not appear to be in no physical distress during the interview.

Held: Affirmed. The Court ruled that the trial court did not err in finding that the video of the child's forensic interview was admissible under § 19.2-268.3(B).

The Court reviewed the various considerations listed in § 19.2-268.3(B)(1) that a trial court may examine to determine whether a child's statements in a forensic interview are inherently trustworthy. Considering the totality of the circumstances, the Court agreed that the record supported the trial court's finding that the forensic interview was inherently trustworthy and admissible under § 19.2-268.3.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0422234.pdf>

Marshall v. Commonwealth: April 16, 2024

King George: Defendant appeals his convictions for Aggravated Malicious Wounding, Abduction, and related offenses on Fifth Amendment, Appointment of Expert, Jury Selection, Admission of a 911 Call, Hearsay, and sufficiency of the evidence grounds.

Facts: After accusing the victim of infidelity, the defendant shot the victim in the chest with a rifle. The defendant then attempted to strangle the victim to death. After the defendant abducted and moved the victim to various locations for several hours, the victim was able to contact her brother by cellphone to request help.

The victim's brother called 911 and told the dispatcher that the victim had called him and told him that "her boyfriend had shot her and they were trying to kill her." The brother stated that the victim could barely speak. He also stated that he "d[idn't] know what to do" because he doesn't live near the victim. He stated that "she told me I could not call her back or text her because he [the defendant] was sitting right there and it was just gonna get her killed faster." On the recording, the brother said it sounded like the victim "was hiding" while she was on the phone with him.

Officers located the victim using the cellphone signal. She initially told police that an unknown person shot her during a drive-by shooting. During the investigation, police located the rifle as well as ammunition and DNA evidence. Ultimately, the victim identified the rifle found within reach of the driver's seat of the car as the gun that the defendant used to shoot her.

After arresting the defendant, an officer transported him to the jail. The defendant had a long, mostly one-sided conversation with the officer on the ride back to the police station. The defendant did most of the talking, but the officer occasionally responded. The officer asked the defendant questions like, "You doing all right man?" and, "you still tired?" The defendant spontaneously made incriminating statements.

During the conversation, the defendant asked the officer, "how was your day, though?" to which the officer responded, "It was good, how was yours?" The defendant answered: "It was horrible," to which the officer reiterated, "horrible day?" The defendant also asked the officer, "you know, I found evidence of her almost burning me?" to which the officer responded, "[b]urning you?"

The defendant also asked the officer "hey, is that Michael Kors bag going to go . . . in my evidence file?" The officer asked, "what's that?" The defendant clarified, "the Michael Kors bag in the car," to which the officer responded, "I'm not sure what you're talking about." The defendant also asked, "did you guys search the vehicle?" to which the officer responded, "I've been with you the entire time."

After the magistrate issued a protective order for the benefit of the victim against the defendant, the defendant made a comment about the expiration date of the order. A detective told the defendant that the protective order date could be extended. The defendant responded by asking for a counter protective order and surveillance on the victim's social media. The detective asked, "What's her Facebook page?" to which the defendant responded. The defendant then talked about the victim cheating on him, saying, "I caught her!" The detective asked, "was it one of your boys?" to which the defendant responded that he doesn't know the details. However, he described the situation of the victim cheating on him.

Prior to trial, the defendant moved to suppress his statements to the police. He maintained that the police subjected him to custodial interrogation in violation of his rights under *Miranda v. Arizona*. The trial court denied the motion.

Prior to trial, the defendant asked the trial court to appoint an expert witness. He requested a medical expert, contending that such an expert would help him refute medical testimony it predicted that the Commonwealth would introduce (and later did) that the victim was shot at close range. The defendant explained that he hoped that a medical expert would testify that the victim was shot from a further range, in support of the victim's first statement that she was shot in a drive-by shooting.

The defendant was arrested in 2018, but his trial did not take place until 2021. The defendant moved to dismiss the charges against him, alleging that he was denied his constitutional right to a speedy trial. The defendant acknowledged that the delays 2018 through May 2020 were attributable to him. The trial court responded that "only recently, on January 20th . . . received a letter from the Supreme Court . . . that stated that th[e trial c]ourt now has authority to have a jury trial in this courthouse." The trial court further stated that there was an "inability to [hold jury trials] within just a few days because of the number of things that have to occur before a jury trial can happen." The trial court denied the motion.

During voir dire, one of the jurors stated that he knew one of the witnesses because the witness "is the father of a former classmate." Another juror stated that he knew one of the officers since that officer was a child because the officer was a contemporary with her sons. A third juror stated that she knew another officer and his wife from church "on a personal level." All three of the jurors indicated that they would not credit the witnesses' testimony simply based on the jurors' familiarity with the witnesses.

The defendant moved to strike these jurors for cause. The trial court denied the motions to strike based on the jurors' assurances that they would not necessarily credit the officers' testimony above that of other witnesses and would base their decisions on the evidence presented.

At trial, the Commonwealth admitted the 911 call. The defendant objected on Confrontation grounds, but the trial court overruled the defendant's objection. The defendant also objected on hearsay grounds, but the trial court overruled that objection as well based on § 8.01-390.

From the defendant's Instagram account, the police obtained a video of him firing a rifle repeatedly and photographs of the weapon. The Commonwealth admitted that evidence over the defendant's objection. An officer testified that the gun depicted in the defendant's Instagram account had the same markings as the gun that the police seized from the vehicle.

At trial, the victim testified that she had two scars—one where the bullet entered her body and one where the bullet exited her body—and showed her entrance wound scar while on the stand. She testified that she still has pain in her chest and that she has permanent carotid artery damage on the right side of her neck.

Held: Affirmed.

Regarding the motion to suppress, the Court found that the officers' questions were not designed to aid in factfinding, but to carry on polite conversation with the defendant and some questions were to inquire of his wellbeing. The Court found that the other responses were not reasonably likely to elicit an incriminating response from the suspect. Thus, the Court concluded that

because the officers did not subject the defendant to interrogation or its functional equivalent, the officers did violate the defendant's Miranda rights.

Regarding the defendant's request for an expert witness, the Court ruled that the trial court did not err in denying the defendant's motion for an expert witness because the defendant only showed a hope or suspicion that favorable evidence may be procured from the expert. In this case, the Court found that the defendant had only shown a hope or suspicion that favorable evidence may be procured from an expert.

Regarding speedy trial, the Court applied the four factors under *Barker v. Wingo*. The Court first acknowledged that the three-year delay between the defendant's arrest and his trial is presumptively prejudicial, triggering review of the remaining Barker factors.

Regarding the reason for the delay, the Court concluded that the delay 2020 to early 2021 was validly justified due to the pandemic and concerns with holding jury trials. The Court also concluded that the delay from January 2021, until May 2022 was attributable to the ordinary course of the administration of justice because the trial court stated that "a number of things" had to occur before the trial court would be ready to hold jury trials after receiving the Supreme Court's approval. The Court noted that this delay was not intentional or due to the Commonwealth's negligence. The Court then held that, since the delay attributable to the Commonwealth was validly justified, the defendant was required to establish specific prejudice, and had failed to do so.

Regarding jury selection, the Court concluded that the record contained no indication that the trial court committed manifest error by refusing to strike three members of the venire for cause simply because they knew two law-enforcement witnesses and had positive opinions of them.

Regarding the 911 call, the Court ruled that the brother's statements to the 911 dispatcher were nontestimonial hearsay and did not violate the Confrontation Clause. The Court examined the call and found that the circumstances indicate that the brother's call was to ask for help responding to an ongoing emergency—getting medical care for the victim's gunshot wound and getting the victim away from the ongoing threat of being killed by her attacker.

The Court then explained that while § 8.01-390 is largely concerned with the public records hearsay exception, the plain language of the statute clearly states that evidence offered in compliance with the statute shall be received as prima facie evidence. Thus, the Court noted that it is one of the few statutes relating to document admissibility which satisfies the best evidence rule, the authentication requirement, and the hearsay rule. Repeating its ruling in the *Canada* case, the Court ruled that the trial court did not err in concluding that the 911 recording was admissible under the statutory exception to the hearsay rule contained in § 8.01-390.

Regarding the defendant's social media posts, the Court reasoned that evidence from the defendant's Instagram account made more likely the fact that the defendant possessed the gun used to shoot the victim and that he shot the victim. The Court explained that the photos and video from the Instagram account that the Commonwealth introduced were relevant to link him to the weapon he used against the victim and to show that the defendant remained in possession of the gun when the police found him.

Regarding sufficiency, the Court agreed that the evidence was sufficient to establish that the victim suffered a permanent and significant physical impairment. The Court held that the evidence sufficiently established that the defendant abducted the victim. The Court noted that, as in *Crawford*,

the defendant shot and strangled the victim, he kept her in her car and drove her to different places, and on all but one occasion, he kept her cell phone so she could not call for help.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0519222.pdf>

Faust v. Commonwealth: March 5, 2024

Chesterfield: Defendant appeals his convictions for Child Sexual Assault on Jury Selection, Hearsay, and Expert Witness grounds.

Facts: The defendant sexually assaulted an 11-year-old child. The child’s father had invited the defendant to live with him, his wife, and their seven children in their home. Thereafter, the defendant assaulted the children.

At trial, during jury selection, one juror disclosed that her father had abused her and her sister when they were young. Following this disclosure, the defendant asked the juror if that experience would “make it hard for [her] to give a fair trial today?” She answered, “No,” and explained that her father “did the right thing” after the abuse by getting “help” and by “acknowledg[ing].” The juror also expressed that she had forgiven her father. The trial court denied the defendant’s motion to strike the juror for cause based on her statement that her experience would not interfere with her ability to provide a fair trial.

At trial, the Commonwealth asked the child’s father “Why did you call the police to the house on that day?” The father responded, “When [the defendant] came back to get the U- Haul, he was packing up, and [the victim] asked me—.” At that point, the defendant objected. The Commonwealth explained that it was not offering the testimony for the truth of the matter but rather to explain why the defendant called the police. The trial court overruled the objection.

The father then testified that the child asked if the defendant was leaving “because he touched us.” The father further testified that, following this statement by the child, he “brought the girls into the room, and we immediately asked them, questioned them on that.” Thereafter, the father called the police.

At trial, over the defendant’s objection, social worker Marcella Rustioni testified as an expert in “delayed reporting and the dynamics of child abuse.” Rustioni cited several reasons that a child might not disclose sexual abuse right away. She explained the dynamics of child abuse and how children process and articulate that abuse. The trial court overruled the defendant’s objections that her testimony was inadmissible because it constituted a direct comment on the victims’ veracity and served to bolster their credibility. The trial court also rejected the defendant’s claims that her testimony invaded the province of the jury.

Held: Affirmed.

Regarding the juror, the Court ruled that the trial court did not abuse its discretion by refusing to strike the juror for cause. The Court observed that the juror evinced such an ability to lay aside any preconceived views in rendering a verdict.

Regarding the father's testimony about the child's statement, the Court ruled that the trial court did not err by admitting the child's extrajudicial statements to her father. The Court agreed with the trial court that the Commonwealth offered the evidence not for the truth of the matter—i.e., that the defendant touched the child—but rather, to explain what the father did next. The Court explained that the fact that the child made the statement was relevant to explain why the father spoke with her and her cousin about the abuse that day and reported it to the police.

Regarding Marcella Rustioni's expert testimony, the Court ruled that the trial court did not err in admitting Rustioni's testimony. The Court distinguished the *Davison* case, explaining that in this case, the expert testimony cleared a threshold admissibility requirement that the *Davison* child therapist did not. Further, the Court observed, Rustioni did not opine, either directly or indirectly, on a specific witness's veracity or credibility. Instead, her testimony focused generally on the reasons for delayed reporting by child sexual abuse victims. The Court concluded that the expert testimony did not invade or otherwise impermissibly encroach upon the province of the jury.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1345222.pdf>

Coles v. Commonwealth: February 27, 2024

Pittsylvania: Defendant appeals his convictions for Possession with Intent, 3rd Offense, Possession of a Firearm and Possession of Ammunition on Admission of Hearsay, Sixth Amendment Confrontation, and Authentication grounds.

Facts: The defendant sold drugs after multiple previous convictions for that offense. Police responded to a call for a woman, partially clothed, yelling for help from under a mobile home. Police interviewed the woman and learned that the defendant had threatened the woman and her friend, accusing them of having taken his drugs. At gunpoint, he forced them to remove their clothes and told them that he would kill them unless they returned his drugs. The woman explained that she escaped and hid under the mobile home until police arrived. She provided a description of the defendant's vehicle.

Police later located the vehicle stopped on a roadway. When officers approached, the truck suddenly pulled away and police pursued it. However, one officer saw a woman, the witness in this case, lying face down where the truck had been stopped. That officer stayed behind to assist the witness. Near the witness, officers discovered a bag containing several different drugs, money, digital scales, and other paraphernalia. This witness indicated that the defendant had thrown the bag along with a handgun out of the truck. Police later located that firearm as well.

Police took a statement from the witness while she was being treated at the hospital. The officer wrote out the statement as the witness recounted the events.

Later, while both the defendant and the witness were incarcerated, they spoke over the phone. Officers obtained several recorded jail phone calls where the defendant told the witness not to testify at trial and to recant her testimony; “[y]ou just keep your mouth closed, and you gonna be alright.” The witness then reached out to the Commonwealth and voiced her desire to no longer testify against the defendant.

The Commonwealth moved in limine to admit the victim’s written statement at trial. The Commonwealth contended that the defendant had forfeited his right under the Sixth Amendment to confront the witness at trial due to his wrongdoing which led to her unavailability as a witness.

The Court examined the witness. The witness stated that she did not want to testify against the defendant due to the possibility of self-incrimination and her lack of memory. The witness confirmed that the defendant “knew [her] mom and [her family].” During cross examination, the witness agreed with defense counsel that the Commonwealth had made threats to the witness of prosecution if she did not cooperate. The witness claimed that the defendant did not make any threats towards her. Additionally, the witness denied that the defendant had procured or caused or brought about her refusal to testify.

After her testimony, the trial court found that the witness was refusing to testify and was therefore unavailable due to some wrongdoing by the defendant. Thus, the court found that the witness was unavailable for purposes of forfeiture by wrongdoing. At trial, the witness’ various written and recorded statements were presented to the jury. Portions of the recorded jail calls were also played to the jury at trial, including those between the witness and the defendant.

The officer who testified about the witness’ written statement identified the four-page handwritten document as the statement that the witness gave him. The officer testified that the statement had not been altered or “messed with in any way.” The defendant objected to the officer’s handwritten statement of the witness’ account of events, arguing that the statement was not properly authenticated. The defendant contended that the officer should have recorded the statements by audio or video, not handwriting. The trial court overruled his objection.

Held: Affirmed.

The Court agreed that the statements, including the written statement, that the witness made were testimonial because the primary purpose of the conversation was “to establish or prove past events potentially relevant to later criminal prosecution.” Thus, the Court agreed that the Confrontation Clause of the Sixth Amendment applied to her statements to law enforcement.

The Court noted that the U.S. Supreme Court has articulated two exceptions to a defendant’s right to confront witnesses against him: dying declarations and forfeiture by wrongdoing. The Court explained that the forfeiture-by-wrongdoing exception permits the introduction of unconflicted testimonial statements only when the defendant engaged in conduct designed to prevent the witness from testifying.

To establish forfeiture by wrongdoing, the Commonwealth must show by a preponderance of evidence that the defendant intended to prevent a witness from testifying and that the witness is unavailable to testify at a defendant’s criminal trial. Where a witness is physically available but “legally” unavailable to testify, the Court repeated that unavailability can only be determined when the witness is actually called to testify and, if they decline to do so, the reasons must be ascertained in the record.

In this case, the Court explained that having established that the witness was unavailable, the question was whether the Commonwealth established by a preponderance of the evidence that the defendant intended to cause the witness to become “unavailable” within the meaning of the forfeiture doctrine and whether the defendant’s actions constitute “wrongdoing” as a matter of law. The Court concluded that the defendant’s actions fell within the broad category of wrongdoing applicable to the forfeiture by wrongdoing doctrine.

The Court explained that, when conducting the forfeiture-by-wrongdoing analysis, the trial court was entitled to consider the defendant’s statements to the witness. Although the defendant did not make any direct threats towards her, the Court observed that the witness was afraid of the defendant and didn’t know what he was capable of, and stated that he “knows my mom, where’s [sic] my, where my family lives.” In sum, the Court agreed that the trial judge was not plainly wrong when she found the witness was unavailable to testify because of the defendant’s wrongdoing.

Regarding the authenticity of the written statement, the Court ruled that the officer’s testimony established that the document was what it purported to be and therefore his testimony properly authenticated the statement. The Court rejected the defendant’s argument that the statement could only be considered authentic if it was recorded by audio or video, finding that it was unsupported by legal authority. The Court explained that any concerns about the statement’s reliability went to the weight a jury may give the statements contained within the transcription.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0110233.pdf>

Gamaz Amaya v. Commonwealth: January 23, 2024

Prince William: Defendant appeals his convictions for Murder, Abduction, and related offenses on Admission of Hearsay and Jury Instruction issues.

Facts: The defendant and his fellow gang members murdered a man by stabbing him over a hundred times and cutting off his ear. After his arrest, the defendant called his sister from jail. A jail recording captured him telling his sister that his confederates were “innocent” and they had “nothing to do with it.” He claimed that they were “there because of ignorance.” When his sister urged him to defend himself, the defendant replied, “I know what I’ve done. I know I alone did it. ... I did the sin.” Later, the defendant claimed that he, not the victim, “would have been the dead person” if he had not defended himself.

At trial, a gang expert testified that only certain high-ranking gang leaders have the authority to order murders. Moreover, members from various cliques coordinate to execute such orders, and “[e]veryone [must] participate” to advance in rank.

At trial, one of the defendant’s fellow gang members testified against him. Consistent with the gang expert’s account, the witness testified that gang leaders ordered them to bring other victims to where the defendant was holding the murder victim captive. The defendant contended that the gang leaders’ statements were inadmissible hearsay. Over the defendant’s hearsay objection, the trial court

permitted the gang member to testify that he received an order to kill the man from leaders of the gang. He explained that after the defendant and his cohorts transported the victim to the woods to murder him, they sought “permission to kill” him. After the call, the men stabbed and murdered the victim.

At the conclusion of trial, the defendant requested that the trial court give a jury instruction cautioning the jury on the “uncorroborated” testimony of a co-conspirator. The trial court denied the instruction, finding that the testimony was corroborated.

[Great job to Katie Pavluchuk and Dave Husar, ACAs, for their work in this case – EJC].

Held: Affirmed.

The Court ruled that the trial court did not abuse its discretion by allowing the co-conspirator to testify that the gang leaders ordered him to kill the victim under Virginia Rule of Evidence 2:803(0)(E), which permits a co-conspirator’s statements made during and in furtherance of a conspiracy. The Court ruled that evidence, independent of the challenged out-of-court statements, established a prima facie case of conspiracy among the MS-13 members to abduct and murder the victim. The Court found that the evidence permitted the trial court to infer that the gang members conspired with the defendant and the other MS-13 members to abduct and murder the victim. Accordingly, the trial court’s admission of the gang member’s testimony that the gang leaders ordered him to kill the victim under Rule 2:803(0)(E) was not an abuse of discretion.

Regarding the defendant’s request for a co-conspirator jury instruction, the Court repeated that although a jury may convict a defendant based solely on accomplice testimony, the danger of collusion between accomplices and the temptation to exculpate themselves by fixing responsibility upon others is so strong that it is the duty of the court to warn the jury against the danger of convicting upon their uncorroborated testimony. Conversely, though, the Court repeated that where accomplice testimony is corroborated, it is not error to refuse a cautionary instruction.

In this case, the Court agreed that the defendant’s own statements to his sister corroborated the co-conspirator’s testimony “in material facts” that “tend[ed] to connect” him to the charged offenses, “sufficient to warrant the jury in crediting the truth” of the testimony. Accordingly, the Court ruled that the trial court did not abuse its discretion in refusing the proffered cautionary instruction.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1141224.pdf>

Coglio v. Commonwealth: December 5, 2023

Newport News: Defendant appeals his conviction for Murder, Use of a Firearm, and Malicious Shooting on Admission of Hearsay Evidence and Double Jeopardy grounds.

Facts: The defendant shot and killed his ex-girlfriend in her apartment and staged the scene to make it appear to be a suicide. The victim was right-handed; police found that the victim’s hand was underneath her body and the firearm was on a desk on her left side. Police also found gunshot residue on the defendant’s hands and his DNA on the firearm. The Commonwealth indicted the defendant with

second degree murder, use of a firearm, and shooting in an occupied building under § 18.2-279. The Commonwealth charged the Class 4 felony of shooting in an occupied building, rather than shooting resulting in death, which is punished as second-degree murder.

At trial, the Commonwealth introduced testimony from a witness who stated that the victim “told me she had been walking on eggshells and stated that [the defendant] had been drinking more and she was just trying to get through the next two weeks” before she moved out. The defendant objected, arguing that the victim’s statements were inadmissible because her state of mind had not been relayed to the defendant prior to her death. The trial court admitted the evidence over the defendant’s objection.

At the conclusion of the trial, the jury found the defendant guilty of second-degree murder, use of a firearm, and shooting in an occupied building (Class 4 felony). The defendant argued that it was a violation of Double Jeopardy to convict him of both second-degree murder and shooting in an occupied building, even if the shooting offense was not charged as a murder offense. The trial court rejected his argument.

Held: Affirmed. The Court held that the witness’ testimony regarding the victim’s statements was properly admitted, as it was both relevant and more probative than prejudicial. The Court also found that the trial court did not violate the protections against double jeopardy.

Regarding the witness’ testimony, the Court found that the victim’s state of mind was relevant, especially as the defendant argued at trial that the victim’s death resulted from an accidental shooting or suicide. The Court noted that the witness did not testify as to any specific threats or acts of violence by the defendant in the past; instead, she testified only regarding the victim’s state of mind. The Court analogized this case to the *Clay* and *Hodges* cases and rejected the defendant’s analogy to the *Hanson* case. The Court ruled that the trial court did not err in finding that the witness’ testimony was relevant to the main issue in the case and that its limited content was more probative than prejudicial.

Regarding the defendant’s double jeopardy argument, the Court found that because the defendant was not convicted of second-degree murder under § 18.2-279, nor did he receive “multiple punishments” for the murder, his double jeopardy rights were not violated in this case. The Court applied the ruling from *Commonwealth v. Gregg* that reversed convictions for common law involuntary manslaughter and of involuntary manslaughter under § 18.2-154 as violative of Double Jeopardy. The Court examined the statutory language in § 18.2-279 and found it to be nearly identical to that found in § 18.2-154. Just as in *Gregg*, the Court concluded that § 18.2-279 “simply created a mechanism that permits the Commonwealth to substitute proof of distinct facts” to show second-degree murder. Thus, under *Gregg*, the Court found that the defendant could not be convicted of common law second-degree murder and of second-degree murder under § 18.2-279 for the same shooting.

In a footnote, the Court pointed out that the Blockburger analysis for maliciously shooting into an occupied building without causing the death of a person is quite different from the elements of second-degree murder and would not result in a double jeopardy violation.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1313221.pdf>

Newman v. Commonwealth: October 10, 2023

Winchester: Defendant appeals his conviction for Malicious Wounding on Sixth Amendment Confrontation grounds.

Facts: The defendant repeatedly stabbed the mother of his child. She fled the home and he chased and tackled her. The defendant then repeatedly kicked and punched her while she was on the ground. The victim suffered numerous injuries.

Prior to trial, the defendant filed a pretrial motion in limine to exclude a jail call recording of his conversation with his mother in which he answered “yeah” when asked “did you stab her?” The defendant contended that the admission of the jail call violated both the rule against hearsay and his confrontation rights under the Sixth Amendment. The trial court denied his motion.

Held: Affirmed. The Court found that the admission of the jail call did not violate the hearsay rule or the Sixth Amendment.

The Court first observed that the defendant’s affirmative response that he stabbed the victim during the recorded phone call was admissible under Rule 2:803(0) as a party admission, under an exception to the rule against hearsay.

The Court then noted that, while the defendant’s admission in response to his mother’s question was admissible for the truth of the matter asserted, the question posed by his mother only provided the context for the defendant’s response and was properly admitted. The Court agreed with the Commonwealth that the defendant’s mother’s question “did you stab her?” gave context to the defendant’s admission when responding “yeah.” The Court pointed out that the mother’s question alone contained no inherent assertion.

The Court reasoned that the relevant statement the Commonwealth relied upon was the defendant’s answer of “yeah,” which was admissible as a party admission. In short, the Court explained that the introduction of the question giving context to that admission without regard to the truth or falsity of its content, did not violate the hearsay rule or the defendant’s Sixth Amendment confrontation right. The Court wrote “the mother’s question was not introduced for the truth of any matter asserted and only gave context to Newman’s response, thereby not qualifying as hearsay, and its admission therefore did not violate Newman’s Sixth Amendment rights.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1697224.pdf>

Gordon v. Commonwealth: September 19, 2023

Lynchburg: Defendant appeals his convictions for Computer Solicitation of a Child, Child Sexual Abuse, and Indecent Liberties on Admission of Recent Complaint Hearsay Evidence and Variance with the Indictment, and Sufficiency of the Evidence.

Facts: The defendant solicited a 13-year-old child for sexual acts and sexually assaulted the child repeatedly. The first incident occurred in January, when the defendant grabbed her buttocks on her birthday. He did not apologize or say it was accidental; he “smirked” and walked away.

The assaults quickly escalated and continued into February. About three weeks later, he pulled out his penis and told the victim to touch it. Then about a week after that, he forced the victim to touch his penis before making her perform oral sex. Later, the defendant sent the victim a text message conveying his desire for oral sex and intercourse.

Initially, the victim did not tell anyone because, in her words, she “didn’t know how to,” “didn’t know what to say,” and “didn’t know how people would react.” She later explained that she felt embarrassed. She told her sister not to tell anyone because she was scared and wanted to handle it herself. Nevertheless, the victim disclosed in detail to her mother in early March, less than two months later, after the victim received the lewd text message from the defendant. Soon thereafter, the victim also disclosed the facts to a police investigator.

At trial, the defendant objected to admitting the victim’s recent complaint hearsay statements to corroborate her testimony about the sexual abuse she suffered. Over the defendant’s objection, the trial court allowed the victim’s mother and the police officer to recount the victim’s out-of-court statements about the assaults.

At trial, the defendant also argued that the evidence was insufficient to prove that he committed an act of sexual abuse during the time frame alleged in one of the indictments, concerning February. As to that time frame, the defendant contended that the victim’s testimony established only that she “saw [his] penis” and there was “no evidence of any touching whatsoever.” The trial court rejected his argument.

At trial, regarding the Indecent Liberties offense under § 18.2-370.1, the defendant argued at trial that there was no evidence that the touching of the victim’s buttocks was “intentional” or “of a sexual nature.” The trial court disagreed.

Held: Affirmed.

The Court first noted that § 19.2-268.2 provides that “in any prosecution for criminal sexual assault . . . the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.” “[T]he ‘only time requirement is that the complaint have been made without a delay [that] is unexplained or is inconsistent with the occurrence of the offense.’”

In this case, the Court observed that the delay here was not long. Moreover, the Court found that the evidence sufficed to explain that relatively brief delay. The Court wrote that the victim’s reasons were “perfectly understandable hesitations by a 13-year-old child who was being sexually abused by a member of her extended family.”

Regarding the variance with the date of the offense, the Court explained that even assuming that the third incident occurred in March, not February, it would not invalidate the conviction. The Court repeated that an indictment that imperfectly states the date of the offense is not invalid when, as here, “time is not the essence of the offense.”

Regarding the indecent liberties offense, the Court agreed with the trial court's conclusion that the defendant grabbed the victim's buttocks intentionally and in "a state of mind . . . eager for sexual indulgence." The Court found that the facts, viewed in their entirety, supported the trial court's conclusion that the defendant possessed the requisite intent when he grabbed the victim's buttocks.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1056223.pdf>

Miller v. Commonwealth: September 5, 2023

Norfolk: Defendant appeals his conviction for Possession of a Firearm on Admission of Hearsay Testimony.

Facts: The defendant, a convicted felon, possessed a firearm. A witness saw him with the firearm at the scene of a shooting, where the defendant pointed the gun at the witness and police found a person dead after being shot. The witness testified to seeing the defendant with the firearm at preliminary hearing.

At trial, however, the witness testified that: "I seen him earlier, but I'm not sure, like, if he was the person with the gun or not. I just don't remember." At that point, the Commonwealth asked the witness whether he remembered testifying about this matter at the preliminary hearing. The defendant objected, but the trial court permitted the Commonwealth to show the defendant his preliminary hearing testimony. When the Commonwealth then asked whether the events the witness had previously described were "what happened to the best of your recollection," the witness stated that he didn't remember. The witness stated he did not remember what happened the day of the shooting but did remember testifying at the preliminary hearing.

At that point, the Commonwealth entered the transcript of the witness' testimony at preliminary hearing over the defendant's objection. The trial court admitted the transcript, pointing to the witness' statement that he did not remember the events but had testified truthfully.

Held: Reversed. Because the trial court did not examine whether the witness' alleged memory loss at trial rendered him "unavailable" for purposes of Rule 2:804, the Court ruled that the trial court erred in admitting and considering the witness' prior testimony for the truth of the matter of whether the defendant possessed a firearm.

The Court ruled that neither Rule 2:801(d), which permits the admission of a witness's prior statement for impeachment of the witness's credibility, nor the ability to refresh a witness' recollection, permitted the admission and use of the transcript as substantive evidence. The Court also ruled that the trial court did not properly admit the transcript pursuant to the "Former Testimony" exception under Rule 2:804(b)(1).

The Court explained that where "unavailability" is based on a claim of memory loss (rather than the witness's physical absence), trial courts must also comply with the "limiting principles" established by the Supreme Court "to ensure that the witness is not merely attempting to avoid his duty to testify."

The Court explained: “Simply put, the trial court cannot declare a witness claiming memory loss to be “unavailable” for purposes of Rule 2:804 without first “conducting an inquiry and observing the demeanor of the witness as it does so” as to “satisfy itself that the loss of memory is genuine.” The Court warned that this factfinding process is a “non-negotiable prerequisite” to the admission of a witness’s prior testimony under Rule 2:804(b)(1), explaining that “The questioning of the witness by either party is no substitute for the trial court’s duty to directly test the witness’s claim.” For example, in a footnote, the Court noted that because “feigned loss of memory is nothing more than a refusal to testify,” such refusal ““should be met with an order . . . directing the witness to testify.””

In this case, the Court complained that the trial court here conducted no such inquiry into the genuineness of the witness’ memory loss. The Court also complained that the trial court did it find, either expressly or by implication, that the witness was “unavailable.” For the Court, those omissions, taken together with the trial court’s “complete silence as to any aspect of Rule 2:804,” demonstrated that the trial court never considered applying the “former testimony” exception as a basis for admitting the preliminary hearing transcript.

In a footnote, the Court also cautioned that the declarant’s “unavailability” is a necessary but not sufficient condition to admitting a witness’s prior testimony pursuant to Rule 2:804(b)(1).

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1067221.pdf>

Turner v. Commonwealth: July 18, 2023

Lancaster: Defendant appeals his convictions for Eluding on Admission of Preliminary Hearing Testimony, Denial of his Duress Defense, and Double Jeopardy grounds.

Facts: The defendant dangerously eluded a police officer, escaped, and then again dangerously eluded another officer. Initially, an officer saw the defendant speeding and activated his lights to conduct a traffic stop. The defendant did not stop and, instead, turned off his headlights to avoid detection. The officer, being unable to find the vehicle on the dark roads, disengaged his pursuit. The defendant believed the officers were gone and reactivated his headlights.

Minutes later, a trooper observed the defendant’s car and activated his lights and sirens. The defendant again disregarded the signals to stop and fled from the police for over an hour. The chase had begun late in the evening on September 15, 2020, and ended in the early morning hours of September 16, 2020. The Commonwealth charged two separate offenses of felony eluding.

At preliminary hearing, the Commonwealth presented evidence from a witness who had been inside the vehicle. After the preliminary hearing, the witness signed a return-to-court slip. The Commonwealth coordinated with his attorney to secure his presence at trial. The Commonwealth then learned on the morning of the trial that the witness would not attend.

At trial, the Commonwealth moved to declare the witness unavailable and admit his preliminary hearing testimony. The Commonwealth introduced the return-to-court slip signed by the witness indicating that he would testify at trial. The Commonwealth then called the witness’ attorney to testify.

The attorney testified that he and the witness had discussed planning for the witness to appear at trial. The attorney informed the witness the evening before trial that he “had not yet found a method to travel here and would update” the attorney. The next morning, before the trial started, the witness told the attorney that he “had been unable to arrange for transportation” and “was still waiting for the results of a COVID test.”

The attorney admitted that he never asked the Commonwealth for assistance securing transportation and the Commonwealth did not offer any aid. The defendant objected to using the preliminary hearing testimony. The defendant contended that the Commonwealth failed to establish the witness’ unavailability, as it did not exercise due diligence in attempting to secure his presence at trial.

The trial court found that the Commonwealth undertook the necessary precautions to secure the witness’ appearance. It found the witness unavailable as a witness and admitted the preliminary hearing transcript. The attorney took the stand and read the transcript of the prior testimony.

At trial, the defendant testified and presented another witness, and both testified that the missing witness threatened them with two guns. The defendant argued that he was under duress, but the trial court found that, even if the defendant was subject to duress, he had an opportunity to escape and seek protection when he was surrounded by four patrol vehicles. Because the defendant continued to evade the officers and did not take advantage of the opportunity to escape, the trial court found that the defendant failed to prove duress.

The defendant also argued that the evidence established, at most, one continuing offense instead of two separate acts of eluding. He contended that the charges differed only in the dates of the offense and argued that the difference was meaningless. The trial court rejected his argument.

Held: Affirmed. The Court found that the trial court did not abuse its discretion in admitting the witness’ preliminary hearing testimony and that the evidence was sufficient to support the two felony eluding convictions.

The Court first found that the record demonstrated that the Commonwealth met the basic requirement of serving the missing witness while he was still in court and that it made reasonable efforts to secure his presence. Because the witness’ preliminary hearing testimony was under oath, properly recorded, and subject to cross-examination, the Court ruled that the trial court did not err in admitting the witness’ testimony.

The Court also agreed that the evidence showed that the defendant did not act under duress.

Lastly, the Court addressed the defendant’s Double Jeopardy claim. The Court reasoned that the trial court did not violate the Double Jeopardy Clause because the defendant’s acts constituted two eluding offenses rather than one continuing offense. The Court found that when the defendant successfully eluded the first officer, the first offense was complete. The Court then found that when the defendant fled from the second officer, the second eluding was complete.

Although the defendant drove continuously between the two chases, the Court reasoned that his failure to stop for the second officer was not a continuation of his failure to stop for the first one. Instead, the Court explained that the second act involved a new formation and execution of purpose. Thus, the evidence supported the trial court’s finding that the defendant committed two separate and distinct acts of eluding.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0615222.pdf>

Epps v. Commonwealth: June 20, 2023

Colonial Heights: Defendant appeals his conviction for Murder on Refusal to Admit Hearsay evidence.

Facts: The defendant and his brother ambushed a man who had previously had children with the mother of the defendant's children, shooting and killing the man. The man died trying to shield the mother's body; she survived and identified the defendant at trial.

At trial, the mother testified that she phoned the victim's mother and told her that the victim had been shot. On cross-examination, the defendant asked if the victim's mother accused the defendant of being the shooter. He also asked whether the victim's mother was yelling at her and was mad at her because her the defendant had shot the victim. The Commonwealth objected to the questioning on hearsay grounds. The defendant contended that the testimony was admissible as an excited utterance, but the trial court sustained the objection.

Held: Affirmed. The Court ruled that the trial court's ruling refusing to admit the statements under the excited utterance exception was not error.

The Court observed that the victim's mother, the declarant, did not have any firsthand knowledge about who shot her son. The only person who saw the defendant shoot at the victim was not the person who made the alleged utterances. Therefore, the Court ruled that the victim's mother's statements, although perhaps "spontaneous" or "impulsive" and "prompted by a startling event," did not fall within the excited utterance exception to the rule against hearsay.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1149222.pdf>

Prior and Other Bad Acts

Virginia Court of Appeals - Published

Carolino v. Commonwealth: November 28, 2023 (En Banc)

Aff'd Panel Decision of December 29, 2022

Virginia Beach: Defendant appeals his conviction for Strangulation on Admission of Prior Bad Acts.

Facts: The defendant strangled the victim, his girlfriend, injuring her. Although witnesses noticed the injuries, the victim did not report the incident until a month later. At trial, the defendant denied strangling the victim. On cross-examination, the following exchange took place:

Q: [The victim]—have you ever—you said you didn’t choke her. Have you ever been physical with her?

A: Aggressively physical, no. Sexually, sure. Yes.

Q: Okay. Never been aggressively physical with her?

.... A: “I’ve never aggressively assaulted [the victim]. I’ve never—I’ve never done anything to [her] that she didn’t ask me to do or did not want me to do.”

On rebuttal, the Commonwealth recalled the victim, who testified that the defendant had whipped her several months before. The victim explained that she had first falsely claimed that the whipping was consensual, but only out of fear of the defendant. Over the defendant’s objection, the trial court admitted several graphic photographs that depicted the victim’s injuries from the whipping incident.

A panel of the Court of Appeals reversed the conviction. The panel ruled that, under *McGowan*, the trial court erred in admitting prior bad acts evidence in rebuttal solely to impeach the defendant’s credibility regarding issues raised by the Commonwealth on cross-examination of the accused. The Court reiterated the holding in *McGowan*, that when a defendant is cross-examined on collateral matters, the prosecution must accept the answer provided and cannot introduce extrinsic evidence to contradict the accused. In this case, the Court found that the trial court ran afoul of *McGowan* in admitting this propensity evidence for the sole purpose of attacking the defendant’s credibility.

Held: Panel Affirmed, Conviction Reversed. In a 9-7 ruling, the Court found that the trial court ran afoul of *McGowan* in admitting this collateral propensity evidence for the sole purpose of attacking the defendant’s credibility. The Court reiterated that, under *McGowan*, when a defendant is cross-examined on collateral matters, the prosecution must accept the answer provided and cannot introduce extrinsic evidence to contradict the accused. In this case, the Court noted that the testimony—and the extrinsic photographs—were offered and admitted purely for impeachment purposes.

The Court then rejected the Commonwealth’s argument that the evidence would have been admissible to show the defendant’s intent, consent, motive, or state of mind, to proving “the dysfunction” of the couple’s relationship or explaining why the victim “did what she did.” The Court acknowledged that the Commonwealth could have demonstrated an exception for the prior bad acts but pointed to the *Kenner* and *Conley* cases to illustrate “the rigorous analysis and balancing a trial court must undertake to fulfill its gatekeeper function.” The Court also argued that the two incidents were not particularly similar, except to suggest the defendant’s alleged propensity to aggression.

The Court complained that the trial court had not conducted such analysis in this case. The Court complained that the trial court did not pass judgment on any of the Commonwealth’s arguments regarding grounds for admissibility, nor did it weigh the prejudicial effect of the whipping evidence against its probative value as to these alternate grounds. In a footnote, the Court repeated that prior bad acts evidence will often be prejudicial to the defendant, but the test is whether the evidence is unfairly so. However, the Court explained that even if the whipping testimony were found to be marginally probative as to one or more of these alternative grounds, the trial court failed to engage in any balancing of any probative value versus its prejudicial effect on the defense.

In this case, while the Court explained that “such prejudice would be significant,” the Court decided to “leave the weighing of these unresolved issues to the trial court on remand.”

Judge Fulton, joined by six other justices, filed a dissent.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1270211.pdf>

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/1270211.pdf>

Cheripika v. Commonwealth: September 19, 2023

78 Va. App. 480, 891 S.E.2d 754 (2023)

Fluvanna: Defendant appeals his convictions for Child Sexual Assault Under 13 on admission of Prior Bad Acts, Admission of Medical Records, Prohibiting Access to the Internet in Discovery, a Jury Instruction, and the Constitutionality of his Mandatory Life Sentence.

Facts: The defendant repeatedly sexually assaulted his own stepchild from age eight to age twelve. The child disclosed the years of abuse to her mother and revealed the abuse but could not remember specific dates because it happened at least two or three times a week for a long period of time. The mother contacted the police, who immediately investigated, along with CPS.

After speaking with police and CPS, the defendant left the family home and admitted himself into a hospital in New Jersey. While receiving mental health treatment, the defendant admitted that he had sexually assaulted a child who was a member of his family. The medical records also indicated that “everything seemed normal” when the defendant’s mother saw him for Easter, but a couple days later, he wanted to go to New Jersey for treatment. A police investigator obtained and executed a search warrant for the defendant’s medical records.

Before trial, the defendant moved to exclude from the evidence his medical records from the hospital in New Jersey that contained his admission that he had sexually assaulted a child who was a member of his family. He argued that admitting the records would violate his right to confront his accusers. The trial court denied the motion, finding that the statements were not testimonial because he was at the hospital seeking treatment.

The defendant elected to proceed pro se despite having several attorneys appointed for him. During discovery, the defendant asked the trial court to allow him to access the internet to “try and receive defense information” and “print off other materials as part of [his] defense.” The defendant asserted that he needed internet access to retrieve exculpatory evidence from cloud storage. He also argued that his lack of internet access violated his First Amendment rights. The defendant did not proffer what information was in the cloud storage, or what the nature of the purportedly exculpatory evidence was; he stated only that “they’re documents.” The trial court denied the defendant’s motion, finding that there was “nothing specific enough” for it to act upon.

The defendant had also sexually assaulted the victim’s sister, who was three years younger. At trial, over the defendant’s objection, the sister testified as well that the defendant sexually abusing her when she was eight years old. The defendant objected that the testimony served no purpose other than to prove his propensity to commit sexual offenses, but the trial court rejected his argument. Nonetheless, the Court instructed the jury that it could consider the other child’s testimony “only as

evidence of [the defendant's] motive or intent or as evidence of [his] scheme or plan as evidenced by his conduct and feelings toward the victim."

At trial, the trial court gave the Flight instruction, over the defendant's objection. The defendant had asserted that the record was devoid of evidence that he fled the scene of the crime to avoid detection, apprehension, arrest, or criminal prosecution.

During sentencing, the trial court appointed the defendant's standby counsel for the sentencing phase of the trial. The defendant's convictions for object sexual penetration of a victim under the age of 13 carried mandatory minimum terms of life imprisonment per § 18.2-67.2. The trial court sentenced him to the mandatory minimum of life imprisonment for each of two charges.

The defendant unsuccessfully asserted that the mandatory life sentences were grossly disproportionate to his crimes, arguing that he was a first-time offender with no criminal record. He also argued that the mandatory sentences violated his Sixth Amendment right to counsel because although represented, his attorney could do nothing to change the mandatory sentences. The trial court rejected the defendant's argument that the mandatory life sentences were unconstitutional.

Held: Affirmed.

Regarding the defendant's prior sexual assaults against the other child, the Court repeated that when the prior sexual abuse was committed against another victim, evidence of the abuse may be admissible to demonstrate a defendant's common motive, method, plan, or scheme, particularly in prosecutions for crime involving "a depraved sexual instinct." The Court repeated that acts "showing a perverted sexual instinct are circumstances which with other circumstances may have a tendency to connect an accused with a crime of that character."

In this case, the Court reasoned that when the two daughters provided substantially similar testimony that described the defendant's same pattern of abuse, each daughter's testimony had significant probative value of demonstrating the defendant's incestuous disposition toward his daughters and that his offenses against both were "inspired by one purpose." The Court found that the other child's testimony describing the sexual abuse was highly probative of the nature of the defendant's relationship with both children and established the parallel conduct of his abuse with both girls.

The Court pointed out that the children were siblings in the same household and close in age. Both testified that the defendant began abusing them when they were eight years old, which the Court reasoned demonstrated that he was sexually attracted to children of that age. The Court also noted that the defendant employed the same method of abuse with both children. Thus, the Court concluded that their testimony highlighting the defendant's parallel conduct was highly probative of the common scheme and method he employed to abuse the victim in this case.

The Court also relied on the trial court's jury instruction, repeating that it would presume the jury followed the trial court's limiting instruction.

Regarding the defendant's medical records, the Court found that the circumstances surrounding the challenged records demonstrated that the defendant was seeking medical treatment, during the defendant's treatment for his suicidal ideation. The Court applied *Crawford* and concluded that the primary purpose of the statements was not to create an out-of-court substitute for trial testimony. Rather, the statements were made to properly document the defendant's medical chart for his

treatment. Accordingly, the Court found that the statements in the defendant's medical records were not testimonial, and the trial court did not abuse its discretion by admitting them.

Regarding the defendant's request for Internet access in discovery, the Court complained that the defendant failed to provide any proffer—let alone an adequate one—of the information he sought to obtain from the internet. On this record, the Court found no basis to determine whether the trial court committed reversible error by denying him that access.

Regarding the flight instruction, the Court agreed that there was sufficient evidence for the jury to have concluded that the defendant travelled to New Jersey to avoid detection, apprehension, arrest, or prosecution. The Court noted that there was no evidence that demonstrated that he could not seek treatment within the Commonwealth, a circumstance from which a rational factfinder could conclude he sought to distance himself from apprehension.

Regarding the constitutionality of the defendant's life sentences, the Court again declined to engage in a proportionality review, as the defendant's life sentence does not lack the possibility of parole. The Court noted that the defendant's convictions were not Class 1 felonies, so he will be eligible for geriatric release under § 53.1-40.01. Therefore, although the defendant was sentenced to life in prison, he was not sentenced to life without parole.

The Court also rejected the defendant's argument that the mandatory sentences deprived him of counsel who could advocate on his behalf. The Court found that the record demonstrated that despite the predetermined sentences, the defendant's counsel challenged the validity of the mandatory sentences, argued that the sentences should not have been imposed, addressed the Commonwealth's arguments, and cross-examined a witness. The Court noted that counsel's actions during the sentencing hearing preserved the defendant's arguments for appeal. Thus, the Court concluded that the defendant's Sixth Amendment right to counsel was fully vindicated at the sentencing hearing.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1153222.pdf>

Virginia Court of Appeals -
Unpublished

Floyd v. Commonwealth: May 21, 2024

Norfolk: Defendant appeals his conviction for Murder and Use of a Firearm on Admission of Prior Bad Acts.

Facts: The defendant shot and killed his ex-girlfriend's ex-boyfriend. At trial, the ex-girlfriend testified that she and the defendant had a prior romantic relationship that became awful after he started acting "crazy," and he began to stalk her when the relationship ended. The defendant repeatedly drove by the ex-girlfriend's apartment and even kicked her door down, causing her to change the locks three times and turn the lights off when she was home. He appeared at her place of employment if she

did not return his calls. Conversely, the ex-girlfriend had a good relationship with the victim, who was the father of her daughter, and the two were trying to reconcile.

On the night of the shooting, a witness testified that she was surprised to see the defendant on the balcony outside the ex-girlfriend's apartment because he was not supposed to be there, and she heard the defendant say something "smart" to the victim as they walked away. Another witness saw the defendant shooting into the victim's car and watched the defendant follow the victim out of the parking lot. Forensic evidence proved that the defendant fired nine shots toward the victim and hit him three times.

At trial, the defendant objected to witness testimony about his abusive behavior toward his ex-girlfriend in the months before the shooting. He argued that the testimony was inadmissible evidence of prior bad acts, irrelevant, and unduly prejudicial. He specifically complained that the testimony was not relevant to whether he committed the offenses because the alleged bad acts were directed at the ex-girlfriend rather than the victim.

Held: Affirmed. The Court held that find that the trial court did not abuse its discretion in allowing the ex-girlfriend to testify about the defendant's conduct after their breakup because that information was relevant to his reason for killing the victim.

The Court found that the witness testimony about the defendant's behavior toward her was relevant to his motive for killing the victim. Thus, the Court ruled that the defendant's past behavior toward the ex-girlfriend, which indicated a possessive and controlling obsession with her, was relevant to explain why he would get a gun from his car and shoot the victim when he saw the victim.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0476231.pdf>

Reed v. Commonwealth: May 21, 2024

Chesterfield: Defendant appeals his convictions for Assault on Law Enforcement and Attempted Strangulation on Admission of Bad Acts.

Facts: During booking at a jail, the defendant attacked and attempted to strangle law enforcement officers at the jail. Before trial, the defendant filed a motion in limine to prohibit the Commonwealth from introducing evidence of his charges of an earlier assault and contributing to the delinquency of a minor, offenses that precipitated his initial arrest. The trial court granted the motion, noting that it would reconsider the issue if the "door opened."

At trial, the defense centered on the defendant's claim that the officers lied about mistreating him at the jail. In support of that theory, he testified on direct examination that the officers shackled his legs, carried him naked through the jail, and threw him into a cell—injuring his right shoulder, elbow, hip, and knee in the process. He suggested that he received treatment for those injuries only after he was transferred to another jail.

After the defendant testified, the trial court decided to allow the initially excluded evidence. The trial court found that the defendant “opened the door” for the Commonwealth to provide an “alternative explanation for [his] injuries.” The trial court admonished the Commonwealth to introduce evidence of the prior fight “without getting into the arrest.”

After the ruling, the Commonwealth questioned the defendant about the prior altercation. He admitted that the day before he arrived at the jail, he fought with two teenagers at a vape shop. The defendant acknowledged that he had a knife during the fight and was struck in the face, ear, chest, and legs. He claimed that the only injuries he received from the fight were to his face. He insisted that the officers inflicted his injuries.

Held: Affirmed. The Court held that the trial court did not abuse its discretion by allowing the Commonwealth to introduce evidence of the prior altercation when cross-examining the defendant.

The Court found that by claiming that the officers injured him through their mistreatment, the defendant opened the door to the Commonwealth’s providing an alternate explanation for those injuries. Consequently, the Court found that the trial court did not abuse its discretion by permitting the Commonwealth to cross-examine him regarding the earlier fight in which he was struck in the head, chest, and legs. The Court reasoned that it was appropriate for the jury to hear the competing theories about how the defendant sustained his injuries and resolve that factual question. Further, the Court agreed that it was appropriate for the jury to consider the evidence about when the defendant sustained injuries.

The Court concluded that the record supports the trial court’s ruling that the probative value of the evidence outweighed the danger of unfair prejudice. The Court explained that evidence of the fight the defendant had before arriving at the jail was probative of the source of his injuries. To the extent the evidence was prejudicial to the defendant because it tended to show his propensity for physical altercations, the Court found that the trial court reduced the impact of any prejudice by limiting the Commonwealth’s examination and excluding testimony about the defendant’s arrest.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1934222.pdf>

Cruz v. Commonwealth: April 8, 2024

Pittsylvania: Defendant appeals his conviction for Assault on Law Enforcement on Admission of Other Bad Acts.

Facts: The defendant, while speeding and driving recklessly, nearly struck a police vehicle. The defendant then crashed into a ditch at a residence. The officer investigated and learned that the defendant had been involved in a dispute with the resident, his estranged wife. The officer arrested the defendant.

Immediately upon his arrest, the defendant became increasingly agitated, yelled, cursed, made pig noises and other animal sounds, and engaged in a course of offensive name-calling. He continued his

tirade for the entire 30-minute drive to the magistrate's office and while the officer calmly filled out the criminal complaint form. The defendant vomited repeatedly on the floor before moving closer to the officer, suddenly standing up, and thrusting his body forward to spit or vomit on him. The spray hit the officer's face and uniform.

After vomiting on the officer, the defendant said he would sue the officer, repeatedly referred to him with a vulgar slur, barraged him with an unbroken chain of profanity, and twice expressly stated, "that's what you get you f#%\$ing bitch."

Prior to trial, the defendant filed a motion in limine, seeking to exclude evidence of his statements and conduct after the vomiting incident. The defendant argued that the evidence of his post-assault behavior was only relevant, if at all, to prove his animosity toward the officer for pushing him against the wall. He argued that, because his post-assault behavior did not include any specific threats to harm or offensively touch the officer, it was completely unrelated to the assault itself. The trial court denied the motion.

Held: Affirmed. The Court held that the evidence was relevant to the element of intent, and its probative nature was not substantially outweighed by any unfair prejudice to the accused.

The Court noted that in this case, the Commonwealth was required to prove that the defendant intentionally committed a battery, i.e. a rude, insolent, or angry touching, upon the officer. The Court found that the evidence of the defendant's behavior after the assault was probative of his intent to commit the assault. The Court agreed that the defendant's statements and behavior after the assault clearly indicated the animosity he felt toward the officer and proved his intent. The Court explained that the mere fact that the evidence was prejudicial does not change the outcome, writing: "All probative direct evidence generally has a prejudicial effect to the opposing party."

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0517233.pdf>

White v. Commonwealth: April 8, 2024

Augusta: Defendant appeals his convictions for Murder and Use of a Firearm on Admission of Prior Bad Acts.

Facts: In 2021, the defendant repeatedly shot his wife in the back, killing her. At trial, the defendant claimed that he killed the victim during a struggle, in self-defense. Before trial, the Commonwealth moved the trial court in limine to admit evidence of the defendant's history of domestic violence against the victim. The defendant objected that the offenses were too remote in time to be probative of his motive and intent at the time of the shooting in 2021. Over the defendant's objection, the trial court admitted:

- A 2009 Assault and battery on a family member conviction.
- A 2012 Assault and battery, 3rd offense, and strangulation conviction.

- A 2021 Assault and battery on a family member.

The trial court also admitted a 2009 unlawful wounding conviction along with testimony from the officer who responded to that offense, describing the victim's injuries. The trial court then gave a limiting instruction restricting the jury's consideration of the prior crimes evidence.

[Good job to ACAs Lorna Port and Holly Rasheed, who tried this case – EJC].

Held: Affirmed. The Court held that the trial court did not abuse its discretion in admitting evidence of the defendant's prior violent criminal conduct towards the murder victim.

The Court ruled that the evidence of the defendant's prior violent crimes against the victim was relevant in determining the defendant's state of mind at the time of the shooting and the manner of the victim death. The Court explained that, in the absence of similar violent abuse by the victim against the defendant, this evidence tended to make it less probable that at the time of the fatal shooting, the victim was the initial aggressor. Thus, the Court found that the evidence of the defendant's violent conduct against the victim throughout their relationship was relevant to rebut the defendant's claims that the victim was the aggressor in her fatal last encounter with him and that he was acting in self-defense.

The Court rejected the defendant's argument that his prior convictions were too remote, noting that, in the intervening period between the 2009 convictions and the victim's death, the evidence supported a finding of a relationship pattern of the defendant's violent conduct against the victim. The Court acknowledged that, without more, evidence of a defendant's domestic violence against the same victim over a decade before an alleged offense would not tend to show the defendant's conduct and attitude toward the victim at the time of the alleged offense.

However, in this case, the Court noted that the evidence showed that the defendant assaulted and battered the victim in 2008, 2012, and again in 2020, a year before the victim was killed. The Court concluded that this evidence of the defendant's violent abuse of the victim throughout their relationship tended to show the defendant's persistent conduct and attitude toward the victim, thus establishing a nexus for relevancy of the defendant's prior crimes against the victim over a decade before she was killed.

The Court also emphasized that the jurors were properly permitted to determine the appropriate weight of the prior crimes evidence considering all factors, including its remoteness in time. The Court also held that the trial court did not abuse its discretion in implicitly ruling that the prejudicial effect of the prior crimes evidence did not substantially outweigh its probative value.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1746223.pdf>

Santana Mieles v. Commonwealth: March 26, 2024

Waynesboro: Defendant appeals his conviction for Burglary and related offenses on Admission of Business Records.

Facts: The defendant broke into a store and stolen numerous items. Before the date of the burglary, the defendant had conducted business several times at a pawn shop, located less than a block from the crime scene. The day before the burglary, the defendant visited the pawn shop and sold several items; the clerk created a receipt of the transaction. The receipt included a photocopy of the defendant's driver's license. Soon after the burglary, the defendant returned and tried to sell some of the stolen items, but the clerk refused to purchase them.

At trial, the clerk testified that he was familiar with the defendant because the defendant had come into the pawn shop several times, including the day before and the day of the burglary. The Commonwealth moved to enter the receipt from the day before into evidence. The defendant objected, arguing that the trial court should not admit the pawn shop receipt into evidence because the document was irrelevant and constituted improper "bolstering" pursuant to Rule of Evidence 2:608. The trial court overruled the objection.

Held: Affirmed. The Court held that the trial court did not abuse its discretion when it admitted the pawn shop receipt from the day before the burglary.

The Court first agreed that the pawn shop receipt helped establish the defendant's familiarity with the defendant based on their interaction the day prior to the criminal offenses. The Court found that the pawn shop receipt was relevant because it established the clerk's prior interaction with the defendant and his familiarity with the defendant.

The Court rejected the defendant's argument that the receipt might constitute "specific instances of conduct" within the meaning of Rule 2:608 or amounted to reputation evidence for truthfulness. Here, the Court agreed that the pawn shop receipt did not pertain to anyone's reputation. Additionally, rather than demonstrating a "specific instance of conduct," the Court found that the pawn shop receipt is simply a physical record that shows the defendant pawned items at the store the day before the crimes at issue occurred.

The Court ruled that the business record exception under § 8.01-390.3 would apply to the receipt here. Under these circumstances, the Court also found that the pawn shop receipt was also otherwise admissible by other "principle[s] of evidence" as set out in Rule 2:608, repeating that a witness identifying an accused may detail all the facts within his personal knowledge bearing on the identification; any fact which shows the acquaintance and familiarity of the witness testifying to the identity of the accused is admissible.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0365233.pdf>

Kao v. Commonwealth: March 5, 2024

Fairfax: Defendant appeals his conviction for Violation of a Protective Order on Admission of Prior Bad Acts and Chain of Custody grounds.

Facts: The defendant, while a protective order was in place ordering him to stay away from the victim business, visited the victim business and threatened to set the building on fire. Years before, the defendant had briefly been an employee at the company. Following his resignation, the defendant spent several years contacting employees; his contact often scared them. On one instance, he brought a loaded gun to the business, frightening employees.

The company obtained a two-year protective order prohibiting the defendant from contacting its employees and requiring him to stay at least one mile away from the business. Despite the protective order, the defendant returned to the business with a can of gasoline and a lighter.

The next year, the defendant again brought a lighter with him and doused himself with gasoline directly in front of the entrance to the company. Security notified police, who responded. Officers observed the defendant actively trying to light himself on fire when they arrived. The officers restrained the defendant and took him into custody.

Prior to trial, the Commonwealth notified the trial court that it intended to introduce evidence of the defendant's prior bad acts. The Commonwealth noted that the defendant had an "M.O. of dousing himself in gasoline on or near the property." The defendant objected, but the trial court overruled his objection.

During the trial, the Commonwealth also sought to introduce the gas can that police found next to the defendant's car on the previous incident. The defendant objected, arguing that the Commonwealth had not laid a proper foundation because it had not established a chain of custody. Initially, the trial court agreed. The Commonwealth asked the witness more questions to establish that he observed the gas can, took the gas can into custody, and the gas can in the courtroom was the same gas can the witness observed by the car. Then Commonwealth then sought to introduce the gas can. The defendant conducted a voir dire establishing that the witness did not seal the gas can in the box and the witness had not seen the gas can for 11 months. The defendant objected arguing that the Commonwealth still had not properly established chain of custody. The trial court overruled the objection.

Held: Affirmed. The Court ruled that the trial court did not commit reversible error by admitting evidence of the defendant's prior bad acts or by admitting the gas can recovered next to his car.

Regarding the defendant's prior bad act, the Court noted that to prove threat to burn, the Commonwealth had to prove that the defendant's conduct constituted a threat to burn the company's property in violation of § 18.2-83. In this case, the Court agreed that the defendant's prior actions were relevant to the attempted arson charge because it tended to prove whether he intended to set the business on fire, as opposed to only himself. The Court also found that it was relevant to the threat to burn charge because it was relevant to the context and whether his conduct was a "threat" to the company and its employees. Moreover, the Court observed, the probative value of the defendant's prior bad acts was greater than the incidental prejudice to him.

Regarding chain of custody, the Court observed that the officer identified the gas can as the same gas can he collected at the scene. The Court explained that such testimony was sufficient to "afford reasonable assurance" that it was the same gas can that the officer collected and that it was in the same condition at trial as when the officer collected it.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0310234.pdf>

Horton v. Commonwealth: February 13, 2024

Albemarle: Defendant appeals his conviction for Murder and related offenses on Joinder, Admission of Bad Acts Evidence, and Refusal to Declare a Mistrial grounds.

Facts: The defendant and his co-defendant shot and killed a man during a robbery. During the robbery, the defendant dropped his phone. Police recovered the phone and subjected it to forensic analysis. Later, police executed a search warrant at the defendant's mother's house, arresting the defendant, his confederate, and locating a box of ammunition of the same brand and type recovered from the crime scene. The trial court agreed to join the defendant's trial with his co-defendant's trial, over the defendant's objection. The defendant did not testify at trial, nor did the Commonwealth introduce any statements by the co-defendant.

At trial, over the defendant's objection, the Commonwealth introduced photographs extracted from the defendant's phone, including some that depicted the defendant and others that depicted a hand holding a black handgun consistent with the murder weapon. The Commonwealth also introduced the ammunition, again over the defendant's objection.

During jury deliberations, one of the jurors sent the court a note, reading: "Dear, Your Honor, English is my second language[.] I am not sure that all the things were understood correctly. I'm very afraid for that. So, can you please release me from this case?" The defendant expressly objected to the court releasing the juror and made no other motions concerning that juror. The court declined the juror's request to be released.

Held: Affirmed.

Regarding the joinder issue, the Court noted that, since the defendant did not testify at trial, nor did the Commonwealth introduce any statements by the co-defendant, the defendant could not show any actual prejudice. Since the defendant could not point to any evidence admitted against him that would not have been admitted had the Commonwealth tried him and the co-defendant separately, the Court agreed that the trial court did not abuse its discretion by granting the Commonwealth's joinder motion.

Regarding the admission of the photographs and the ammunition, the Court pointed out that the evidence pertained to whether the defendant would have had the means to complete the elements of the offense, which is not the type of unfair prejudice contemplated by Va. R. Evid. 2:403(a)(i)

Lastly, regarding the juror, because the defendant did not ask for a mistrial and in fact told the court that he wanted the juror to remain on the panel, the Court ruled that it was barred from reaching the merits of the defendant's argument.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0870222.pdf>

Pair v. Commonwealth: January 16, 2024

Newport News: Defendant appeals his conviction for Murder on Admission of a Previous Protective Order.

Facts: The defendant killed his wife by beating her to death on New Year's Day, less than a day after she obtained a protective order against him. Prior to trial, the Commonwealth filed a motion in limine asking to introduce evidence that the victim had obtained EPOs against the defendant on December 5 and December 31. The trial court excluded the December 5th order but admitted the December 31 order over the defendant's objection.

At trial, the jury heard only that the EPO was issued and served on the defendant on December 31, 2020, and the actual document was not admitted into evidence. The court then instructed the jury that the EPO was not evidence of any wrongdoing by the defendant.

Held: Affirmed. The Court held the trial court did not abuse its discretion by admitting testimony that the murder victim had obtained an EPO against the defendant and that it was served on him less than twenty-four hours before she was killed.

In this case, the Court concluded that the EPO was evidence of the strained state of the defendant's marital relationship with the victim. In addition, the course of events connected the timing of service of the December 31 EPO to the victim's death. In a footnote, the Court emphasized that the evidence of the EPO was not admitted to establish the truth of the allegation the victim made to obtain it; Instead, it had probative value because she obtained it shortly before her death and it explains what happened next.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1507221.pdf>

Beltran Saavedra v. Commonwealth: December 28, 2023

Fairfax: Defendant appeals his convictions for Unlawful Filming on Fifth Amendment *Miranda* and Admission of Prior Bad Acts grounds.

Facts: The defendant attempted to use a cellphone to secretly film a child who was in a bathroom at the defendant's office. The child notified her parents, who called the police.

A police officer responded and seized the defendant's phone. The defendant repeatedly requested to have his smartphone returned and declined to answer questions. The officer told the defendant, falsely, that ten officers were about to execute a search warrant at his residence, where his mother was at home. The defendant then asked, "What can we do so that you don't involve my mom?" The officer reiterated that if the defendant agreed to discuss the incident, then police would not have to

search his residence. The officer said that he did not intend to threaten or intimidate the defendant, but merely to explain to the defendant what the officer would “do next as part of the investigation.”

The officers interviewed the defendant in an unlocked office at the defendant’s office for about 82 minutes. The defendant was not arrested or detained, and the officer maintained an “approachable, non-confrontational” demeanor throughout. The officers identified themselves at the start as detectives, confirmed that the defendant spoke English and was college-educated, and described the nature of their investigation. The officer repeatedly reminded him that he was free to leave and did not have to discuss the incident.

The defendant then admitted to making several previous videos of women without their consent and that he stored them on devices that he kept at home. Officers obtained a search warrant for the defendant’s phone, which contained five videos of different women using the toilet or showering.

Prior to trial, the defendant moved to suppress his statements. He also moved to exclude evidence of five other videos found on the defendant’s smartphone showing women using toilets or showering. The trial court denied his motions.

Held: Affirmed.

Regarding the *Miranda* issue, the Court ruled that although the defendant felt pressure to cooperate after the officer lawfully seized his smartphone and threatened to execute a search warrant for the defendant’s other phone at his residence, the totality of the circumstances show that the defendant’s statements were voluntary.

The Court repeated that a defendant’s confession may be found voluntary under the totality of circumstances even when police use deception to procure it. In this case, the Court acknowledged that the officers falsely told the defendant that ten officers were about to execute a search warrant at his residence, where the defendant’s ailing mother was staying. But the Court pointed out that executing that search warrant would have been permissible.

Regarding the other videos found on the defendant’s phone, the Court concluded that the videos were highly probative of the defendant’s intent to film the victim. The Court also concluded that the videos also refuted the defendant’s hypothesis of innocence that he sought only to “peek” at the victim, not record her. The Court agreed that the videos showed his “sexualized interest” in surreptitiously recording women using the restroom, generally, and his intent to record the victim, specifically. Although the videos of other women were not recorded using a smartphone and did not depict children using the toilet in a public restroom, the Court noted that the trial court found that they each depicted women either using the toilet or showering in bathrooms “under circumstances that” were “clear[ly] . . . inconsistent with consent.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1918224.pdf>

Blanchard v. Commonwealth: December 5, 2023

Roanoke: Defendant appeals his conviction for Indecent Liberties on Admission of Prior Bad Acts and Variance with the Indictment.

Facts: The defendant repeatedly sexually assaulted his child. The defendant was charged with one felony count of taking indecent liberties with a minor in violation of § 18.2-370.2. In addition, on two occasions, the defendant rubbed his erect penis against the victim. One incident took place while she was a child; the other took place after she turned 18 and occurred in their kitchen. At trial, the Commonwealth sought to introduce testimony about the incidents, but the defendant objected. The defendant argued that the testimony gave rise to a fatal variance between the indictment and the proof offered at trial and that the testimony was impermissible “uncharged bad acts” evidence.

The trial court overruled the defendant’s objections and admitted the evidence.

Held: Affirmed. The Court held that the trial court did not err in allowing the victim to testify about the kitchen incident and the incident when she was still a child.

Regarding the defendant’s “variance” argument, the Court found no variance, much less a fatal one, between the indictment and the proof obtained at trial. The Court observed that the evidence at trial proved the defendant was convicted of the same offense for which he was indicted, upon proof that he committed that offense. The Court reasoned that the evidence related to the kitchen incident was not the actus reus for the conviction; it was simply relevant evidence that was probative in proving that conviction. The Court wrote: “The mere fact that Blanchard also committed a misdemeanor offense against R.B. after she turned 18 does not alter the fact that he committed the felony upon her when she was 17.”

Regarding the kitchen incident specifically, the Court found that the evidence of what occurred in the kitchen was relevant to show the defendant’s conduct or attitude towards the victim, along with his motive, method, and intent. The Court noted that the Commonwealth was required to prove that the defendant touched the victim “with lascivious intent.” The Court pointed out that, at trial, the defendant claimed that any touching was accidental, rather than lascivious. Thus, the Court concluded, the evidence that he developed an erection while standing behind the victim and fondling her breasts during the kitchen incident was admissible and relevant to prove that he did so with lascivious intent, and it supported the Commonwealth’s contention that his prior acts of touching were inspired by the same purpose.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1504223.pdf>

Gordon v. Commonwealth: October 3, 2023

Pittsylvania: Defendant appeals her convictions for Strangulation, Battery, Assault on Law Enforcement, and Resisting on Fourth Amendment and Joinder grounds.

Facts: The defendant attacked and strangled her 14-year-old stepchild, and then did the same thing the next day. The victim fled the home and walked to the hospital to get help. Along the way, a motorist picked up the victim and brought her to the hospital, concerned over her visible injuries. A forensic nurse examiner documented numerous injuries and contacted law enforcement and CPS.

After investigating the offense, officers knocked on the door of the defendant's residence. The defendant answered and sat on the stairway outside the door. After discussing the strangulation allegations, the officers informed the defendant that they were arresting her. She abruptly stood up and turned to reenter the residence. The officers stepped to grab her, "to keep her from going back inside," but the defendant pulled away. The officers pursued her, entering the residence. During the ensuing struggle, the defendant bit at one of the officers.

After her arrest, the defendant denied strangling the victim but admitted to having "whooped" and "restrained" her. When told that the victim had marks on her throat, the defendant held up her right arm, in a choke-hold position, while offering a dubious explanation, "yeah, that's probably from getting her to stop pulling on stuff."

Prior to trial, the defendant moved to suppress the evidence derived from law enforcement officers' entry into her home. The defendant argued that the absence of exigent circumstances rendered the officers' warrantless entry unlawful. The trial court found that the officers made physical contact with the defendant before she went back inside her residence and denied the motion.

Prior to trial, the defendant also moved for separate jury trials, one for the strangulation charges and the other for the arrest-related charges. The trial court denied that motion as well.

Held: Affirmed. The Court found no reversible error in the trial court's decision to conduct a single trial. The Court also rejected the defendant's argument that the officers violated the Fourth Amendment by entering her home without a warrant to arrest her. Instead, the Court ruled that the trial court properly found that the arrest began outside the home, when an officer first touched the defendant to arrest her, thus justifying the officers' subsequent pursuit as she retreated into her home.

Regarding the officers' entry into the defendant's home, the Court ruled that because the defendant had been lawfully arrested by the time she reentered her home, the officers could follow her inside without a warrant. The Court observed that the officers spoke "words of arrest" and touched the defendant for the stated purpose of arrest. Thus, at that moment, notwithstanding the defendant's subsequent resistance, the Court ruled that the arrest was effected and the defendant was in custody.

The Court then explained that Virginia courts follow the *per se* rule that once a suspect is placed under arrest, an officer is authorized in accompanying the arrestee wherever he goes, which includes following a defendant into his home. In other words, after arresting the defendant outside her home, the Court concluded that the officers properly followed her inside when she tried to escape.

Regarding the trial joinder issue, the Court focused on the harmless error question, examining whether evidence of the strangulations would be admissible at a trial on the arrest-related charges, and vice versa under Virginia Rule of Evidence 2:404(b). In this case, the Court found that the defendant's attempted flight and resisting arrest were probative of her "consciousness of guilt" or "guilty knowledge" related to the strangulations. The Court also found that the defendant's statements and body language as captured in the body-camera footage were relevant and admissible on the strangulation charges.

Similarly, to prove that the defendant bit the victim and resisted arrest, the Court found that the facts surrounding the strangulation incidents were probative of the defendant's motive—to escape arrest on serious charges. Because evidence of the defendant's crimes involving each set of charges was admissible in the prosecution of the other set, the Court ruled that any error in denying separate trials was harmless under *Cousett*.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1676223.pdf>

Moore v. Commonwealth: June 20, 2023

Pittsylvania: Defendant appeals his conviction for Strangulation on the Judge's Refusal to Recuse, Refusal to Disqualify the Prosecutor, Admission of Other Bad Acts, and Admission of Expert Testimony

Facts: In 2016, the defendant attacked and strangled his wife. The victim did not report this incident to the police until May 2020. At the time of the trial in 2022, the defendant and the victim were separated, and the victim was seeking a divorce.

The defendant moved for the judge in the matter to recuse herself. The defendant asserted that until recently, the judge's former law firm bore her name; the firm was founded by the judge's father, and the judge was married to a named partner. Until his death many years earlier, a partner in the firm had been representing the victim in the divorce proceedings against the defendant. The defendant alleged that the judge's son, a law school student, had interned with the firm, where the judge's brother also practiced. Commenting upon a jury's prior acquittal of the defendant of strangulation from an incident that occurred with the victim in 2019, the victim's father had told the prosecutor that they needed a "win" in the present case to strengthen her position in the divorce. The defendant maintained that the judge should recuse herself because of her close ties with the law firm, as well as the victim's parents' beliefs that the civil and criminal matters were intertwined.

The trial court denied the motion to recuse herself. At the time of the ruling, it had been almost nineteen years since the judge had practiced at the firm. The judge noted that the victim's civil attorney was not involved in the criminal matter, the firm was not named for her, and there was no conflict of interest.

The defendant also moved to recuse the entire Office of the Commonwealth's Attorney because members of the office were potential fact witnesses to the victim's father's statement about needing a "win." The Commonwealth offered to stipulate to the statement at trial. The trial court found that no conflict of interest then existed and denied the motion to recuse the Commonwealth's Attorney's office.

At trial, over the defendant's objection, the trial court admitted evidence of other incidents of alleged domestic violence occurring in March 2019, January 2020, and May 2020, ruling at a pretrial motion in limine that evidence of those other assaults would be admissible "for explaining timeline and context" so long as the Commonwealth laid a proper foundation for the evidence. The defendant had been acquitted of some of these charges in a previous trial.

During trial, the court restricted the March 2019 evidence to show the timing of the victim's reporting of the abuse to her family. The court allowed the victim to testify regarding the January 2020 incident, finding that it was "admissible and relevant with regard to state of mind," and instructed the jury to consider that testimony only "with regard to state of mind." The Commonwealth introduced photographs of the victim's injuries from the January 2020 incident, and the court admitted them "with regard to just the effect on her mindset at that time." The victim also testified regarding the May 2020 incident, and the Commonwealth introduced photographs of her injuries from that incident over the defendant's objection. The court admitted those photographs "with regard to state of mind."

The Court also admitted, over the defendant's objection, an audio recording of the victim speaking to her brother after the May 2020 incident. The recording, of which the victim was unaware at the time, contained her detailed description of the defendant's assault that night. The victim also spoke about how difficult it would be to leave the defendant since the couple shared three children, and she cited her religious beliefs as one reason she had not left the relationship. Again, the trial court instructed the jury to consider the recording only insofar as it showed the victim's state of mind as to why she did not report the defendant's abuse or leave the marriage.

In addition, the Court admitted photographs from the January 2020 incident, over the defendant's objection, and allowed the victim to testify about the injuries depicted in those photos "with regard to just the effect on her mindset at that time." Similarly, the trial court admitted the photographs from the May 2020 incident "as noted previously with regard to state of mind and circumstantial evidence" over the defendant's objection.

At trial, the Commonwealth also called Sandy Dawson, an outreach prevention specialist at the Southside Survivor Response Center with fourteen years of experience in counseling victims of domestic violence, to testify as an expert witness in "victimology" and the pattern of "female victim responses to domestic assault and abuse." The defendant objected to Dawson's qualification as an expert witness, arguing that she was not "licensed" or "certified" and that Dawson had not spoken with the victim and was "just being asked to make generalized statements based upon her training and experience." The trial court overruled this objection, finding that Dawson had specialized knowledge that would assist the trier of fact.

Dawson opined that it was uncommon for a female victim of domestic violence to leave the relationship after the first instance of abuse. She stated that many victims blame themselves for the abuse and do not flee because they believe that the situation will improve. Dawson further stated that victims who had minor children with their abusers tended to remain in the relationship.

[Note: Sandy Dawson has since passed away – EJC].

[Great job to CA Bryan Haskins and ACA Mary Katherine Pendleton in this case – EJC].

Held: Affirmed.

First, regarding recusal of the judge, the Court found that the defendant failed to show that the trial judge had a personal bias or prejudice in this case. The Court also found that the defendant did not show that the civil attorney "personally and substantially participated in the matter as a lawyer while associated with the judge." The Court pointed out that even the defendant had agreed that the trial judge could, after 19 years on the bench, hear a case that the civil attorney was handling.

Next, regarding the recusal of the prosecutor, the Court noted that the Commonwealth agreed to stipulate that the comments had been made, thus negating the need to call the prosecutors as witnesses. The Court ruled that the defendant had failed to make a showing that disqualification of the prosecutor or the Commonwealth's Attorney's office would have been required under Rule 3.7 of the Rules of Professional Conduct.

Third, regarding the other bad acts evidence, the Court found that, given the limiting instructions to the jury and our presumption that the jury followed those instructions, the admission of this other bad acts evidence was not an abuse of discretion. The Court concluded that the defendant's violent behavior toward the victim in 2019 and 2020 was admissible. The Court reasoned that it was relevant under Rule 2:404(b) to show the relationship between the parties and to explain the victim's long delay in reporting the December 2016 incident. The Court found that the victim's state of mind and her delay in reporting were made relevant by the defendant's arguments that the delay made the victim's testimony less credible. The Court also noted that the trial court properly limited the jury's consideration of this evidence only to show the victim's state of mind during this time period, thus avoiding exclusion under Rule 2:403.

Regarding the recording in particular, the Court pointed out that the audio recording was not offered for the truth of the matter asserted. Instead, the Court agreed that the recording was relevant to explain the delay in the victim's reporting of the abuse and ruled that it was not error to admit it into evidence.

Regarding the photographs, the Court also ruled that the trial court did not abuse its discretion in ruling that the photos were relevant, and therefore admissible under Rules 2:401 and 2:402, to show why the victim was reluctant to report the defendant's abuse, as well as the reasons for her ultimately deciding to come forward. The Court agreed that the photos were consistent with and relevant to the Commonwealth's position that her delay related to her desire to preserve her marriage and to avoid legal trouble for her husband—until she reached a breaking point when the incidents continued and escalated.

Lastly, regarding the Commonwealth's DV expert, the Court noted that the trial court found that the expert had "specialized knowledge" that would "assist the trier of fact." The court also found that the expert's knowledge was in "a specialized area in which not the average individual would know." While the expert was not licensed by the state as a counselor, nor did she testify to having any other state licensures, the Court pointed out that no such license is required by Rule 2:702. The Court agreed that the expert had knowledge and experience in a specialized field, and the trial court did not abuse its discretion in qualifying her as an expert witness.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0724223.pdf>

Romero v. Commonwealth: June 13, 2023

Prince William: Defendant appeals his conviction for Rape of a Child on Refusal to Strike a Juror for Cause and Admission of Prior Bad Acts

Facts: The defendant raped an eleven-year-old child. At jury selection, all of the prospective jurors indicated that they had no personal interest in the outcome of the trial, that they had not obtained any information about the alleged offense from outside sources, that they had no opinion about the defendant's guilt or innocence, and that they had no awareness of any biases or prejudices against the defendant.

One juror indicated that both she and a good friend had previously been victims of a sexual assault many years earlier. When asked whether her experience would impact her ability to listen to this case fair and impartially, she responded, "No." She further affirmed that she would be able to form an opinion in the case based solely upon the evidence presented at trial. Defense Counsel asked, "Could it possibly affect your ability to be impartial when you hear the evidence and it could perhaps bring up some past experiences?" The juror responded, "Maybe, yeah. I can't tell. Possibly."

However, after the trial judge explained to her the role of a juror in deciding the case and asked her if her experience would compromise her ability to be impartial in deciding the case, the juror affirmed that she could indeed be impartial. Consequently, the trial court denied the defendant's motion to strike the juror for cause.

During trial, the victim testified as to how the defendant's sexual advances toward her had begun shortly before his rape of her on the night of the offense. Over the defendant's objection, the victim testified to three prior occasions when the defendant touched her sexually. The trial court, however, gave the jury an instruction limiting the jury from considering any evidence of prior bad acts for propensity purposes.

Held: Affirmed. The Court held that the trial court did not abuse its discretion when it denied the defendant's motion to strike the juror and when it allowed the victim to testify about the defendant's prior sexual assaults against her.

Regarding the juror, the Court found that, although she briefly indicated that her past experiences could possibly affect her, the juror's statement was an outlier when viewed in context of the entire voir dire. Furthermore, following her very brief exchange with defense counsel, the Court noted that the juror reassured the trial court that her past experiences would not compromise her ability to fairly and impartially decide this case based on the evidence. Consequently, the Court ruled that the trial court did not commit manifest error by denying the defendant's motion to strike the juror for cause.

Regarding the defendant's prior bad acts, the Court reasoned that the fact that the defendant touched the victim sexually on at least three separate occasions before the offense "certainly constitutes evidence of the relationship" that the defendant had with the victim and of his conduct and attitude toward her. Specifically, the Court found that the defendant's repeated sexual advances toward the victim show that he sexually desired her. Furthermore, the Court also contended that the victim's testimony showed that she did not misunderstand what was happening to her, because the defendant had touched her vagina before when they were "play fighting" and had even inserted his penis in her vagina at least once before when they were in a bedroom of the home. Consequently, the Court ruled that the victim's testimony concerning the defendant's prior sexual acts committed against her has legitimate probative value under Va. R. Evid. 2:404(b).

The Court also found that the probative value of the defendant's prior sexual advances toward the victim simply outweighed any incidental prejudice that might arise. The Court also noted that the trial court gave a limiting instruction in this case.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0847224.pdf>

Prior Convictions

Virginia Court of Appeals - Published

Smith v. Commonwealth: September 5, 2023

78 Va. App. 371, 891 S.E.2d 414 (2023)

Caroline: Defendant appeals his conviction for DUI on Retroactivity of the Bar on Certain Traffic Stops, Admission of the DMV Transcript, and Admission of Expert Testimony.

Facts: The defendant drove while intoxicated after having two previous convictions for that offense. At the time of the stop, in February 2021, the officer's reason for stopping the defendant was for driving with a defective tag light in violation of § 46.2-1003. Prior to trial, the defendant argued that the March 2021 amendment, which added subsection C to Code § 46.2-1003 and barred a law-enforcement officer from stopping a person for driving a motor vehicle with defective vehicle equipment, was retroactive. The trial court rejected the argument.

At trial, to prove that the defendant had two prior DWI convictions, the Commonwealth introduced a DMV transcript showing that the defendant was convicted in the Henrico County General District Court of driving while intoxicated in May 2016, and driving while intoxicated, second offense within 10 years, in June 2020. The Commonwealth also presented the June 2020 court order, signed by the judge, stating that the defendant pleaded guilty to the DWI-second offense. The Commonwealth did not offer the court order reflecting the DWI-first conviction in 2016. The trial court denied the defendant's motion to exclude the DMV transcript.

The trial court excluded the certificate of analysis showing the defendant's BAC. At trial, over the defendant's objection, the Commonwealth called Dr. Jon K. Dalglish from DFS as an expert on the effects of alcohol on a typical individual. The defendant objected to Dr. Dalglish's expert testimony about the effects of alcohol on the body after the court excluded the certificate of analysis, but the trial court overruled the objection.

In the defendant's case-in-chief, the trial court received into evidence a letter addressed "To Whom It May Concern," signed by a deputy clerk for the Henrico County General District Court. The letter identified the defendant and the case number for the DWI-first conviction shown on the DMV transcript. The letter stated: "After conducting a search for the above referenced case, we are unable to

locate it at this time.” The defendant argued that the letter negated the Commonwealth’s proof that the defendant was convicted of the requisite “first” offense, but the trial court rejected the argument.

Held: Affirmed.

First, the Court rejected the defendant’s argument that the stop was unlawful. The Court repeated that even if an officer uses the defendant’s minor traffic offense as a legal pretext to stop a car, it does not invalidate the reasonableness of the stop under the Fourth Amendment. In this case, as in *Montgomery, Street*, and many other recent cases, the Court ruled that the officers who stopped the defendant in February 2021 because his tag light was out could not have stopped him “in violation of” subsection C because that subsection had not yet become law.

Regarding the defendant’s prior conviction, the Court rejected the defendant’s reliance on the clerk’s letter and the *Mwangi* case. The Court concluded that the clerk’s letter here did not rebut the DMV transcript as a matter of law. Instead, the Court reasoned that the letter reported only that the clerk could not “locate” the file “at this time” and did not show that the criminal case never existed or that the DWI-first conviction was invalid because the judge failed to sign the disposition. The Court concluded that, absent decisive rebuttal evidence, the DMV transcript was “prima facie evidence” of the first and second DWI convictions. The Court pointed out that, although the conviction order was not introduced to corroborate the May 2016 conviction, prior convictions may be proved by any competent evidence.

The Court also noted that both the second conviction order and the DMV transcript reported the June 2020 conviction as a second DWI offense, corroborating that the May 2016 conviction shown on the DMV transcript was the first DWI conviction. The Court reasoned that it was reasonable for the jury here to have concluded from the DMV transcript, together with the defendant’s conviction order for a second DWI in 2020, that the defendant had been convicted of two prior DWI offenses within the preceding ten years.

As for the DMV transcript, the Court ruled that, as “prima facie evidence” of the defendant’s two prior DWI convictions, the DMV transcript had substantial probative value. The Court found that the trial court could properly conclude from the transcript that the defendant would not suffer unfair prejudice from the transcript’s admission.

Regarding the expert testimony, the Court repeated that § 18.2-266 does not require proof of the defendant’s BAC to prove that he was driving while intoxicated. The Court ruled that the trial court did not abuse its discretion in admitting Dr. Dalgleish’s testimony about how intoxication affects a person’s behavior. Without evidence to show the defendant’s intoxication based on his BAC, the Court noted that the Commonwealth depended on the officers’ observations, as well as on the dash-camera video. The Court reasoned that Dr. Dalgleish’s testimony helped the jury understand how the defendant’s behavior reflected being under the influence of alcohol. The Court also reasoned that that testimony was “beyond the knowledge and experience of ordinary persons,” under Va. R. Evid. 2:702(a)(ii), and it assisted the jury to understand that what the officers observed during the field sobriety test evidenced the defendant’s intoxication.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0169222.pdf>

Virginia Court of Appeals –
Unpublished

Roane v. Commonwealth: April 8, 2024

Newport News: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment, Jury Instruction, and sufficiency grounds.

Facts: The defendant, a convicted felon, carried a firearm while riding as a backseat passenger in a vehicle. During the stop, the defendant opened the door and started to get out. The officer ordered the defendant to get back inside, and the defendant complied. The defendant stated that he was getting a ride from the driver. The officer asked the defendant for ID, which the defendant provided.

After a dog alerted to the presence of narcotics in the vehicle, the officers ordered everyone out of the car and, consistent with departmental policy, proceeded to handcuff them and move them to the curb. The defendant began moving around and reached towards his right side. The officers ordered the defendant to raise his hands. When the defendant complied, the act of raising his arms lifted his shirt and officers noticed he was carrying a concealed handgun.

A struggle ensued between the defendant and the officers. The officers repeatedly shouted: “stop reaching.” Officers finally were able to control the defendant and an officer grabbed the defendant’s gun.

The defendant moved to suppress. The defendant argued that absent reasonable suspicion particularized to him, a mere passenger, the officer’s order to him to remain in the car when he tried to leave the scene violated his Fourth Amendment rights. The trial court denied the motion.

At trial, an officer identified the gun as a black “Glock 42” .380 caliber gun with a magazine inside it that contained six bullets. Officers also noted the gun’s serial number. One of the officers explained that a “BB gun fires BBs” whereas a “real firearm fires bullets.” He testified that the item was a firearm, not a BB gun. Another officer explained that when a firearm is discharged, “the firing pin hits the igniter[,] which releases the powder” that “caus[es] the explosion” and “mak[es] the bullet fly out of the firearm.” An officer also testified that he test-fired the firearm prior to trial and it worked as designed.

At trial, the defendant objected to the Commonwealth’s jury instruction defining the term “firearm” for purposes of § 18.2-308.2. The Commonwealth used Model Jury Instruction number 18.622: “A firearm is an instrument designed, made, and intended to expel a projectile by means of an explosion. It is not necessary that the firearm be operable, capable of being fired, or have the actual capacity to do serious harm.” The defendant argued that the prosecution did not offer any evidence regarding the definition of a firearm. The trial court overruled the defendant’s objection.

Lastly, at trial, the Commonwealth introduced two of the defendant’s prior felony convictions. The two orders reflected that a person with the defendant’s name and social security number was convicted for possession of a concealed weapon by a felon, a violation of § 18.2-308.2, based on an

offense date of October 13, 1997. Both orders were copies certified by a circuit court deputy clerk. Additionally, the orders were entered by the same circuit court in which the defendant was tried for the instant offense. The trial court also admitted redacted copies of a certified prior conviction order from 1998 and a related “Correction Order” from 2021, entered nunc pro tunc to the date of entry of the 1998 order.

The defendant contended that the evidence was insufficient to prove he had the requisite prior conviction for a violent felony. He noted that the two prior conviction orders relied upon by the prosecution listed his name but reflected two different birthdates. He argued that these orders were “of suspect validity,” particularly given that they were signed by two different judges more than twenty years apart and the second one was entered in 2021, “after [the instant] case had started.” The trial court rejected his argument.

Held: Affirmed. The Court held that the trial court did not err by denying the motion to suppress. The Court also held that the trial court did not err in determining that the instruction properly stated the law. Lastly, the Court concluded that the evidence was sufficient to prove that the defendant had the requisite prior conviction for a violent felony at the time he possessed the firearm at issue in this case.

The Court reaffirmed that the officers’ order to the defendant to remain in the car during the traffic stop was reasonable and lawful under the Fourth Amendment. The Court also found that the officer was permitted to order the defendant to get out of the car pending completion of the routine traffic stop.

The Court then observed that the K9 alert provided an additional reason to continue the stop—to investigate the potential drug offense—as well as probable cause to search the vehicle. The Court found that, while removing the defendant from the car to conduct the search, the police acted reasonably by directing him to raise his hands for safety reasons. The Court noted that this action revealed the firearm, which had previously been concealed by the defendant’s shirt, in plain view at his waist. Once the firearm was in plain view, the Court concluded that the officers were entitled to seize it as evidence of the crime of carrying a concealed weapon.

Regarding the jury instruction, the Court explained that the prosecution was not required to call a witness from the forensic laboratory to provide testimony about the weapon to support the proffered instruction. In this case, the Court found the witness testimony about the weapon given by three different law enforcement officers provided the necessary quantum of evidence to support the instruction.

In this case, while the Commonwealth was not required to establish that the firearm was operable, the Court elucidated that proof that it was operable when he test-fired it provided evidence that it was, in fact, designed to function as a firearm and was not merely a replica of a firearm. The Court concluded that this evidence amply supported the trial court’s decision to overrule the defendant’s objection to the proffered “firearm” instruction.

Lastly, regarding the prior convictions, the Court agreed that the evidence was sufficient to permit the jury, as the finder of fact, to determine that the order accurately reflected the defendant’s 1998 conviction for the offense of possession of a concealed weapon by a convicted felon in violation of § 18.2-308.2 and that the only substantive difference between the two orders was a correction of the birthdate listed. The Court noted that both orders bore the identical name and social security number—

the same name and social security number on the identification that the defendant provided to the officers shortly prior to his arrest for the instant offense.

The Court repeated that, while many persons have the same name, a social security number is a unique number that is assigned to and identifies a specific individual. Consequently, the Court found that the record supported the conclusion that the single-digit difference between the birthdate in the original order and the defendant's birthdate was a clerical error, not a failure to adequately identify the person who was the subject of the prior conviction order.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0032231.pdf>

Rape Shield

Virginia Court of Appeals

Unpublished

Gushwa v. Commonwealth: April 23, 2024

Orange: Defendant appeals his conviction for Rape on Rape Shield and Denial of Mistrial grounds.

Facts: The defendant raped the victim. Police investigated and spoke to the victim. During the investigation, the victim explained to police that when she reported a prior rape allegation to her sister, her sister responded, "well... I know how you get when you get depressed, are you sure that you just didn't regret it afterwards." The victim responded, "why the f--- would the police believe me if my own family can't."

Prior to trial, the defendant moved to admit the statements that the victim made to the investigating officer regarding the prior rape allegation and her sister's response to it. He asserted that the statements that the victim made to the investigator were admissible "for impeachment purposes" to show that the victim "makes false statements concerning sexual behavior." The trial court conducted an evidentiary hearing and ruled that the statements that the victim made to police were protected by the rape shield statute and did not fall under the "motive to fabricate" exception to it in § 18.2-67.7(B).

At trial, after the Commonwealth rested and before the defense presented its case, the trial court learned that the investigating officer had remained in the courtroom during argument on the defendant's motion to strike. After the defendant reminded the trial court that it had excluded the witnesses, the Commonwealth stated that it had no expectation of calling the officer as a rebuttal witness. The defendant moved for a mistrial. He argued that after realizing the officer remained in the courtroom during the motion to strike, he was left with "scant choices" on whether to call her to testify during his case-in-chief. He argued that "if he had any choice at all . . . it was a Hobson's choice." That is, if he called her to testify, he risked the possibility of tainted testimony.

The trial court denied the motion for a mistrial.

Held: Affirmed. The Court held that the trial court did not abuse its discretion in refusing to admit the victim's statements concerning an alleged prior rape and her sister's supposed disbelief about it and that the trial court did not abuse its discretion in refusing to grant the defendant's motion for a mistrial.

Regarding the victim's statements, the Court assumed without deciding that the trial court erred in finding that the victim's statements referred to conduct for purposes of the rape shield statute. The Court repeated that, under *Clinebell*, false statements about sexual abuse do not qualify as conduct under the rape shield statute. Nevertheless, the Court found that the trial court properly excluded the statements. The Court held that the trial court's denial of the defendant's motion was not plainly wrong in the refusal to admit the victim's statements.

The Court explained that, unlike the defendant in *Clinebell*, the defendant here failed to present any evidence or proffer any information proving that the victim's assertion that she was raped before was false. Rather, as the trial court found, the Court reasoned that the victim's statement only concerned a general allegation of a prior unreported rape that was not shown to be false—or even that a reasonable probability of falsehood existed. The Court concluded that the statement was therefore irrelevant and inadmissible, as it had no probative importance to the question of whether the defendant raped the victim.

In a footnote, the Court explained that, because the Court had found that the victim's statements were not protected by the rape shield statute, the Court was not going to address whether they were admissible under the "motive to fabricate" exception to the general rule. However, the Court then explained that the motive to fabricate exception also would not apply because one accusation, not proven to be false, would not rise to the level of a "pattern of behavior" that directly correlates to the issue.

Regarding the defendant's motion for a mistrial, the Court ruled that the trial court did not abuse its discretion by denying the motion for mistrial because there was no showing of prejudice and no proffer of what the testimony would have included.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1610222.pdf>

Chavez v. Commonwealth: July 12, 2023

Loudoun: Defendant appeals his convictions for Child Sexual Assault on Refusal to Strike a Juror and Refusal to Admit Defense Evidence.

Facts: The defendant repeatedly sexually assaulted a child. Prior to trial, the defendant requested a hearing pursuant to § 18.2-67.7, the rape shield statute. The defendant sought to admit the following:

(a) The victim's statements that she self-harmed in the past with a knife because her mother would not let her have a boyfriend;

(b) The victim's statements that she believed she was pregnant;

(c) Statements from the victim's classmate that the victim discussed a boyfriend in the same conversation during which she reported the defendant's abuse; and

(d) Printouts of two photographs from the victim's Facebook account, posted during the period of abuse, showing an unknown couple kissing with "heart balloons" in the background and an unknown couple on a beach with the quote "I was born to love you."

The defendant argued that this evidence would demonstrate that the victim had a motive to fabricate. The trial court denied the defendant's motion.

During voir dire, the Commonwealth asked the venire if anyone had been a victim or had a friend or family member who had been the victim of sexual abuse. One juror revealed that his wife was sexually abused as a child. He stated that he thought he could be unbiased, but that he "just ha[d] some doubt." However, he did acknowledge that "something" in the case could "trigger" a response from him related to his wife's abuse. The prosecutor asked if he had already determined the defendant's guilt because of his own experience, and the juror responded "no." When asked if he could determine the case based on the evidence presented and not on his own experience, the juror stated, "I think I can."

The defendant moved to strike the juror for cause. In denying the motion, the court noted that it observed the juror's body language, his facial gestures, and his vocal intonation and believed him when he said he could be impartial.

Held: Affirmed. The Court ruled that the court did not abuse its discretion when it denied the defendant's motion to introduce certain proffered testimony and exhibits, and when it denied the defendant's motion to strike the juror from the jury for cause.

Regarding the defendant's proffered evidence, the Court noted that § 18.2-67.7(B) provides that "[n]othing contained in this section shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused." However, in this case, the Court found that the defendant did not establish a pattern of behavior with a sufficient nexus to the crime for which he was on trial. The Court pointed out that the defendant did not proffer the details of the statements, any claimed prior sexual activity, or the existence of a boyfriend. The Court therefore ruled that the trial court did not abuse its discretion when it denied the defendant's motion to introduce the victim's statement suggesting a belief that she was pregnant.

The Court also complained that the defendant failed to establish how the victim's alleged self-harm tended to prove a motive to fabricate. Second, the Court explained that the bare fact of the victim mentioning a boyfriend is too attenuated from any evidence supporting a motive to fabricate. Lastly, the Court agreed with the trial court's conclusion that the photographs from the victim's Facebook page were irrelevant to prove any issue in the case and merely invited speculation. The Court noted that these images simply portrayed an unknown couple and did not make the existence of a potential boyfriend more probable and produced only an attenuated, speculative inference.

Regarding the juror, the Court found that the record did not establish that the juror held firm opinions of such "fixed character which repel[] the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already." The Court noted that the trial court found that

the juror was honest about his ability to be impartial and specifically noted that it came to this conclusion based on the juror's body language, facial gestures, and vocal intonation. Considering the entire voir dire, the Court ruled that the record supported the court's determination that the juror could serve as an impartial juror.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0793224.pdf>

Commonwealth v. Crack: June 13, 2023

Spotsylvania: Defendant appeals his conviction for Rape on Rape Shield grounds.

Facts: The defendant raped the victim, whom he had known since 2002. The defendant had had three consensual sexual encounters with the victim in early 2017. In November 2018, after the victim had not heard from the defendant in almost a year, the defendant broke into the victim's home and raped her.

Prior to trial, the defendant filed a pre-trial motion requesting that he be allowed to cross-examine the victim at trial under § 18.2-67.7 about her prior sexual contacts with him. The defendant contended that he and the victim had engaged in consensual sexual relations on three occasions and that those acts of consensual sex were relevant to his defense that "the act complained of was not accomplished by force, threat, or intimidation." The defendant also alleged that the victim had sent him texts on unspecified dates expressing her desire to have sex with him. The trial court denied his motion.

At trial, the victim explained that she had known the defendant for more than fifteen years before the rape. The victim stated that she was reluctant to call the police partly because she considered the defendant part of the family and did not want him to get in trouble.

Held: Affirmed. The Court agreed that the trial court did not err by finding that the prior sexual acts proffered by the defendant were too remote from the charged offense to be admissible. The Court found that the record did not support the defendant's assertion that the 2017 encounters were reasonably proximate to the charged rape because they were part of an ongoing, albeit surreptitious, relationship.

Given the victim's testimony about their relationship, the Court also noted that the exclusion of evidence about the 2017 sexual encounters did not improperly influence the jury's credibility determination by "presenting a case of an alleged rape between virtual strangers."

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0337222.pdf>

Miscellaneous Evidentiary Issues

Fourth Circuit Court of Appeals

U.S. v. Hunt, et. al.: April 16, 2024

E.D.Va.: Defendants appeal their convictions for Murder, Racketeering, and Related Offenses on Admission of Firearms Forensic Evidence.

Facts: The seven defendants are members of a criminal gang that committed a string of murders, attempted murders, and assaults in 2015 and 2017 in Hampton and Newport News.

During the trial, the defendants moved to exclude testimony of three forensic experts connecting the defendants' firearms to the scenes of multiple assaults, murders, and attempted murders. The defendants argued that the field of "toolmark identification" is categorically unreliable. The defendants argued that toolmark analysis relies on subjective, ill-defined standards; that it may produce erroneous matches between guns from similar production batches; and that these uncertainties are vulnerable to bias.

The district court denied the motion. The district court addressed these concerns by instructing the Government not to overstate the accuracy of its experts' conclusions, and by advising the defendants to impeach them before the jury.

Held: Affirmed.

The Court repeated that the rejection of expert testimony is the exception rather than the rule, and that even "shaky but admissible evidence" should be addressed through "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," not through "wholesale exclusion." Because confrontation is the preferred vehicle for litigating these concerns, the Court ruled that the trial court did not abuse its discretion by permitting the defendants to challenge these experts at trial, rather than keeping this evidence from the jury.

Tags: Evidence – Scientific Evidence - Firearms

Full Case At:

<https://www.ca4.uscourts.gov/opinions/214231.P.pdf>

Virginia Court of Appeals - Published

Griffin v. Commonwealth: August 1, 2023
78 Va. App. 116, 890 S.E.2d 619 (2023)

Alexandria: Defendant appeals his conviction for Battery on Fifth Amendment *Garrity* grounds, *Batson* Jury Selection Issues, Jury Instruction Issues, Refusal to Admit Victim Character Evidence, and sufficiency of the evidence.

Facts: While delivering an ECO detainee to the hospital, the defendant, a police officer, moved the detainee to a registration desk. The detainee was in handcuffs at the time. When the detainee began to pull back and resist the officer's control, the officer gave one or two demands to the detainee to "stop resisting." The officer then grabbed the detainee with both hands and used his right leg to sweep the detainee's legs out from under him. The detainee, still handcuffed behind his back, fell face-first onto the hospital floor, sustained facial injuries and broke his kneecap.

At trial, the defendant testified that he thought the detainee "was putting himself in a position where he could assault me." The defendant also admitted, "I didn't react properly" because he had intended to use some technique other than a leg-sweep to bring the detainee to the ground.

The defendant also testified that he was concerned about the detainee, whom he knew suffered from bipolar disorder. He testified that he was also aware that the detainee had "made threats to several government installations and had a previous conviction of arson." The defendant also testified that he had heard that the detainee had assaulted a nurse and a deputy at a mental health hospital in the past and that the detainee "had physically confronted firefighters" in the past. However, the defendant acknowledged that the detainee had not made any verbal threats toward hospital staff and had not tried to bite or spit at anyone in the hospital.

A police sergeant investigated the case. The sergeant interviewed the defendant as part of the investigation. Before the sergeant spoke with the defendant during the administrative investigation, he gave the defendant a "*Garrity* Form" which stated that the "employee can be compelled to respond and failure to do so is subject to disciplinary action up to and including termination." The defendant then made several statements. The sergeant then watched the video of the incident and interviewed the witnesses who were on the video.

Prior to trial, the defendant moved to dismiss the prosecution on the grounds that the sergeant violated the defendant's Fifth Amendment rights under *Garrity*. The sergeant testified that he maintained a wall between both investigations. Furthermore, when he gave his criminal investigation file to the Commonwealth, the sergeant only included information obtained from the witnesses with whom he spoke, including those at the hospital. The sergeant testified that he specifically did not give any of the defendant's *Garrity*-protected statements to the Commonwealth's Attorney. The trial court denied the defendant's motion, concluding that "there's no evidence before the Court that there was anything" derived from the defendant's protected statements.

During jury selection, the defendant challenged all four of the Commonwealth's peremptory strikes under *Batson*, arguing that the Commonwealth had used its peremptory strikes to remove "all white males" from the jury. The prosecutor explained that she struck the first juror from the venire because "he was a neighbor of [another juror] and I didn't want both of them on the panel." The prosecutor added that the juror "also rolled his eyes at several attempts of humor to include Your Honor's at the very end."

Regarding the other juror, the Commonwealth explained that she struck the second juror because he "didn't talk at all" and because she "couldn't see him during most of the selection" process,

which she said meant that she did not “know enough about him.” The trial court overruled the defendant’s *Batson* challenge.

At trial, the defendant sought to introduce several pieces of evidence concerning the detainee’s mental health history and aggressive behavior from various sources, including an incident at another hospital in the previous year and several incidents that took place after this incident. The defendant argued that the evidence of the detainee’s mental health history, his history of violence, and of his “history of resentment and hostility against first responders and hospital staff” was admissible under this exception because it was “relevant to the need for the use of force.”

The trial court excluded the defendant’s proffered evidence, but allowed the defendant to testify regarding what he knew about the detainee’s mental health and behavioral history that informed and affected the defendant’s decisions that day.

At trial, the Court gave an instruction on the elements of Battery. The instruction, to which the defendant objected, read as follows:

“The defendant is charged with the crime of assault and battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant willfully touched James Lenzen without legal excuse or justification; and
- (2) That the touching was done in an angry, rude, insulting, or vengeful manner.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of assault and battery.

If you find that the defendant had a legal excuse or justification to touch James Lenzen but that the force used during the touching was excessive, then you shall find the defendant guilty of assault and battery.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the crime as charged, then you shall find the defendant not guilty.”

During jury deliberations, the jury sent a question asking “Do both elements (1 & 2) apply to be found guilty? Paragraph 3 seems to negate Paragraph 1 by stating that the focus of the charge is based on the force used being excessive, is this accurate?” The trial court provided a written response to the jury stating, “Whether the touching was without legal excuse or justification or if there was legal excuse or justification but the force was excessive the Commonwealth, in either event, must prove that the touching was done in an angry, rude, insulting, or vengeful manner.”

Held: Affirmed.

The Court first addressed the defendant’s *Garrity* argument. The Court acknowledged that the Commonwealth bore the burden of proving by a preponderance of the evidence that the sergeant’s administrative investigation did not taint the Commonwealth’s criminal case but cautioned that “the burden of proof imposed by *Kastigar* does not require the prosecution to ‘negate every abstract possibility of taint.’” In this case, the Court found that there was no evidence that the Commonwealth used the defendant’s protected statements in any way to develop its case. The Court wrote: “While it certainly was not advisable or wise for the police department to have Sergeant East conduct both the administrative investigation and the criminal investigation of Griffin (a point Sergeant East made to the

then-chief of police), Garrity and its progeny did not create a per se rule requiring different investigators for the different investigations.”

Regarding the defendant’s *Batson* challenge, the Court noted that the prosecutor based her reasons for striking the jurors based upon her observations (or lack thereof) of the jurors’ body language. The Court repeated that a juror’s body language or demeanor during voir dire is certainly a gender-neutral and race-neutral reason for striking a juror. The Court refused to find that the trial court erred in crediting the prosecutor’s gender-neutral and race-neutral explanations for striking the jurors.

Regarding the excluded defense evidence, the Court first pointed out that the defendant did not present evidence that the defendant acted in self-defense. The Court then rejected the defendant’s argument that the entirety of the detainee’s mental health history and criminal record were relevant to the question of whether the defendant’s use of force was reasonable. Instead, the Court explained that evidence relevant to the question of whether the use of force was objectively reasonable would have been only circumstances known to him at the time of the incident.

In this case, the Court explained that testimony from others about their own experiences with the detainee and knowledge of his behavior do not bear on the reasonability of the defendant’s decision because the specific details of their experiences did not inform the defendant’s actions on that day. Conversely, the Court noted that the jury was able to hear quite a bit about the defendant’s knowledge of the detainee’s character and how it informed his decision to take the detainee to the ground that day.

Regarding the jury instruction, the Court found that, to the extent that it may have confused the jury as to whether the Commonwealth needed to prove that the defendant touched the detainee in an angry, rude, or insulting manner in addition to proving that the defendant acted with excessive force, the trial court remedied any such issue by the clarifying instruction it issued following the jury’s questions. The Court concluded that, in the trial court’s clarifying instruction in answer to the jury’s question, the trial court clearly and unequivocally instructed the jury that regardless of whether the jury found that the defendant used excessive force, the Commonwealth still “must prove that the touching was done in an angry, rude, insulting, or vengeful manner.”

Lastly, regarding the sufficiency of the evidence, the Court repeated that a police officer’s use of excessive force is a battery because that touching is not justified or excused and therefore is unlawful. The Court also repeated that the reasonableness of the force is evaluated from the objective perspective of a reasonable police officer on the scene, allowing for officers to make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary.”

In this case, the Court noted that the detainee, who was handcuffed and in the defendant’s custody, had not made any attempts to flee custody and had not made any threatening movements toward any of the hospital staff (or other patients). Furthermore, the Court pointed out that the evidence showed that the detainee had been compliant—at least until the defendant forced him to move a few steps closer to the registration counter.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0485224.pdf>

Virginia Court of Appeals -
Unpublished

Rabender v. Commonwealth: April 23, 2024

Henrico: Defendant appeals his conviction for Grand Larceny on Admission of Document Evidence and Jury Instruction issues.

Facts: While fleeing from police, the defendant stole a car from the victim's garage. Police located the vehicle, abandoned, several weeks later. Inside, police found uncovered a "Request for Appointment of a Lawyer" form belonging to the defendant's wife dated the day after the theft. At trial, the Commonwealth admitted the document into evidence over the defendant's objection. The defendant argued that the document was irrelevant.

At trial, the trial court granted a jury instruction 11 stating that "[b]ecause larceny is a continuing offense, anyone who knows that property is stolen and assists in its transportation or disposition is guilty of larceny." The defendant objected that the instruction was overbroad and not supported by the evidence, but the trial court overruled the objection.

Held: Affirmed.

Regarding the relevance of the document, the Court noted that the Commonwealth proved at trial that the defendant's wife called him in jail and identified herself as his wife and that the document was dated the day after the truck was stolen. The Court found that the facts tended to make the defendant's involvement with the stolen vehicle, where the item was found, "more probable." While there was no direct evidence that the defendant had ever read, saw, or knew of the existence of the document, the Court explained that it was within the jury's purview to assign appropriate weight to the document in determining the defendant's guilt or innocence.

Regarding the jury instruction, the Court reasoned that the jury was entitled to consider whether the evidence proved that the defendant knew the truck was stolen and "assist[ed] in its transportation or disposition" given that several documents and surveillance footage connected him to the vehicle. The Court ruled that the jury instruction was supported by the evidence, and the trial court did not abuse its discretion in granting it.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0269232.pdf>

Roberts v. Commonwealth: April 16, 2024

Lunenburg: Defendant appeals his convictions for attempted murder, robbery, and abduction on Discovery and Admission of Jail Calls grounds.

Facts: The defendant held his mother-in-law, who was bound to a motorized wheelchair, at knifepoint and threatened to dismember her, even after police arrived. While speaking with his wife on recorded jail phone calls, the defendant told wife that he was sorry, acknowledged “it’s my fault,” and asked wife and mother to “drop the charges.” He admitted, “I made a big mistake and I know I did and I’m really, really sorry for it.”

The Commonwealth disclosed the recording of the 911 call as soon as she had it, although the Commonwealth had previously produced a written summary of the recording. Prior to trial defendant moved to exclude the jail recording as a “late disclosure” in violation of *Brady*. The defendant complained that he did not have “the exact words” that wife used or the location data that came with the recording. He argued that the tape was exculpatory and should have been produced earlier than several days before trial.

The trial court denied the motion. The defendant declined the trial court’s offer of a continuance if the defendant needed more time.

The defendant also moved to exclude the jail call recordings by arguing that the telephone recording revealed to the jury that he was in jail when he called wife, so the recording should have been excluded. The trial court rejected that motion as well.

Held: Affirmed. Regarding the discovery issue, the Court noted that the defendant had the recording before trial, in time for “it to be put to use.” Regarding admission of the jail calls, because the defendant’s statements on the call to his wife from jail were probative of guilt, the Court ruled that the trial court did not abuse its discretion in admitting the recording into evidence.

Regarding the discovery objection, the Court repeated that there is no prejudice when the Commonwealth discloses the evidence as soon as it receives it or when evidence is disclosed “in time to be put to use.” The Court also repeated that a defendant who “failed to move for a continuance or even for a recess in order to consider the material” untimely disclosed by the prosecution “will not be heard to complain that he had insufficient time to prepare for trial.

Regarding the defendant’s objection to the jail calls’ reference to his incarceration, the Court distinguished the ruling in *Estelle* about a defendant’s appearing in prison garb throughout trial, which the Court noted provided a “constant reminder” to the jury of his incarceration. In this case, however, the Court noted that the jail references were intermittent and fleeting. The Court saw nothing in *Estelle* that would require trial courts to exclude a defendant’s incriminating statements whenever they are made in a telephone call in which the defendant’s incarcerated status is apparent. The Court pointed out that the defendant did not request a limiting instruction about the jail references, nor did he argue that the jail references could and should have been redacted.

Tags: Discovery – Timing of Disclosure; Evidence – Jail Calls - *Estelle*

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0180232.pdf>

Harris v. Commonwealth: April 8, 2024

Henrico: Defendant appeals his convictions for Possession with Intent to Distribute and Possession of a Firearm on Admission of Text Messages and Refusal to Admit a Co-Defendant's Guilty Plea.

Facts: The defendant possessed a firearm, heroin, cocaine, suboxone, marijuana, and Fentanyl with the intent to distribute. Officers discovered his contraband and arrested him during a traffic stop.

The Department of Forensic Science analyzed the defendant's cellphones, finding various text messages and a photograph of a handgun. In one text, a number associated with "Aaron" texted the defendant, "Ya I'll do 40 worth 25 and 15 powder." The defendant responded, "Ok 20min." In another exchange, the defendant asked a person identified as "Tiffany," "Did u like the smoke"? Tiffany replied "yesss that shit was gasss" and later texted the defendant, "I need some weed," to which the defendant responded, "How much money u got"?

Before trial, the defendant objected to the admission of all incoming text messages, arguing that they were all hearsay. The trial court overruled his objection and admitted the incoming text messages.

At trial, the defendant asked the trial court to admit his co-defendant's guilty plea to drug possession and possession of a firearm regarding the same incident. The trial court refused to admit that evidence.

Held: Affirmed.

The Court first found that clear Virginia precedent permits the admission of statements made to a defendant to provide context for his responses. The Court noted that in the 2020 *Jones* case, it held that out-of-court statements are not hearsay when offered to provide context for the defendant's admissions in response. The Court, citing the *Bennett* and *Swain* cases, explained that the incoming text messages to the defendant's phone were admissible because without the incoming messages, the outgoing messages would lack context and be incomprehensible.

The Court then found that the co-defendant's guilty plea did not fall into one of the few exceptions to the general rule that a co-defendant's guilty plea is inadmissible. In this case, the Court explained that the co-defendant pleading guilty to possession did not exonerate the defendant because possession of a drug need not be exclusive but may instead be joint. The Court reasoned that the fact that the co-defendant pleaded guilty did not make it "more probable," under Rule 2:401, that her possession was exclusive, rather than joint.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1653222.pdf>

Kamga v. Commonwealth: January 16, 2024

Frederick: Defendant appeals his convictions for Involuntary Manslaughter by Unlawful Discharge of a Firearm and Reckless Handling of a Firearm on issues regarding Direct Examination of a Witness and sufficiency of the evidence.

Facts: The defendant and his compatriots became intoxicated at a gathering while using marijuana, alcohol, and Xanax. While recording music, the defendant accidentally shot and killed the victim in this case. Given the trajectory of the bullet and the distance between the victim and the muzzle of the firearm, the medical examiner determined that the victim could not have shot himself. The Commonwealth's evidence was that it was necessary to apply 6.75 pounds of pressure to the trigger before the gun would fire.

One of the Commonwealth's witnesses was another individual from the party, whom the defendant contended had been the actual shooter. At trial, the defendant objected at trial when the Commonwealth asked the witness, "[W]ould you say that July of 2020 was the time when relationships with the police and young African American men in this country was sort of in question?" The defendant argued that information related to "cultural racial tensions back two years ago" was irrelevant because "the Defendant is Black, the victim is Black, and the witness is Black."

The Commonwealth responded that the information was relevant because Smith was expected to testify that his own reactions to police on the night of the shooting were influenced by the recent death of George Floyd in May 2020. The Commonwealth expected the witness to explain that he had reacted to his perception that the police were falsely accusing him of shooting the defendant. The Commonwealth offered to withdraw the question if the defendant agreed not to raise questions or make allegations regarding the witness' conduct on the night of the shooting. However, the defendant alleged that the witness' hostility toward police on the night of the shooting was evidence of the witness' own consciousness of guilt as the shooter.

The trial court found that the information was relevant and overruled the defendant's objection.

At the conclusion of trial, the defendant argued that the evidence failed to prove that criminal negligence was the proximate cause of the victim's death. Finally, the defendant argued that evidence that he was intoxicated and handled a firearm was insufficient to prove reckless handling of a firearm or criminal negligence, i.e., "gross, wanton and culpable" conduct.

Held: Affirmed.

Regarding the question for the witness, the Court found that evidence providing an alternative explanation for the witness' attitude and conduct towards police would make it less likely that the witness exhibited consciousness of guilt after the shooting. The Court explained that the witness' perception of police relations with African American men in July 2020 provided context and an alternative explanation for the witness' hostile reactions to police directives on the night of the shooting. Therefore, the Court ruled that the witness' testimony about police relations with African American men was relevant, and the trial court did not err in overruling the relevance objection.

Regarding sufficiency of the evidence, the Court agreed that a rational juror could find that the defendant, while under the influence of Xanax-laced brandy, applied the requisite pressure to the trigger of his gun and fired the gun in a confined space in very close proximity to two other people. From the evidence about the trajectory of the bullet, a rational juror could infer that the gun was pointed toward the victim when the defendant applied the requisite pressure to the trigger to discharge the firearm. From the foregoing, a rational juror could conclude that the defendant's conduct in discharging his firearm was so gross, wanton, and culpable as to show a reckless disregard of human life.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1539224.pdf>

Cabrera v. Commonwealth: July 12, 2023

Fairfax: Defendant appeals his convictions for Murder, Burglary, and Larceny on Variance with the Indictment, Admission of Flight Evidence, and Admission of Autopsy and Crime Scene Photos.

Facts: The defendant and his confederate broke into a home, strangled, and bludgeoned the victim to death, and stole items, such as a safe and paintings, from his home. At trial, the Commonwealth's expert testified that the victim died from strangulation and from blunt force injuries to his head. The defendant's confederate also testified for the Commonwealth at trial.

During his police interview in 2020, the defendant admitted that he was present at the apartment during the murder, that he stole valuable items from the deceased, and that he took the victim's car. The defendant also admitted that he fled to El Salvador after the murder because he was scared. The defendant objected to the Commonwealth introducing evidence of his flight to El Salvador, but the trial court overruled his objection.

At trial, the defendant objected to the admission of crime scene and autopsy photos. He argued that the photographs had little probative value because the manner of death was not in dispute and that the risk of unfair prejudice substantially outweighed the photographs' probative value.

The indictment in this case alleged that the defendant murdered the victim "[o]n or about the 23rd day of November 2016." The evidence adduced at trial showed that the defendant killed the victim sometime between 11:00 p.m. on November 22 and 12:30 a.m. on November 23. The trial court rejected the defendant's argument that this variance was fatal to the indictment.

Held: Affirmed.

Regarding the defendant's flight, the Court found that the defendant's admission, taken in conjunction with his knowledge of the crime and his presence at the scene of the crime, supported the conclusion that the defendant had some knowledge that he might be a suspect. The Court also found that the defendant's conduct of quickly fleeing the country after the murder and his later statements to law enforcement tended to prove that immediately after the killing, the defendant sought to avoid any contact with law enforcement officials and the courts. Thus, the Court ruled that the trial court did not abuse its discretion in balancing the probative value of this evidence against its potential prejudicial effects and in admitting this evidence.

Regarding admission of the crime scene photos and autopsy photos, the Court concluded that the autopsy and crime scene photographs, which depicted the brutality of the murder, were highly probative of the defendant's malice and premeditation (two elements of first-degree murder). The Court also contended that the photographs corroborated the confederate's account of the incident, rendering the photographs essential to the Commonwealth's case given the defendant's attempts to discredit his confederate's testimony. Thus, the Court ruled that the photographs were highly probative and essential to the Commonwealth's case, and the probative value was not substantially outweighed

by any unfair prejudice and the Court held that the trial court did not abuse its discretion in admitting the autopsy and crime scene photographs.

Lastly, regarding the variance with the offense date in the indictment, the Court ruled that the evidence clearly established that the defendant murdered the victim on or about November 23, 2016, and no variance or inconsistency between the date alleged in the indictment and the evidence existed. Consequently, the Court held that the trial court did not err in denying the defendant's motion to strike.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1038224.pdf>

Webster v. Commonwealth: June 20, 2023

Greene: Defendant appeals his conviction for Murder on Refusal to Admit Evidence of Third-Party Guilt and sufficiency of the evidence.

Facts: The defendant killed the victim after contacting him by cellphone and meeting him by car. The victim's girlfriend saw the victim driving just before the murder and another witness saw the victim's body just minutes later in a car.

At trial, Special Agent Jeremy D'Errico of the FBI testified. He explained that the defendant's phone and the victim's phone were in the same area just before and at the time of the murder. He also noted that the defendant and victim were in contact before the murder, but that the defendant immediately stopped contacting the victim after the murder.

The Department of Forensic Science initially matched a fingerprint on the victim's car to a man in California, but after re-examination found the match "inconclusive." The police investigated the California man and determined that no evidence suggested that he had been to Virginia.

Before trial, the Commonwealth filed a motion in limine seeking to exclude "alleged evidence of third-party guilt." The defendant proffered that he planned to call a fingerprint expert to testify that he gathered fingerprints from the "left door post" of the victim's car and sent them to a laboratory. The defendant further proffered that one of the fingerprints belonged to the California man. The defendant argued that because evidence in the record proved that the car was washed regularly, the presence of a fingerprint "suggests an agent of the victim's death." The Commonwealth argued that there was no evidence about when the fingerprint was placed on the car, and nothing linked the fingerprint to the murder. The trial court granted the Commonwealth's motion and ruled that the fingerprint evidence was "collateral and otherwise inadmissible."

Held: Affirmed. The Court ruled that the trial court did not abuse its discretion by determining that the fingerprint was not admissible as evidence of third-party guilt. Because such evidence was inadmissible to prove third-party guilt, the Court held that the trial court did not abuse its discretion in excluding the proffered evidence.

The Court repeated that an accused may introduce evidence of third-party guilt "only 'where there is a trend of facts and circumstances tending clearly to point out some other person as the guilty

party.” In this case, the Court ruled that the presence of the fingerprint—whether it belonged to the California man or not—did not “tend clearly to point” to the California man as the guilty party. Instead, the Court contended that the evidence was attenuated, irrelevant, and immaterial. To the Court, the presence of the fingerprint only suggested that the California man, assuming the fingerprint was properly attributable to him, touched the car sometime after the victim last washed it. It did not, according to the Court, demonstrate that the California man was at the scene of the offense, and it did not demonstrate that he was involved in the offense.

The Court also repeated that the mere presence of the fingerprint, without any other circumstances, is insufficient to demonstrate a “trend of facts and circumstances tending clearly to point out [the owner] as the guilty party.”

Lastly, the Court ruled that, based on the combination of the cell phone records, the victim’s girlfriend’s testimony, the defendant’s multiple attempts to conceal his guilt, and the fact that he stopped contacting the victim immediately after the victim’s death, the jury could rationally conclude beyond a reasonable doubt that the defendant shot and killed the victim.

Judge Chaney dissented regarding the sufficiency of the evidence.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0856222.pdf>

MISCELLANEOUS

Appeals

Virginia Court of Appeals

Published

Russell v. Commonwealth: January 30, 2024

Lancaster: Defendant appeals his conviction for Practicing Law Without a License on Refusal to Permit Withdrawal of Guilty Plea.

Facts: On September 24, 2021, the trial court entered an order convicting the defendant of Practicing a Law Without a License and imposing a 6-month jail sentence and a \$2,500 fine. The defendant subsequently filed a motion asking the trial court both to vacate his conviction and to allow him to withdraw his plea. A few days later, on October 1, 2021, the trial court entered an order “stay[ing] execution of [the] Sentence to December 17, 2021.” The order did not address substantively the defendant’s underlying plea, nor did it otherwise implicate the September 24 order.

On December 17, 2021, the trial court entered an order continuing the defendant’s motion to vacate and to withdraw his plea. On March 31, 2022, following a hearing on the matter, the trial court entered an order denying the motion and requiring him to report to jail on April 18.

Held: Affirmed. The Court ruled that the September 24, 2021 order imposed a judgment of conviction against the defendant and no subsequent order of the trial court modified, vacated, or suspended the conviction. Thus, the Court ruled that the trial court lost jurisdiction of the judgment 21 days after the September 24 order and each order entered after that period was a nullity. Because the trial court had no jurisdiction to rule on the defendant’s motion to withdraw his plea, the Court ruled that it had no jurisdiction to entertain an appeal of the same.

The Court repeated that to avoid the application of the 21-day time period running from what would otherwise be a final order, the trial court’s order must include specific language stating that the court is retaining jurisdiction over the case. The trial court’s intent to rule on pending motions is “insufficient to negate the finality of an order rendering a final judgment.” Thus, when a trial court enters an order and renders judgment against an accused, unless a court vacates or suspends a final order during the twenty-one-day period or some other exception to the general rule applies, the court loses jurisdiction over the case and any action taken by the trial court after the twenty-one-day period has run is a nullity. On the other hand, an execution of judgment is a “ministerial act” over which a trial court retains jurisdiction even after it no longer has jurisdiction of the underlying conviction.

In this case, the Court ruled that the trial court’s October 1, 2021 order staying the execution of the sentence did not affect the finality of the conviction, because the imposition of judgment is distinct from the execution of judgment. The Court concluded that the October 1 order stayed the execution of the defendant’s sentence, but it did not modify, vacate, or suspend the order of conviction beyond the 21-day period delineated by Rule 1:1.

The Court cautioned that “Rule 1:1 does not require incantation; it requires specificity.” In a footnote, the Court explained that “to the extent the trial court stayed execution of the sentence to retain jurisdiction to consider Russell’s motions for post- judgment relief, we hold that the stay had no such effect.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0822222.pdf>

Asset Forfeiture

U.S. Supreme Court

Culley v. Marshall: May 9, 2024

11th Circuit: Plaintiffs appeal the dismissal of their Fifth Amendment Lawsuit regarding Seizure of their Assets.

Facts: Plaintiffs are both owners of vehicles that Alabama law enforcement seized for forfeiture due to transportation of illegal drugs. Regarding the first plaintiff, Alabama filed a forfeiture complaint against the vehicle 10 days after the seizure of the car. The first plaintiff waited six months before answering that complaint and waited another year before raising an innocent owner defense in a motion for summary judgment. Soon thereafter, an Alabama state court granted the first plaintiff’s motion and ordered the return of her car.

Regarding the second plaintiff, Alabama brought a forfeiture case against the car 13 days after the seizure. The second plaintiff initially failed to appear in the case, causing the state court to enter a default judgment for Alabama. The second plaintiff later requested that the state court set aside that judgment, and the state court did so. The second plaintiff then submitted a brief answer and served discovery requests on Alabama, but the second plaintiff otherwise took no action until the state court set a date for the forfeiture trial. Three weeks before the scheduled trial date, the second plaintiff finally moved for summary judgment on the ground that she was an innocent owner. Soon thereafter, the state court granted her motion, and she recovered her car.

Both plaintiffs filed a lawsuit against Alabama in federal court, seeking money damages under 42 U. S. C. §1983, claiming that the state officials violated their due process rights by retaining their cars during the forfeiture process without holding preliminary hearings. The district court dismissed the lawsuit and the 11th circuit affirmed.

Held: Affirmed. In a 6-3 ruling, the Court ruled that in civil forfeiture cases involving personal property such as cars, the Due Process Clause requires a timely forfeiture hearing but does not require a preliminary hearing.

The Court concluded that its 1986 ruling in *US v. Von Neumann* had already resolved the issue. In that case, the Court had stipulated that timeliness in civil forfeiture cases must be assessed by analogizing to a defendant's right to a speedy trial and considering four factors: the length of the delay, the reason for the delay, whether the property owner asserted his rights, and whether the delay was prejudicial. The Court explained that those factors are appropriate guides in the civil forfeiture context because the factors ensure that the flexible requirements of due process have been met.

In this case, the Court characterized the plaintiff's argument as contending that the Due Process Clause requires "more extensive preliminary procedures for the temporary retention of property than for the temporary restraint of persons. The Due Process Clause does not demand that incongruity."

The Court concluded that "to balance the interests of the government and individuals in civil forfeiture cases involving personal property, the States and Congress have adopted a wide variety of approaches. For example, some States require that the forfeiture hearing occur within a fixed period of time. Others require a jury trial. Still others condition civil forfeiture on a successful criminal prosecution. And a few now require preliminary hearings. Our decision today does not preclude those legislatively prescribed innovations. Rather, our decision simply addresses the baseline protection of the Due Process Clause. In civil forfeiture cases, the Due Process Clause requires a timely forfeiture hearing, but does not require a separate preliminary hearing."

Justice Gorsuch filed a concurring opinion, joined by Justice Thomas. Justice Sotomayor filed a dissent, joined by Justices Kagan and Jackson.

Full Case At:

https://www.supremecourt.gov/opinions/23pdf/22-585_k5fm.pdf

Virginia Court of Appeals

Unpublished

Harris v. Commonwealth: April 8, 2024

Fauquier: Defendants appeals the forfeiture of their dogs due to mistreatment on Bill of Particulars and Fourth Amendment grounds.

Facts: The defendants neglected their three dogs to the point that neighbors called the police, alerting them to the dogs being in imminent danger. When officers responded, they observed the dogs outside of the defendants' residence. Officers observed that all three dogs appeared in distress and in need of emergency aid. Officers entered the defendants' backyard and examined the dogs, including third dog, who began to whimper but could not stand. One dog was emaciated. Another had open, bloody cuts in his mouth. The third dog was emaciated and "appeared dead."

The officers rescued the dogs and obtained care for them. Two dogs survived and later were restored to health; one dog suffered a seizure and had to be euthanized.

The Commonwealth began forfeiture proceedings in the general district court pursuant to § 3.2-6569. After a hearing, the court ordered that the dogs were forfeited to the shelter's care. The

defendants appealed to the circuit court. In circuit court, the defendants moved for a bill of particulars, allegedly to assist them in preparing a motion to suppress. The trial court denied the motion.

The defendants then moved to suppress, but the trial court denied that motion as well.

Following a trial, the court ruled that the dogs had been abandoned, cruelly treated, or had not been provided adequate care and were therefore forfeited.

[Good job to Nichole Geisenhof, ACA, Fauquier, who litigated this appeal with assistance from Michelle Welch at the AG's office – EJC].

Held: Affirmed.

Regarding the defendant's motion for a bill of particulars, the Court did not address the Commonwealth's argument that §§ 19.2-266.22 and 19.2-2303 apply only to criminal proceedings, not civil forfeiture proceedings. Instead, the Court simply ruled that any alleged error was harmless. The Court pointed out that the defendants already possessed the information a bill of particulars would have provided, as the Commonwealth had already presented its case in the general district court.

Regarding the motion to suppress, as with the previous issue, the Court declined to decide whether the exclusionary rule applies to civil forfeiture cases because it found that exigent circumstances justified the search of the property and seizure of the evidence at issue. The Court found that the officers' entry into the backyard did not extend beyond what was reasonably required to rescue the dogs. The Court ruled that the totality of these circumstances rendered the officers' actions objectively reasonable, and the court properly denied the motion to suppress.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/1567224.pdf>

Morris v. Commonwealth: March 26, 2024

Augusta: Defendant appeals the Forfeiture of his Assets, alleging Deficient Legal Process.

Facts: The defendant sold methamphetamine after having a previous conviction for that offense. Police conducted a controlled buy from the defendant using \$4,560 in marked bills. After the purchase, police executed a search warrant at the defendant's residence and recovered more drugs and \$13,350 in cash. Among that money were the marked bills from the controlled purchase.

Eighty-three days after the seizure, the Commonwealth filed a forfeiture notice and information seeking forfeiture of "\$12,080 in U.S. Currency." The Commonwealth's information described the property as the "above-referenced property" that was seized "on or about March 6, 2020, . . . by law enforcement authorities of the County of Augusta, Virginia."

After the defendant's conviction, the defendant moved for the return of \$1,270 of the seized funds arguing that "[n]o notice of seizure was filed for" the difference between the amount recovered from the safe and the amount named in the information. The trial court denied the forfeiture motion to return any seized funds, finding that the buy money belonged to Virginia State Police and remained its property during the controlled buy.

Held: Affirmed. The Court ruled that, because the information filed 83 days after the seizure was timely and specifically described the property subject to forfeiture, trial court did not err in denying the defendant's motion to return any of the seized funds.

The Court found that the Commonwealth's notice described the property subject to the forfeiture proceeding with sufficient specificity. The Court found that the defendant was informed not only that the Commonwealth sought the forfeiture of U.S. currency, but also of how to identify which currency would be subject to forfeiture. The Court agreed that the defendant likewise had notice that the Commonwealth was not seeking forfeiture of the vehicle she was driving or the safe in which the currency was discovered. Accordingly, the Court concluded that any discrepancy between the amount of U.S. currency named as defendant and the amount reported on the search warrant inventory was of no consequence.

In a footnote, the Court explained that, finding that the Commonwealth's information was specific enough to satisfy § 19.2-386.1(B), the Court would not consider whether the buy money provided as part of the controlled buy remained the property of the Commonwealth after it entered the defendant's possession.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0074233.pdf>

Expungement

Virginia Court of Appeals – Unpublished

McFadden v. Commonwealth: April 16, 2024

Virginia Beach: Defendant appeals the denial of his Expungement petition.

Facts: In 2016, the petitioner was arrested for attempted possession of a firearm after conviction of a nonviolent felony. That charge was concluded with a nolle prosequi. The petitioner's record also includes a few out-of-state convictions: a 2001 felony drug conviction in Connecticut, which was "provisional[ly] pardon[ed]" in 2009; two misdemeanor drug convictions in New York from 1986 and 1987; and a felony drug conviction in New York from 1997.

Between 2009 and 2021, the petitioner worked successfully at a store, but he lost his job due to an injury. Afterward, the petitioner applied for numerous jobs, but he was unable to obtain employment. As a result of his unemployment, the petitioner faced financial hardship, including an inability to pay rent or purchase food without government assistance. Most employers who declined to hire him did not provide specific reasons for his rejection. One rejection involved "a dispute regarding his commercial driver's license." Asserting that his 2016 arrest created a barrier to being able to regain

employment and maintain “a good lifestyle,” the petitioner applied for expungement under § 19.2-392.2(A).

The Commonwealth opposed the petition, contending that, considering the petitioner’s existing criminal record, no circumstances “would constitute a manifest injustice” to him from the continued existence or possible dissemination of information relating to the arrest.

Following a hearing, the circuit court denied the petition for expungement, and then, after a second hearing, denied the petitioner’s motion to reconsider. The court found no “direct connection with the felony charge” and petitioner’s inability to gain employment.

Held: Reversed. The Court ruled that the circuit court abused its discretion by requiring the petitioner to prove a “direct connection” between his employment difficulties and his unexpunged felony charge. The Court reversed and remanded for the circuit court to review the petition to consider whether the petitioner faces “a reasonable possibility of manifest injustice” because of the nolle prossed 2016 charge which remains on his record.

The Court explained that while courts should not favor “fantastical or exaggerated assertions of a potential adverse impact,” even “a reasonable fear” of a negative impact on career advancement or other prospects is sufficient to compel an expungement under the statute. In this case, the Court ruled that the circuit court here erred in requiring the petitioner to prove a “direct connection” between his nolle prossed felony charge and his challenges in finding work, rather than requiring only “a reasonable possibility of manifest injustice.”

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0312231.pdf>

Kost v. Commonwealth: September 12, 2023

Arlington: Defendant appeals the denial of his Expungement petition.

Facts: The defendant was acquitted of charges of malicious wounding and attempted robbery in a jury trial. The defendant filed an expungement petition, asserting that the continued existence of the charges negatively impacted his ability to obtain housing and employment. In support of his petitions, the petitioner filed copies of email correspondence purportedly showing that, due to the presence of the acquitted charges on his criminal record, he was denied the opportunity to rent an apartment, and he was not hired for a job at a particular employer. The petitioner later testified that he had lost job opportunities and had been told that his criminal charges were a barrier to obtaining an apartment.

The Commonwealth did not object to the petition, but the trial court denied the expungement. The trial court found that the petitioner failed to prove he “would” be denied a job or apartment opportunities despite the acquittal.

Held: Reversed. Because the petitioner satisfied his burden to prove a “reasonable possibility” of manifest injustice, the Court concluded that the trial court abused its discretion by failing to apply the appropriate standard and in denying the petitions for expungement.

The Court first repeated that a petitioner bears the burden of proof that “the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause” him a manifest injustice. In this case, the Court concluded that the trial court necessarily required the petitioner to prove “actual manifest injustice” rather than only a “reasonable possibility” of manifest injustice from the continued existence of the charges.

The Court also pointed out that the petitioner had no charges or convictions on his criminal record other than the charges for which he sought expungement.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0035234.pdf>

Extraordinary Writs

Virginia Supreme Court

West v. Merritt: February 16, 2024 (Unpublished)

Norfolk: Parole Board appeals the granting of a Writ of Habeas Corpus.

Facts: In 2001, the trial court convicted the defendant of murder and use of a firearm. In 2019, a key trial witness recanted her testimony. In 2020, she signed affidavits to that effect. In a subsequent habeas proceeding, the circuit court determined that the petition was timely, finding that the defendant could not have known about the facts underlying his claims until the witness admitted her role in his conviction. The defendant also learned that, in discovery, he had not received canvass notes revealing witness reports of a different vehicle leaving the scene.

Prior to the habeas hearing, the Governor issued the defendant a conditional pardon. The parole board unsuccessfully argued that the defendant waived his right to pursue habeas relief under the terms of the conditional pardon. The trial court granted the petition for habeas relief.

Held: Affirmed.

Examining the canvass notes, the Court agreed that they would have been “very important,” if not “essential,” in the aggregate. The Court reasoned that eyewitness testimony describing a vehicle different from the one described by the recanting trial witness would undoubtedly have been used to further undermine her credibility. The Court also reasoned that such testimony also could have “called into question the reliability of an investigation already weakened by blatant investigative failures and a lack of physical evidence connecting Merritt to the crime.”

The Court concluded that the canvass notes were material in the sense that their suppression “undermines confidence in the outcome” of the trial. The Court ruled that the circuit court, therefore, did not err in finding the evidence material. The Court also rejected the argument that the defendant’s acceptance of the conditional pardon waived his right to pursue habeas relief.

Full Case At:

https://www.vacourts.gov/courts/scv/orders_unpublished/220654.pdf

Richardson v. Commonwealth: February 1, 2024 (Unpublished)

Rev’d Va. Court of Appeals ruling of June 21, 2022

Sussex: Defendant seeks a Writ of Actual Innocence on the offense of Involuntary Manslaughter

Facts: The defendant and another man killed a police officer during a struggle. The defendant pled guilty to Involuntary Manslaughter pursuant to a plea agreement in which he admitted his guilt.

Later, a Federal grand jury indicted the defendant for conspiracy to distribute a controlled substance, using a firearm to commit murder while drug trafficking, and murder of a law enforcement officer while drug trafficking. Following a trial, a jury convicted the defendant of the drug trafficking conspiracy but acquitted him of the other two charges.

After his conviction, the defendant claimed that he discovered two new pieces of evidence. First, the defendant located a nine-year-old child who stated that she saw the perpetrator flee the scene and made a statement to investigators that she saw a “man with dreads” running away from the scene. The defendant stated, “I wore my hair in cornrows at the time.” The defendant then learned that the witness had identified another man in a photo array that showed the silhouettes of apparently twelve people’s heads and upper torsos, although their faces were not visible in the array. Before the guilty plea, the Commonwealth had subpoenaed that child as a witness for trial.

The second piece of evidence was a message on the State Police answering machine with a tip that identified the person whom the child identified as a person involved and that this person “had since cut his dreads.” The 911 message was transcribed by an unidentified individual.

The defendant sought a writ of actual innocence. The Attorney General initially agreed with the request, but later sought leave to amend its pleadings and opposed the request.

The Court of Appeals denied the writ. Because the defendant failed to prove that the photo array “could not, by the exercise of diligence, have been discovered” before his conviction became final, the Court ruled that the photo array failed to satisfy one of the necessary statutory preconditions to the issuance of a writ of actual innocence. The Court also rejected the defendant’s claim that his federal acquittal and the 911 call merited a writ as well, complaining that the defendant provided no information concerning the origin of the 911 message, the identity of the caller, or the identity of the person who transcribed it. Thus, the Court ruled that the defendant failed to show by a preponderance of the evidence that the 911 message was “material” within the meaning of § 19.2-327.11(A)(vii), because he has not shown that the content of the message is true.

Held: Reversed. Without taking any position on the merits of the petition, the Court ruled that the Court of Appeals abused its discretion when it refused to grant his request for an evidentiary hearing. Accordingly, the Court remanded the case to the Court of Appeals for the purposes of ordering an evidentiary hearing to permit the defendant the opportunity to demonstrate whether reasonable diligence was exercised as well as whether the purported newly discovered evidence is material. The Court provided no further explanation for its ruling.

Full Case At:

https://www.vacourts.gov/courts/scv/orders_unpublished/220499.pdf

Original Court of Appeals Ruling At:

<https://www.vacourts.gov/opinions/opncavwp/0361212.pdf>

Prease v. Clarke: July 6, 2023

888 S.E.2d 758 (2023)

Botetourt: Defendant seeks a Writ of Habeas Corpus based on Denial of Earned Sentence Credits.

Facts: The defendant opened fire on police officers, engaging in an extended gunfight until police captured him. In November 2013, the trial court convicted the defendant of attempted aggravated murder of a law enforcement officer under §§ 18.2-25 and -31, along with several other offenses. The trial court sentenced the defendant to a total sentence of 63 years plus 12 months, with all but 13 years plus 12 months suspended.

In 2020, the General Assembly revised the statutory scheme governing earned sentence credits by amending Code § 53.1-202.3. The revised statutory scheme created a two-tier system whereby prisoners convicted of a few enumerated offenses could only receive 4.5 credits for every 30 days served. In contrast, prisoners convicted of an offense other than those enumerated in § 53.1-202.3(A) were eligible to receive expanded earned sentence credits. Using DOC's pre-existing 4-tier system, which it had developed after 1995, the new statute stated that prisoners at Level I received 15 credits for every 30 days served, prisoners at Level II received 7.5 credits for every 30 days served, prisoners at Level III received 3.5 credits for every 30 days served, and prisoners at Level IV were not eligible to receive any sentence credits. The new statute directed that the credits shall be awarded retroactively.

In March 2022, VDOC informed the defendant that he would be released between July 1 and August 30, 2022, based on the retroactive application of expanded earned sentence credits. However, in an April 2022 opinion, the Attorney General interpreted § 53.1-202.3 and concluded that the phrases "any violation" and "any felony violation" of a criminal statute encompass the completed offense as well as the associated inchoate offenses (e.g., conspiracy, attempt, or solicitation to commit that offense). The Attorney General further opined that conspiracy to commit aggravated murder and attempted aggravated murder were ineligible for expanded earned sentence credits.

Based on that opinion, VADOC determined that the defendant's convictions for attempted aggravated murder rendered him ineligible for expanded earned sentence credits and revised his release date to June 4, 2024. In October 2022, the defendant petitioned for a writ of habeas corpus,

arguing that VADOC improperly denied him expanded earned sentence credits that would have resulted in his release shortly after July 1, 2022.

Held: Writ Granted. The Court granted the defendant's petition and issued a writ of habeas corpus directed to VADOC ordering that the defendant be released from custody.

The Court agreed that under § 53.1-202.3, a person convicted of aggravated murder is ineligible to receive expanded earned sentence credits. The Court pointed out, however, that the defendant was not convicted of aggravated murder, but was convicted of attempted aggravated murder. The Court explained that "The remainder of Code § 53.1-202.3(A) enumerates a number of specific offenses that are also ineligible for expanded earned sentence credits. Notably, attempted aggravated murder is not one of those enumerated offenses. Thus, it would appear that there is no basis in the governing statutes for denying [the defendant] expanded earned sentence credits on his attempted aggravated murder convictions."

The Court rejected the Commonwealth's argument that the verbiage used throughout § 53.1-202.3(A) indicates that the General Assembly intended to exempt actual violations of the enumerated statutes as well as the associated inchoate crimes from receiving expanded earned sentence credits. The Court also refused to consider the public policy implications associated with the General Assembly's inclusion of less serious offenses as exempt under § 53.1-202.3.

In a footnote, the Court cautioned that under normal circumstances, the Court generally lacks jurisdiction to award habeas relief regarding the calculation of earned sentence credits. The Court explained that, as there is the possibility that earned sentence credits can be forfeited, a challenge to the calculation of those credits will usually only result in a potential impact on the duration of confinement. The Court found that this case, however, represented an exception to this general rule, because the defendant filed his habeas petition after the date he would have been released if he was eligible to earn expanded sentence credits. In other words, his assertion was that VDOC's alleged miscalculation of credits resulted in the extension of his detention without lawful authority, and therefore made him eligible to seek a writ.

Full Case At:

<https://www.vacourts.gov/opinions/opnscvwp/1220665.pdf>

Virginia Court of Appeals -
Unpublished

Abdul-Sabur v. Commonwealth: November 14, 2023

Louisa: Defendant appeals the denial of his Post-Conviction Motion for Resentencing.

Facts: The trial court convicted the defendant of grand larceny in 1998 and sentenced him in 1999, after which the Court of Appeals denied his appeal. In 2021, the defendant filed a motion for resentencing in the trial court, alleging that recent amendments to § 19.2-295.1 and the Supreme

Court's holding in *Fishback v. Commonwealth*, 260 Va. 104 (2000), entitled him to be resentenced on his 1999 convictions. The trial court denied the motion.

Held: Affirmed. The Court concluded that because the defendant filed this motion well after 21 days from the entry of the final order, the trial court did not have jurisdiction to grant the relief that the defendant requested. The Court pointed out that the Supreme Court expressly held in *Fishback* that, because it had announced "a new rule of criminal procedure," the holding was "limited prospectively to those cases not yet final" on the date it was announced, which in 2000. The Court also agreed that the amendments to § 19.2-295.1 do not contain any provisions that permitted the trial court to reconsider the defendant's sentence many years after a final judgment was entered.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0210222.pdf>

Holloway v. Commonwealth: October 31, 2023

Williamsburg: Defendant appeals the denial of his Motion to Vacate his conviction.

Facts: The trial court sentenced the defendant to 33 years of incarceration for abduction and rape in 2014. The defendant appealed and sought *habeas* relief, but the courts denied those efforts.

The defendant filed a motion to vacate his convictions in 2022, alleging that a law enforcement officer lied in a search warrant affidavit and that this falsehood constituted an "extrinsic fraud" under § 8.01-428(D). The trial court determined it lacked jurisdiction under Rule 1:1 and denied the motion.

Held: Affirmed. The Court explained that even if his allegations of perjury were correct, they fell squarely within the definition of intrinsic fraud. Therefore, the Court ruled that the sentencing order was not subject to this type of collateral attack after it became final. The Court repeated that "Virginia law does not permit a motion to vacate that is filed in a trial court long after the court lost active jurisdiction over the criminal case to serve as an all-purpose pleading for collateral review of criminal convictions." "Just as habeas corpus cannot be used as a substitute for a direct appeal, a motion to vacate cannot be used as a substitute for a habeas corpus petition." Thus, the Court ruled that the trial court correctly concluded it lacked jurisdiction to entertain the defendant's motion to vacate filed eight years after the conviction became final.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0231231.pdf>

Riggleman v. Commonwealth: October 25, 2023

Rockingham: Defendant appeals the dismissal of his petition for Declaratory Judgment

Facts: In 2007, the trial court convicted the defendant of 25 offenses under a written plea agreement, including 4 counts of use of a firearm in the commission of a felony, in violation of § 18.2-53.1. The trial court sentenced the defendant, in part, to three years' incarceration on each of the use of a firearm convictions. The defendant did not appeal the trial court's judgment.

In 2022, the defendant filed a petition for declaratory judgment and "to compel the court to stop lending its aid to the enforcement of an illegal contract." The defendant argued that under § 18.2-53.1, a second or subsequent conviction for use of a firearm in the commission of a felony requires a five-year mandatory minimum term of incarceration. He thus asserted that the prosecutor in his criminal cases did not have the authority to draft a plea agreement that imposed only three years of incarceration for three of his four convictions under § 18.2-53.1. Therefore, the defendant concluded that his plea agreement contained "ultra vires provisions" that were void ab initio. The defendant asked the trial court for a declaratory judgment that the prosecutor "did not have the authority to change the statutory fixed punishment" for a second or subsequent offense under § 18.2-53.1 from five to three years' incarceration.

The trial court denied the defendant's petition.

Held: Affirmed.

The Court ruled that any alleged defects in the sentences the trial court imposed upon his convictions under § 18.2-53.1 could have been raised when the plea agreement was presented to the trial court or on direct appeal of the sentences and, therefore, cannot be challenged in a declaratory judgment action. The Court also found that the record demonstrated that the order was not void. The Court concluded that the defendant's sentence was consistent with the statutory sentences for his convicted offenses and that the sentencing order was not void ab initio.

Full Case At:

<https://www.courts.state.va.us/opinions/opncavwp/0531233.pdf>

Revell-Walgorski: September 5, 2023

Norfolk: Defendant appeals the denial of his Post-Conviction motion for Resentencing.

Facts: The defendant pleaded guilty to three counts of obtaining money by false pretenses. The trial court sentenced him to 30 years' imprisonment, with all but 2 years and 9 months suspended. In 2022, the defendant filed a post-conviction motion alleged that the trial court was required to include a period of post-release supervision under § 19.2-295.2 but had failed to do so. The trial court denied the motion.

Held: Affirmed. The Court held that the sentence was not void or illegal and the trial court lacked jurisdiction to consider the defendant's motion to modify his sentence. Therefore, the trial court lacked subject-matter jurisdiction to grant the relief sought.

The Court repeated that § 19.2-295.2 comes into effect only when a judge suspends less than six months of a felony sentence. In this case, the Court noted that the defendant was in the custody of the Department of Corrections when he filed his 2022 motion to modify his sentence to include post-release supervision and had been in DOC custody since at least 2018. For the circuit court to have had jurisdiction over the defendant's motion, the Court found that he had to show that he filed it no later than 60 days after his transfer to the Department of Corrections.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0939221.pdf>

Fox v. Commonwealth: August 1, 2023

Chesterfield: Defendant appeals the denial of his Motion to Vacate his convictions for Firearms offenses.

Facts: In 2002, the defendant pleaded guilty several offenses with an agreed sentence, including first-degree murder and several firearms offenses. In 2022, the defendant moved to vacate the judgment under § 8.01-428(D), asserting that his sentences were obtained through extrinsic fraud and were void ab initio. Specifically, he asserted that the Commonwealth's attorney committed extrinsic fraud by arguing that (1) the sentences for using a firearm could not run concurrently by statute, and (2) the mandatory minimum sentence for possessing a firearm by a felon was five years' imprisonment rather than two years. The trial court denied the motion.

Held: Affirmed. The Court held that the defendant did not prove that the 2003 judgment was void or that § 8.01-428 provides an exception to Rule 1:1, and therefore the trial court lacked jurisdiction to vacate that judgment.

The Court repeated that both § 8.01-428(D) and common law voidness rules required the defendant to prove fraud and the defendant failed to do so. The Court noted that the record refuted most of the defendant's allegations. The remaining issue concerned whether the defendant's sentences for use of a firearm could run concurrently. The Court pointed out that this statutory question was unclear when the trial court sentenced the defendant in 2003. The Court noted that it was not until 2012, more than nine years after the circuit court sentenced the defendant, that the Virginia Supreme Court held that the trial court has discretion to impose the sentences concurrently or consecutively in *Brown v. Commonwealth*, 284 Va. 538, 545 (2012).

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1582222.pdf>

Harvey v. Commonwealth: July 25, 2023

Richmond: Defendant appeals the dismissal of his Complaint for Declaratory Judgment.

Facts: A jury convicted the defendant of aggravated malicious wounding, attempted murder, and two counts of use of a firearm in the commission of a felony in the Circuit Court of the City of Roanoke. The trial court sentenced the defendant in 2015. In 2022, the defendant filed a motion for declaratory judgment in the Circuit Court for the City of Richmond, asking the court to rule that the 2021 amendment to § 19.2-295, which deprived the Commonwealth of the ability to request a jury sentencing, was retroactive.

The circuit court sustained the Commonwealth's demurrer, granted the motion to dismiss, and dismissed the defendant's complaint with prejudice.

Held: Affirmed. The Court concluded that the defendant lacked standing under the declaratory judgment statute. The Court found that the defendant's motion for declaratory judgment did not seek a declaration of his rights. The Court pointed out that, although the right to a jury trial to determine guilt is guaranteed by both the federal and Virginia constitutions, there is no constitutional right to a particular sentencing procedure. Thus, the Court concluded that the circuit court properly dismissed the action because the defendant's claim did not present a justiciable controversy to invoke the circuit court's jurisdiction to render a declaratory judgment.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1456222.pdf>

First Amendment

U.S. Supreme Court

Lindke v. Freed: March 15, 2024

6th Circuit: Plaintiff appeals the dismissal of his lawsuit against a public official on First Amendment grounds.

Facts: The defendant, a city manager, maintained a Facebook page. He began the Facebook page before he was city manager, converting it to a "public figure" page before becoming city manager. After becoming city manager, the defendant added his title, a link to the city's website, and the city's general email address to his Facebook page. Most of his posting activity consisted of content related to his personal life. However, he also shared news about the city's activities, highlighted communications from other city officials, and invited comments from residents. He also often replied to the comments, including by answering inquiries from city residents.

During the COVID pandemic, the plaintiff made many derogatory comments about the defendant and other city officials on the defendant's Facebook page. Initially, the defendant deleted the

plaintiff's comments; ultimately, he blocked him. Once blocked, the plaintiff could see the defendant's posts but could no longer comment on them.

The plaintiff sued under 42 U. S. C. §1983, alleging that the defendant had violated his First Amendment rights. The plaintiff argued that he had the right to comment on the defendant's Facebook page as a public forum. The defendant, the plaintiff claimed, had engaged in impermissible viewpoint discrimination by deleting unfavorable comments and blocking the people who made them.

The District Court granted summary judgment to the defendant. The Sixth Circuit affirmed. The Sixth Circuit held that an official's activity is state action if the text of state law requires an officeholder to maintain a social-media account, the official uses state resources or government staff to run the account, or the account belongs to an office, rather than an individual officeholder. Those situations, the Sixth Circuit explained, make an official's social-media activity "fairly attributable" to the State, which the defendant's activity was not.

Held: Reversed. In a 9-0 ruling, the Court held that the state-action doctrine required the plaintiff to show that the defendant (1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts. To the extent that this test differed from the one applied by the Sixth Circuit, the Court vacated its judgment and remanded the case for further proceedings.

The Court concluded that the plaintiff "cannot hang his hat" on the defendant's status as a state employee. The Court first emphasized that the defendant did not relinquish his First Amendment rights when he became city manager. The Court explained that his First Amendment right includes the ability to speak about information related to or learned through public employment, so long as the speech is not itself ordinarily within the scope of the employee's duties. The Court also repeated that, where the right exists, editorial control over speech and speakers on the public employee's properties or platforms is part and parcel of it. Thus, the Court explained, if the defendant acted in his private capacity when he blocked the plaintiff and deleted his comments, the defendant did not violate the plaintiff's First Amendment rights—instead, he exercised his own.

The Court ruled that a public official's social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media. The Court emphasized that the appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first. The Court cautioned that an act is not attributable to a State unless it is traceable to the State's power or authority. "Private action—no matter how "official" it looks—lacks the necessary lineage."

In this case, the Court contended that the plaintiff must show more than that the defendant had some authority to communicate with residents on behalf of the city. Instead, the alleged censorship must be connected to speech on a matter within the defendant's bailiwick. The Court noted that the inquiry is not whether making official announcements could fit within the job description; it is whether making official announcements is actually part of the job that the State entrusted the official to do.

Thus, the Court found, a defendant must have actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he

cannot establish state action.

The Court then explained that for social-media activity to constitute state action, an official must not only have state authority—he must also purport to use it. The Court noted that state officials have a choice about the capacity in which they choose to speak and that generally, a public employee purports to speak on behalf of the State while speaking “in his official capacity or” when he uses his speech to fulfill his responsibilities pursuant to state law. The Court acknowledged that if the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice.

In this case, the Court agreed that had the defendant’s account carried a label (e.g., “this is the personal page of James R. Freed”) or a disclaimer (e.g., “the views expressed are strictly my own”), he would be entitled to a heavy (though not irrebuttable) presumption that all the posts on his page were personal. In a footnote, however, the Court cautioned that an official cannot insulate government business from scrutiny by conducting it on a personal page. The Court also cautioned that an official who uses government staff to make a post “will be hard pressed to deny that he was conducting government business.”

The Court cited an example of a “slam dunk:” “Take a mayor who makes the following announcement exclusively on his Facebook page: “Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules.” The post’s express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty. If, by contrast, the mayor merely repeats or shares otherwise available information—for example, by linking to the parking announcement on the city’s webpage—it is far less likely that he is purporting to exercise the power of his office. Instead, it is much more likely that he is engaging in private speech “relate[d] to his public employment” or “concern[ing] information learned during that employment.” In this case, however, the Court found the defendant’s page, to be “mixed use”—a place where he made some posts in his personal capacity and others in his capacity as city manager.

The Court also expressed that the nature of the technology matters to the state-action analysis. Here, the Court distinguished between merely deleting comments and blocking a user entirely. The Court reasoned that, because blocking operated on a page-wide basis, a court would have to consider whether the defendant had engaged in state action with respect to any post on which the plaintiff wished to comment. The Court wrote: “The bluntness of Facebook’s blocking tool highlights the cost of a “mixed use” social-media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts. A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.”

Full Case At:

https://www.supremecourt.gov/opinions/23pdf/22-611_ap6c.pdf

O’Connor-Ratliff v. Garnier: March 15, 2024

9th Circuit: Defendant public officials appeal the denial of summary judgment on a First Amendment lawsuit.

Facts: The defendants, members of a school board, created public Facebook pages to promote their election campaigns. While they both had personal Facebook pages that they shared with friends and family, the defendants used their public pages for campaigning and issues related to the schools. After they won election, the defendants continued to use their public pages to post school-related content, including board-meeting recaps, application solicitations for board positions, local budget plans and surveys, and public safety updates. They also used their pages to solicit feedback and communicate with constituents. Their Facebook pages described them as “Government Official[s]” and noted their official positions. One defendant also created a public Twitter page, which she used in much the same way.

The plaintiffs, who have children attending the schools, often criticized the board. They began posting lengthy and repetitive comments on the defendants social-media posts—for instance, nearly identical comments on 42 separate posts on a Facebook page and 226 identical replies within a 10-minute span to every tweet on her Twitter feed. The defendants initially deleted the plaintiffs’ comments before blocking them from commenting altogether.

The plaintiffs sued under 42 U. S. C. §1983, seeking damages and declaratory and injunctive relief for the alleged violation of their First Amendment rights. At summary judgment, the District Court granted the defendants qualified immunity as to the damages claims but allowed the case to proceed on the merits on the ground that the defendants acted under color of state law when they blocked the plaintiffs. The Ninth Circuit affirmed. It held that §1983’s state-action requirement was satisfied because there was a close nexus between the defendants’ use of their social media pages and their official positions.

Held: Reversed. In a per curiam opinion, issued the same day as its ruling in the companion *Lindke* case (described above), the Court simply wrote: “Because the approach that the Ninth Circuit applied is different from the one we have elaborated in *Lindke*, we vacate the judgment below and remand the case to the Ninth Circuit for further proceedings consistent with our opinion in that case.”

Full Case At:

https://www.supremecourt.gov/opinions/23pdf/22-324_09m1.pdf

Police Use of Force & Liability

Fourth Circuit Court of Appeals

Lopez v. Hamilton: May 29, 2024

N.C.: A Police Officer appeals the denial of Qualified Immunity in a Fourth Amendment lawsuit.

Facts: Police responded to a call that the plaintiff was attempting to enter a residence. Multiple officers responded and found the plaintiff inside a small room located in the back of a garage at the residence. [*The facts from here on are those alleged by the plaintiff; the officer disputes several of these facts – EJC*]. A K9 officer, who had his dog with him, approached and opened the door of the room. Without entering, the K9 officer said, “police, if you’re in there, make yourself known.” The plaintiff responded, “Yes, I’m here.” The K9 officer then instructed the plaintiff to “[c]ome on out with [his] hands up” or the officer would send his dog in and the dog would bite the plaintiff. The plaintiff replied that he would come out of the room when it was “safe” to do so.

The K9 officer released his dog into the room and the dog attacked the plaintiff, who “yelled out in distress.” The K9 officer then walked through the door, pulled his handgun from his holster, and fatally shot the plaintiff without saying anything. At the time he was shot, the plaintiff was sitting in a chair approximately fifteen feet away from the officer and was unarmed and had made no verbal or physical threats.

The plaintiff’s estate brought an action against the officer claiming, under § 1983, that the officer violated the plaintiff’s Fourth and Fourteenth Amendment rights by unreasonably using excessive force against him. The officer raised the defense of federal qualified immunity for the § 1983 claim and moved to dismiss. The district court disagreed and denied the motion to dismiss.

Held: Affirmed.

The Court applied the factors in *Graham v. Connor* and concluded that the plaintiff sufficiently alleged that the officer’s use of deadly force was unreasonable. First, regarding the severity of the crime, the Court noted that the complaint states that the plaintiff “had been trying to enter” a particular residence. When making inferences in the plaintiff’s favor, the Court noted that the plaintiff’s actions suggested that he was, at most, trespassing—a minor crime that does not support the use of deadly force. Second, the Court noted that the plaintiff did not pose an immediate threat to the safety of the officers or others. The Court wrote: “Officers are not entitled to use deadly force simply because they are unsure whether the suspect poses a threat; instead, officers must affirmatively demonstrate that they had probable cause to believe the suspect was dangerous before they resorted to such tactics.”

Third, the Court pointed out that the plaintiff was not actively resisting or attempting to evade arrest when he was killed. The Court then wrote that even if the plaintiff was resisting arrest, “we have made clear that non-cooperation with law enforcement has never given officers carte blanche to use deadly force against a suspect.”

Full Case At:

<https://www.ca4.uscourts.gov/opinions/231832.U.pdf>

Craven v. Novelli: May 3, 2024

N.C.: Plaintiff appeals the dismissal of his Use of Force Lawsuit against Officers on Fourth Amendment grounds.

Facts: The plaintiff's stepdaughter called 911 call, reporting that that the plaintiff, while armed with a gun, had attacked her mother, his wife, and was threatening to "blow his brains out." While officers responded, the daughter and wife both confirmed to 911 that the defendant had a gun.

When they arrived, the officers immediately identified themselves as law enforcement and yelled to the plaintiff, "Let me see your [expletive] hands." The plaintiff heard this order and responded by raising his hands above his head. But the plaintiff did not keep his hands up; Instead, he almost immediately put them back down and continued to advance toward the officers. At that point, seconds after the first order but nevertheless after the plaintiff brought his hands back down, an officer yelled for the plaintiff to "get on the [expletive] ground." Instead, the plaintiff moved quickly toward the officers. When the plaintiff continued to approach the officers, they opened fire on him and killed him.

The parties disputed whether the plaintiff had reached for a handgun in his waistband and drawn the handgun before officers shot him. The parties also disputed whether the plaintiff told the officers that "you're going to have to shoot me." However, based on the undisputed facts, the officers moved for summary judgment and the trial court granted the motion.

Held: Affirmed. The Court agreed with the district court that it was reasonable for the officers to believe that the plaintiff posed an immediate risk of serious harm and, thus, there was no constitutional violation in this case.

In this case, the Court agreed that the officers reasonably believed that the plaintiff posed an immediate risk of harm when he persisted in advancing toward them and, despite their commands, dropped his hands toward his waist where a gun holster was located. The Court pointed out that the alleged crime -- a domestic assault by an armed perpetrator -- involved at least a heightened level of violence and created an atmosphere that was volatile and threatening, weighing in the officers' favor. In addition, although the plaintiff was experiencing a mental health crisis, the Court observed that the plaintiff was armed with a gun, had assaulted his wife, and was threatening to take his life in front of his children, distinguishing this case from previous cases in which mental health played a pivotal role in the Court's analysis.

The Court pointed to other cases where it had found the use of deadly force reasonable where an armed suspect confronts law enforcement officers who have identified themselves, and despite their clear commands, the suspect makes some furtive movement. Regarding the allegation that the plaintiff had reached for and drawn a handgun, the Court reasoned that whether the plaintiff reached directly for his waist or actually pulled out the gun was immaterial to the court's analysis where the plaintiff dropped his arms toward his waist after commands to show his hands. The Court contended that the record clearly supported that when faced with clear commands to submit to the officers, the plaintiff failed to do so and instead dropped his hands toward his waist where a holster was visible. That alone, for the Court, was enough to support that the officers acted reasonably when they deployed deadly force.

Regarding the dispute about the plaintiff's words, the Court argued that even without crediting the officers' testimony, the plaintiff's furtive movements, in light of the officers' commands to surrender himself, created probable cause that the plaintiff posed a serious risk of harm. Whether the plaintiff shouted something different, such as "you don't have to shoot me, as the plaintiff contended, or "y'all

know you don't have to do this," for the Court, such statements would not dispel the risk of harm to the officers. Instead, the Court emphasized that this theory would still indicate that the plaintiff knew he was confronting police and yet failed to comply with the officers' commands and continued to advance on them.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/231393.U.pdf>

Atkinson v. Godfrey: May 2, 2024

N.C.: Officers appeal the denial of Qualified Immunity on a Lawsuit for False Arrest.

Facts: A repossession company located and attempted to repossess the plaintiff's vehicle. During the repossession, the plaintiff entered the car and refused to exit. The company called the police. An officer responded and ordered her out of the vehicle so that the company could repossess it. The plaintiff alleged that because she was intimidated by the officer, she got out of the vehicle as requested.

The plaintiff then sued the officer under § 1983 alleging an unlawful seizure under the Fourth Amendment. The officer moved to dismiss, but the trial court denied the motion. The district court recognized that the Fourth Circuit had not addressed the question presented here. Even so, it found the Western District of Virginia's decision in *Goard v. Crown Auto, Inc.*, 170 F. Supp. 3d 915 (W.D. Va. 2016), persuasive.

Held: Reversed. The Court considered whether a law enforcement officer called to the scene of a private repossession of a vehicle is entitled to qualified immunity from a claim that the officer unreasonably seized the vehicle in violation of the Fourth Amendment. The Court observed that neither the Supreme Court, the Fourth Circuit, the highest court of the state where the conduct occurred, nor a consensus of other circuit courts of appeals have determined that conduct similar to that of the officer is unconstitutional. The Court therefore concluded that the right alleged to be violated was not clearly established. As a result, the Court reversed the district court's denial of the officer's motion to dismiss based on qualified immunity and remanded with instructions to grant the motion to dismiss.

The Court acknowledged that in *Soldal v. Cook County*, 506 U.S. 56 (1992), the Supreme Court recognized the potential for law enforcement to become so enmeshed in a forceable seizure conducted by a private party to constitute a violation of the Fourth Amendment. Regarding the *Goard* case, however, the Court pointed out that *Goard* is a district court decision from a different state. The Court repeated that district court opinions, unlike those from the courts of appeals, do not necessarily settle constitutional standards with respect to claims of qualified immunity and such opinions do not have precedential value.

Therefore, regarding qualified immunity, as neither the Supreme Court, the Fourth Circuit, nor North Carolina's high court has provided fair warning that conduct like the officer's was unconstitutional, nor is there a consensus from other courts of appeals that would have provided fair

warning to a reasonable officer standing in the officer's shoes, the officer was therefore entitled to qualified immunity.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/231344.P.pdf>

Thurston v. Frye: April 29, 2024

N.C.: Officers appeal the denial of Qualified Immunity on a Lawsuit for False Arrest.

Facts: The plaintiff is a registered sex offender who must verify his registration every six months. In August 2016, the plaintiff informed the sheriff that he had been invited to his nephew's wedding, which was scheduled for September in Washington, when the plaintiff's biannual verification was due to be sent out around that same time. The plaintiff asked the sheriff what to do and the sheriff told the plaintiff that he could "[g]o on" because the sheriff's office was "working on it." He told the plaintiff that all the plaintiff needed to do was email a copy of the plaintiff's Washington visitor-registration form within ten days of his arrival.

While the plaintiff was on his way to Washington, the sheriff reached out again, asking the plaintiff for the address of where he would be staying, which the plaintiff provided. Once there, the plaintiff registered as a visitor and emailed the registration to the sheriff as instructed. The sheriff also sent the biannual verification form directly to the plaintiff's address in North Carolina. The plaintiff contacted the sheriff about that, but the sheriff never replied.

Eventually, the plaintiff was able to speak to a sheriff's deputy, who erroneously told the plaintiff that it was illegal for him to be out of the state for more than thirty days. The deputy also said that he had spoken with the sheriff, and they had decided that, as long as the plaintiff was back in North Carolina by October "there would be no problem." The plaintiff ultimately returned by that deadline.

The deputy then discussed potential criminal liability with an assistant district attorney, who recommended that the deputy pursue charges against the plaintiff. The deputy obtained a warrant from a local magistrate alleging three different criminal violations: (1) being out of state for thirty (30) + days, (2) willfully failing to return his verification, and (3) willfully failing to report in person to the Sheriff's Office. When the plaintiff returned, deputies arrested him.

After the charges were dropped, the plaintiff brought a lawsuit against the sheriff and his deputies for violation of his Fourth Amendment rights.

Held: Affirmed. The Court found that, when viewing the facts as the district court had, the arrest was unconstitutional. The Court also concluded that the officers failed to prove that they acted objectively reasonably in seeking the arrest warrant and concluded that the plaintiff's right to be free from unlawful arrest was clearly established.

The Court ruled that the officers lacked probable cause to arrest the plaintiff for any of the crimes alleged in the warrant. The Court explained that "notwithstanding the deference that magistrates deserve," the officers' knowledge of the plaintiff's "pure motives" precluded finding that

probable cause existed. The Court emphasized that a warrant loses its evidentiary value for objective reasonableness when it is obvious that no reasonably competent officer would have concluded that a warrant should issue.

The Court repeated that to establish malicious prosecution, a plaintiff must show that (1) the defendant seized him pursuant to legal process but without probable cause and (2) the criminal proceedings terminated in the plaintiff's favor. In this case, the Court concluded that the officers lacked probable cause to believe that the plaintiff acted willfully. The Court agreed that the plaintiff, by asking the sheriff for advice and obtaining his permission to leave, believed that he was following the law and remained motivated by a desire to follow the law. Even if the plaintiff's beliefs were mistaken, the Court noted that "a mistake of law" is a defense to an offense that requires willfulness.

In this case, the Court concluded that when the officers sought and obtained an arrest warrant, they had affirmative knowledge that the plaintiff was not breaking the law. The Court ruled that no reasonable officer in such circumstances could believe that a warrant should issue and therefore, the warrant could not establish the officers' objective reasonableness.

In an extensive footnote, the Court cautioned that different principles may apply to an officer who only executed the warrant. The Court acknowledged that once a warrant issues, officers have a sworn duty to carry out its provisions. The Court noted that warrants thus impose on officers "an obligation to arrest" the person named in the warrant. The Court pointed out that, before executing the warrant, the officer has a duty to ensure that the warrant conforms to constitutional requirements, but as long as the previously issued warrant is not "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid," a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in executing it. The Court repeated that, in the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient.

Regarding the officers' defense that they had sought advice of the district attorney, the Court explained that "If 'the greater incompetence of the magistrate' issuing a warrant cannot excuse the officer's conduct, then it's hard to see why the greater incompetence of the district attorney can do so ... when no reasonable officer would seek out a warrant, an officer's 'conversation with the state's lawyer does not—as a matter of law—overcome the unreasonableness of the criminal charge and its lack of probable cause.'"

The Court wrote, in conclusion: "Qualified immunity is controversial and criticized. But it is binding. And it provides a powerful defense for officers who, while performing the critical services they provide to society, make reasonable mistakes in complying with the law. And warrants serve a similar purpose. We recognize that 'the magistrate is more qualified than the police officer to make a probable cause determination.' ... Thus, a magistrate's approval of a warrant application in the average case will be the 'clearest indication' of the officer's objective reasonableness... But 'clearest' should not be confused with 'absolute.' In a narrow set of cases, where no reasonable officer would have sought the warrant, we cannot treat its issuance as evidence of objective reasonableness."

Full Case At:

<https://www.ca4.uscourts.gov/opinions/211459.P.pdf>

Baltimore: Officers appeal the denial of Summary Judgement in a Police Use of Force lawsuit.

Facts: An officer responded to a domestic incident at an apartment complex. The call indicated the incident was “active” and “physical.” The officer was the first officer to arrive at the complex, where he found the plaintiff, a fifteen-year-old boy, pacing on a sidewalk and his mother crying nearby on her front steps. The officer approached the mother, who told him that her son had physically assaulted her. The officer then approached the plaintiff, who clenched his fists, assumed a “fighting stance,” and shouted, “[Y]o get the f&\$# away from me.” The officer tried talking to the plaintiff, but the teenager maintained a fighting position and continued yelling at him.

After a backup officer arrived on the scene, the plaintiff continued backing away, repeatedly telling the officers not to touch him. When the officer told the plaintiff to stop, the plaintiff clenched his fists below his waist, bent his knees, and shouted, “[A]in’t nobody f%&ing playing with you.” The officers ordered the plaintiff to surrender, and the backup officer pointed his taser at the plaintiff. The officers then grabbed the plaintiff and put him on the ground.

The officer made three elbow strikes to the back of the plaintiff’s shoulder area while the plaintiff was still on his hands and knees with his face down. The officer then executed knee strikes on the plaintiff, who was still down. There is a dispute about whether the knee strikes hit the plaintiff in the head. The officer then moved over the plaintiff, adopted a boxer-like stance, and struck the plaintiff’s head area four or five times. The backup officer finally tased the plaintiff, who became compliant.

The plaintiff sued the officer, bringing state and federal constitutional claims for excessive force and a state-law battery claim. The officer filed a motion for summary judgment on the grounds of qualified and statutory immunity, which the district court denied.

Held: Affirmed. The Court agreed with the district court that disputes of material fact precluded summary judgment. The Court explained that a reasonable jury could find that the officer struck the plaintiff when the teenager did not pose a threat, was not actively resistant, and was subdued. The Court stated that several consecutive closed-fist punches to the head of an arrestee in those conditions constitute excessive force.

The Court further held that the defendant’s constitutional right to be free from excessive force in the form of head strikes was clearly established at the time of his arrest. The Court also held that there is a genuine dispute of material fact as to whether the officer’s actions amounted to gross negligence or malice, precluding summary judgment in his favor on his statutory immunity defense. The Court found that the officer’s use of force in this case was significant, and pointed out that it has previously held that several closed-fist strikes to the head could constitute deadly force.

The Court then applied the *Graham v. Connor* factors to this case. The Court first looked at the severity of the crime at issue. Although the mother reported that her son had physically assaulted her, the Court noted that there was no evidence that the mother was visibly injured or that any weapons were present, and the offense was a misdemeanor.

Regarding whether the defendant was an immediate threat, the Court observed that the video indicated that the plaintiff was retreating from the officers and that he never voluntarily touched them. The Court found that the plaintiff posed no immediate danger to the officers. The Court observed that the video appears to show the plaintiff walking away from his mother's apartment well before the officers lunged at him. The Court also opined that when the officers initiated force, at least two officers were on top of the plaintiff and could have protected the mother from the unarmed teenager even if she was nearby. The Court also contended that the plaintiff was "partially subdued" before the officer began striking his head. Thus, the Court ruled that a jury could thus find that the plaintiff posed no reasonable threat that could have justified the officer's escalation of force.

Regarding the third *Graham* factor, the Court stated that the plaintiff made no attempt to flee. Regarding the plaintiff's resistance during the struggle, the Court agreed with the trial court that the plaintiff's resistance may merely have been "a natural response to the physical nature of the arrest."

The Court concluded that a reasonable officer would not think that beating a non-dangerous suspect's head, after elbow- and knee-striking the suspect, was proportionate to the minimal resistance that the plaintiff gave. The Court found that an officer striking the head of a non-dangerous, non-actively resistant, partially subdued adolescent would not be objectively reasonable. The Court then held that the right of a suspect who was at the very least partially subdued and posed no immediate threat to be free from excessive force in the form of strikes to his head was clearly established at the time of the events of this case in 2018. The Court therefore rejected the officer's claim of qualified immunity.

Judge Diaz filed a dissent.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/222115.P.pdf>

Johnson v. Baltimore: March 21, 2024

(unpublished)

MD: Plaintiff appeals the dismissal of his lawsuit against police on *Brady* Discovery grounds.

Facts: In 1988, a group of men murdered the man in Baltimore at a neighborhood bar. Police investigated and interviewed the victim's 15-year-old cousin, who was a witness to the murder. A police officer interviewed her and brought her to the police department. There, a police detective also interviewed the child witness. The child witness described how several men entered and one shot the victim. She described the physical appearance of the man holding the gun but indicated that she did not know his name. She also said she knew the names of two of the other men but did not want to give the police that information because she feared for her life.

The officers wrote reports based on personal notes regarding their investigations. Later, at Grand Jury, the child witness testified that she saw the plaintiff hand a firearm to the man who shot the victim. Based partially on her testimony, a jury later convicted the plaintiff and two others for the murder. The trial court sentenced the defendant to life.

The defendant sought a writ of actual innocence and submitted an affidavit from a man who claimed to have seen the murder and that the defendant was not present. Investigators later learned that this affidavit was false; the man was incarcerated at the time of the murder and could not have witnessed it. The court denied the defendant's writ of actual innocence. The defendant then obtained another affidavit from another man, one that was similar to the first affidavit. Eventually, the Baltimore City State's Attorney's Office and the plaintiff jointly petitioned for a writ of actual innocence. The Baltimore court granted that petition, vacating the convictions.

The plaintiff then sued the Baltimore Police Department and several investigating officers under 42 U.S.C. § 1983, alleging that due to the officers' failure to disclose exculpatory evidence and other actions, he served several decades in prison for a crime he did not commit. He argued that the officer defendants failed to turn over the officer and detective's reports and their notes from the incident. He also complained that officers did not reveal the existence of another potential witness, another child at the scene.

During the litigation, the defendants learned that the defendant had attempted to bribe the child witness, sent money to another witness, and, in a recorded phone call, told a third witness to change their testimony to benefit his lawsuit.

The police officers and the police department moved to dismiss the complaint as a litigation sanction, alleging he knowingly used false and fabricated evidence to secure his exoneration and intentionally tampered with potential witnesses to influence their testimony in connection with efforts to vacate his convictions. They also moved for summary judgment on the merits of Johnson's § 1983 and related claims.

The district court granted the sanction motion dismissing the complaint, and, alternatively, granted the motion for summary judgment on all pending counts on the merits as well.

Held: Affirmed. Rather than addressing the trial court's ruling on sanctions, the Court affirmed the district court's alternative holding in which it granted the officer defendants and the police department summary judgment on the merits.

The Court began by repeating that police officers, unlike prosecutors, commit constitutional violations only when they suppress exculpatory evidence in bad faith. In this case, the Court acknowledged that there was a factual dispute about whether the prosecution turned over the reports and notes; however, the Court noted that the district court assumed these documents were not produced prior to trial, thereby giving the plaintiff the benefit of the doubt.

The Court then affirmed the district court's finding that none of this evidence was material nor was it exculpatory. The Court also pointed out that the plaintiff had complete access to all the information from the child witness' grand jury testimony. The Court repeated that the *Brady* Rule does not apply if the evidence is available to the defendant from other sources or the defendant knew or should have known of the facts permitting him to take advantage of exculpatory evidence.

The Court also affirmed the district court's finding that there was no bad faith on the part of the officers, either by their actions or with respect to potential deviation from police policies. The Court pointed to the district court's conclusion that there was no evidence the officers fabricated evidence; that there was no evidence that the officers tried to cover up the reports, and that the mother of the other child witness did not permit her daughter to speak with the officers.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/222095.U.pdf>

English v. Clarke: January 5, 2024

S.C.: Plaintiffs appeal the dismissal of their Malicious Prosecution lawsuit.

Facts: The two plaintiffs were arrested for sexual assault and burglary and detained for over a year before their cases were dismissed by nolle prosequi. The case began when the victim fled to a neighbor's doorstep crying, bleeding, and nearly naked. The victim said she had just been sexually assaulted by two men who broke into her home and attacked her with a firearm. The neighbor called 911. Police investigated and the victim identified the first plaintiff as one of her attackers.

Police located the first plaintiff. Within a few hours, a police investigator obtained a written statement, signed by the first plaintiff, that implicated both him and the second plaintiff in the crimes. Police then located the second plaintiff, who also confessed to the same investigator. However, eight months after their arrest (and five months after their indictment), DNA test results returned that matched neither plaintiff, but a third man. Seven months later, the prosecutor nolle pros'd the charges on the basis that "insufficient evidence existed to meet the standard of proof" required at a criminal trial.

The two plaintiffs filed suit, alleging that the investigator who interrogated them in connection with the charges had coerced them into signing false confessions. That coercion, and the arrests and imprisonments that followed it, they argued, violated their constitutional rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. They sued the officer, the elected Sheriff, and the County Sheriff's Department for damages under § 1983.

The defendants moved for summary judgment, and the district court granted their motion on all claims except for a malicious prosecution claim against the second plaintiff. The one malicious prosecution claim, the district court said, could proceed to trial because it turned on a disputed question of fact—namely, whether the confessions were indeed coerced.

Held: Affirmed in Part, Reversed in Part.

Regarding the first plaintiff, the Court agreed that the officer was entitled to summary judgment on the Fourth Amendment claims because there was probable cause to arrest and prosecute the first plaintiff based on the victim's identifications. The Court also ruled that the plaintiff's First Amendment claim was unsupported by the law, and his Fourteenth Amendment claims were unsupported by the record. Given that the first plaintiff did not make out a constitutional claim against the officer, the Court also found no issue of triable fact as to liability for the elected Sheriff or the Department.

Regarding the first plaintiff, the Court held that the officer was amply justified in believing that the first plaintiff had committed burglary and sexual assault that morning based on the victim's repeated identification of the first plaintiff as one of her assailants. The Court repeated that a victim's "reliable identification of [her] attacker" almost always suffices to establish probable cause. The Court

found that the fact that she recounted a consistent story across four interviews even though she was “all over the place” after being sexually assaulted evinces correctness, not falsehood. The Court concluded that the officer had sufficient probable cause to arrest the first plaintiff based on the victim’s identifications before the contested interrogation even began and that nothing about the interrogation would have undermined that probable cause. The Court held therefore that the first plaintiff’s § 1983 claim for false arrest in violation of the Fourth Amendment failed as a matter of law.

The Court also agreed that the officer could not be responsible for the prosecutor’s decision to prosecute the case. Even assuming that probable cause was negated, the Court explained that the officer cannot be held responsible for the continued detention, as by that point the case was “in the lap of the prosecutor.” The Court repeated that once the prosecutor’s office has taken control of a case, law enforcement officers are generally not responsible for the prosecutor’s decisions going forward unless the officer has withheld substantial evidence, or lied to or misled the prosecutor.

The Court rejected the plaintiffs’ argument that coerced confessions are compelled speech violative of the First Amendment. The Court pointed out that no court that has taken this view, and the Court declined to become the first. The Court wrote: “The proper remedy for a coerced confession is suppression of the confession, not a separate First Amendment suit.”

The Court also rejected the plaintiff’s Due Process claims. The Court wrote: “Even if we credit entirely English’s account of Clarke’s interrogation, none of the methods alleged—the handcuffs and leg shackles, the rejection of his request for his mother or an attorney, the kicking out of his chair—shocks the conscience. While such allegations may form the basis of a Fifth Amendment infraction and its ensuing suppression consequences, they do not satisfy the materially higher standard of a due process violation.”

The Court equally rejected the claims against the department generally. The Court found no evidence in the record that reveals any unconstitutional policy or custom on the part of the Department. The Court therefore affirmed the district court’s summary judgment ruling as to the Sheriff and the County Sheriff’s Department as well. The Court wrote: “This is a case about the conduct of an individual officer, and the rest of the department should be kept out of it.”

However, regarding the second plaintiff’s claim against the officer claiming a coerced confession, the Court held that the appeal here was heavily factual and unsuitable for interlocutory treatment. The Court noted that the evidence against the second plaintiff was considerably thinner than the evidence against the first plaintiff. The Court pointed out that the victim offered nothing remotely akin to the consistent identifications she offered with respect to the first plaintiff. Apart from the confessions, the only evidence connecting the second plaintiff to the crimes was that he was with the first plaintiff the night before. The Court concluded that that fact did not satisfy probable cause.

The Court wrote, regarding the second plaintiff: “Here we are not in any position to sort out the facts and determine whether the confessions are infirm or not. The facts surrounding the confessions are very much in dispute, reinforcing the inappropriateness of accepting this cross-appeal for interlocutory treatment. We have no jurisdiction to make a determination as to qualified immunity when important facts remain unsettled.”

Full Case At:

<https://www.ca4.uscourts.gov/opinions/221788.P.pdf>

Omeish v. Kincaid: November 15, 2023

86 F. 4th 546 (2023)

E.D.Va: Plaintiff appeals the dismissal of a Police Use of Force Lawsuit on Fourth Amendment grounds and denial of Attorneys' Fees on her RLUIPA lawsuit.

Facts: An officer stopped the plaintiff for running a red light. He then asked the plaintiff for her license and registration, but the plaintiff stated that she did not believe she had run the red light. Over the next couple of minutes, the officer made six separate requests for her documentation, and the plaintiff failed to comply with any of them. The officer then advised the plaintiff that she could either produce her license and registration or get out of the car and be arrested. The plaintiff did neither, stating that the options were "not fair."

The officer then demanded that the plaintiff step out of the car to place her under arrest. Despite some thirteen separate requests that she get out of the car, the plaintiff refused. The officer then retrieved his handcuffs and reached into the vehicle to remove her physically. As he pulled on her arm and continued to instruct her some fourteen more times to get out of the car, the plaintiff resisted, only then offering to produce her license but continuing to refuse to exit the car. A struggle ensued and the plaintiff leaned toward the passenger side, bringing a dark object toward the officer, which he could not identify but which was her phone.

At that point, given the struggle at the edge of a busy highway at night, the officer chose to use pepper spray to effectuate the arrest, deploying one burst directed at the plaintiff's hairline. The officer was then able to remove her from the car and handcuff her. He transported her to the jail, where she was booked.

At the jail, under the Sheriff's Office standard operating procedures, officers were required to capture booking photographs of arrestees without wearing any religious head coverings. When the plaintiff, a Muslim who wears a hijab, heard that she would be required to remove her hijab, she protested, repeatedly telling the officers that her religious beliefs prohibited her from appearing publicly or being photographed without her hijab. Guards required the plaintiff to remove it against her will for the purpose of taking booking photographs.

The plaintiff sued the arresting officer, alleging an unlawful use of force under 42 U.S.C. § 1983. The plaintiff also sued the jail officers alleging violations of her rights under the First and Fourteenth Amendments of the Constitution and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc et seq, alleging that her religious beliefs had been unlawfully burdened when she was required to remove her hijab for the booking photographs.

The district court dismissed the plaintiff's claim against the officer based on qualified immunity, but it granted the plaintiff a permanent injunction, requiring the Sheriff to destroy and use her best efforts to have destroyed all copies of the booking photographs of the plaintiff without her hijab. The trial court concluded that the Sheriff had failed to adduce evidence as to whether the retention of the booking photographs was the least restrictive means of furthering a compelling government interest. Thereafter, all photographs were in fact destroyed, prompting the court to conclude that the injunction's requirements had been fulfilled.

However, the court denied the plaintiff's motion under 42 U.S.C. § 1988(b) for attorneys' fees, where the plaintiff had sought roughly \$1/4 million in attorneys' fees.

Held: Dismissal of Use of Force Lawsuit Affirmed; Denial of Attorneys' Fees Reversed and Remanded.

Regarding the officer's use of force, the Court agreed that use of pepper spray can, in given circumstances, be objectively unreasonable and therefore constitute excessive force, in violation of the Fourth Amendment. However, the Court did not reach the issue of whether the use of force was lawful or unlawful. Instead, the Court only examined the question of whether a reasonable officer in the officer's position would have had adequate notice that his use of pepper spray violated the defendant's right. The Court repeated that whether the use of pepper spray is unreasonable depends on the circumstances confronting the officer.

The Court distinguished the 2001 case of *Park v. Shiflett*, where an officer used pepper spray on a woman whom he was arresting who was secured in handcuffs in violation of governing police procedures. In this case, the Court noted that the officer used pepper spray while actively trying to complete an arrest and did so in compliance with governing police procedures.

The Court concluded that whether the use of pepper spray amounts to excessive force was highly dependent on the particular circumstances and that no rule was well settled in the circumstances of this case, and therefore there was no clearly established legal precedent set by the Supreme Court, the Fourth Circuit, or the general consensus of persuasive authority governing the question presented here to inform a reasonable officer.

Regarding the denial of attorneys' fees, the Court noted that RLUIPA may allow the prevailing plaintiff a reasonable attorney's fee as part of the costs under 42 U.S.C. § 1988(b). In this case, the Court noted that there are outstanding issues about whether the plaintiff is a "prevailing party," whether "special circumstances" exist to deny fees, and, the proper amount of fees to be awarded, if any. Accordingly, the Court vacated the district court's order denying the plaintiff's motion for attorneys' fees and remanded for consideration of her motion under the § 1988(b) standard.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/221826.P.pdf>

Armstrong v. Hutcheson: September 13, 2023

80 F.4th 508 (2023)

W.D.Va: Plaintiff appeals the dismissal of his lawsuit against Law Enforcement on Fourth Amendment grounds.

Facts: The plaintiff's estranged wife called police to claim that her husband had locked her out of the house during a dispute. She told police that there were guns in the home but that those guns were not involved in the incident. When police arrived, the wife told police that although she and the plaintiff had separated, they had recently reconciled, and she had moved back into the residence. She also told the police that she had multiple vehicles at the residence.

When the officers arrived at the home, the wife asked to enter the home to retrieve her belongings. The wife used a key to cut a hole in an exterior screen located on the back door. After that, she pulled back the screen and used the key to unlock the back door. When the plaintiff/husband discovered the wife and police entering, he insisted that they had separated, and the wife did not live in the residence. The police asked why the wife would store all her belongings at the plaintiff's residence if she did not live there. The officers ordered the plaintiff to wait downstairs while the plaintiff retrieved her belongings. She then left with her property.

In fact, the wife was lying. The parties had already entered into a written premarital agreement which listed the residence at issue as separate property to which the wife had no rights. Police did not know that at the time, however.

The plaintiff then sued the officers under 42 U.S.C. § 1983 for violating the Fourth Amendment by entering his home and detaining him after they were inside. The officers moved to dismiss on summary judgment and the trial court granted the motion.

Held: Affirmed.

The Court first examined the question of whether the officers' reliance on the alleged co-tenant's consent to enter the home without a warrant was reasonable under the circumstances. The Court noted that the consent exception extends even to entries and searches with permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant. The Court repeated that the determination of whether the police reasonably believed that an individual possessed authority to consent to their entering must be judged against an objective standard: would the facts available to the officer at the moment "warrant a man of reasonable caution in the belief" that the consenting party had authority over the premises.

The Court then examined who decides whether the officers' conduct was objectively reasonable, the judge or the jury. The Court ruled that when the historical facts are settled, the question of the objective reasonableness of officers' conduct is a question of law to be decided by the court.

The Court clarified that if after construing the historical facts in favor of the non-moving party, the court determines the officers' conduct was unreasonable, summary judgment for the officers is improper. The case would then proceed to trial for a jury to resolve not the ultimate question of the conduct's reasonableness—because that is a question for the court—but the disputes over any material historical facts. Then, after the jury resolves those disputes, the court decides the objective reasonableness of the officers' conduct.

In this case, the Court agreed that the evidence establishes that it was reasonable for the deputies to believe that the wife possessed authority to permit them to enter the residence. The Court noted that the wife "told the deputies that they had reconciled. Couples—even those with rocky relationships—often reconcile."

Regarding the detention, the Court also agreed that the officers acted reasonably as a matter of law because they were responding to a domestic situation, there were guns in the house and the plaintiff was argumentative.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/221082.P.pdf>

Aleman v. Charlotte: August 16, 2023

80 F.4th 264 (2023)

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

Facts: The plaintiff called 911 because, as he explained it, he sought to turn himself in for impending court proceedings and that he wanted police officers to pick him up at his apartment. The plaintiff was facing North Carolina charges of misdemeanor assault by pointing a firearm and simple assault, although he had no other known history of criminal activity. The plaintiff had recently been diagnosed with paranoia, without being deemed a danger to himself or others. When asked why he was asking the police to pick him up, his answer was “Because I have a gun in my hand.”

The plaintiff communicated with 911 entirely in Spanish. When asked by the dispatcher what he was “going to do with the gun,” the plaintiff responded with the query, “Are you going to help me or are you not going to help me?” Pressed about his intentions, the plaintiff said that the dispatcher should “tell me if [the officers] are coming or not so that I can put my firearm there in the front or whatever.” The plaintiff first claimed his name was “El Dios Estrella” (which translates to “the Star God”), before giving his name. He complained of police officers and other people “following me,” and he said that “I can’t take it any longer,” and also admitting to drinking alcohol that day but denied using drugs.

The plaintiff repeatedly asked if someone was going to help him. He stated “Look, I only need [the officers] to come for me[.] It’s only for me [and] I will be outside of the apartment,” “I only need the police to come for me, for them to take me.” He also requested that a responding officer be “someone that speaks Spanish.” The plaintiff denied wanting to hurt anyone, stating “I want to turn myself in” and that “I prefer for [the officers] to lock me up.”

Regarding the firearm, the plaintiff told 911 that the firearm was “[i]n my bag” and that “if you want, I will take it out.” The dispatcher then repeatedly instructed the plaintiff to leave the firearm in a safe place and not to have it when the police officers arrived to meet him outside his apartment. Specifically, the dispatcher advised: “leave it in a safe place and when you see the officers, show your hands, I don’t want you to have the [firearm]”; “[n]o please, no, no please [do not have the firearm with you]”; “please leave it” “for your safety and of everyone’s”; “I need you to assure me that you will leave the gun please”; and “I need you to please put that gun somewhere please.” Even as the dispatcher gave those instructions, the plaintiff continually indicated that he planned to have his firearm with him when he met the police officers. The plaintiff told the 911 dispatcher “as long as [the officers] don’t shoot me I will throw them the gun.” While reportedly “giggling” during the second 911 call, the plaintiff asserted that the firearm “doesn’t have bullets.” He then said approximately 11 more times that “I don’t have bullets.”

Officers arrived and waited for a Spanish-speaking officer to arrive, but then learned that a woman’s voice could be heard in the background and were concerned that she was a victim and that the plaintiff sounded delusional. Four officers approached the residence and called for the plaintiff to exit. Immediately after opening the screen patio door, the plaintiff stood in the doorway, facing the primary officer. The plaintiff’s left arm was down at his side, and his right arm was similarly at his side but just behind the door frame. The officer pointed his rifle at the plaintiff’s lower body and quickly said

“manos” two more times. Concomitantly, the officer raised his right arm off the barrel of his rifle, demonstrating to the plaintiff to raise his hand. The plaintiff raised his left hand — in which he was holding a pistol — to about waist level.

The officer yelled, now in English, “put it down, drop the gun, put it down.” The plaintiff reacted to those English commands by quickly raising his left arm above his shoulder and extending his left hand — still holding the pistol — past the end of the opened screen patio door. The plaintiff’s left arm was then extended about 45 degrees from the center of his body and pointing toward the wall, leaving it about 45 degrees away from the officer. When the plaintiff raised his left arm, he also began to raise his right arm. The four officers shouted over each other, still in English, to “drop the gun” and “put it down.” As they shouted, the plaintiff swiftly raised his right arm and extended it out like his left, above shoulder height and about 45 degrees from the center of his body.

The primary officer shot the plaintiff twice, killing him. The officers’ body cameras captured the interaction, although the cameras were on the officer’s bodies, which were behind cover, and therefore showed a partially obstructed view.

The plaintiff sued the officer, alleging an unlawful use of force, and also the city, alleging negligent training. The district court granted summary judgment to both defendants, determining that — because it was objectively reasonable for the defendant to shoot the plaintiff, in that the plaintiff posed an immediate threat to the officer and others — the officer defendant was entitled to qualified immunity on the Fourth Amendment claim. Citing a lack of sufficient evidence, the district court also awarded summary judgment to the city defendant on the plaintiff’s claim of negligent training.

Held: Reversed in Part, Affirmed in Part.

Regarding the officer’s use of deadly force, the Court wrote: “a reasonable jury could review and interpret the video footage, consider the other evidence, and decide that Galindo did not pose an immediate threat to Officer Guerra or anyone else at the moment Guerra shot him... Or a reasonable jury could find that Guerra mistakenly perceived that Galindo posed an immediate threat, but that Guerra’s mistake was not reasonable. As such, it very well may be concluded that Guerra used excessive force in contravention of the Fourth Amendment, meaning that he is not presently entitled to qualified immunity under the first prong of the qualified immunity analysis.”

Regarding qualified immunity, the Court ruled that it was clearly established that an officer would contravene the Fourth Amendment by using deadly force against a suspect who is holding a firearm in his hand and ignoring commands to drop the weapon, but who is standing still in a position of surrender, is not firing the weapon or aiming it at any person, and is not otherwise making a furtive or threatening movement that would suggest he had an intent to use the weapon to harm the officer or anyone else. Instead, the Court explained, the failure to obey commands by a person in possession of, or suspected to be in possession of, a weapon only justifies the use of deadly force if that person makes some sort of furtive or other threatening movement with the weapon, thereby signaling to the officer that the suspect intends to use it in a way that imminently threatens the safety of the officer or another person.

The Court acknowledged that the officers had good reason to be skeptical of the plaintiff and to treat him as a potential threat to the safety of the officers and others. The Court found the plaintiff’s purported reason for summoning the officers was dubious, he was refusing to disarm himself, and he

was otherwise being uncooperative with the dispatcher and sounding delusional.” Moreover, he had admitted to consuming alcohol, was suspected of a previous firearm-related offense, and posed a threat not only of ambush to the officers, but also of domestic violence to the woman inside his apartment.

However, the Court criticized the officer’s command of “manos” (“hands”), rather than the more precise “manos arriba” (“put your hands up”), albeit with a physical gesture demonstrating to the plaintiff of what he should do. The Court also complained that when the plaintiff raised his gun, the officers immediately shouted English commands — neither calmly nor non-threateningly — to “drop the gun” and “put it down.” Those commands, unlike the “manos” command, were not accompanied by any physical gestures that would illustrate what the officers meant.

Regarding the lack of a Spanish-speaking officer, the Court noted that the officers entered the event knowing that it should be treated “as a crisis intervention” with a person who “sound[ed] delusional,” and knowing that they therefore needed “to establish an open line of communication” with someone who spoke Spanish and may have understood no English, “Yet they proceeded to confront Galindo without the assistance of a Spanish-speaking officer, and they otherwise disregarded their training on how to properly interact with non-English speakers and persons suffering from mental illness.”

Evaluating the videos itself, the Court observed that the plaintiff “assumed a position of surrender,” with both his arms raised above shoulder height and about 45 degrees from the center of his body. The Court also concluded that the plaintiff was holding the pistol upside down, with the grip pinched between his thumb and fingers. The Court found that although he could have fired the pistol while holding it in that position, he could not have done so accurately. The Court also observed that the plaintiff never pointed his pistol toward the officers, and no other person was present.

The Court then turned to the plaintiff’s firearm and the role it played in this case. The Court ruled that, even accepting that deadly force was justified at the moment the plaintiff brandished his pistol, the Court ruled that this “justification would have vanished once Galindo assumed his position of surrender.” The Court repeated that “deadly force cannot be used simply because a suspect is armed and has ignored commands.” The Court acknowledged “that an officer does not have to wait until a gun is pointed at the officer before the officer is entitled to take action.” However, the Court explained, there must be some basis, other than a suspect’s mere possession of a weapon and failure to obey commands, for the officer to reasonably feel threatened. That is, the suspect must make “some sort of furtive or other threatening movement with the weapon, thereby signaling to the officer that the suspect intends to use it in a way that imminently threatens the safety of the officer or another person.”

While the Court acknowledged that the officers did not have to believe the plaintiff, the Court thought that the plaintiff’s assurances that he had no bullets and his statement that he would be carrying the pistol so that he could surrender it, as well as the fact that the plaintiff affirmatively indicated that he intended the officers no harm, weakened the case for probable cause to believe that the plaintiff posed an immediate threat.

The Court also found it significant that the plaintiff did not make any movement suggesting that he was about to fire the pistol; Rather, he remained “frozen in his position of surrender” until the officer shot him. The Court pointed to the fact that the plaintiff did not appear to make he “furtive or other threatening movement with the weapon” that would have signaled an intent to use it in a way that imminently threatened the safety of the officer or another person.

The Court acknowledged that the video footage did not capture everything that occurred at the shooting scene, rendering it possible that, just before the officer shot him, the defendant made threatening movements that the video footage does not show. Thus, the Court concluded, a reasonable jury could instead find that the plaintiff did pose an immediate threat at the moment the officer fatally shot him or that the officer was reasonably mistaken in perceiving an immediate threat. The Court therefore also declined to direct the entry of a judgment in the plaintiff's favor on his Fourth Amendment claim.

The Court, however, affirmed the district court's summary judgment award to the city on the negligent training claim. The Court complained of the plaintiff's failure to produce evidence sufficient to establish any alleged training failure. The Court found that the plaintiff's argument that negligent training can somehow be inferred from the officers' conduct, particularly their decision to approach without the assistance of a Spanish-speaking officer, was an insufficient evidentiary basis for the negligent training claim.

Judge Richardson dissented from the denial of summary judgment for the officer.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/212223.P.pdf>

Thweat v. Rhodes: June 28, 2023

(Unpublished)

E.D.Va: Plaintiff appeals the dismissal of her lawsuit for Malicious Prosecution

Facts: The plaintiff, working as a bus driver, threatened a student on her bus after the student made a comment to another student that the driver found threatening. Believing the student to have directed the comment at her, the plaintiff confronted the student, while unbuckling her seatbelt and exiting the driver's seat of the school bus to approach the student in her seat. When the plaintiff reached the student's seat, she yelled at the student, "Me? Bring it on. You going to hit me in the face?" While making these statements, the plaintiff gestured with her hands and raised her arms.

The student did not respond, but the plaintiff continued to yell, "Who you talking to, me or who?", then moved into the student's seat, stood over the student, and shook her finger, while stating "Naw, you're going to tell me who you're talking to." The student then stood up and pushed past the plaintiff to escape the bus. Video surveillance captured the incident.

The student reported the incident. A school official and a police officer decided to seek charges against the plaintiff. The officer appeared before and made sworn statements to a magistrate and the magistrate issued an arrest warrant for the plaintiff for disorderly conduct under Va. Code. § 18.2-415. The plaintiff was arrested but ultimately was found not guilty at trial.

The plaintiff filed a lawsuit against the school official and the officer for malicious prosecution pursuant to 42 U.S.C. § 1983. The plaintiff argued that probable cause was lacking to arrest her for disorderly conduct. The plaintiff also argued that the school official and the officer caused her arrest, and the officers knew there was no probable cause when applying for the warrant, thus violating the

plaintiff's clearly established rights. The district court found that neither the school official nor the officer violated the defendant's rights and dismissed the lawsuit.

Held: Affirmed.

The Court agreed that the defendant's actions of unbuckling her seat belt, rising out of her seat, approaching a teenage girl, and loudly shouting and waving her arms, while leaning over the girl's seat and blocking her entrance, were enough to show disorderly conduct under § 18.2-415. Therefore, the Court ruled, the officer had probable cause for seeking the arrest warrant from the magistrate for disorderly conduct.

The Court then pointed out that the first element of a § 1983 malicious prosecution claim requires that defendants "caused" the allegedly unlawful seizure. In this case, the Court ruled that the magistrate judge's order was an intervening cause that broke that causal chain such that neither the officer nor the school official "caused" the defendant's arrest. The Court explained that the intervening acts of a decision maker such as a magistrate can act as a superseding cause that breaks the causal chain and shields an investigating officer from liability.

The Court cautioned, however, that police officers can be held liable if they have misled, unduly pressured, or lied to a magistrate. Nevertheless, in this case, the plaintiff did not allege that the officer misled, unduly pressured, or lied to the magistrate who issued the arrest warrant.

Full Case At:

<https://www.ca4.uscourts.gov/opinions/211242.U.pdf>

Hulbert v. Pope: June 14, 2023

70 F. 4th 726 (2023)

M.D.: Police Officers appeal the denial of Qualified Immunity in a First Amendment Lawsuit.

Facts: The plaintiff and six other individuals picketed on a 15.5-foot-wide strip of public sidewalk at the intersection of two streets in downtown Annapolis, one block from the State House, separated only by a grassy square known as Lawyers' Mall, an area bordering the sidewalk that was frequently used for political demonstrations. An officer told the plaintiffs that they could not protest on the sidewalk and directed them to Lawyers' Mall instead.

The Maryland legislature was set to soon convene just one block away, generating significant pedestrian traffic. The level of traffic congestion was low at the time; however, the picketers were brandishing large signs at an intersection where pedestrians had twice been struck by vehicles in the preceding year. At the time, it was dark, and the officer's supervisor had warned of a safety issue related to the demonstration.

An hour later, the officer returned to the area and noticed that the picketers had come back and were demonstrating on the sidewalk. He approached the group and ordered them to back up onto Lawyers' Mall. Some members of the group initially complied, but the plaintiff's brother then declared that they were not moving. The officer repeated his command at least two more times, threatening to arrest those who did not comply. The officer arrested the plaintiff's brother. Multiple passersby filmed

the arrest, and the officer ordered them to back up off the sidewalk as well. The plaintiff was filming while standing relatively close behind the officer as he arrested the plaintiff's brother. After the plaintiff alone failed to comply, the officer placed him under arrest too.

The plaintiff sued, alleging a violation of his First Amendment rights. The trial court denied the officers plea of Qualified Immunity. The trial court found that the officer arrested the plaintiff because he did not comply with repeated orders to move to Lawyers' Mall, not because he was filming, as there was no evidence that the officer told the plaintiff that he could not film; the officer did not stop or arrest others who were filming. Instead, the trial court denied qualified immunity because it held that there was a genuine dispute of material fact as to whether the officer's interference with the plaintiff's filming served a significant governmental interest.

Held: Reversed, Case Dismissed. The Court ruled that, because a reasonable officer in the officer's position could have believed that the orders constituted lawful time, place, or manner restrictions on the picketers' First Amendment rights, the officer was entitled to qualified immunity. The Court concluded that the undisputed material facts established that the officer acted reasonably when he arrested the brothers for disobeying clear orders.

The Court first observed that, in this case, the picketers could continue their demonstration from Lawyers' Mall. The Court then found that even if the picketers were merely crowded along the sidewalk and not on the street, a reasonable officer could have inferred a safety risk from these facts. The Court observed that the officer's solution—making the sidewalk a buffer between picketers and roadway— in turn placed a "relatively small" burden on the picketers' rights. The Court explained that "no law, clearly established or otherwise, required [the officer] to wait for an imminent traffic accident."

The Court then concluded that "it is difficult to imagine narrower orders that [the officer] could have given to realize the desired effect." The Court noted that, although the officer told the picketers to move off the sidewalk, he allowed them to continue their demonstration mere steps away and did not seek any change to their manner or type of expression. Thus, the Court concluded that the officer was entitled to qualified immunity unless it was clearly established that ordering the plaintiff to move back while he was filming would violate his First Amendment rights.

The Court then observed that neither the 4th Circuit, nor the Supreme Court, nor any other circuit has recognized an unlimited First Amendment right to film police free of otherwise reasonable limitations. In fact, the Court noted that the circuits that recognized a right to film explicitly noted that it "may be subject to reasonable time, place, and manner restrictions." The Court wrote: "The right to film police, to the extent one existed, was not the right to a close-up." Thus, a reasonable officer could conclude that ordering the plaintiff to move back less than fifteen feet and film from off the sidewalk was a permissible time, place, and manner restriction, as it left open "ample alternative channels for communication" because the plaintiff was allowed to continue filming from off the sidewalk, just a little farther away.

The Court also found that a reasonable officer could have believed that ordering the plaintiff and the other onlookers to stand farther away while the officer arrested the brother served a significant interest in reducing any possible risk to the officer's safety. Finally, the Court noted that "While the arrest effectively prevented [the plaintiff] from continuing to film, we are aware of no precedent

suggesting that there is a First Amendment right to continue filming even after one has been formally arrested and subjected to custody.”

The Court wrote: “Not every time, place, or manner restriction will prove lawful. But to yank the leash on capitol police officers too tight would at this most delicate of moments prevent them from taking necessary measures out of an “undue apprehension of being sued.” ... The upshot would be to discourage actions, even the most modest and incremental, that guard the sanctity of legislative proceedings and provide for the safety of the public. Hence the “breathing room” that qualified immunity affords. Properly and carefully applied, the doctrine protects the reasonable judgments that help sustain our constitutional democracy.... Capitol police officers are asked to preserve a delicate balance between protest and order. Neither that balance nor the officers who maintain it should ever be taken for granted.”

Full Case At:

<https://www.ca4.uscourts.gov/opinions/211608.P.pdf>

**Virginia Court of Appeals -
Published**

Howard v. Harris: March 5, 2024

Spotsylvania: Plaintiff appeals the dismissal of his Negligence Lawsuit against Law Enforcement.

Facts: While detained in the backseat of a law enforcement vehicle, the plaintiff escaped his handcuffs, obtained a loaded handgun from the front seat of the vehicle, and shot himself in the head. The plaintiff survived and sued the officers who detained him, alleging that they were grossly negligent in supervising him during his detention.

The day before the incident, the plaintiff’s girlfriend had obtained an EPO against the plaintiff and a warrant was issued for his arrest regarding his assault on her. The plaintiff announced that he would “take down” any law enforcement who tried to arrest him. The plaintiff was a convicted felon. The day of this event, the plaintiff stole a friend’s shotgun and announced that he was going to kill himself. Officers soon located the plaintiff and arrested him, finding shotgun shells but not the stolen shotgun.

The arresting officer placed the plaintiff in handcuffs in the back seat of his patrol vehicle. The window partition separating the front and back seats was open and unlocked because the plaintiff had complained of having trouble breathing. After placing the plaintiff, handcuffed, in the back seat, the officer walked away from the vehicle to retrieve the items obtained from the plaintiff’s person from the ground. A loaded handgun that the officer had seized during a traffic stop the day prior was stored in plain view in a bag on the front passenger seat.

While the officer was away from the vehicle, the plaintiff “jumped” his handcuffs by bringing his hands underneath his legs to the front of his body. He reached through the open window partition separating the front and back seats of the vehicle, took the handgun from the bag in the front passenger

seat, and confirmed that the handgun was loaded. The plaintiff then moved his hands back underneath his legs and concealed the handgun beneath his legs.

After retrieving the plaintiff's belongings from the ground, the officer returned to his vehicle, opened the rear left passenger door, and observed that the plaintiff's hands were underneath his knees. The officer warned the plaintiff that he would pepper spray him if he tried to jump his handcuffs, but otherwise took no actions to resecure the plaintiff's handcuffs or ensure that the plaintiff was still safely detained. The plaintiff, who at this point appeared in visible distress and was rocking back and forth, again stated that he could not breathe and assured the officer that he was not trying to escape. The plaintiff then asked the officer to turn up the air conditioning. The officer confirmed that the air conditioning was at its highest setting.

The plaintiff then revealed the location of the stolen shotgun to the officer. The officer left to retrieve the stolen shotgun. After retrieving the stolen shotgun, the officer spoke to a supervisor about whether to take the plaintiff to jail or to a hospital. The officer decided to take the plaintiff for a mental evaluation, but before the officer returned to the vehicle, the plaintiff shot himself.

The plaintiff sued the officers, alleging that they were grossly negligent in their supervision by allowing him to obtain and shoot himself with a handgun while detained in the police vehicle. In his complaint, the plaintiff alleged that he was of unsound mind throughout the time of his apprehension and detention.

The trial court granted summary judgment for the defendants on two grounds: (1) by attempting suicide, the plaintiff was a felon illegally in possession of a firearm, barring any recovery under Virginia's illegality defense; and (2) the plaintiff's gross-negligence claim failed as a matter of law because the officers exercised "some degree of care" for the plaintiff's safety in the events surrounding his suicide attempt.

Held: Reversed, Summary Judgment Improperly Granted.

Regarding illegality, the Court held that the trial court erred in granting summary judgment for the defendant on the illegality defense. The Court explained that the illegality defense is based on the principle that a party who consents to and participates in an illegal act may not recover from other participants for the consequences of that act. However, the Court repeated that to successfully raise the illegality defense, the defendant must also prove that the plaintiff consented to the commission of the illegal act and engaged in it, freely and voluntarily, without duress or coercion; "This evidentiary burden necessarily includes consideration of the maturity, intelligence, and mental capacity of the plaintiff, regardless of age."

The Court agreed that under *Nelms*, there is a presumption in favor of the sanity of every man until evidence that he is of unsound mind is introduced, and this presumption applies in all cases, criminal as well as civil. However, in this case, the Court pointed out that the plaintiff alleged in his complaint that he was of unsound mind at the time of his detainment. Thus, to the extent that the plaintiff is capable of presenting evidence showing him being of unsound mind, thus preventing him from having the requisite mens rea to have violated § 18.2-308.2(A), the Court agreed that such evidence would be admissible under § 19.2-271.6 to prove that he did not knowingly and intentionally possess the handgun before attempting suicide.

The Court cautioned, however, that under the January ruling in *Shaw*, the defense in § 19.2-271.6 “must go further than showing merely that the defendant suffered impaired judgment or diminished capacity. The testimony must explain how the defendant did not have the state-of-mind [i.e., mens rea] required to commit the offense.”

The Court then held that the trial court erred in granting summary judgment for the officer on the gross-negligence claim. The Court repeated that the standard for gross negligence in Virginia is one of indifference, not inadequacy, and therefore a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care. In this case, the Court observed that the officer may have initially exercised “some degree of care” for the plaintiff’s safety by handcuffing him, placing him in the backseat of the police vehicle, and helping ensure his comfort while detained.

However, the Court contended that the threat that the plaintiff posed to himself and to others changed significantly once the officer was on notice that the plaintiff’s handcuffs were not effectively restraining him and that the plaintiff appeared capable of jumping his handcuffs. To satisfy the “some degree of care” standard at this point, the Court reasoned that the factfinder could reasonably conclude that the officer had to take some action to reasonably respond to the heightened level of threat that the plaintiff posed and that this obligation superseded any competing duty that the officer might have had to find the missing shotgun.

The Court contended that the evidence showed that the officer took no actions to respond to this heightened threat, such as by resecuring the handcuffs or ensuring that the plaintiff was still safely detained in the police vehicle, combined with the officer’s knowledge that (1) the plaintiff was a suicidal detainee, (2) a loaded handgun was in plain view in a bag on the front passenger seat, and (3) the window partition separating the front and back seats was open and unlocked, a reasonable jury could find that the officer’s inaction constituted “a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person.”

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/1499222.pdf>

Griffin v. Commonwealth: August 1, 2023

78 Va. App. 116, 890 S.E.2d 619 (2023)

Alexandria: Defendant appeals his conviction for Battery on Fifth Amendment *Garrity* grounds, *Batson* Jury Selection Issues, Jury Instruction Issues, Refusal to Admit Victim Character Evidence, and sufficiency of the evidence.

Facts: While delivering an ECO detainee to the hospital, the defendant, a police officer, moved the detainee to a registration desk. The detainee was in handcuffs at the time. When the detainee began to pull back and resist the officer’s control, the officer gave one or two demands to the detainee to “stop resisting.” The officer then grabbed the detainee with both hands and used his right leg to sweep the detainee’s legs out from under him. The detainee, still handcuffed behind his back, fell face-first onto the hospital floor, sustained facial injuries and broke his kneecap.

At trial, the defendant testified that he thought the detainee “was putting himself in a position where he could assault me.” The defendant also admitted, “I didn’t react properly” because he had intended to use some technique other than a leg-sweep to bring the detainee to the ground.

The defendant also testified that he was concerned about the detainee, whom he knew suffered from bipolar disorder. He testified that he was also aware that the detainee had “made threats to several government installations and had a previous conviction of arson.” The defendant also testified that he had heard that the detainee had assaulted a nurse and a deputy at a mental health hospital in the past and that the detainee “had physically confronted firefighters” in the past. However, the defendant acknowledged that the detainee had not made any verbal threats toward hospital staff and had not tried to bite or spit at anyone in the hospital.

A police sergeant investigated the case. The sergeant interviewed the defendant as part of the investigation. Before the sergeant spoke with the defendant during the administrative investigation, he gave the defendant a “*Garrity* Form” which stated that the “employee can be compelled to respond and failure to do so is subject to disciplinary action up to and including termination.” The defendant then made several statements. The sergeant then watched the video of the incident and interviewed the witnesses who were on the video.

Prior to trial, the defendant moved to dismiss the prosecution on the grounds that the sergeant violated the defendant’s Fifth Amendment rights under *Garrity*. The sergeant testified that he maintained a wall between both investigations. Furthermore, when he gave his criminal investigation file to the Commonwealth, the sergeant only included information obtained from the witnesses with whom he spoke, including those at the hospital. The sergeant testified that he specifically did not give any of the defendant’s *Garrity*-protected statements to the Commonwealth’s Attorney. The trial court denied the defendant’s motion, concluding that “there’s no evidence before the Court that there was anything” derived from the defendant’s protected statements.

During jury selection, the defendant challenged all four of the Commonwealth’s peremptory strikes under *Batson*, arguing that the Commonwealth had used its peremptory strikes to remove “all white males” from the jury. The prosecutor explained that she struck the first juror from the venire because “he was a neighbor of [another juror] and I didn’t want both of them on the panel.” The prosecutor added that the juror “also rolled his eyes at several attempts of humor to include Your Honor’s at the very end.”

Regarding the other juror, the Commonwealth explained that she struck the second juror because he “didn’t talk at all” and because she “couldn’t see him during most of the selection” process, which she said meant that she did not “know enough about him.” The trial court overruled the defendant’s *Batson* challenge.

At trial, the defendant sought to introduce several pieces of evidence concerning the detainee’s mental health history and aggressive behavior from various sources, including an incident at another hospital in the previous year and several incidents that took place after this incident. The defendant argued that the evidence of the detainee’s mental health history, his history of violence, and of his “history of resentment and hostility against first responders and hospital staff” was admissible under this exception because it was “relevant to the need for the use of force.”

The trial court excluded the defendant's proffered evidence, but allowed the defendant to testify regarding what he knew about the detainee's mental health and behavioral history that informed and affected the defendant's decisions that day.

At trial, the Court gave an instruction on the elements of Battery. The instruction, to which the defendant objected, read as follows:

"The defendant is charged with the crime of assault and battery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant willfully touched James Lenzen without legal excuse or justification; and
- (2) That the touching was done in an angry, rude, insulting, or vengeful manner.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty of assault and battery.

If you find that the defendant had a legal excuse or justification to touch James Lenzen but that the force used during the touching was excessive, then you shall find the defendant guilty of assault and battery.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above elements of the crime as charged, then you shall find the defendant not guilty."

During jury deliberations, the jury sent a question asking "Do both elements (1 & 2) apply to be found guilty? Paragraph 3 seems to negate Paragraph 1 by stating that the focus of the charge is based on the force used being excessive, is this accurate?" The trial court provided a written response to the jury stating, "Whether the touching was without legal excuse or justification or if there was legal excuse or justification but the force was excessive the Commonwealth, in either event, must prove that the touching was done in an angry, rude, insulting, or vengeful manner."

Held: Affirmed.

The Court first addressed the defendant's *Garrity* argument. The Court acknowledged that the Commonwealth bore the burden of proving by a preponderance of the evidence that the sergeant's administrative investigation did not taint the Commonwealth's criminal case but cautioned that "the burden of proof imposed by *Kastigar* does not require the prosecution to 'negate every abstract possibility of taint.'" In this case, the Court found that there was no evidence that the Commonwealth used the defendant's protected statements in any way to develop its case. The Court wrote: "While it certainly was not advisable or wise for the police department to have Sergeant East conduct both the administrative investigation and the criminal investigation of Griffin (a point Sergeant East made to the then-chief of police), *Garrity* and its progeny did not create a per se rule requiring different investigators for the different investigations."

Regarding the defendant's *Batson* challenge, the Court noted that the prosecutor based her reasons for striking the jurors based upon her observations (or lack thereof) of the jurors' body language. The Court repeated that a juror's body language or demeanor during voir dire is certainly a gender-neutral and race-neutral reason for striking a juror. The Court refused to find that the trial court erred in crediting the prosecutor's gender-neutral and race-neutral explanations for striking the jurors.

Regarding the excluded defense evidence, the Court first pointed out that the defendant did not present evidence that the defendant acted in self-defense. The Court then rejected the defendant's

argument that the entirety of the detainee's mental health history and criminal record were relevant to the question of whether the defendant's use of force was reasonable. Instead, the Court explained that evidence relevant to the question of whether the use of force was objectively reasonable would have been only circumstances known to him at the time of the incident.

In this case, the Court explained that testimony from others about their own experiences with the detainee and knowledge of his behavior do not bear on the reasonability of the defendant's decision because the specific details of their experiences did not inform the defendant's actions on that day. Conversely, the Court noted that the jury was able to hear quite a bit about the defendant's knowledge of the detainee's character and how it informed his decision to take the detainee to the ground that day.

Regarding the jury instruction, the Court found that, to the extent that it may have confused the jury as to whether the Commonwealth needed to prove that the defendant touched the detainee in an angry, rude, or insulting manner in addition to proving that the defendant acted with excessive force, the trial court remedied any such issue by the clarifying instruction it issued following the jury's questions. The Court concluded that, in the trial court's clarifying instruction in answer to the jury's question, the trial court clearly and unequivocally instructed the jury that regardless of whether the jury found that the defendant used excessive force, the Commonwealth still "must prove that the touching was done in an angry, rude, insulting, or vengeful manner."

Lastly, regarding the sufficiency of the evidence, the Court repeated that a police officer's use of excessive force is a battery because that touching is not justified or excused and therefore is unlawful. The Court also repeated that the reasonableness of the force is evaluated from the objective perspective of a reasonable police officer on the scene, allowing for officers to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary."

In this case, the Court noted that the detainee, who was handcuffed and in the defendant's custody, had not made any attempts to flee custody and had not made any threatening movements toward any of the hospital staff (or other patients). Furthermore, the Court pointed out that the evidence showed that the detainee had been compliant—at least until the defendant forced him to move a few steps closer to the registration counter.

Full Case At:

<https://www.vacourts.gov/opinions/opncavwp/0485224.pdf>