COMMONWEALTH'S ATTORNEYS' SERVICES COUNCIL
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2019 VIRGINIA LAW ENFORCEMENT APPELLATE UPDATE

MASTER LIST

Cases Reported from June 1, 2018 to June 1, 2019

CRIMINAL PROCEDURE

Bail

Virginia Court of Appeals
Unpublished

Commonwealth v. King: July 24, 2018

Spotsylvania: The Commonwealth appeals the granting of post-conviction bail.

Facts: The trial court convicted the defendant of assault and battery of a law enforcement officer, assault and battery of a firefighter, and driving while under the influence of alcohol. After remanding the defendant to serve his 18-month sentence, the trial court granted the defendant a $10,000 secured bond pending her appeal. The Commonwealth appealed the granting of bond.

Held: Appeal dismissed. In an unpublished order, the Court found that an order granting bail pending appeal under Code § 19.2-319 is not included in the express language of § 19.2-398(B), which governs Commonwealth's bond appeals. The Court also found that the express language of Rule 5A:2(c) precludes the Commonwealth from seeking review of post-conviction bail determinations. The Court therefore determined that the trial court's bail ruling fell outside the narrow confines of the statute and cannot be reviewed on appeal.

[Thank you to Colleen Barlow and Alexandra Vakos from Spotsylvania County, who sent this order to us; it is not available online. We are sharing it via Dropbox below.]

Full Case At:
https://www.dropbox.com/s/8c4raih9my3fh8t/Commonwealth%20v.%20King%20-%20Order.pdf?dl=0

Competency

Virginia Supreme Court

Martinez v. Commonwealth: December 6, 2018
821 S.E.2d 529 (2018)
Williamsburg/James City County: Defendant appeals the determination that he is unrestorably incompetent.

Facts: The defendant is facing two charges of capital murder. In 2005, the trial court determined that the defendant was incompetent to stand trial. From 2006 through 2013, the defendant received in-patient treatment and the trial court conducted biannual evaluations to determine whether he

remained incompetent. In 2013, the trial court entered an order finding that the defendant "incompetent to stand trial" and "likely to remain incompetent for the foreseeable future."

The defendant moved to dismiss the indictments and end the treatment, arguing that it was medically unnecessary. The trial court denied the motion to dismiss and found that the defendant remained incompetent to stand trial, that his continued treatment was medically appropriate, and that he presents a danger to himself and others. The trial court entered an order directing Central State Hospital to continue treating the defendant "in an effort to restore him to competency."

The defendant filed a second motion to dismiss, arguing that § 19.2-169.3(F) was unconstitutional because it violated his rights to due process, equal protection, and a speedy trial.

Held: Appeal dismissed. The Court concluded that the determination of one's competency to stand trial is part of a purely criminal process, and the appeal from such determination is criminal in nature. Therefore, the Virginia Supreme Court found that it does not have jurisdiction to consider the appeal in this case. However, the Court also found that, since there has been no final conviction, it could not transfer the case to the Court of Appeals. Therefore, the Court dismissed the appeal.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180179.pdf

Discovery & Brady

Fourth Circuit Court of Appeals

U.S. v. Chavez, Castillo, et. al.: July 2, 2018
894 F.3d 593
E.D.Va: Defendants appeal their convictions for Murder in furtherance of Racketeering on *Brady* and Fourth Amendment grounds.

Facts: Defendants, all members of MS-13, participated in the murders of several individuals. During the investigation, the government obtained historical cell site tracking data through a court order under the Stored Communications Act, 18 U.S.C. §§ 2703(c)(1)(B), 2703(d), and the related provisions of the Virginia Code. At trial, at least two eyewitnesses testified about each murder. The government also introduced hours of recorded phone calls in which the defendants implicated themselves and each other in the charged crimes. Physical and forensic evidence further implicated the defendants.

At trial, the defendant's fellow MS-13 member also testified for the government. The government had arranged various benefits for the witness, including a letter to an immigration judge who ultimately granted the witness lawful status in the United States. At trial, the witness admitted to almost all of those benefits, but he at first testified that his immigration judge did not receive the letter. However, on cross-examination he corrected himself and stated that the judge did receive the letter.

During the trial, the defendants alleged prosecutorial misconduct. In particular, they complained that the prosecutors used objections to convey suggested answers to witnesses and that the prosecutor

misstated the law in closing argument. The trial court issued corrective instructions to the jury but denied any other relief.

Two of the defendants received life sentences. Although they were both over 18 at the time of the offenses, they argued that their youth at the time of the offenses made their life sentences unconstitutional under *Miller v. Alabama*.

After trial, the defendants moved for a new trial on *Brady* grounds. They subpoenaed and received the cooperating witness' immigration file, which revealed that he had not disclosed his prior criminal history and MS-13 membership on some of his paperwork, although he admitted those facts elsewhere in the file.

The defendants moved to dismiss the case on various grounds, including violation of *Brady* and *Napue*, for failure to disclose exculpatory evidence and failure to correct the witness' false statement. The defendants also moved to suppress the cell site tracking data, which they argued during the appeal was a violation of the recent ruling in *Carpenter v. United States.*

Held: Affirmed. The Court first pointed out that, at trial, the jury heard extensive testimony about the immigration benefits that the witness received through his cooperation with the government. Regarding the alleged *Napue* violation regarding the letter to the immigration judge, the Court wrote: "It is difficult to imagine how a conviction could have been 'obtained by the knowing use of perjured testimony' when that testimony was almost immediately corrected by the witness himself." In addition, the Court noted there was no evidence that the government had any idea that the testimony was false.

Regarding the claim of prosecutorial misconduct, the Court found that the trial court's instructions to the jury cured any potential prejudice from the prosecutor's errors. The Court wrote: "Under *Darden*, prosecutors are not required to be perfect, and indeed they could hardly be expected to be. Prosecutors should of course strive for impeccable performance and seek to avoid all improper behavior, but isolated and immaterial incidents such as those at issue here do not implicate the overall fairness of the trial, and therefore do not necessitate a new one."

The Court declined to apply *Miller v. Alabama* to the defendants who received life sentences for crimes that they committed while over the age of 18. The Court found that, while they were young at the time of the offenses, it was not unconstitutional to sentence the defendants to life terms.

Lastly, the Court rejected the defendant's complaint that the government obtained cell-site location data in violation of *Carpenter v. United States*. The Court noted that the Supreme Court announced its decision in that case, which held that the government must obtain a search warrant based on probable cause to collect 7 days or more of historical cell-site data, on June 22. The Court wrote: "While *Carpenter* is obviously controlling going forward, it can have no effect on Chavez's case. The exclusionary rule's 'sole purpose . . . is to deter future Fourth Amendment violations'… Chavez does not, and cannot, deny that investigators in this case reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records. Without question, then, the good-faith exception to the exclusionary rule applies to investigators' actions here."

Full Case At:
http://www.ca4.uscourts.gov/opinions/164499.P.pdf

U.S. v. Bell: August 28, 2018
901 F.3d 455
Maryland: Defendant appeals his convictions for Possession with Intent to Distribute Heroin and Cocaine and for Possession of a Firearm on Fifth Amendment issues, Admission of Other Bad Acts, and refusal to disclose an Informant's Identity.

Facts: Detectives obtained a search warrant for the defendant's residence based on information from an informant. The informant had recently observed the defendant inside a room of the residence, with a firearm and a quantity of heroin consistent with distribution amounts. The informant had no other role in the defendant's crimes or his prosecution.

While executing the warrant, an officer asked the defendant's wife: "if there [were] any weapons in the house that would hurt an officer." The defendant and his wife were being held together, next to each other. The defendant interjected, telling police that there was a rifle under the couch. Police found a Ruger semi-automatic rifle under the couch.

Four months later, police arrested the defendant again during a traffic stop. Police located illegal drugs in the car, packaged in distinctively marked baggies. Police executed another search warrant at the defendant's residence and found the same type of narcotics, in the same type of baggies, in the defendant's basement. After the traffic stop, the defendant told police that he had been "sharing" the gun with another man in the car; that the two of them had been "hustlin[g] together" when they were arrested; that he had come to Washington, D.C., that evening to buy "two guns and some coke"; and that, in particular, he was expecting to buy "two Rugers."

Even though the government only charged the defendant with possession of the drugs and guns in his home, the trial court admitted the evidence regarding the traffic stop at trial over the defendant's objection based on F.R.E. Rule 404(b). The trial court denied the defendant's motion to disclose the identity of the informant from the search warrant. The defendant also moved to suppress his statement to the police, arguing that the police subjected him to the functional equivalent of questioning under *Innis.* The trial court denied the motion to suppress.

Held: Affirmed. The Court first rejected the defendant's motion to suppress, finding that the defendant was subjected to neither express questioning nor its functional equivalent. Rather than addressing the "public safety" exception to the *Miranda* rule, the Court simply explained that the officer's single question to the defendant's wife did not result in the degree of coercion that would constitute the functional equivalent of express questioning.

Regarding the admission of the defendant's statement to the police after the traffic stop, the Court ruled that it was plainly necessary and relevant to showing that the defendant had, as charged, possessed the Ruger rifle in furtherance of drug trafficking four months earlier. The Court found his possession of drugs in similar packaging to what police found in the home to be similarly probative and persuasive proof that the defendant had, as alleged in the indictment, knowingly possessed the illegal drugs in his residence with the intent to distribute them.

Finally, the Court rejected the defendant's argument that he was entitled to learn the identity of the informant who provided the information in the search warrant. The Court addressed the so-called "informer's privilege" under *Rovario* and repeated that the government is permitted to withhold the

identity of a confidential informant when "the informant was used only for the limited purpose of obtaining a search warrant." The Court rejected the defendant's assertion that the informant might have testified that it was someone else, not the defendant, who had stockpiled illegal drugs at the residence — in flat contradiction to the representations in the warrant affidavits —as dubious or speculative.

Full Case At:
http://www.ca4.uscourts.gov/opinions/164343.P.pdf

U.S. v. Abdallah: December 18, 2018

E.D.Va: Defendant appeals his conviction for Distribution of Narcotics on Fifth Amendment and *Brady* grounds.

Facts: A law enforcement task force arrested the defendant for Distribution of Synthetic Cannabinoids. When agents read the defendant his *Miranda* warnings, the defendant interrupted approximately halfway through to inform the officers that he "wasn't going to say anything at all." The agents continued the *Miranda* warnings, the defendant indicated he understood his rights, and the defendant made a statement.

During the suppression hearing, the defendant highlighted inconsistencies in the agents' reports regarding when law enforcement gave the defendant *Miranda* warnings and how the investigators noted what the defendant said. The primary agent testified during the suppression hearing that there were "some modifications" made over the eight-day drafting period of his report over email. Based on the inconsistencies, the defendant requested production of the agents' emails pertaining to the drafting of the report, but the district court denied the request. The district court also denied the defendant's motion to suppress his statements.

Held: Reversed. The Court suppressed the defendant's statement and held that the district court erred in failing to conduct an *in camera* review of confidential law enforcement records requested by the defendant after the defendant established the confidential records plausibly contained materially favorable information.

Regarding the defendant's *Miranda* claim, the Court ruled that the defendant unambiguously invoked his right to remain silent, but nevertheless the officers continued interrogating him and thus failed to scrupulously honor the defendant's invocation. The Court repeated that once a suspect unambiguously invokes the right to remain silent, all questioning must cease. Under *Mosley*, the Court found that the defendant's statements are therefore inadmissible.

The Court rejected the government's argument that the defendant's statement, in context, was not an invocation of his right to remain silent. The Court found no pre-request context suggesting, for example, that the defendant's statement was nothing more than an "angry response", or otherwise casting ambiguity on the defendant's clear request to remain silent. The Court also stipulated that courts may not use post- request facts and circumstances in determining whether a defendant unambiguously invoked his right to remain silent.

Regarding the defendant's *Brady* claim, the Court repeated that once a defendant identifies specific evidence that is potentially privileged or that is otherwise confidential but could plausibly be favorable to his defense, the defendant "does not become entitled to direct access to the information to determine for himself its materiality and favorability." Rather, the defendant is "entitled, in order to secure the basic right, to have the information he has sufficiently identified submitted to the trial court for in camera inspection and a properly reviewable judicial determination made whether any portions meet the *Brady* requirements for compulsory disclosure.

Based upon: (1) the inconsistencies that existed between the inspector's contemporaneous handwritten notes and the agent's final report, (2) the inconsistencies in the agent's grand jury testimony and suppression hearing testimony, and (3) the agent's own testimony that there were "some modifications" over the course of the drafting exchange, the Court found it plausible that an *in camera* review of the specific drafting exchange would reveal evidence that was materially favorable to the defendant's challenge of when law enforcement gave him *Miranda* warnings.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174230.P.pdf

Virginia Court of Appeals
Published

Rams v. Commonwealth: February 26, 2019

Prince William: Defendant appeals his conviction for Capital Murder on denial of a Bill of Particulars and sufficiency of the evidence.

Facts: The defendant killed his 15-month-old child after purchasing a $1/2 million life insurance policy on the child. The defendant called 911 and claimed that the child had stopped breathing in the last few minutes before he called 911. Although he had been having severe financial difficulties, the defendant texted his real estate agent twice during the month prior to the child's death to say that he could afford not only to move back into his home but also to undertake major improvements.

The Medical Examiner at first concluded that the child died from drowning, but her superior set aside that conclusion because he could not rule out suffocation as a cause of death. The Commonwealth's expert reported that the child died from drowning or asphyxiation. The physical evidence demonstrated that the child stopped breathing probably an hour and a half or more before the defendant allegedly discovered the child non-responsive and called 911.

The defendant sought a bill of particulars requiring the Commonwealth to specify what cause or causes of death it sought to prove, but the trial court denied the motion. The Commonwealth's initial theory of the case, which the prosecutor conveyed to the defendant verbally prior to trial, was that the defendant drowned the child for insurance money. The defendant contended that the child died from a febrile seizure or some other noncriminal cause. During trial, the prosecution altered its theory to contend that in addition to drowning, the death could have resulted from suffocation. The trial court

overruled the defendant's argument that the Commonwealth should not be permitted to change its theory of the case.

At a bench trial, numerous experts testified. The Commonwealth's primary expert explained that the rate of sudden unexplained death in otherwise normal children in the victim's age group is "extraordinarily low" and "basically doesn't happen." The trial court rejected the hypothesis that the child could have died from a heart malfunction such as a spontaneous cardiac arrhythmia because no evidence supported that as a cause of death.

Held: Affirmed. Regarding the defendant's request for a bill of particulars, the Court observed that he already had notice of the existence of an alternate theory of the case in time to satisfy any due process right to notice of the precise manner in which he was alleged to have caused his son's death; in fact, the defendant himself noted the existence of both theories when he had sought to require the Commonwealth to elect a cause of death or require dismissal of the murder indictment. The Court noted that, although the defendant claimed surprise at trial, he did not request a continuance.

The Court ruled that the defendant had no constitutional entitlement to notice of the precise manner in which the Commonwealth alleged that he caused his son's death. The Court repeated that it is improper for a defendant to use a bill of particulars to expand the scope of discovery in a criminal case. The Court pointed out that § 19.2-221, which provides for the short form indictments for murder and manslaughter, specifically validates murder indictments that allege only that the defendant 'feloniously did kill and murder' the victim.

Regarding sufficiency, the Court reviewed the witness statements, expert testimony, and physical evidence in great detail before concluding that the circumstantial evidence supports the finding that the child's death was criminal and did not result from natural, noncriminal causes. The Court explained that the law does not require the Commonwealth to prove the precise cause of death, only that the death "resulted through a criminal agency."

The Court also agreed that evidence of the defendant's motive was relevant to determining whether the victim's death was criminal rather than accidental or natural.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1453174.pdf

Fifth Amendment: Collateral Estoppel

U.S. Supreme Court

Currier v. Virginia: June 22, 2018
Affirming Virginia Supreme Court Ruling of December 8, 2016
And Court of Appeals Ruling of December 15, 2016
585 U.S. ___ , 138 S. Ct. 2144, 201 L.Ed.2d 650
Albemarle: Defendant appeals his conviction for Possession of a Firearm by Felon on Collateral Estoppel grounds.

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

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

Held: Affirmed. The Court refused to apply the Double Jeopardy clause in this case. In a 5-4 ruling, the Court repeated its holding in *Jeffers* that, if a single trial on multiple charges would suffice to avoid a double jeopardy complaint, "there is no violation of the Double Jeopardy Clause when the defendant elects to have the offenses tried separately and persuades the trial court to honor his election." The Court explained that the Double Jeopardy Clause, which "guards against Government oppression," does not relieve a defendant from the consequences of his voluntary choice.

Although four of the justices in the majority also agreed that collateral estoppel would not apply in this case, Justice Kennedy did not join that portion of their opinion. Instead, he simply concurred with the majority that the defendant, by voluntarily choosing two separate trials, could not invoke the Double Jeopardy clause.

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/16-1348_h315.pdf

Virginia Court of Appeals
Published

Hall v. Commonwealth: November 6, 2018
69 Va. App. 437, 819 S.E.2d 877
Pittsylvania: Defendant appeals her conviction for Possession of a Firearm by Convicted Felon on Collateral Estoppel grounds.

Facts: Executing a search warrant, police discovered drugs and a firearm at the defendant's residence. Facing indictments for four felonies, including possession of a firearm by a convicted felon, the defendant moved to sever the charge for possession of a firearm by a felon from the other charges in the indictment. After she prevailed on a motion to strike at the first trial on the other charges, she moved to dismiss the charge of possession of a firearm by a convicted felon, arguing that it violated the principle of collateral estoppel and double jeopardy. The trial court denied the motion.

Held: Affirmed. The Court applied the U.S. Supreme Court's 2018 ruling in *Currier v. Virginia* and ruled that the trial court did not err because the defendant agreed to have the charges against her severed. The Court explained that the defendant's voluntary decision to request that the charges be severed benefited the defendant because it kept the Commonwealth from introducing evidence of earlier felony convictions in the first trial. Since the severance was at her election, under *Currier*, she was not subject to any prosecutorial overreaching or abuse that the Double Jeopardy Clause was intended to prevent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1751173.pdf

Fifth Amendment: Double Jeopardy

Virginia Court of Appeals
Published

Campbell v. Commonwealth: August 21, 2018
69 Va. App. 217, 817 S.E.2d 663
Amherst: Defendant appeals his conviction for Manufacturing Methamphetamine on violation of the Search Warrant statute and Double Jeopardy grounds.

Facts: The defendant and several others cooked methamphetamine at their home. Police received a detailed series of tips from a known reliable informant about a "meth cook" that was about to take place in the next few hours. During the night, while other officers obtained a search warrant, police officers approached the residence and, from a concealed location, observed as the "cook" took place.

Police obtained a search warrant for the defendant's residence. Police executed the search warrant and seized evidence of the defendant's methamphetamine operation. The next day, the Magistrate transmitted the paperwork to the clerk's office, but failed to send the entire affidavit. The clerk's office only received one page of the affidavit, a page that lacked most of the relevant information.

The Commonwealth charged the defendant with Manufacturing Methamphetamine and with Possession with Intent to Distribute Methamphetamine. The trial court denied the defendant's motion to suppress the evidence on the grounds that the complete affidavit supporting the warrant had not been filed within thirty days as required by §19.2-54. The charges were to be tried concurrently. However, the defendant requested a continuance in the possession with intent to distribute case, arguing that he had been indicted on that charge less than two weeks prior and needed more time to prepare. The trial court granted his continuance. The manufacturing trial proceeded first, and the trial court found the defendant guilty.

The defendant first appealed his conviction for Manufacturing Methamphetamine and the Court of Appeals reversed. However, the Virginia Supreme Court re-instated the conviction. In that ruling, the

Court assumed but did not rule that the magistrate's incomplete faxing rendered the search warrant invalid under Code § 19.2-54. The Court ruled that the search was lawful under the "exigent circumstances" exception to the search warrant requirement. The Court reviewed the dangers of the operation and the risk to both safety and of destruction of evidence. The Court reasoned that, even if the police had not obtained a warrant under the circumstances, and had instead assembled the law enforcement team and raced to the scene of the "meth cook" that was either on the cusp of, or actually was, taking place, such a warrantless search would be justified under the exigent circumstances exception.

The defendant then appealed his conviction for Possession with Intent to Distribute Methamphetamine, again arguing the suppression issue and also that he was subjected to multiple prosecutions for the same act in violation of the Double Jeopardy clause and § 19.2-294. The Court held that appeal in abeyance, pending the Virginia Supreme Court ruling in the companion case.

Held: Affirmed. Invoking the recent U.S. Supreme Court ruling in *Currier*, the Court ruled that through his request to sever the charges pending against him and have two separate trials, the defendant waived any right to challenge the decision of the trial court to proceed with the second trial.

The Court refused to consider the defendant's motion to suppress, finding that the Virginia Supreme Court's previous ruling constituted the "law of the case." Judge Humphreys wrote a lengthy concurrence, decrying the Virginia Supreme Court ruling in the companion case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1923153.pdf
Prior 2017 Virginia Supreme Court Ruling At:
http://www.courts.state.va.us/opinions/opnscvwp/1161676.pdf

Virginia Court of Appeals
Unpublished

Camacho Garcia v. Commonwealth: June 19, 2018

Powhatan: Defendant appeals his convictions for Identity Theft and False ID to Law Enforcement on Double Jeopardy grounds.

Facts: The defendant provided a false name and date of birth to an officer at a driver's license checkpoint. At trial, the trial court rejected the defendant's argument that double jeopardy barred his being convicted under both § 18.2-186.3(B1) and § 19.2-82.1.1.

Held: Affirmed. The Court noted that § 18.2-186.3(B1) and § 19.2-82.1 contain multiple, separate elements. For example, a person who gave false identification to someone who was not a "law enforcement officer," such as a loss prevention manager at a store investigating a shoplifting incident, would violate Code § 18.2-186.3(B1), but not Code § 19.2-82.1. The Court concluded that the two

statutes, therefore, are not the same offense under the *Blockburger* test, and the defendant did not receive multiple punishments for the same offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0831172.pdf

Fifth Amendment: Interviews & Interrogations

Fourth Circuit Court of Appeals

U.S. v. Bell: August 28, 2018
901 F.3d 455
Maryland: Defendant appeals his convictions for Possession with Intent to Distribute Heroin and Cocaine and for Possession of a Firearm on Fifth Amendment issues, Admission of Other Bad Acts, and refusal to disclose an Informant's Identity.

Facts: Detectives obtained a search warrant for the defendant's residence based on information from an informant. The informant had recently observed the defendant inside a room of the residence, with a firearm and a quantity of heroin consistent with distribution amounts. The informant had no other role in the defendant's crimes or his prosecution.

While executing the warrant, an officer asked the defendant's wife: "if there [were] any weapons in the house that would hurt an officer." The defendant and his wife were being held together, next to each other. The defendant interjected, telling police that there was a rifle under the couch. Police found a semi-automatic rifle under the couch.

Four months later, police arrested the defendant again during a traffic stop. Police located illegal drugs in the car, packaged in distinctively marked baggies. Police executed another search warrant at the defendant's residence and found the same type of narcotics, in the same type of baggies, in the defendant's basement. After the traffic stop, the defendant told police that he had been "sharing" the gun with another man in the car; that the two of them had been "hustlin[g] together" when they were arrested; that he had come to Washington, D.C., that evening to buy "two guns and some coke"; and that, in particular, he was expecting to buy "two Rugers."

Even though the government only charged the defendant with possession of the drugs and guns in his home, the trial court admitted the evidence regarding the traffic stop at trial over the defendant's objection based on F.R.E. Rule 404(b). The trial court denied the defendant's motion to disclose the identity of the informant from the search warrant. The defendant also moved to suppress his statement to the police, arguing that the police subjected him to the functional equivalent of questioning under *Innis.* The trial court denied the motion to suppress.

Held: Affirmed. The Court first rejected the defendant's motion to suppress, finding that the defendant was subjected to neither express questioning nor its functional equivalent. Rather than addressing the "public safety" exception to the *Miranda* rule, the Court simply explained that the

officer's single question to the defendant's wife did not result in the degree of coercion that would constitute the functional equivalent of express questioning.

Regarding the admission of the defendant's statement to the police after the traffic stop, the Court ruled that it was plainly necessary and relevant to showing that the defendant had, as charged, possessed the rifle in furtherance of drug trafficking four months earlier. The Court found his possession of drugs in similar packaging to what police found in the home to be similarly probative and persuasive proof that the defendant had, as alleged in the indictment, knowingly possessed the illegal drugs in his residence with the intent to distribute them.

Finally, the Court rejected the defendant's argument that he was entitled to learn the identity of the informant who provided the information in the search warrant. The Court addressed the so-called "informer's privilege" under *Rovario* and repeated that the government is permitted to withhold the identity of a confidential informant when "the informant was used only for the limited purpose of obtaining a search warrant." The Court rejected the defendant's assertion that the informant might have testified that it was someone else, not the defendant, who had stockpiled illegal drugs at the residence — in flat contradiction to the representations in the warrant affidavits —as dubious or speculative.

Full Case At:
http://www.ca4.uscourts.gov/opinions/164343.P.pdf

U.S. v. Abdallah: December 18, 2018

E.D.Va: Defendant appeals his conviction for Distribution of Narcotics on Fifth Amendment and *Brady* grounds.

Facts: A law enforcement task force arrested the defendant for Distribution of Synthetic Cannabinoids. When agents read the defendant his *Miranda* warnings, the defendant interrupted approximately halfway through to inform the officers that he "wasn't going to say anything at all." The agents continued the *Miranda* warnings, the defendant indicated he understood his rights, and the defendant made a statement.

During the suppression hearing, the defendant highlighted inconsistencies in the agents' reports regarding when law enforcement gave the defendant *Miranda* warnings and how the investigators noted what the defendant said. The primary agent testified during the suppression hearing that there were "some modifications" made over the eight-day drafting period of his report over email. Based on the inconsistencies, the defendant requested production of the agents' emails pertaining to the drafting of the report, but the district court denied the request. The district court also denied the defendant's motion to suppress his statements.

Held: Reversed. The Court suppressed the defendant's statement and held that the district court erred in failing to conduct an *in camera* review of confidential law enforcement records requested by the defendant after the defendant established the confidential records plausibly contained materially favorable information.

Regarding the defendant's *Miranda* claim, the Court ruled that the defendant unambiguously invoked his right to remain silent, but nevertheless the officers continued interrogating him and thus failed to scrupulously honor the defendant's invocation. The Court repeated that once a suspect unambiguously invokes the right to remain silent, all questioning must cease. Under *Mosley*, the Court found that the defendant's statements are therefore inadmissible.

The Court rejected the government's argument that the defendant's statement, in context, was not an invocation of his right to remain silent. The Court found no pre-request context suggesting, for example, that the defendant's statement was nothing more than an "angry response", or otherwise casting ambiguity on the defendant's clear request to remain silent. The Court also stipulated that courts may not use post- request facts and circumstances in determining whether a defendant unambiguously invoked his right to remain silent.

Regarding the defendant's *Brady* claim, the Court repeated that once a defendant identifies specific evidence that is potentially privileged or that is otherwise confidential but could plausibly be favorable to his defense, the defendant "does not become entitled to direct access to the information to determine for himself its materiality and favorability." Rather, the defendant is "entitled, in order to secure the basic right, to have the information he has sufficiently identified submitted to the trial court for in camera inspection and a properly reviewable judicial determination made whether any portions meet the *Brady* requirements for compulsory disclosure.

Based upon: (1) the inconsistencies that existed between the inspector's contemporaneous handwritten notes and the agent's final report, (2) the inconsistencies in the agent's grand jury testimony and suppression hearing testimony, and (3) the agent's own testimony that there were "some modifications" over the course of the drafting exchange, the Court found it plausible that an *in camera* review of the specific drafting exchange would reveal evidence that was materially favorable to the defendant's challenge of when law enforcement gave him *Miranda* warnings.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174230.P.pdf

U.S. v. Azua-Rinconada: January 28, 2019

E.D. N.C.: Defendant appeals his conviction for Illegal Entry on Fourth and Fifth Amendment grounds.

Facts: The defendant was living in the United States after entering unlawfully. Officers visited the defendant's residence for a "knock-and-talk." After knocking on the dwelling door, although the officers lacked the authority to forcibly enter the home, an officer stated: "Open the door or we're going to knock it down." When the defendant's fiancé opened the door, an agent calmly greeted her. The two engaged in a non-confrontational conversation, with the agent speaking in a modulated and relaxed tone. At the end of the conversation, the agent did not demand entry into the residence but, instead, asked if the fiancé would "mind if [the officers] came in and talked" because it was "awfully cold" outside.

For most of his interaction with the officers, the defendant sat next to his fiancé on the couch, where he elected to sit when entering the room, with the officers on the opposite side of the room. The

officers' language, demeanor, and actions were calm and nonthreatening, and the tenor of the interaction remained conversational. No one notified the defendant that he was not under arrest or that he was free to leave. The agent asked the defendant if he would fill out a questionnaire about his entry into the United States. The defendant agreed, and thereafter the agent explained the questions and directed the defendant to answer each question one by one. The defendant made several incriminating statements.

The trial court denied the defendant's motion seeking to suppress the statements and to suppress all evidence taken from his person and property.

Held: Affirmed. The Court rejected the defendant's argument that his fiancé did not freely consent to allow the officers into his home. The Court examined the threat from the officer at the door and concluded that, in context, it did not fatally infect the voluntariness of the consent.

The Court also rejected the defendant's argument that the officers should have read him *Miranda* warnings before questioning him. The Court found that the defendant's "freedom of action" was not "curtailed to a degree associated with formal arrest," meaning that he was not in custody and *Miranda* warnings were therefore not required.

In a concurrence, Justice Keenan agreed that any coercive effect from the officer's initial statement had dissipated by the time the defendant's fiancé motioned to the officers to enter the dwelling. However, she noted that in the absence of the ameliorating context in this case, a dishonest or reckless threat such as the one in this case would have been sufficiently coercive to invalidate her consent.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174344.P.pdf

U.S. v. Riley: April 3, 2019

W.D. Va.: Defendant appeals the revocation of his probation on Fifth Amendment *Miranda* grounds.

Facts: While the defendant was on supervised release for Federal drug convictions, police arrested him for drug possession. The defendant's Federal probation officer interviewed him while he was being held at the county jail. The officer did not inform the defendant of his *Miranda* rights before questioning him. The defendant admitted to the officer that he had been using methamphetamine on a daily basis for several months and that, during the previous month, he had been distributing an ounce of methamphetamine per week.

At his revocation hearing, the defendant objected to the admission of his statements on Fifth Amendment grounds, arguing that the probation officer should have read him *Miranda* warnings. The trial court overruled the objection and determined that the defendant had violated the conditions of his supervised release by distributing a controlled substance.

Held: Affirmed. The Court held that, because supervised release revocation proceedings are not criminal proceedings, the introduction of unwarned admissions made by the defendant to his probation

officer did not violate his rights under the Self-Incrimination Clause of the Fifth Amendment. The Court re-emphasized that the Fifth Amendment privilege against self-incrimination is violated only when compelled statements are used against the witness in a criminal proceeding. However, the Court explained: "supervised release revocation hearings are not criminal proceedings."

Full Case At:
http://www.ca4.uscourts.gov/opinions/184783.P.pdf

Virginia Supreme Court

Garcia-Tirado v. Commonwealth: August 9, 2018
Aff'd Unpublished Court of Appeals Opinion of March 7, 2017
817 S.E.2d 309
Arlington: Defendant appeals his conviction for Rape on Fifth Amendment and Hearsay grounds.

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

During a motion to suppress, the defendant alleged that he did not waive his *Miranda* rights and voluntarily make the incriminating statements that followed because his native language is Mam, not English or Spanish, and that he was not provided a Mam interpreter to translate the exchange he had with the police regarding his rights. The defendant pointed out that his written apology was riddled with grammatical and spelling errors. The defendant also argued that the video of his interview was inadmissible, as was a transcript and translation of that interview.

The Court of Appeals affirmed the conviction in an unpublished opinion.

Held: Affirmed. The Court first rejected the argument that the Court of Appeals erred by relying on evidence adduced at trial, in addition to evidence adduced at the motion to suppress. The Court also rejected the argument that the video and transcript were inadmissible, pointing out that, at the suppression hearing, as well as at trial, the detective testified that the recording accurately depicted her interview. The Court further found that the officers' testimony established the foundation of the recording and transcript as accurate translations of the statements.

Regarding voluntariness, the Court found no evidence or assertion that the defendant's waiver of Miranda was the product of "intimidation, coercion, or deception." Regarding the adequacy of the defendant's *Miranda* waiver, the Court found ample evidence to support the circuit court's conclusion that the defendant comprehended Spanish well enough to understand his rights as stated on the *Miranda* waiver form.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170458.pdf

Secret v. Commonwealth: October 11, 2018
Aff'd Court of Appeals Ruling of February 14, 2017
819 S.E.2d 234
Louisa: Defendant appeals his convictions for Arson and Attempted Murder on sufficiency of the evidence and Fifth Amendment grounds.

Facts: The defendant poured fuel throughout a rooming house in the early morning hours when people were still sleeping and attempted to burn the building down. A deputy responded and located the defendant, who was surrounded by residents of the building. The deputy detained the defendant and placed him in handcuffs. The deputy asked the defendant if he would be willing to come to the Sheriff's Department to talk to a State Police Investigator. The defendant agreed. The deputy told the defendant he would have to transport him handcuffed, per policy, but that he was not under arrest. The deputy removed the handcuffs when the defendant arrived at the Department.

An investigator then spoke with the defendant in a closed room for almost an hour. The investigator did not believe that the defendant was in custody, but instead thought he was there "on his own accord" and willing to speak. The defendant admitted to setting the fire and that he could hear people in the building while he was setting it on fire. After the defendant admitted to setting the fire, the investigator read the defendant his *Miranda* rights. Thereafter, the defendant explained that he set the fire to eliminate the "holograms" that lived inside the building. During his interview, the defendant denied being under the influence of either drugs or alcohol.

The defendant moves to suppress his statement, arguing that by first obtaining a confession, and then administering *Miranda* warnings, the investigator violated *Elstad* and *Seibert*. During the motion to suppress, however, the investigator denied deliberately using a "two-step interrogation technique. The defendant also argued that his statement was involuntary due to his mental state, but the trial court found no evidence of impairment.

At trial, the defendant argued that the Commonwealth failed to prove the specific intent to kill each individual victim. The trial court disagreed and convicted the defendant of arson and nine counts of attempted murder. The Court of Appeals affirmed.

Held: Affirmed. [*Note: The Court assumed but did not rule that the defendant was in custody – EJC]*. Rejecting the defendant's *Seibert* argument, the Court relied on Justice Kennedy's "subjective-intent" test, where the key inquiry is whether the investigator purposefully utilized a "two-step interrogation technique". The Court, like Justice Kennedy, rejected an "objective" test that would find any statement automatically inadmissible when the defendant is in custody. Instead, the Court agreed that the statement was admissible because the investigator neither deliberately employed a two-step interrogation technique, nor employed any deliberately coercive or improper tactics in obtaining the initial statement.

The Court also agreed with the Court of Appeals that the defendant failed to demonstrate impairment sufficient to render his statement involuntary.

Finally, the Court agreed with the Court of Appeals that the evidence proved the defendant's specific intent to kill all of the individuals located within the building at the time he started the fire, even though he did not know the specific identity of the individuals who were in the facility at that time. The Court explained that the Commonwealth needed only prove that the defendant knew that the building was occupied at the time he started the fire and that the natural and probable consequence of his actions was that all of them—whomever they happened to be— would be killed by the fire.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170540.pdf

Adkins v. Commonwealth: March 28, 2019 (Unpublished)

Alexandria: Defendant appeals his conviction for Murder on Fifth Amendment and Jury Instruction grounds.

Facts: The defendant shot and killed the victim during an argument. Some witness stated that, during the argument, the victim pushed the defendant. Police located the defendant and arrested him for possession of a firearm and interviewed him. After learning of his *Miranda* rights and making a few initial statements, the defendant stated: "I don't have no more to say to you." The officers terminated their interview immediately thereafter. However, a few minutes later, other officers began to ask the defendant about the murder. The defendant denied killing the victim in self-defense, claiming that he did not kill the victim at all.

The defendant moved to suppress his statements, arguing that the officers violated his *Miranda* rights when the detectives continued to interrogate him after he invoked his right to remain silent. The trial court denied the motion. At trial, the defendant requested a jury instruction on "mutual combat" but the trial court denied the instruction, although it allowed a self-defense instruction. The Court of Appeals denied the defendant's appeal.

Held: Reversed. The Court pointed out that a suspect may invoke his right to remain silent and terminate questioning by simply stating "I do not want to answer any more questions." In this case, the Court found that the defendant's statement "I don't have no more to say to you" was "not quite so eloquent, but it clearly conveys the same sentiment." The Court ruled that once the defendant invoked his right to remain silent, the Commonwealth was prohibited from interrogating him unless the defendant voluntarily reinitiated the interrogation or a significant period of time passed.

In a footnote, the Court explained that the defendant's statement, "I don't have no more to say to you," essentially meant: "I am invoking my right to remain silent" because the context did not reasonably support any other interpretation. However, depending on the circumstances, the Court allowed that this same statement could also be interpreted in another case to mean "I've told you everything I know about this subject, and there's no more for me to say about it." In such a situation, the suspect would not be invoking his right to remain silent but instead would merely be implying that saying more would just be an exercise in repeating himself.

The Court agreed, however, that the trial court properly denied an instruction on "mutual combat." The Court observed that the defendant and victim were engaged in an argument, during which the victim became the sole aggressor. The Court repeated that not every fight is mutual combat; where one party assaults another, "the ensuing struggle cannot be accurately described as a mutual combat."

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/180485.pdf

Spinner v. Commonwealth: May 30, 2019
Aff'd Court of Appeals Unpublished Ruling of April 3, 2018
Campbell County: Defendant appeals his conviction for Robbery and Murder on Fifth Amendment *Miranda* grounds.

Facts: The defendant robbed and murdered an 89-year-old man. A few days later, several officers executed a search warrant at the defendant's residence. Outdoors, in an open carport beside the house and near a sidewalk, an officer took the defendant's fingernail clippings pursuant to the warrant. Police did not restrain the defendant in any way. Nevertheless, officers read him *Miranda* warnings. He made a few statements and then terminated the interview.

Two days later, police arrested the defendant. Prior to interviewing him, the police informed the defendant of his *Miranda* rights. An officer read the standard rights, but included the statement: "If you cannot afford to hire a lawyer, one will be appointed to represent you before any question and if you wish one . . . [i]f you're charged with a crime." The defendant admitted to involvement in the crime.

Prior to trial, the defendant moved to suppress the statement, arguing that the *Miranda* warnings he received implied that he did not have the right to an appointed attorney during the interrogation, but only if he was "charged with a crime." The trial court denied the motion and the Court of Appeals affirmed.

Held: Affirmed. Unlike the Court of Appeals, the Supreme Court first addressed whether the defendant was in custody in the first interview. The Court repeated that the ultimate inquiry into whether an individual is subject to custodial interrogation is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest. In view of the fact that police did not deprive the defendant of his freedom of action in any significant way until his arrest, the Court agreed with the trial court that the first interview required no *Miranda* warnings.

Regarding the second interview, like the Court of Appeals, the Court likened this case to the U.S. Supreme Court's *Duckworth* case and held that the officer's *Miranda* warnings effectively informed the defendant of his constitutional rights and were a "fully effective equivalent" of the warning mandated by *Miranda*. The Court found that the officer simply described the procedure for the appointment of counsel to indigent persons in Virginia.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180583.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Johnson: September 17, 2018

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

Facts: An officer stopped the defendant for an equipment violation and failure to yield, arrested her and found cocaine and marijuana in the purse. During a conversation with the magistrate, the defendant made several incriminating statements. The defendant moved to suppress those statements.

At the motion to suppress, the officer could not recall the full context of the interaction between the magistrate and the defendant. The officer recalled the defendant making statements, and recalled that the magistrate asked the defendant "at least some questions," but he did not remember what the questions had been. The trial court found that, based on the lack of evidence about the questions the magistrate asked, it was unable to determine whether the circumstances in which the defendant made the statements were the functional equivalent of interrogation. The trial court suppressed the statements.

Held: Affirmed, motion properly granted. The Court explicitly dodged the issue of who had the burden, the Commonwealth or the defendant, to show whether the questions were the "functional equivalent of interrogation." The Court agreed that there was a lack of affirmative evidence of the precise context in which the defendant made her statements. Further, because of this lack of context, the Court held that the trial court did not err in finding that it was unable to determine whether the magistrate was acting only as a judicial officer during the conversation, or whether the magistrate was acting as an agent of law enforcement.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0551181.pdf

Commonwealth v. Briggs: January 22, 2019

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

Facts: While serving a penitentiary sentence, the defendant received narcotics unlawfully and stored them in his jail cell at Lawrenceville Correctional Center. A private company operates Lawrenceville, pursuant to a contract with the Virginia Department of Corrections to house inmates. The staff at Lawrenceville operates in the same manner as the staff at prisons run by employees of the Department of Corrections, but are private employees.

Guards found the narcotics and began transferring the defendant to administrative segregation (a.k.a. "the hole") by placing him in restraints and taking him to the medical unit for transfer. While the defendant was in a cell in the prison medical unit, waiting for his transfer, an investigator, who was also an employee of the private company operating Lawrenceville, asked the defendant if the contraband in the cell was his. The defendant admitted that it was. The interview consisted of only that one question, occurred with the cell door open, albeit one with a prison official standing in it. No one was armed. The defendant was familiar with the guards and investigator and had a good rapport with them.

After the Commonwealth indicted the defendant for the offense, the defendant moved to suppress his statement to the investigator, arguing that the investigator should have given him *Miranda* warnings before the interview. The Commonwealth argued that the defendant was not entitled to *Miranda* warnings under *Shatzer* and further that the investigator was no different from the private security guards employed by a department store, and therefore as a non-governmental agent, was not required to provide *Miranda* warnings. The trial court disagreed, suppressing the statement.

Held: Affirmed, motion properly granted. While the Court agreed that investigators do not have to provide *Miranda* warnings to all inmates, the Court found that the seizure and transfer of the defendant was the "functional equivalent of arrest" in this case. The Court explained that the defendant was subjected to additional and substantial restraints on his liberty, in addition to those he experienced every day as an inmate, and that the totality of the circumstances reasonably suggested a coercive environment. Therefore, the Court concluded that the defendant was in custody for the purposes of *Miranda* when the investigator questioned him regarding ownership of the contraband.

The Court rejected the analogy to a private security guard at a department store, writing that: "the running of a prison holding such inmates is certainly a law enforcement activity by any reasonable definition." Thus, the Court agreed that the investigator was acting as an agent of law enforcement when he interrogated the defendant and should have provided *Miranda* warnings.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1340182.pdf

Harris v. Commonwealth: March 26, 2019

Hampton: Defendant appeals his convictions for Burglary and Larceny on Fifth Amendment grounds.

Facts: The defendant broke into a residence and stole a firearm. Thereafter, he accidentally shot himself and went to a hospital. The hospital treated the defendant and released him. Following the defendant's discharge, the police transported him to the police station, where they provided a second chair to elevate his injured leg. They also gave him water and a cigarette, and they took numerous breaks during the two-hour interview. The defendant was not handcuffed or threatened, although he was dressed only in his hospital gown with a bedsheet wrapped around him. Police did not use any deceptive or confusing questioning tactics. The defendant confessed.

During the interview, the defendant did not tell the detectives anything about his pain until the end of the interview. Although he had taken pain medicine and testified that he fell asleep during the

interview, the trial court reviewed the videotape and found that the defendant was fully conversant with the detectives and seemed "appropriately responsive" to the questions. The trial court denied the defendant's motion to suppress his statement as involuntary, up until the point in the interview when the defendant "lost his ability to articulate."

Held: Affirmed. The Court repeated that, to find a statement involuntary, a court must conclude that it resulted from police coercion. In this case, the Court found that the defendant failed to establish any coercive police activity that rendered his statements involuntary.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1754171.pdf

Fourth Amendment – Search and Seizure

U.S. Supreme Court

Carpenter v. United States: June 22, 2018
585 U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507
Certiorari to the 6th Circuit Court of Appeals: Defendant appeals his robbery convictions on Fourth Amendment grounds.

Facts: The defendant and his accomplices committed a series of robberies. The FBI obtained court orders for seven days of the defendant's historical cell-site location information (CSLI) under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U. S. C. §2703(d). The Government used the information they collected to arrest and convict the defendant.

The defendant argued that, under the Fourth Amendment, the Government should have obtained a search warrant, supported by probable cause, for that information. The trial court and the Sixth Circuit rejected that argument, as the Fourth Circuit had in *United States v. Graham.*

Held: Reversed. In a 5-4 decision, the Court held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. Therefore, the Court ruled that Government conducted a "search" under the Fourth Amendment when it accessed historical cell phone records that provided a comprehensive chronicle of the user's past movements. As a result, the Court concluded that the Government must generally obtain a warrant supported by probable cause before acquiring such comprehensive records. The Court did not reverse the conviction in this case; instead it remanded the case to the Sixth Circuit, to decide whether to apply the exclusionary rule in this case.

The Court re-affirmed the "third party" doctrine, which holds that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. However, the Court distinguished this case, writing that: "digital data—personal location information maintained by a third

party—does not fit neatly under existing precedents." In particular, it distinguished the *Smith* case, where it had held that the phone numbers that someone dialed are not protected by the Fourth Amendment because the defendant "assumed the risk" that the company's records "would be divulged to police." The Court explained that: "while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records."

The Court declined to apply the "third party" doctrine to the historical CSLI collected in this case, due to "the unique nature of cell phone location records." The Court invoked *Katz* to explain that, despite the third party doctrine, a person does not surrender all Fourth Amendment protection by venturing into the public sphere. The Court explained that the third party doctrine must account for the nature of the particular documents sought to determine whether there is a legitimate expectation of privacy concerning their contents.

Regarding CSLI, the Court found that "society's expectation has been that law enforcement agents and others would not— and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period… Allowing government access to cell-site records contravenes that expectation." Mirroring its concerns in the *Jones* case, the Court wrote that "when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."

The Court also rejected the argument that, by voluntarily sharing his location data, the defendant waived his privacy interest in the records. The Court found that cell phone location information is not truly "shared," noting that these ubiquitous devices record a cell-site location "by dint of its operation, without any affirmative act on the part of the user beyond powering up." Thus, unlike the *Smith* case, "there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily 'assumed the risk' of turning over a comprehensive dossier of his physical movements."

Prior to this ruling, the standard under the Stored Communications Act, 18 U. S. C. §2703(d), to issue an order for such information was to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." The Court found that this standard falls below the standard of probable cause and therefore that the Stored Communications Act cannot be used to obtain the type of information in this case. The Court instead ruled that the Government must obtain a warrant.

The Court repeatedly limited the scope of its ruling, often referring to the "unique" nature of CSLI. For example, in a footnote, the Court explicitly declined to decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. The Court merely stated "It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search."

The Court also explicitly did not express a view on matters such as real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). The Court wrote: "We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security."

The Court also refused to extend its ruling to subpoenas for other types of information, writing: "This is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."

Lastly, the Court also pointed out, as it had in *Riley* and *Wurie,* that even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell- site records under certain circumstances. One example the Court noted was the "exigent circumstances" exception, in cases involving the "need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." The Court cited lower court opinions approvingly that concerned cases of bomb threats, active shootings, and child abductions.

In a footnote in the majority opinion, the Chief Justice rejected the "property rights" theory of the Fourth Amendment that other recent rulings have advanced. He wrote: "while property rights are often informative, our cases by no means suggest that such an interest is 'fundamental' or 'dispositive' in determining which expectations of privacy are legitimate."

ANALYSIS BY CASC

This case may have many implications in the future, but the immediate implication is clear: In any case where you are seeking historical cell-site location data, your law enforcement officers should obtain a search warrant for that data. Although traditional Fourth Amendment exceptions, such as exigent circumstances, consent of the device's owner, etc., may still apply in individual cases, the default rule should be to get a warrant. The Court did not explain whether there is a unit of time (1 hour, 1 day, etc.) for which a warrant is not required; in the absence of that guidance, the safest route is to always get a warrant.

The Court did not apply this holding to "real-time" location data, but Virginia already requires a warrant to obtain such data in most circumstances. For simple "toll records" (numbers dialed, date and time of call, and the like) and user account information, the Court appeared to leave the third-party doctrine in place. Therefore, the typical legal process that you currently use for that information should suffice.

As for information obtained from Internet providers, note that Federal Law already requires a warrant to obtain the contents of the communications someone transmits over the Internet. User account information would like fall within the third-party doctrine. As for IP address information, we should expect further litigation on that issue. Seeking a single IP address used by a suspect to gain access to a particular site does not implicate any of the concerns in this case. However, a Court could easily apply this case to find that obtaining information as extensive as a week of someone's "Google Timeline," with all the IP addresses that person used, requires a search warrant. (Of course, Google already requires a search warrant for such information.) *-EJC*

Full Case At:
https://www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

Fourth Circuit Court of Appeals

U.S. v. Kehoe: June 20, 2018
893 F.3d 232
E.D.Va.: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: The defendant carried a concealed handgun while drinking alcohol at a bar. Police received two 911 calls reporting the offense. Although the first caller did not provide his last name, he provided his first name and phone number, gave a description of the defendant, and stated that he was at the bar and saw the defendant carrying the gun. The second caller only provided a bare description of the offense, without any identification or basis of knowledge.

The officers knew that the bar was located in a "known problem area" where they had received such calls before. The officers entered the bar and learned from the bartender that several patrons had reported that a white man in a blue-and-white striped shirt was carrying a concealed weapon. They identified the defendant as the only man in the bar who matched the description. The officers spoke to the defendant and observed that the defendant's speech was "slightly slurred." The officers handcuffed the defendant and patted him down, locating his firearm.

The District Court denied the defendant's motion to suppress.

Held: Affirmed. The Court held that the officers had reasonable suspicion that, while in the bar, the defendant was carrying a concealed handgun and drinking alcohol in violation of § 18.2-308.012(B). The Court rejected the defendant's argument that the 911 calls were "effectively" anonymous tips, although the Court agreed the second call was anonymous, in that the officers had no information about the second caller's identity or basis of knowledge.

The Court found that the first 911 call was from an identifiable citizen-informant and therefore was both reliable and credible. By providing his first name and phone number, the caller allowed the police to ascertain his identity. The Court also pointed out that the first caller provided the basis of his knowledge: his presence at the bar and personally witnessing the offense.

The Court then noted that the officers corroborated several key facts from the first caller's tip before they seized the defendant, including by speaking to the bartender. The Court also observed that the bar was known for such problems in the past.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174536.P.pdf

U.S. v. Chavez, Castillo, et. al.: July 2, 2018
894 F.3d 593
E.D.Va: Defendants appeal their convictions for Murder in furtherance of Racketeering on *Brady* and Fourth Amendment grounds.

Facts: Defendants, all members of MS-13, participated in the murders of several individuals. During the investigation, the government obtained historical cell site tracking data through a court order under the Stored Communications Act, 18 U.S.C. §§ 2703(c)(1)(B), 2703(d), and the related provisions of the Virginia Code. At trial, at least two eyewitnesses testified about each murder. The government also introduced hours of recorded phone calls in which the defendants implicated themselves and each other in the charged crimes. Physical and forensic evidence further implicated the defendants.

At trial, the defendant's fellow MS-13 member also testified for the government. The government had arranged various benefits for the witness, including a letter to an immigration judge who ultimately granted the witness lawful status in the United States. At trial, the witness admitted to almost all of those benefits, but he at first testified that his immigration judge did not receive the letter. However, on cross-examination he corrected himself and stated that the judge did receive the letter.

During the trial, the defendants alleged prosecutorial misconduct. In particular, they complained that the prosecutors used objections to convey suggested answers to witnesses and that the prosecutor misstated the law in closing argument. The trial court issued corrective instructions to the jury but denied any other relief.

Two of the defendants received life sentences. Although they were both over 18 at the time of the offenses, they argued that their youth at the time of the offenses made their life sentences unconstitutional under *Miller v. Alabama*.

After trial, the defendants moved for a new trial on *Brady* grounds. They subpoenaed and received the cooperating witness' immigration file, which revealed that he had not disclosed his prior criminal history and MS-13 membership on some of his paperwork, although he admitted those facts elsewhere in the file.

The defendants moved to dismiss the case on various grounds, including violation of *Brady* and *Napue*, for failure to disclose exculpatory evidence and failure to correct the witness' false statement. The defendants also moved to suppress the cell site tracking data, which they argued during the appeal was a violation of the recent ruling in *Carpenter v. United States.*

Held: Affirmed. The Court first pointed out that, at trial, the jury heard extensive testimony about the immigration benefits that the witness received through his cooperation with the government. Regarding the alleged *Napue* violation regarding the letter to the immigration judge, the Court wrote: "It is difficult to imagine how a conviction could have been 'obtained by the knowing use of perjured testimony' when that testimony was almost immediately corrected by the witness himself." In addition, the Court noted there was no evidence that the government had any idea that the testimony was false.

Regarding the claim of prosecutorial misconduct, the Court found that the trial court's instructions to the jury cured any potential prejudice from the prosecutor's errors. The Court wrote: "Under *Darden*, prosecutors are not required to be perfect, and indeed they could hardly be expected to be. Prosecutors should of course strive for impeccable performance and seek to avoid all improper behavior, but isolated and immaterial incidents such as those at issue here do not implicate the overall fairness of the trial, and therefore do not necessitate a new one."

The Court declined to apply *Miller v. Alabama* to the defendants who received life sentences for crimes that they committed while over the age of 18. The Court found that, while they were young at the time of the offenses, it was not unconstitutional to sentence the defendants to life terms.

Lastly, the Court rejected the defendant's complaint that the government obtained cell-site location data in violation of *Carpenter v. United States*. The Court noted that the Supreme Court announced its decision in that case, which held that the government must obtain a search warrant based on probable cause to collect 7 days or more of historical cell-site data, on June 22. The Court wrote: "While *Carpenter* is obviously controlling going forward, it can have no effect on Chavez's case. The exclusionary rule's 'sole purpose . . . is to deter future Fourth Amendment violations'… Chavez does not, and cannot, deny that investigators in this case reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records. Without question, then, the good-faith exception to the exclusionary rule applies to investigators' actions here."

Full Case At:
http://www.ca4.uscourts.gov/opinions/164499.P.pdf

U.S. v. Young: October 25, 2018
(Unpublished)
South Carolina: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment grounds.

Facts: Police stopped a vehicle in which the defendant, a felon, was a passenger. The driver pulled into a hotel parking lot. When the officers learned that the driver was suspended, they arrested the driver. The officers were not able to locate the owner of the vehicle and decided to tow the vehicle. The officers searched the car and found two firearms belonging to the defendant under his seat.

During a motion to suppress, the Government relied on the "inventory search" exception to the warrant requirement. At the suppression hearing, an officer explained that after she arrested the driver, she and other officers began to prepare an inventory of the contents of the car. When asked why, the officer responded that the car "was being towed and that way we were not responsible for anything left in that vehicle." The government introduced no other testimony or documentary evidence regarding the Department's policy on inventory searches of cars. The trial court denied the motion to suppress, finding that the officers conducted their search "in good faith and for the purpose of securing objects in the vehicle and not because of any suspicion of criminal activity."

Held: Reversed. The Court held that the government failed to establish the existence of the standardized criteria required to apply the inventory search exception. The Court criticized the trial court for failing to determine whether the search was conducted according to "standardized criteria, such as a uniform police department policy, that sufficiently limited the searching officer's discretion," as required by the Fourth Amendment. The Court acknowledged that the bar for proving the existence of the requisite standard policy is not a high one and that the policy and criteria need not be in writing; "testimony regarding standard practices" will do. However, the Court emphasized that there must be "sufficient evidence" of the policy, whether through introduction of written police department rules and regulations or through police officer testimony.

In a footnote, the Court also repeated that a police officer's initial decision to tow and impound a vehicle – the necessary predicate for an inventory search – also must be governed by standardized criteria, but noted that the defendant did not raise that issue in this case.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174124.U.pdf

United States v. Thomas: November 8, 2018

W.D.Va: Defendant appeals his conviction for Production of Child Pornography on Fourth Amendment grounds.

Facts: The defendant sexually abused two children and recorded the assaults on his cellphone. Police arrested the defendant and seized his cellphone. Police obtained a search warrant for the defendant's cellphone.

The defendant moved to suppress the evidence obtained through the search warrant. The trial court found that, although the affidavit did not contain particularized facts establishing a nexus between the place to be searched – the phone – and the alleged sexual abuse, the officer knew that both the victims' mother and one of the victims had reported that the defendant used a phone in furtherance of his criminal conduct, calling the mother to attempt to arrange further interactions with her sons. The trial court concluded that the officer "reasonably could infer" that the defendant's cell phone was the same phone that he had used to contact the boys' mother.

Similarly, the trial court noted that, though the affidavit lacked any information about when the offenses and phone calls occurred, the officer knew that the defendant had visited a hotel with his victims and tried to contact their mother less than five months prior to the search, resolving any staleness issues that otherwise might arise. Thus, the trial court found that the search warrant survived a "good faith" analysis.

Held: Affirmed. The Court ruled that the district court properly considered facts known to the detective, but inadvertently omitted from his supporting affidavit, when it applied *Leon* in this case. Because the officer "harbored an objectively reasonable belief in the existence of probable cause," the Court found that the trial court correctly denied the defendant's motion to suppress.

The Court rejected the defendant's argument that the officer deliberately excluded facts from his affidavit under police policy and therefore forfeited his ability to rely on "good faith." The Court pointed out that the police department's policy was not to file deficient affidavits; it was to file affidavits that included enough, but no more than necessary, to establish probable cause.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174523.P.pdf

U.S. v. Terry: November 30, 2018

S.D.W.Va: Defendant appeals his conviction for PWID Methamphetamine on Fourth Amendment grounds.

Facts: During a drug investigation, police placed a GPS tracker on a car that the defendant had been driving. The officers did not have a warrant to do so; instead, they obtained a warrant after placing the GPS device on the vehicle. While tracking the vehicle, the officers used the GPS tracker to determine that the car was speeding. At the time, the defendant was the passenger and the owner was the driver. The officers stopped the car, noticed the smell of marijuana, searched the car, and found the defendant's drugs.

During the motion to suppress, an officer testified that he knew a warrant was required for the tracking device when he placed it on the car, and despite this knowledge, he failed to inform the Magistrate that he had already placed the GPS tracker before applying for the warrant—a practice that he admitted had also occurred in other cases.

Although the trial court found that the officers' conduct constituted a flagrant constitutional violation, it nevertheless denied the motion to suppress on the basis of standing.

Held: Reversed. The Court held that the defendant had standing and that the discovery of the evidence seized during the traffic stop was not sufficiently attenuated from the unlawful GPS search to purge the taint of the unlawful search. The Court explained that, even though he was not the owner, the defendant had standing to move to suppress the evidence that resulted from the illegal GPS search because he was the driver when officers surreptitiously placed the GPS device on the vehicle.

The Court then held that the evidence discovered as a result of the GPS search was "fruit of the poisonous tree" and should have been suppressed. The Court observed that the speeding violation was confirmed by—and intimately tied to— the illegal GPS search.

The Court refused to find that the officers' observation of the speeding vehicle was sufficiently attenuated from the illegal placement of the GPS to make the stop lawful. The Court acknowledged that a suspect's commission of a new, serious, and distinct crime will virtually always constitute a severe intervening circumstance that breaks the causal chain. However, the Court applied the *Strieff* reasoning, finding that proper attenuation analysis requires a case-specific balancing of the circumstances in light of the objectives of the exclusionary rule.

In this case, the Court found that the constitutional violation was flagrant. The Court refused to apply the attenuation doctrine, writing: "To hold otherwise would allow the government to disregard a constitutional requirement simply by using an illegal GPS search long enough to observe a minor traffic violation."

Full Case At:
http://www.ca4.uscourts.gov/opinions/174799.P.pdf

U.S. v. Lyles: December 14, 2018

Baltimore: Defendant appeals his conviction for Possession of a Firearm by Felon on Fourth Amendment Grounds

Facts: While investigating an unrelated case, police conducted a trash pull at the defendant's residence. The defendant is a convicted felon. They found three marijuana stems, three empty packs of rolling papers, and a piece of mail addressed to the defendant's house. Based on that evidence, the police sought a search warrant for the defendant's residence. The officer had others review the application, including by his superior and a state prosecutor, before submitting it to the magistrate. The magistrate issued a warrant for evidence of possession of controlled substances, possession with intent to distribute controlled substances, and money laundering. Police executed the warrant and found a firearm.

The district court suppressed the results of the search warrant.

Held: Affirmed, motion properly granted. The Court ruled that the affidavit did not provide a substantial basis for the magistrate to find probable cause to search the home for evidence of marijuana possession. The Court described that this was a single trash pull, and thus one less likely to reveal evidence of recurrent or ongoing activity.

The Court focused on the scope of the warrant, calling it an "astoundingly broad warrant—resembling a general warrant." For example, the Court pointed out that the warrant permitted, the seizure of any computers, toiletries, or jewelry, and the search of every book, record, and document in the home, but found that the connection of such things to the personal possession of marijuana is "to put it gently, tenuous." The Court complained that the warrant application lacked any nexus between cell phones and marijuana possession. The Court found insufficient reason to believe that any cell phone in the home, no matter who owns it, will reveal evidence pertinent to marijuana possession simply because three marijuana stems were found in a nearby trash bag.

The Court explained: "the miniscule quantity of marijuana detected in the trash pull, again, does not provide the requisite foundation to search any and all persons in the home, let alone any other location." The Court distinguished the *Gary* case, where there was an informant's tip, and the *Monteith* case, where there was extensive evidence of marijuana trafficking.

The Court refused to apply the good faith exception. The Court wrote: "objectively speaking, what transpired here is not acceptable. What we have before us is a flimsy trash pull that produced scant evidence of a marginal offense but that nonetheless served to justify the indiscriminate rummaging through a household."

Full Case At:
http://www.ca4.uscourts.gov/opinions/174787.P.pdf

U.S. v. Azua-Rinconada: January 28, 2019

E.D. N.C.: Defendant appeals his conviction for Illegal Entry on Fourth and Fifth Amendment grounds.

Facts: The defendant was living in the United States after entering unlawfully. Officers visited the defendant's residence for a "knock-and-talk." After knocking on the dwelling door, although the officers lacked the authority to forcibly enter the home, an officer stated: "Open the door or we're going

to knock it down." When the defendant's fiancé opened the door, an agent calmly greeted her. The two engaged in a non-confrontational conversation, with the agent speaking in a modulated and relaxed tone. At the end of the conversation, the agent did not demand entry into the residence but, instead, asked if the fiancé would "mind if [the officers] came in and talked" because it was "awfully cold" outside.

For most of his interaction with the officers, the defendant sat next to his fiancé on the couch, where he elected to sit when entering the room, with the officers on the opposite side of the room. The officers' language, demeanor, and actions were calm and nonthreatening, and the tenor of the interaction remained conversational. No one notified the defendant that he was not under arrest or that he was free to leave. The agent asked the defendant if he would fill out a questionnaire about his entry into the United States. The defendant agreed, and thereafter the agent explained the questions and directed the defendant to answer each question one by one. The defendant made several incriminating statements.

The trial court denied the defendant's motion seeking to suppress the statements and to suppress all evidence taken from his person and property.

Held: Affirmed. The Court rejected the defendant's argument that his fiancé did not freely consent to allow the officers into his home. The Court examined the threat from the officer at the door and concluded that, in context, it did not fatally infect the voluntariness of the consent.

The Court also rejected the defendant's argument that the officers should have read him *Miranda* warnings before questioning him. The Court found that the defendant's "freedom of action" was not "curtailed to a degree associated with formal arrest," meaning that he was not in custody and *Miranda* warnings were therefore not required.

In a concurrence, Justice Keenan agreed that any coercive effect from the officer's initial statement had dissipated by the time the defendant's fiancé motioned to the officers to enter the dwelling. However, she noted that in the absence of the ameliorating context in this case, a dishonest or reckless threat such as the one in this case would have been sufficiently coercive to invalidate her consent.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174344.P.pdf

U.S. v. Pratt: February 8, 2019

South Carolina: Defendant appeals his convictions for Sex Trafficking and Child Pornography on Fourth Amendment grounds.

Facts: The defendant prostituted a child, trafficking her over state lines and producing child pornography by taking photos of her with his phone. When FBI agents arrested the defendant, he confessed that his phone had images of the victim on his phone. Agents seized the phone. However, agents did not obtain a warrant for the phone for another 31 days. After obtaining and executing the warrant, they discovered child pornography on the device.

The defendant moved to suppress the search of the phone, contending that the FBI unreasonably delayed getting a search warrant. To justify the delay, the government pointed to the difficulty of coordinating the various law enforcement agencies involved in the investigation and deciding where to seek a search warrant for the phone. The government also argued that it could keep the phone indefinitely because it was an instrumentality of the crimes. The district court denied the defendant's motion.

Held: Reversed. The Court held that the delay in obtaining a search warrant was unreasonable. While the Court agreed that a strong government interest may justify an extended seizure, the Court cautioned that if the individual's interest outweighs the government's, an extended seizure may be unreasonable. The Court ruled that given the defendant's undiminished interest, a 31-day delay violates the Fourth Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay. In this case, the Court complained that the government's only explanation for the delay in obtaining a warrant was that the defendant committed crimes in both North Carolina and South Carolina and agents had to decide where to seek a warrant.

The Court distinguished a number of other cases where similar delays were lawful. For example, in *Vallimont*, the delay was reasonable because the investigator was diverted to other cases, the county's resources were overwhelmed, and the defendant diminished his privacy interest by giving another person access to the computer. The Court also cited *Laist*, where the delay was reasonable because the agents worked diligently on the affidavit; they were responsible for investigations in ten counties; and the defendant consented to the seizure and had been allowed to keep certain files, diminishing his privacy interest. The Court also cited with approval delays due to weekends, holidays, tactical decisions, legal questions, and technical needs.

In this case, however, the Court found that the FBI's resources were not overwhelmed, but that the agents here failed to exercise diligence by spending a whole month debating where to get a warrant.

The Court rejected the argument that the phone was, in and of itself, evidence and therefore could be held indefinitely because it had independent evidentiary value, like a murder weapon. The Court argued that only the phone's files had evidentiary value and that the agents could have removed or copied incriminating files and returned the phone.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174489.P.pdf

U.S. v. Agent: March 20, 2019 (Unpublished)

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

Facts: The defendant, a felon, hid a firearm in his home. While investigating another man who had used the firearm in a series of robberies, law enforcement learned that the defendant had the firearm. While several officers conducted a warrantless "protective sweep" of the defendant's home, another detective obtained a search warrant for the residence. The officers' decision to obtain the

warrant was not based on information discovered during the initial warrantless entry and the officers did not discover any evidence during that first entry. Upon receipt and execution of the search warrant, officers found guns and ammunition in the ceiling.

Despite the initial unlawful entry, the District Court denied the defendant's motion to suppress the evidence.

Held: Affirmed. In this case, because law enforcement obtained the evidence pursuant to a valid search warrant issued independent of the entry and seizure of the defendant's residence, the Court declined to suppress the evidence based on the "independent source" doctrine. The Court repeated that the two criteria to apply the independent source doctrine are: (1) that officers did not include any recitation of their earlier unlawful observations in their application for a warrant; and (2) that the alleged illegal entry did not affect the officers' decision to obtain a warrant.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174697.U.pdf

Virginia Supreme Court

Curley v. Commonwealth: July 26, 2018
295 Va. 616, 816 S.E.2d 587
Pittsylvania: Defendant appeals his convictions for Drug and Firearm offenses on Fourth Amendment grounds.

Facts: The defendant carried drugs for sale and a firearm in his car. An officer stopped the defendant for a traffic violation and noticed the defendant leaning over the passenger seat. When the officer asked the defendant for his driver's license, the defendant said it was located inside a backpack on the passenger seat. The defendant took approximately thirty seconds to retrieve it, though, and while he did, the officer observed that the defendant was "bent all the way" over the backpack with his chest to the top of the bag, which blocked the officer's view of the backpack's contents.

As the defendant handed over his driver's license, he appeared very nervous, his hand was shaking, and he was breathing heavily. The officer became concerned about the possibility of weapons and asked the defendant to exit the vehicle. The defendant consented to a search of his person. The officer searched the defendant and located a scale in the defendant's pocket that had white powder on it that appeared to be cocaine residue. The officer also noticed that the defendant appeared not to have smoking devices, which was inconsistent with personal use.

The officer searched the car and found the defendant's drugs and his firearm. The trial court denied the defendant's motion to suppress, as did the Court of Appeals in a *per curiam* order.

Held: Affirmed. Rejecting the defendant's "divide-and-conquer analysis" of the individual facts, standing alone, the Court looked collectively at three main factors: the defendant's furtive movements while in his vehicle after the traffic stop, the defendant's overly nervous demeanor, and the defendant's possession on his person of a digital scale with suspected cocaine residue. The Court held that there was

sufficient evidence to establish probable cause to search the vehicle, as there was a fair probability that contraband or evidence of a crime would be found. In a footnote, the Court distinguished the *Brown, Buhrman, Cost* and *Harris* cases, where officers had observed items such as hand-rolled cigarettes or film canisters and had no other indication of criminal activity.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170732.pdf

Collins v. Commonwealth: March 28, 2019

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

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

An officer went to the defendant's home, where he saw the same motorcycle, now partially covered with a tarp in the driveway. The officer walked up the driveway, past the point where he would normally turn to approach the front door, lifted the tarp, and discovered that the motorcycle now had different plates, which came back to another vehicle. The officer ran the Vin # and confirmed that it was stolen.

The officer then found the defendant at the front door of the house. The defendant first denied knowing about the motorcycle, then admitted he purchased it from the previous owner, and then admitted he had driven it recently and obtained new tires for it. Prior to trial, the defendant argued that the officer's examination of the motorcycle violated the Fourth Amendment. The trial court denied the motion to suppress. The Court of Appeals affirmed the trial court's ruling under the "exigent circumstances" exception to the Fourth Amendment, but did not address the "automobile exception" to the Fourth Amendment. The Virginia Supreme Court affirmed based on the "automobile exception" to the Fourth Amendment, rather than the "exigent circumstances" exception.

The U.S. Supreme Court reversed. Although the Court reaffirmed that, in general, officers may search an automobile without having obtained a warrant so long as they have probable cause to do so, the Court ruled that the automobile exception to the Fourth Amendment does not permit a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. The Court determined that the defendant's driveway was within the "curtilage" of the defendant's home. The Court then ruled that the automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage. The Court remanded the case to the Virginia Supreme Court.

[*Full disclosure – I prosecuted this case – EJC*].

Held: Affirmed, motion to suppress properly denied. On remand from the U.S. Supreme Court, the Court ruled that the exclusionary rule did not apply in this case even if no exigent circumstances existed because, at the time of the search, a reasonably well-trained officer would not have known that the search of the motorcycle, located a few feet across the curtilage boundary of a private driveway, was unconstitutional.

The Court repeated that "[t]he fact that a Fourth Amendment violation occurred — i.e., that a search or arrest was unreasonable — does not necessarily mean that the exclusionary rule applies." The Court noted that the Fourth Amendment prohibits unreasonable searches and seizures but, as the U.S. Supreme Court had written in *Davis v. United States*: "says nothing about suppressing evidence obtained in violation of this command." The Court then discussed the considerable body of caselaw, including the U.S. Supreme Court's ruling in *Scher v. United States,* that had applied the automobile exception to driveways without considering whether, and if so where, the curtilage boundary might intersect with the driveway and thus put the automobile exception off limits.

The Court applied the "good faith" exception as expressed in *Davis*: "The pertinent analysis of deterrence and culpability is objective" and "is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal in light of all of the circumstances." Under this standard, the Court repeated that the inquiry must be focused on the "flagrancy of the police misconduct" at issue and employ the "last resort" remedy of exclusion only when necessary "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."

In this case, the Court concluded that the exclusionary rule did not apply. The Court wrote: "After the United States Supreme Court's ruling in this case, police officers relying on the automobile exception must locate the curtilage boundary, if any, in every private-driveway- search case. But no judicial consensus had recognized the need to do so before this case."

Concurring with the majority opinion, three judges also argued that the exigent circumstances of this case justified the warrantless search.

Two judges wrote in dissent: "while it is unreasonable for a court to expect police officers investigating a crime to analyze the circumstances of a search with the nuanced analysis of a judge or law professor, but where there is ambiguity (especially when contemplating a search of a home or its curtilage) and the circumstances are not so exigent that a warrant cannot be obtained before the evidence is lost, removed, or destroyed, they should err on the side of obtaining one."

Two justices joined the dissent, agreeing with the dissent that exigent circumstances did not apply in this case, but also joined the majority opinion, agreeing that the exclusionary rule should not apply in this case under the "good faith" exception.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1151277.pdf
U.S. Supreme Court Ruling at:
https://www.supremecourt.gov/opinions/17pdf/16-1027_7lio.pdf

Virginia Court of Appeals
Published

Moore v. Commonwealth: June 5, 2018
69 Va. App. 30, 813 S.E.2d 916
Chesapeake: Defendant appeals his conviction for Possession of a Firearm by Convicted Felon on Fourth Amendment grounds.

Facts: Defendant, a felon, possessed a firearm in his car. When police tried to stop him for a traffic offense, he eluded the police, crashed his car, and then fled on foot. As other officers chased the defendant, one officer stayed at the crashed vehicle, which was in the middle of the road with its front door open on the driver's side. The officer was the only police officer on the scene. A crowd formed near the crashed vehicle. The officer looked inside the vehicle and saw an uncovered firearm in plain view near the gas pedal. The officer seized and secured the firearm.

The trial court denied the defendant's motion to suppress the firearm.

Held: Affirmed. The Court ruled that exigent circumstances existed when the officer saw the firearm in plain view on the floorboard of the vehicle from which the defendant had just fled, leaving the door open. The Court cited a number of cases that upheld the warrantless seizure of firearms in plain view from a vehicle when those firearms posed a potential threat to officer safety, including the U.S. Supreme Court case of *Cady v. Dombrowski*.

In this case, the Court noted that the firearm was in the middle of the road where members of the crowd or the defendant, if he had returned to his vehicle, could immediately have accessed the loaded firearm. The Court found that there was not sufficient time to secure a warrant as numerous people could have potentially obtained the firearm in the interim. Thus, taking control of the uncovered and loaded firearm was necessary for officer safety as well as for the safety of the gathered crowd.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0224171.pdf

Reed v. Commonwealth: October 16, 2018
Aff'd Court of Appeals Ruling of August 30, 2016
69 Va. App. 332, 819 S.E.2d 446
Alexandria: Defendant appeals his conviction for Distribution of Drugs on issuance of a Subpoena Duces Tecum for phone records.

Facts: Defendant sold illegal drugs. Police obtained an *ex parte* court order for the defendant's cellphone records under Va. Code § 19.2-70.3 and 18 U.S.C. §2703(d) and obtained roughly five months of records, including historical cell-site location information (CSLI) for the phone.

The Commonwealth indicted and arrested the defendant for distribution. Prior to trial, the Commonwealth requested the same cell site data, text message data, and incoming and outgoing detail records that it already had, this time using a subpoena duces tecum. The defendant moved to quash the subpoena duces tecum. The trial court granted the motion, in part, limiting the scope to two days before

and two days after the offense, but otherwise rejected the defendant's argument that the court order and subpoena duces tecum violated his Constitutional rights.

The Court of Appeals affirmed, but in June 2018, the U.S. Supreme Court ruled in *Carpenter v. U.S.* that the government may not obtain large amounts of historical CLSI without a search warrant supported by probable cause. The Court remanded this case to Virginia to reconsider in light of its ruling.

Held: Affirmed. The Court agreed with the Fourth Circuit's recent ruling in *Chavez* that, by complying with existing law at the time, the officers acted in good faith when they obtained the historical CLSI using a court order, rather than a search warrant. Thus, as there was no police or governmental conduct that needed to be deterred at the time it occurred, the Court did not apply the Exclusionary Rule.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1305154.pdf

Daniels v. Commonwealth: November 6, 2018
69 Va. App. 422, 819 S.E.2d 870
Williamsburg/James City County: The defendant appeals his conviction for Distribution of Drugs on violation of the Search Warrant statute.

Facts: Police obtained and executed a search warrant at the defendant's residence. The officers were investigating heroin packaged in wax paper bags stamped with red ink. Near the defendant's residence, an officer observed through a car window that the door handle contained a bundle of wax paper bags with a red stamp. The officer, based upon his training and experience, believed that the bundle was packaged heroin. He searched the car and seized the items. The defendant later moved to suppress that search, but the trial court denied the motion.

After searching the residence, the officers interviewed the defendant and confronted him with the evidence they discovered. The defendant made several inculpatory statements.

Prior to trial, the parties discovered that the magistrate never filed the search warrant affidavit with the clerk of the circuit court. However, the police had filed a copy of the search warrant affidavit with the circuit court five days after obtaining the search warrant. The defendant argued that under § 19.2-54, the magistrate's failure to file the required affidavit within the prescribed thirty days invalidated the search warrant and the search. The trial court denied the motion. The trial court also overruled the defendant's objection that his statements were the "fruit of the poisonous tree."

Held: Affirmed. Regarding the search warrant, the Court explained that the purpose of Code § 19.2-54's filing requirement, like the certification requirement, "'is to give the defendant reasonable opportunity to determine that the affidavit on file is the same one upon which the determination of probable cause was based.'" In this case, the Court pointed out that the defendant failed to point to any prejudice he suffered as a result of the affidavit not having been filed by the magistrate.

Regarding the defendant's motion to suppress his statements, the Court stated that the remedy for any material violation of the statutory requirements of Code § 19.2-54 is limited to the sanction

provided by the statute itself, writing: "There is no "fruit of the poisonous tree" application to any statutory sanction unless it is specified by the statute itself." The Court found no evidence of constitutional misconduct by the police officers in obtaining and executing the search warrant in this case.

Regarding the vehicle search, the Court found that warrantless seizure of the contraband observed in the vehicle was supported by probable cause developed pursuant to the plain view exception to the warrant requirement.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1351171.pdf

Carlson v. Commonwealth: February 12, 2019

Chesapeake: Defendant appeals his convictions for Manufacturing Marijuana and Obstruction on Fourth Amendment and Sufficiency grounds.

Facts: Officers responded to a trailer park for an unrelated call. When they arrived, they immediately smelled an overwhelming odor of marijuana. The officers walked around the trailer park, sniffing the windows and doors of all the nearby trailers in an attempt to narrow down the source of the smell. Eventually they reached the defendant's trailer, where they approached from the side of the trailer and sniffed around the windows and doors and located the smell of marijuana. The officers called a detective, who walked straight up to the main entrance house and smelled the odor as well. The detective obtained a search warrant for the residence.

After a standoff with the defendant, officers entered the defendant's home. They located approximately 176 marijuana plants as well as other marijuana, cash, an AK-47, ammunition, a digital scale, and a device used to smoke marijuana. Officers discovered a police scanner that was tuned to the same channel the police were using to communicate during the investigation, and the officers inside could hear radio communication from officers still outside.

The defendant moved to suppress the search. The defendant did not challenge the warrant itself, nor did he challenge the detective's entry onto the property prior to obtaining the warrant; he argued only that the detective's presence at the scene and his observations, and therefore the evidence obtained from them, were the fruit of the officers' initial unlawful entry onto the curtilage to sniff around the doors and windows. The trial court found that the officers acted unlawfully by sniffing around the doors and windows, but denied the motion on the grounds that the detective's own observations were an independent source of information for the search warrant and denied the motion.

At trial, an expert witness testified that the amount of marijuana found, as well as other evidence found, was inconsistent with personal use.

Held: Reversed. The Court accepted, for the purposes of the appeal, that the officers' entry onto the defendant's property to sniff around his widows violated the Fourth Amendment. The Court, in a footnote, explained that it would not consider the Commonwealth's argument that the initial

warrantless search was lawful. Instead, the Court decided that it was bound by the trial court's finding that the search was unlawful.

As a result, the only issue the Court decided was whether the evidence was nevertheless admissible under an exception to the exclusionary rule. The Court concluded that the unlawful entry prompted the subsequent presence of and investigation by the detective, which then led to the search warrant. The Court complained that the record contained no evidence about how the evidence would otherwise have been lawfully obtained had the officers not conducted the unlawful search of the defendant's premises, or that of the other residences. Instead, the Court noted that the only reason the detective could walk immediately to the correct trailer was because of the conduct that the trial court found to be unlawful.

In a footnote, the Court rejected the argument that the officers' searches of other properties were irrelevant, even though the defendant did not have standing to object to those searches. The Court found that the other unlawful searches "demonstrate that the police conduct was sufficiently culpable to justify application of the exclusionary rule." The Court also concluded that the other unlawful searches were relevant to whether there was a reasonable probability the police would have inevitably discovered the evidence through lawful means, reasoning that without the unlawful conduct, it is uncertain whether the officers would have been able to localize the odor of marijuana to the defendant's residence.

The Court agreed, however, that the evidence was sufficient to demonstrate that the defendant possessed the drugs with the intent to distribute them.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2058171.pdf

Virginia Court of Appeals
Unpublished

Commonwealth v. Suluki: June 5, 2018

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

Facts: The defendant robbed a convenience store at gunpoint. The victim provided a description to the police, who responded within minutes. An officer saw the defendant, who partially matched the description, walking into a building. The officer noticed that the defendant was carrying a bundle, consisting of a jacket wrapped around a plastic bag. The defendant's clothing did not match the description exactly, but was close to the description.

The defendant agreed to speak with the officer. He gave inconsistent statements about where he had been. The defendant claimed that the bundle contained food. When the officer asked the defendant if he could examine the bundle, the defendant refused.

When other officers arrived, the defendant refused the officer's direction to him to "come here" and to "put his hands behind his back." The officer grabbed the defendant's right arm and pulled it

behind his back, but the defendant kept his left hand in front of his body, still gripping the bundle, despite being instructed three times over a period of thirteen seconds to put his hands behind his back, five times to drop the bundle he was holding, and twice that he would be tased if he did not do so, each time in a tone of increasing urgency. The officers fired a taser at the defendant, subdued him, and searched him. The officers found the firearm and mask the defendant had used during the robbery on the defendant's person.

The trial court granted the defendant's motion to suppress. The trial court ruled that the officers unlawfully arrested the defendant by deploying a taser and handcuffing him and that the officers had no justification for handcuffing the defendant. The Commonwealth appealed.

Held: Reversed, motion to suppress improperly granted. The Court first ruled that the officers acted lawfully in handcuffing the defendant and displaying the taser to conduct a frisk for weapons. The Court repeated that brief, complete deprivations of a suspect's liberty, including handcuffing and the drawing of weapons, do not convert a stop and frisk into an arrest so long as the methods of restraint used are reasonable to the circumstances. The Court also noted that a police officer "is not required to ask of a person whom he reasonably suspects is engaging in criminal activity to explain his conduct and run the risk of receiving a bullet in answer to his questions."

The Court also reasoned that, even if the defendant was not required to show the contents of his bundle to the officer, his refusal to do so despite his claim that its contents were innocuous provided additional circumstances tending to confirm rather than dispel suspicion that the defendant was the armed robber and that he could still have the firearm in his possession, thereby posing a safety threat to the officers.

The Court then held that there was probable cause to arrest the defendant for obstruction of justice. Therefore, the Court ruled that the officers had lawful authority to conduct a search incident to arrest and the search in this case was lawful.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2068172.pdf

Malone v. Commonwealth: June 12, 2018

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

Facts: The defendant, a felon, carried a concealed firearm while walking down the street. After receiving a call regarding "three to five black males who were passing around a firearm," police noted that the defendant matched the description of one of the men. Officers stopped the defendant, but when they asked to pat him down, the defendant attempted to flee. When the officers grabbed him, the defendant struck an officer repeatedly in the face and then reached for his own waistband. However, another officer was able to stop him and detected that the defendant had concealed a handgun in his waistband. The officers seized the firearm and subdued the defendant.

The trial court ruled that the stop lacked reasonable suspicion, but refused to suppress the firearm under the "new and distinct crime" exception to the Fourth Amendment.

Held: Affirmed. In this case, on appeal, the parties had agreed that the officers lacked reasonable suspicion to stop the defendant and that the officers had detained, but not arrested, the defendant when he attempted to flee. The Court reaffirmed the "new and distinct crime" exception, which provides that if a person engages in new and distinct criminal acts during an allegedly unlawful police encounter, the exclusionary rule does not apply.

The Court found that, despite the illegality of the officers' attempt to detain and frisk him, the defendant was not privileged to use force to repel the unlawful detention. The Court repeated that, although a citizen may use reasonable force to repel an unlawful arrest, he may not do so to repel an unlawful detention and accompanying frisk for weapons. Thus, the defendant's conduct was sufficient to provide probable cause of new and distinct crimes, including assault and battery of law enforcement.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0989171.pdf

Bellamy v. Commonwealth: July 24, 2018

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

Facts: The defendant carried heroin for sale in his vehicle. An officer noticed the defendant's rejected-inspection sticker and began to follow the vehicle. The officer was familiar with the area in which the encounter occurred and identified it as a "high-drug, high-crime" area. The defendant steadily increased his speed and made "hurried" turns in a pattern that suggested evasion to the officer.

The officer stopped the defendant and learned the defendant's license was suspended and that the defendant had multiple arrests for drug offenses, including both possession and distribution. The officer also observed that the defendant and his passenger both exhibited signs of extreme nervousness, including heavy breathing and sweating despite it being late November. While the officer was writing several summonses, a K-9 unit arrived and indicated on the vehicle for the presence of narcotics. The officers then located the defendant's narcotics.

The trial court denied the defendant's motion to suppress, agreeing that although the traffic stop had been elongated by the wait for and use of the drug dog, the officer had independent reasonable, articulable suspicion of criminal activity beyond the traffic offenses.

Held: Affirmed. The Court, applying *Rodriguez*, held that the evidence established sufficient reasonable suspicion of criminal activity to allow the officer to detain the defendant long enough to allow the drug dog to confirm or allay that suspicion. The Court noted the defendant's evasive behavior while driving and his nervous behavior during the stop as well. Although the Court agreed that it would be natural for the defendant to be nervous, given his license status, that suspension did not explain the passenger's nervousness.

The Court repeated that the fact that an area is known to law enforcement as a location where criminal activity often occurs and the details of the defendant's criminal history both supported a finding of reasonable suspicion. The Court also repeated that the reasonable, articulable suspicion standard does not demand that there be no innocent explanations for the facts observed, or even that illicit conduct be the most likely explanation for what an officer learns or observes.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0496171.pdf

Frizell v. Commonwealth: July 24, 2018

Pittsylvania: Defendant appeals his convictions for Attempted Capital Murder of a Law Enforcement Officer and Use of a Firearm on Fourth Amendment grounds, denial of Expert Testimony, and Jury Instruction issues.

Facts: An officer spoke to multiple witnesses who told him that they saw a white SUV, driven by an individual matching the defendant's description, doing "doughnuts" and tearing up the grass in a park. The officer was already familiar with the defendant and the SUV from an interaction a year earlier. Shortly after speaking with the witnesses, the officer observed the SUV and saw the defendant standing next to it. The officer also observed property damage to the park.

The officer pulled behind the vehicle. The driver voluntarily pulled to the side of the road before the officer had activated his lights. The defendant exited the vehicle and attempted to forcibly remove the driver from the vehicle so that he could get into the driver's seat. After the officer ordered the defendant to stop, the defendant walked towards the officer, despite several directives from the officer. After the officer hit the defendant with a Taser, the defendant put his hand in his pocket, said, "you've done fucked up now," pulled out a gun and fired multiple shots at the officer. The officer shot the defendant, who barely reacted. Several more officers arrived and apprehended the defendant after hitting him again with a Taser.

The trial court denied the defendant's motion to suppress, where he had argued that the officer lacked a sufficient basis to stop him.

At trial, the defendant called an expert witness in clinical psychology to offer an opinion on the effect of alcohol and marijuana on the defendant's ability to premeditate. However, the defendant did not testify. The trial court allowed the expert to testify that alcohol and marijuana can potentially affect a person's ability to premeditate. When the trial court asked the expert if it was possible for him to formulate an opinion without relying on the defendant's statements, the expert admitted that it was not. The trial court excluded the expert's opinion.

The trial court denied the defendant's instruction that read "If, at the time of the attempted homicide, [defendant's] state of mind was caused by voluntary intoxication or other factors, and was such that a reasonable doubt exists as to his having acted deliberately and with premeditation, you cannot find him guilty of any offense greater than second degree murder."

The trial court also denied the defendant's instruction that read "For the attempt to kill to be willfull [sic], deliberate, and premeditated, it is necessary that it should have been done on purpose, and

not by accident, or without design; that [defendant] must have reflected with a view to determine whether he would kill or not; and that he must have determined to kill as a result of that reflection before he does the act-that is to say, the attempt to kill must be a premeditated attempt to kill on consideration."

Lastly, the trial court denied the defendant's request for an "imperfect self-defense" instruction.

Held: Affirmed. After providing an elaborate explanation of what a "doughnut" is, citing NASCAR and Wikipedia, the Court found that neither the driver nor the defendant ever submitted to the officer's authority under the Fourth Amendment until long after the defendant shot the officer. The Court observed that the defendant's liberty had not been restrained at the time of his criminal acts, and thus the Fourth Amendment was not implicated because he had not been seized.

Instead, the Court ruled that the entire encounter began consensually when the driver of the vehicle pulled over the SUV voluntarily, and the defendant immediately and exponentially escalated the situation. Though the officer had activated the lights on his cruiser after the driver pulled over, the Court concluded that no seizure had yet occurred; instead, the officer only eventually seized the defendant when other officers arrived at the scene of the incident, tased him again, and placed him under arrest.

The Court also found that, when he arrived, the officer had sufficient reason to believe that the defendant's SUV was the same vehicle that caused the property damage because it was in the area shortly after the incident was reported. The Court also agreed that "officers [have an] ability to make a gut determination that the damage in question is in excess of $1000."

Regarding the defendant's expert testimony, the Court agreed that, because the expert could not render an opinion without relying, at least in some part, upon out-of-court the defendant's hearsay statements, the expert's opinion on the defendant's specific mental state was inadmissible.

Regarding the defendant's first instruction on premeditation, the Court agreed it was improper because of the added language "or other factors." The found no authority supporting the instruction. Regarding the defendant's second instruction on premeditation, while the Court agreed that it was a correct statement of the law, the Court found that it was likely to cause confusion with the jury due to the multiple factual qualifications that it required for a finding of premeditation.

The Court also rejected the defendant's requested instruction that he had a reasonable belief that force was necessary to defend himself from the officer, pointing out that there was not more than a scintilla of evidence necessary to support the theory that the defendant's actions constituted imperfect self-defense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0028173.pdf

Commonwealth v. Gholson: August 21, 2018

Newport News: The Commonwealth appeals the granting of a motion to suppress.

Facts: In 2015, police executed a search warrant at the home of the defendant's mother and brother after a documenting drugs sales from inside the residence. The defendant did not live in the

home at the time of the search and had not done so since 2014. However, police had a history of encountering the defendant at the house, having served previous search warrants on the house in 2011 and 2012, finding the defendant present on both occasions. Police also frequently saw the defendant's car parked outside the house in 2014 and 2015. Police observed a man matching the defendant's description enter and exit the residence several times in the forty-five-minute span before the warrant was executed. When police arrived, the defendant ran towards the house when police exited their vehicles.

Inside the home, police found illegal drugs as well as mail belonging to the defendant. The defendant claimed ownership of shoes and a moped that officers found in the residence.

Police arrested the defendant. The trial court granted the defendant's motion to suppress the evidence obtained from that arrest.

Held: Suppression affirmed. The Court wrote: "the record before us is largely silent with respect to where in the home the drugs, marijuana, mail, shoes or moped were located." The Court emphasized the lack of evidence in the record that could demonstrate the defendant's dominion and control over the drugs, such as whether the defendant was present in the home during the drug transaction that served as the basis for the search warrant; whether other drug transactions occurred during the surveillance period during which the defendant made frequent trips in and out of the home; or where in the home the defendant's personal items were located in proximity to where the drugs were found.

The Court declined to infer ownership of the drugs in the house based on the defendant's ownership of the shoes and the moped. The Court wrote: "If the drugs were found atop Gholson's mail on the kitchen table, the Commonwealth's argument that the probable cause standard is met would be more meritorious, but the record before us provides no basis" for concluding the location of the drugs. The Court wrote: "we decline to recognize a concept of 'probable cause by association' as sufficient for an arrest."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0555181.pdf

Commonwealth v. Law: September 4, 2018

Franklin: The Commonwealth appeals the granting of a motion to suppress

Facts: An officer stopped the defendant for an equipment violation and learned that the defendant's privilege to drive was suspended. The officer gave the defendant a verbal warning for both the equipment violation and the fact that he was driving without a license. The officer was alone and did not use any physical force, did not restrain the defendant, and did not display any weapons.

After returning all of the defendant's documents, the officer inquired if he could ask a few more questions. The defendant had no response. The officer then asked if the defendant had any illegal drugs or guns in the car. The defendant responded that he did not. The officer asked if he could search the car for illegal drugs and guns, advising the defendant that the search would be terminated whenever the

defendant so requested. The defendant nodded, opened the door, stepped out of the car, and stood near the rear of the car. The officer searched the car and discovered contraband.

The defendant moved to suppress the search, prior to trial. After a hearing on the suppression motion, the trial court held that the officer had extended the traffic stop without any suspicion regarding the presence of illegal drugs and that the stop became an illegal seizure when the officer prolonged it to conduct inquiries that were not reasonably related to the original justification for the stop.

Held: Suppression Reversed. The Court held that the defendant's consent to search was not tainted by any illegal seizure. The Court explained that the trial court erred in its application of *Rodriquez* and *Matthews*, finding that the officer did not extend the duration of the traffic stop with unrelated inquiries or activities, nor did he ask for consent to search the defendant's car while the defendant was still detained for the traffic stop. The Court found that the events of the defendant's original detention were concluded after the officer returned the defendant's documents and issued his warnings, and that a reasonable person in the defendant's position would have felt free to leave. As a result, the Court ruled that the subsequent interaction was a new, consensual encounter.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0594183.pdf

Haywood v. Commonwealth: October 9, 2018

Richmond: Defendant appeals her conviction for Possession with Intent to Distribute on Fourth Amendment grounds.

Facts: Officers stopped a vehicle in which the defendant was a passenger for a traffic infraction. A K-9 officer arrived and immediately indicated for the presence of drugs on the defendant. The K-9 then examined the vehicle and the driver, but did not indicate for any contraband. When the K-9 returned to the defendant, the K-9 again indicated the presence of drugs. The officers searched the defendant on the scene, but did not find any drugs. The officers then transported the defendant to a police facility and searched him there, finding drugs near his waistband.

During a motion to suppress, the Commonwealth offered evidence that the dog had completed an initial training program and that she had received annual certifications from the Virginia Police Work Dog Association for the years 2011-2016. The evidence established that she never had a false alert during those certifications. The defendant argued that the officers' failure to find the drugs in the initial, roadside search vitiated any reasonable belief regarding his possession of drugs that the dog's positive alert could have provided. The defendant also argued that the dog unlawfully sniffed him without a warrant. The trial court rejected these arguments and denied the defendant's motion to suppress.

Held: Affirmed. The Court agreed that it was reasonable for the officers to continue to believe the dog was right even though they did not immediately find contraband. Furthermore, the Court pointed out that the officers knew that their initial search was limited by the location and

circumstances. Given these facts, the Court concluded that the officers reasonably and rationally could conclude that a more complete search done in the relative privacy of the precinct house would lead to the discovery of the drugs that the dog's multiple alerts indicated were there.

The Court repeated that: "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert," and thus, met the constitutional requirement. The Court added that, coupled with the evidence of the officer's training and experience, the history of the K-9 team, and the officer's testimony that the dog alerted consistent with her training, there was more than sufficient evidence to support the trial court's conclusion that the dog was reliable.

The Court found nothing about the initial, roadside search that required the officers to overlook the dog's extensive and impressive record of reliability in detecting drugs and conclude that her two alerts were mistaken. The Court ruled that the dog was sufficiently reliable to provide the basis for the officers' actions.

Lastly, the Court rejected the defendant's argument that the dog unlawfully searched him without a warrant. The Court pointed out that the police did not bring the dog into a protected area, such as the curtilage of a home, but merely onto on a public street. The Court found that that geographic difference was significant and placed this case within the general rule regarding the sniffs of drug dogs and outside the exception to that rule announced in *Jardines*.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1408172.pdf

Weathersby v. Commonwealth: October 9, 2018

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

Facts: An officer responded to a call for a larceny from a retail store. The officer observed the defendant, who matched the description of the fleeing suspect, at about 1:30 a.m. "crouching down" behind trucks in a parking lot adjacent to the store. The defendant fled before the officer could speak with him. The defendant ran through another nearby parking lot and jumped into some bushes when the officer was "within an arm's length" of him. The officer had to pull the defendant out of the bushes before he detained him. The officer patted-down the defendant and felt a "round, cylindrical tube" in the defendant's pocket. The officer removed it and found that it contained cocaine.

The trial court denied the defendant's motion to suppress the pat-down and suppress the removal of the pipe.

Held: Reversed. The Court held that the officer had a reasonable basis for frisking the defendant but lacked probable cause to remove the tube from his pocket. The Court repeated that the "plain feel" doctrine applies only when the object at issue is immediately recognized as being illegal. The Court complained that the officer did not say whether he suspected that the tube could be drug paraphernalia or that he suspected the object he felt was a weapon. The Court noted that there was no evidence that the thief had been armed and no evidence that the defendant was a drug user or that the area in which he was detained was a known drug area.

However, the Court acknowledged that the officer had lawfully patted-down the defendant. The Court agreed that the lawful purpose of the pat-down was to ensure that the defendant had no weapons before the officer placed him in his police car while arrangements were made with the store to do a show-up identification. The Court distinguished the *Baker* case because in that case, the officer stated that he "always patted down" pedestrians or bicyclists after he stopped them.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1325171.pdf

Collins v. Commonwealth: October 23, 2018

Richmond: Defendant appeals his convictions for Aggravated Malicious Wounding, Attempted Robbery, and Use of a Firearm on Fourth Amendment grounds.

Facts: The defendant shot a man during an attempted robbery. Police arrested the defendant. In the affidavit supporting a search warrant for his cellphones, an officer described the shooting and explained how the police identified the defendant as a suspect. The affidavit also noted that the defendant had cell phones in his possession when he was taken into custody. The affidavit then stated:

> "Based on your affiant's training and experience investigating weapons offenses, as well as violent crimes, your affiant knows that offenders communicate with cellular devices by means of phone conversations, text messages, email, and social media applications. Your affiant has investigated numerous violent criminal cases in which cell records, to include call detail lists, contact lists, text message content were instrumental in understanding how a violent crime occurred and who was involved. Therefore, . . . your affiant requests a search warrant be issued to further this investigation."

The magistrate issued a warrant to seize the phones, and later a circuit court judge issued a warrant to search the contents of the phones, based on a similar affidavit. Police found evidence on the phones.

The defendant moved to suppress the search of the phones, arguing that the only statements contained in the affidavit suggesting that evidence pertaining to the shooting would be found on his cell phone were the officer's generalized statements about the behavior of violent criminals. The defendant argued that the affidavit failed to establish any factual nexus between the shooting and the data contained on the cell phone.

The trial court determined that the affidavit for the search warrant, and the search warrant itself, lacked sufficient particularity and were facially overbroad. Nevertheless, the trial court concluded that the evidence obtained from the search of the cell phone was admissible under the "good faith" exception provided by *Leon.*

Held: Affirmed. Assuming without deciding that the warrant was not supported by probable cause, the Court held that a reasonable police officer could have relied in good faith on the warrant authorizing the search of the cell phones. The Court found that the warrant contained some indicia of probable cause establishing that evidence of the shooting would be found on the cell phone and noted

that both a magistrate and a circuit court judge concluded that probable cause supported the search. The Court concluded that the officer's statements established a nexus, "however slight," between the shooting and the cell phones.

In a footnote, the Court declined to address whether the circuit court correctly concluded that the underlying affidavit failed to establish probable cause to support the search warrant at issue, on the grounds that the Commonwealth did not challenge that ruling at trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0765172.pdf

Booker v. Commonwealth: November 6, 2018

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

Facts: A confidential and reliable informant told police that a man wearing particular clothes was in a particular area and was in possession of heroin for sale. Officers saw the defendant, who matched the description that the informant gave and was in a "high-crime" area. The officers confronted the defendant, but he denied having any contraband. The officers frisked the defendant but did not search inside of his pants or underwear. The officers did not locate any contraband and told the defendant that he was free to go.

However, minutes later an informant called police to share that the defendant had just stated: "The police did not find nothing on me. I hid the narcotics in my buttocks." The informant had previously provided reliable information about twenty to thirty times and had never provided inaccurate information. The officers re-approached the defendant and asked him to turn over his drugs. The defendant removed the heroin from his buttocks.

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

Held: Affirmed. The Court ruled that the officer had probable cause to stop and search the defendant. The Court repeated that it is not necessary that a police officer's belief regarding criminal activity be "correct or more likely true than false." In this case, the Court concluded that the informant's information was sufficient to demonstrate probable cause.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1542171.pdf

Commonwealth v. Coleman: November 20, 2018

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

Facts: Police encountered the defendant, stopped him, and frisked him. Although they did not find any evidence in his possession, after the defendant left, the officers found that he had discarded a firearm just prior to the encounter. The officers submitted the firearm to the lab. The lab identified the defendant's fingerprints on the firearm using fingerprints that had already been on file.

The trial court suppressed the firearm and the fingerprint results.

Held: Reversed, motion improperly granted. The Court did not reach the questions of whether the defendant was seized, if his alleged seizure was supported by reasonable suspicion, or if the trial court erred by improperly applying the exclusionary rule. Instead, the Court simply held that the fingerprint analysis in this case was not "fruit of the poisonous tree" and thus should not have been suppressed. The Court explained that the fingerprint comparison was produced from two pieces of legally-obtained evidence that were only "linked together" by the questionable police conduct. Therefore, the Court concluded that any taint arising from that conduct was sufficiently attenuated.

The Court noted that, in this case, both the print from the firearm and the defendant's prints in the CCRE were obtained legally. The print card in the CCRE was already in police hands prior to the defendant's encounter with the police, so it could not be "tainted" by anything that occurred that day. The firearm was abandoned and recovered by the police, who then sent it to the lab for analysis, which revealed the print on the magazine. Thus, the defendant's encounter with the police served only to "link together" two pieces of evidence already properly in police hands, as in the *Crews* case.

As in *Crews,* the Court rejected a "but-for" test for the Exclusionary Rule. The Court ruled that resulting fingerprint comparison was not subject to the exclusionary rule because any "Fourth Amendment violation in this case yielded nothing of evidentiary value that the police did not already have in their grasp."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1017182.pdf

Carroll v. Commonwealth: November 20, 2018

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

Facts: After he left a bar, the defendant led police on a high-speed chase on his motorcycle. After ending their pursuit, the officers returned to the bar and obtained the defendant's name, ran a record check, obtained a DMV photograph, and located his address. About thirty to forty minutes after the pursuit, the officers entered the curtilage of the defendant's home and knocked on his door. When they received no response from knocking on the front door of the residence, they decided that they would simply get a warrant for the defendant.

However, at that point, the defendant emerged from the residence, shoeless and shirtless, dressed only in sweatpants. One officer was positioned behind the motorcycle parked in the driveway, and another officer was positioned next to it; also, a vehicle blocked the path of the motorcycle. The defendant voluntarily spoke with the officers. The officers arrested the defendant.

The defendant moved to suppress the evidence obtained subsequent to the defendant's warrantless arrest on the grounds that that he was arrested within the protected curtilage of his home in violation of his Fourth Amendment rights. The trial court granted that motion.

Held: Affirmed, motion properly granted. The Court quoted the U.S. Supreme Court's recent ruling in *Collins v. Virginia*: "[j]ust like the front porch, side garden, or area 'outside the front window,' the driveway enclosure where [the police] searched the motorcycle constitutes 'an area adjacent to the home and "to which the activity of home life extends,"' and so is properly considered curtilage."

In this case, the Court found that, at the time of the arrest, although they had probable cause, the officers were not faced with any exigency when they encountered the defendant. The Court explained that, when he exited the house, the defendant seemingly posed no threat to the officers, nor did he show any signs that he intended to flee. Further, there was no evidence for the defendant to destroy. Thus, the Court agreed that the facts did not support the warrantless arrest.

Justice Haley filed a dissent, arguing that the exigent circumstances exception applied in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0975184.pdf

Hendrick v. Commonwealth: March 26, 2019

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

Facts: The defendant, a felon, carried a concealed handgun on his person. Police stopped a car in which he was a passenger for a traffic violation. An officer smelled marijuana and patted the defendant down. During the pat-down, the defendant made "furtive movements" by dropping his hands down several times to his waistband. The officer told him to keep his hands up" but the defendant dropped his hands several times towards his waistband, and he was also shifting his weight from his left to his right foot repeatedly. The officer searched the car but could not find any marijuana despite the odor. The defendant, who also smelled of marijuana, admitted to smoking marijuana earlier that day. In a police database, the defendant came up as probably armed.

The officer searched the defendant and found his concealed firearm. The trial court denied the defendant's motion to suppress the search.

Held: Affirmed. The Court found that the officer had probable cause to search the defendant based on the odor of marijuana emanating specifically from his person, his admittance that he smoked marijuana, the alert on the police system that the defendant was likely armed, and his furtive movements and nervous behavior. The Court pointed out in a footnote that the defendant's admission of smoking marijuana, coupled with the corroborating odor of burnt marijuana was more than enough probable cause to justify an arrest of the defendant for possession of marijuana and conduct a search incident to that arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0156182.pdf

Commonwealth v. Peyton: April 16, 2019

Newport News: Commonwealth appeals the granting of a Motion to Suppress on Fourth Amendment grounds.

Facts: Police obtained a search warrant for the defendant's residence. In their affidavit, they the explained that they witnessed the defendant leave the premises to be searched while in possession of marijuana. Then, after conducting an illegal drug transaction, the defendant immediately returned to the premises. The affidavit also indicated that it is standard practice for those involved in the distribution of illegal drugs to store additional illegal substances and other associated contraband inside their residence. The officers sought and obtained the warrant less than two hours from when they witnessed the drug transaction outside the address.

The defendant moved to suppress the results of the warrant. The trial court initially ruled that the affidavit set out sufficient probable cause to support the search warrant and denied the motion to suppress. After requesting additional briefing, however, the trial court reversed its prior ruling and issued a written opinion granting the motion.

Held: Reversed, motion improperly granted. Rather than addressing whether there was probable cause to issue the warrant, the Court held that there was a sufficient nexus between the illegal activity and the place to be searched to apply the good faith exception to the exclusionary rule. The Court found that the underlying affidavit described with particularity the items sought, the place to be searched, and the transaction that led the police to believe that the items sought would have been found at the place to be searched. The Court distinguished this case from the *Janis* case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2006181.pdf

Jones v. Commonwealth: April 23, 2019

Henrico: The defendant appeals his convictions for Possession of Ammunition and Possession of Heroin on Fourth Amendment grounds.

Facts: Police stopped the defendant for a traffic violation. When the defendant opened his car door, the officer saw folded lottery tickets consistent with drug packaging in the door pocket in plain view. The officer testified at the suppression hearing that, in the previous few years, "well over fifty percent of the time, heroin packaged for sale or use is packaged in folded lottery tickets of some kind." The officer removed the folded lottery ticket from the door compartment, found no drugs, and then removed a second ticket and found drugs. The trial court denied the defendant's motion to suppress.

Held: Reversed. The Court held that the presence of folded lottery tickets in the defendant's car did not give the officer probable cause to seize and search the tickets and, thus, the trial court erred in denying the defendant's motion to suppress evidence. The Court explained that a police officer may seize and search an item only if its "incriminating character" is "immediately apparent." Likening this case to the *Grandison*, *Cost*, and *Cauls* cases, the Court argued that the incriminating nature of the folded tickets was not immediately apparent to the officer.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0382182.pdf

Identifications - Pretrial

Virginia Court of Appeals
Unpublished

Clark v. Commonwealth: September 24, 2018

Virginia Beach: Defendant appeals his convictions for Larceny and Conspiracy on sufficiency of the evidence.

Facts: The defendant and his confederate walked through a store and placed various items on a cart. As the defendant walked out of the store with the cart, store personnel stopped him and asked for a receipt. The defendant objected, complaining that they were only asking for a receipt because of his race, and continued out of the store without paying for the item. Store employees watched the defendant and his confederate load the stolen items in a car.

Police showed one employee a photo array of six pictures, one of which included the defendant. When she first reviewed the pictures, she said "maybe" when she saw the defendant's photo. Reviewing the array a second time, she said: "I think that's him. I believe this is the one." At trial, the witness explained that when she saw the photo array she was suffering from a tumor that affected her vision. At trial, she positively identified the defendant as the person who had stolen merchandise, as did two other employees.

The defendant also used a similar scheme to steal items from another store, but this time, when staff confronted him, he brandished a razor and threatened them, escaping again. The loss prevention officer who tried to stop the defendant also reviewed other videos from other thefts and identified the defendant in the videos also stealing other items. At trial, the loss prevention officer identified the defendant as the person whom he had seen in the store and in the videos.

The defendant argued that the identifications were insufficient to prove his identity. He also argued that there was insufficient evidence of a conspiracy regarding the first theft.

Held: Affirmed. The Court found that the witnesses each sufficiently identified the defendant, either based on their opportunity to view him in person, or having seen him on video. The Court repeated that inconsistencies in the eyewitnesses' testimony did not render their identifications unreliable.

Regarding the Conspiracy conviction, the Court observed that the defendant and his co-conspirator engaged in "very intricate" movements while in the store, "specifically and quite deliberately" selecting items and placing them on a flat cart. The Court also noted that the defendant and his co-conspirator loaded the items in a car and left together in that car.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1579171.pdf

Jury Selection

Virginia Court of Appeals
Published

Hamilton v. Commonwealth: August 7, 2018
69 Va. App. 176, 817 S.E.2d 343
Richmond: Defendant appeals his conviction for Obstruction of Justice on *Batson* and sufficiency grounds.

Facts: Officers responded to the defendant's residence for a domestic assault call. When the officers arrived inside the residence, they explained to the defendant that they were the police and displayed badges. Despite identifying themselves as officers and informing the defendant that they were there to conduct an investigation, the defendant ignored their repeated directives to step into the main room, stating, "I don't care. Shoot me." The defendant then moved into the back bedroom and used force against the officers when he pushed the door closed while the officers pushed to keep the door open from the other side. The officers had to kick down the door. After the officers captured the defendant, he continued to pull his arms together so forcefully that he temporarily prevented the officers from handcuffing him.

At trial, using preemptory strikes, the prosecutor struck four individuals, three of whom were African-American. The defendant objected on *Batson* grounds. In response, the prosecutor explained one juror had previously been charged with a crime and indicated on a survey provided by the trial court that she was unemployed. The prosecutor also explained that the second juror was struck because she also indicated on the survey that she was unemployed. Regarding the third juror, the prosecutor explained: "He did not answer any of the questions. I really didn't have much information as to him. I think going down the line, the jurors that remained on the panel… all gave answers to some questions and I had additional information about them which I did not have from" the last juror.

The trial court overruled the *Batson* objection, observing "I also had an opportunity to observe the jurors and in particular Ms. [T.W.] when she spoke of her former criminal charge. And with the other jurors, I'm satisfied that [the prosecutor] has offered a race-neutral basis for his strikes."

Held: Affirmed. The Court first addressed the *Batson* issue, relying on the trial court's determinations. The Court observed that many of the questions asked during voir dire solicited non-verbal responses from the jury or responses that could only be observed by witnessing the proceedings in person. The Court embraced the US Supreme Court's admonition not to "on the basis of a cold record easily second-guess a trial judge's decision about likely motivation."

In a footnote, the Court rejected the defendant's argument that: "'unemployed' is a code word for saying that they're African American," noting that it has previously held that unemployment can be a race-neutral basis for a peremptory strike. In another footnote, the Court also found that the trial court was under no obligation to review the voir dire or juror surveys in order to determine if there was a similarly situated Caucasian juror who was not struck – absent an argument from defense counsel at trial.

Regarding sufficiency, the Court found that the defendant's statements clearly illustrated his intention to prevent the officers from performing their investigation. The Court also noted that the officers had to kick down the door to continue their investigation while potentially putting themselves at risk if the defendant had retrieved a weapon or shot at them through the closed door. The Court agreed that this behavior violated § 18.2-460(A). The Court also found that the defendant also obstructed justice by physically resisting the officers' efforts to handcuff him.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0814172.pdf

Stevens v. Commonwealth: May 7, 2019

Norfolk: The defendant appeals his convictions for Robbery and related offenses on the trial court's refusal of his peremptory challenge on *Batson* Due Process grounds.

Facts: The defendant robbed a bank. At trial, the defendant used all five of his peremptory strikes on Caucasian jurors. The Commonwealth raised a *Batson* challenge to the defendant's peremptory strikes. Although the defendant provided race-neutral reasons for four of the strikes, the trial court found the defendant's purported race-neutral explanation for striking the fifth juror, that he "couldn't get a read on" the juror, unconvincing. The trial court noted that the juror's non-responsiveness was probably the result of the fact that no question was ever directed to her individually. The defendant never asked the juror any specific questions about her background, beliefs, or biases. The trial court also observed that the juror did not exhibit any non-verbal body language or other physical signals that could potentially have displayed bias or a visceral reaction to one of the questions.

Held: Affirmed. The Court reviewed the history of the *Batson* case and applied *McCollum*. The Court wrote that it "cannot and should not substitute its judgment for that of the trial court when the issue rests so heavily upon direct observation and a determination of credibility."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1926171.pdf

Juror Misconduct

Fourth Circuit Court of Appeals

Porter v. Zook: August 3, 2018
898 F.3d 408
E.D.Va: Defendant seeks *habeas* relief from his Capital Murder conviction on juror misconduct issues.

Facts: The defendant shot a police officer in the head, killing him. When asked at voir dire whether any jurors had relatives in law enforcement, a juror did not disclose that his brother was a law enforcement officer in the adjacent jurisdiction. The defendant discovered that fact after his conviction and sought *habeas* relief, arguing that the juror was biased and that the juror committed misconduct by failing to disclose a potential basis for a strike for cause. The state and federal courts denied his petition

Held: Reversed. Regarding the defendant's claim of juror bias, the Court ruled that the district court failed to recognize the applicability of Supreme Court precedent requiring a hearing in these circumstances; erected inappropriate legal barriers and faulted the defendant for not overcoming them; and ignored "judicially-recognized factors" in determining whether a hearing is necessary.

While the Court agreed that a *habeas* court is not "obliged to hold an evidentiary hearing any time that a defendant alleges juror bias," the Court repeated that counsel are entitled to expect that when venire panel members take an oath to answer truthfully all questions put to them in voir dire, they "will indeed tell the whole truth." The Court wrote: "Point blank, Juror Treakle did not candidly answer counsel's question. Appellant is entitled to find out why."

The Court remanded the case with instructions that the district court allow discovery and hold an evidentiary hearing on the defendant's two separate juror bias claims.

Full Case At:
http://www.ca4.uscourts.gov/opinions/1618.P.pdf

United States v. Birchette: November 7, 2018

E.D.Va: Defendant appeals his convictions for Drug and Firearm offenses on refusal to permit an investigation into Juror Racial Animus

Facts: Defendant committed drug and gun offenses. During a jury trial, the trial court gave the jury an *Allen* charge. Thereafter, an African- American juror asked the trial court to release her from the jury, without explaining why. The trial court declined the juror's request. Eleven minutes later, the jury returned a unanimous verdict of guilty on all counts.

After the verdict, an African-American juror approached defense counsel and said he was "sorry they had to do that," that during deliberations "a white lady said: 'the two of you are only doing this because of race'," but that "we worked it all out." Another African- American juror also stated that a fellow juror said to the two African-American jurors: "It's a race thing for you." That juror told defense counsel: "I appreciate what y'all do."

After the trial, in an *ex parte* motion, the defendant requested leave to interview jurors for evidence of racial animus, but the trial court denied the request.

Held: Affirmed. The Court found that the district court acted well within its discretion in finding that the defendant was unlikely to find evidence that a juror voted to convict him because of racial animus. The Court construed the U.S. Supreme Court's holding in *Peña-Rodriguez v. Colorado* that courts may receive evidence from jurors impeaching a jury verdict after a "threshold showing" that "racial animus was a significant motivating factor in [a] juror's vote to convict." In this case, the Court concluded that the comments could reasonably be interpreted as the sort of "offhand comment[s]" that the Supreme Court held are insufficient to overcome the no-impeachment rule.

Regarding the comment that the jury "worked it all out," the Court wrote: "Far from casting 'serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict,' this statement reflects a jury's working in the way that juries should."

Full Case At:
http://www.ca4.uscourts.gov/opinions/174450.P.pdf

Juveniles

Fourth Circuit Court of Appeals

Malvo v. Mathena: June 22, 2018
893 F.3d 265
Note: The U.S. Supreme Court will hear this case during its 2019 term
Fairfax, Spotsylvania: Defendant seeks *habeas* relief for his life sentences imposed for multiple murder convictions.

Facts: The defendant and his father murdered numerous people as part of a "sniper team" that terrorized the D.C. area during the fall of 2002. The defendant was seventeen years old at the time.

At the trial for his murders in Fairfax County, the jury found the defendant guilty of two counts of capital murder. It declined to recommend the death penalty, and instead sentenced him to two terms of life imprisonment without parole. Seeking to avoid the death penalty in Spotsylvania County, the

defendant pled guilty there to one count of capital murder and one count of attempted capital murder and received two additional terms of life imprisonment without parole.

Thereafter, in a series of cases, the U.S. Supreme Court held that juvenile defendants cannot be sentenced to life imprisonment without parole unless they committed a homicide offense that reflected their permanent incorrigibility, meaning that sentences that were legal when imposed must be vacated if they were imposed in violation of the Court's new rules. As a result, the defendant sought *habeas* relief from his life sentences. The District Court vacated the defendant's sentences.

Held: Affirmed, sentences vacated. The Court held that the defendant's sentences must now be vacated because the retroactive constitutional rules for sentencing juveniles adopted subsequent to the sentencings were not satisfied at the time. The Court remanded the cases for resentencing to determine (1) whether the defendant qualifies as one of the rare juvenile offenders who may, consistent with the Eighth Amendment, be sentenced to life without the possibility of parole because his "crimes reflect permanent incorrigibility" or (2) whether those crimes instead "reflect the transient immaturity of youth," in which case he must receive a sentence short of life imprisonment without the possibility of parole.

The Court ruled that a sentencing judge violates *Miller*'s rule any time she imposes a discretionary life-without-parole sentence on a juvenile homicide offender without first concluding that the offender's "crimes reflect permanent incorrigibility," as distinct from "the transient immaturity of youth." The Court observed that the first jury was not allowed to give a sentence less than life without parole. The Court also found that the plea agreement in the second case did not provide any form of express waiver of the right to challenge the constitutionality of his sentence in a collateral proceeding in light of future Supreme Court holdings, nor was he advised during his plea colloquy that his plea would have that effect.

The Court concluded by writing: "We make this ruling not with any satisfaction but to sustain the law. As for Malvo, who knows but God how he will bear the future."

Full Case At:
http://www.ca4.uscourts.gov/opinions/176746.P.pdf

U.S. v. Chavez, Castillo, et. al.: July 2, 2018
894 F.3d 593
E.D.Va: Defendants appeal their convictions for Murder in furtherance of Racketeering on *Brady* and Fourth Amendment grounds.

Facts: Defendants, all members of MS-13, participated in the murders of several individuals. During the investigation, the government obtained historical cell site tracking data through a court order under the Stored Communications Act, 18 U.S.C. §§ 2703(c)(1)(B), 2703(d), and the related provisions of the Virginia Code. At trial, at least two eyewitnesses testified about each murder. The government also introduced hours of recorded phone calls in which the defendants implicated themselves and each other in the charged crimes. Physical and forensic evidence further implicated the defendants.

At trial, the defendant's fellow MS-13 member also testified for the government. The government had arranged various benefits for the witness, including a letter to an immigration judge who ultimately granted the witness lawful status in the United States. At trial, the witness admitted to almost all of those benefits, but he at first testified that his immigration judge did not receive the letter. However, on cross-examination he corrected himself and stated that the judge did receive the letter.

During the trial, the defendants alleged prosecutorial misconduct. In particular, they complained that the prosecutors used objections to convey suggested answers to witnesses and that the prosecutor misstated the law in closing argument. The trial court issued corrective instructions to the jury but denied any other relief.

Two of the defendants received life sentences. Although they were both over 18 at the time of the offenses, they argued that their youth at the time of the offenses made their life sentences unconstitutional under *Miller v. Alabama*.

After trial, the defendants moved for a new trial on *Brady* grounds. They subpoenaed and received the cooperating witness' immigration file, which revealed that he had not disclosed his prior criminal history and MS-13 membership on some of his paperwork, although he admitted those facts elsewhere in the file.

The defendants moved to dismiss the case on various grounds, including violation of *Brady* and *Napue*, for failure to disclose exculpatory evidence and failure to correct the witness' false statement. The defendants also moved to suppress the cell site tracking data, which they argued during the appeal was a violation of the recent ruling in *Carpenter v. United States.*

Held: Affirmed. The Court first pointed out that, at trial, the jury heard extensive testimony about the immigration benefits that the witness received through his cooperation with the government. Regarding the alleged *Napue* violation regarding the letter to the immigration judge, the Court wrote: "It is difficult to imagine how a conviction could have been 'obtained by the knowing use of perjured testimony' when that testimony was almost immediately corrected by the witness himself." In addition, the Court noted there was no evidence that the government had any idea that the testimony was false.

Regarding the claim of prosecutorial misconduct, the Court found that the trial court's instructions to the jury cured any potential prejudice from the prosecutor's errors. The Court wrote: "Under *Darden*, prosecutors are not required to be perfect, and indeed they could hardly be expected to be. Prosecutors should of course strive for impeccable performance and seek to avoid all improper behavior, but isolated and immaterial incidents such as those at issue here do not implicate the overall fairness of the trial, and therefore do not necessitate a new one."

The Court declined to apply *Miller v. Alabama* to the defendants who received life sentences for crimes that they committed while over the age of 18. The Court found that, while they were young at the time of the offenses, it was not unconstitutional to sentence the defendants to life terms.

Lastly, the Court rejected the defendant's complaint that the government obtained cell-site location data in violation of *Carpenter v. United States*. The Court noted that the Supreme Court announced its decision in that case, which held that the government must obtain a search warrant based on probable cause to collect 7 days or more of historical cell-site data, on June 22. The Court wrote: "While *Carpenter* is obviously controlling going forward, it can have no effect on Chavez's case. The exclusionary rule's 'sole purpose . . . is to deter future Fourth Amendment violations'… Chavez does

not, and cannot, deny that investigators in this case reasonably relied on court orders and the Stored Communications Act in obtaining the cell site records. Without question, then, the good-faith exception to the exclusionary rule applies to investigators' actions here."

Full Case At:
http://www.ca4.uscourts.gov/opinions/164499.P.pdf

Fourth Circuit Court of Appeals

Bowling v. Director: April 2, 2019

Lynchburg: Defendant seeks *habeas* relief for the denial of parole for his life sentence as a juvenile

Facts: The defendant murdered a store manager on Christmas Eve, 1991, during a robbery, after the man told him he was not able to open the store's safe. The victim had begged the defendant not to kill him and offered whatever cash he had on his person, but the defendant stated "Well, I guess I will have to kill you then" and shot him. The defendant was a juvenile at the time. The trial court convicted the defendant of capital murder and related offenses and sentenced the defendant to two life sentences, plus six years and thirty days, with the possibility of parole.

The Virginia Parole Board has considered and denied the defendant's eligibility for parole annually since 2005. In 2017, the defendant sought *habeas* relief in the Virginia Supreme Court, and then Federal Court, arguing that it is cruel and unusual punishment for the parole board to deny juvenile offenders parole without specifically considering age-related mitigating characteristics as a separate factor in the decision- making process. However, the Virginia Supreme Court and District Court dismissed the *habeas* petition.

Held: Affirmed. The Court concluded that the protections of *Miller* and *Montgomery* have not yet reached a juvenile offender who has and will continue to receive parole consideration, even when their sentence is practically equivalent to life without parole. The Court examined rulings from many other jurisdictions and noted that the Supreme Court has placed no explicit constraints on a sentencing court's ability to sentence a juvenile offender to life with parole.

The Court found that states need not resentence every juvenile offender entitled to *Miller* relief. Rather, states may remedy *Miller* violations by providing juvenile offenders the same protection that the defendant has already received: parole consideration. In this case, the Court found that the Virginia Parole Board complied with *Montgomery* by considering the defendant's age at the time of the offense, as well as any evidence submitted to demonstrate his maturation since then, and account for the concern at the heart of *Graham* and *Miller*: "that children who commit even heinous crimes are capable of change."

The Court also ruled that Virginia provided the defendant with Due Process under the Fourteenth Amendment, as the Parole Board provided the defendant with annual opportunities to be heard and also annually provided a list of reasons why he was found ineligible for parole. The Court

reaffirmed that, even under *Miller*, there is "no constitutional or inherent right" to parole proceedings. However, the Court agreed that because Virginia law gives rise to an expectation of parole proceedings, the Commonwealth has created a liberty interest in parole consideration. Nevertheless, the Court cautioned that there is no Virginia law or regulation that gives a defendant a legitimate expectation of release on parole.

Full Case At:
http://www.ca4.uscourts.gov/opinions/186170.P.pdf

Virginia Court of Appeals
Unpublished

Waters v. Commonwealth: July 3, 2018

Danville: Defendant appeals his convictions for Robbery and Use of a Firearm on refusal to consider the appeal of his Juvenile Transfer and Grand Jury matters.

Facts: On February 6, the J/Dr Court held a transfer hearing regarding the defendant's case and transferred it to Circuit Court. The J/Dr Court sent the file to Circuit Court the next day. Due to an error, although the defendant orally noted his appeal, the J/Dr Court clerk did not prepare a notice of appeal until March 7. The Circuit Court ruled that the defendant's appeal was untimely and rejected it.

On March 8, the Circuit Court advised the Commonwealth it could seek indictments against the defendant. The Circuit Court did not issue an order to that effect until April 6. However, the Commonwealth obtained indictments on March 14. The defendant unsuccessfully argued that § 16.1-269.6(B) prohibited the Commonwealth from obtaining indictments until after the Circuit Court had advised the Commonwealth, in writing, that it could obtain indictments.

The grand jury that met in March was composed of the same grand jurors that had met in February. At the end of the February session, the Circuit Court had stated in its order that the grand jury was "discharged." The Circuit Court rejected the defendant's argument the order completely discharged the grand jury and that under § 19.2-194, once discharge took place, it was improper to use the same panel of grand jurors to indict other persons. The Circuit Court found that its order merely meant that the jurors were "discharged" for that day, paid their per diem, and directed to come back in a month.

Held: Affirmed. The Court first found that the defendant's oral notice of appeal was insufficient and that ruled that Rule 8:20's plain language governs appeals of transfer decisions; Rule 8:20 specifically requires that appeals from the juvenile and domestic relations district courts be noted in writing, and Code § 16.1-269.4 requires appeals from JDR court transfer orders be filed within ten days of the order. Despite the defendant's reference to Rule 3A:19, the Court pointed out that Rule 3A:19 addresses only appeals from "convictions." The Court repeated that: "one who takes the shortcut of asking the clerk's employees to examine the record for him relies on the response at his peril." The Court agreed that the defendant failed to perfect an appeal of the transfer order.

The Court then repeated that, under its terms, § 16.1-269.6(B) only applies when a party appeals a transfer decision. The Court compared the current version of this statute to the previous version and also reviewed an Attorney General's opinion on the issue. The Court ruled that, just as the Circuit Court is no longer required to review cases that are not appealed, the entry of the enabling order before the Commonwealth may seek indictments is also no longer necessary in cases that have not been appealed. In this case, the defendant failed to properly appeal and therefore the Commonwealth could seek indictments after the transfer hearing without an order from the Circuit Court once the appeal period had expired.

Lastly, the Court held that the trial court properly interpreted its own order and determined that it did not "discharge" the grand jury in February, but merely discharged them for the day.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1092173.pdf

Ross v. Commonwealth: October 30, 2018

Bedford: Defendant appeals his sentence for Capital Murder and related offenses on Eighth Amendment grounds

Facts: The defendant murdered one of his classmates while the defendant was a juvenile. In 1999, the defendant pled guilty to capital murder, robbery, and using a firearm to commit murder and robbery. In 2016, a federal district court granted the defendant's *Habeas* writ in light of *Graham v. Florida* and *Miller v. Alabama* and ordered resentencing, finding that the original case was settled via a plea agreement and there was no evidence in the record that the trial judge "considered any factors relating to youthful immaturity or incorrigibility."

The trial court held a re-sentencing and imposed a total active sentence of ninety-nine years.

Held: Affirmed. The Court first repeated that, under *Angel*, geriatric parole provides prisoners who committed their crimes as juveniles with the "meaningful opportunity" for release under *Graham.* The Court explained that, like the defendant in *Johnson*, the possibility exists that the defendant's sentence of life in prison for the robbery conviction will convert to a sentence of roughly forty-two years when he reaches age sixty. Accordingly, the Court concluded that it had no grounds on which to find that the ninety-one-year sentence for robbery violates the holding in *Graham*.

The Court also found that the trial court afforded the defendant the protections specified in the *Miller* decision. The Court pointed out that the trial court gave the defendant a hearing and in that hearing, he presented evidence of his youth and immaturity at the time of his offense—evidence that the judge was free to consider when determining his sentence. The Court found nothing in the Supreme Court's decision in *Miller* or *Montgomery* that required the trial court to make a specific factual finding that the defendant was "irreparably incorrigible" before pronouncing a sentence of life without parole. The Court specifically rejected the Fourth Circuit's reasoning in *Malvo*, repeating that "[o]nly decisions of the United States Supreme Court can supersede binding precedent from the Virginia Supreme Court."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1190173.pdf

A.A.B. v. Commonwealth: November 6, 2018

Portsmouth: The defendant, a juvenile, appeals his sentences for Weapons offenses on Failure to Credit Him for Time Already Served.

Facts: Facing charges for possession of a firearm by a minor and carrying a concealed weapon, the defendant remained in detention pending adjudication. The trial court sentenced the defendant to an indeterminate commitment to the Department of Juvenile Justice (DJJ), and in the sentencing order for each of the two misdemeanor convictions provided that "[t]he Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187." The defendant appealed, arguing that the trial court failed to credit him with the time he had spent, pre-trial and post-trial, in a juvenile detention facility.

Held: Affirmed. The Court found that the trial court's order was sufficient. The Court explained that if DJJ did not credit the defendant with the time he was detained, as ordered by the trial court, his claim is against DJJ; Direct appeal to the Court of Appeals is not the appropriate vehicle to address the claim.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2073171.pdf

Cockrell v. Commonwealth: April 9, 2019

Fauquier: Defendant, a juvenile, appeals his sentence for Mob Assault

Facts: The defendant and others assaulted another juvenile. At the time of the offense, the defendant was a juvenile. The trial court convicted the defendant and sentenced him to twelve months' incarceration, with all but five months suspended, intending to give him credit for the time he had spent in pre-trial detention.

Even though it had imposed a sentence of greater than thirty days, the trial court did not complete the assessment required by § 16.1-284.1. The Court explained that it "had not intended to incarcerate [the defendant] for any additional period of time in light of the fact that [he] had served . . . approximately five months in juvenile detention" because the court felt that amount of time was sufficient for the conviction.

Held: Reversed. The Court ruled that, under the plain language of § 16.1-284.1, the trial court erred in sentencing the defendant to more than thirty days of confinement without completing an assessment. The Court explicitly declined to address the effect, if any, of the trial court's intention to give the defendant credit for time served in pre-trial detention or the time the court suspended.

However, the Court pointed out that, under § 53.1-187, a juvenile may only receive credit for time served in a juvenile detention facility awaiting trial if, "upon conviction, he is sentenced to an adult correctional facility."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0412184.pdf

Grand Jury & Indictment

Virginia Court of Appeals
Unpublished

Waters v. Commonwealth: July 3, 2018

Danville: Defendant appeals his convictions for Robbery and Use of a Firearm on refusal to consider the appeal of his Juvenile Transfer and Grand Jury matters.

Facts: On February 6, the J/Dr Court held a transfer hearing regarding the defendant's case and transferred it to Circuit Court. The J/Dr Court sent the file to Circuit Court the next day. Due to an error, although the defendant orally noted his appeal, the J/Dr Court clerk did not prepare a notice of appeal until March 7. The Circuit Court ruled that the defendant's appeal was untimely and rejected it.

On March 8, the Circuit Court advised the Commonwealth it could seek indictments against the defendant. The Circuit Court did not issue an order to that effect until April 6. However, the Commonwealth obtained indictments on March 14. The defendant unsuccessfully argued that § 16.1-269.6(B) prohibited the Commonwealth from obtaining indictments until after the Circuit Court had advised the Commonwealth, in writing, that it could obtain indictments.

The grand jury that met in March was composed of the same grand jurors that had met in February. At the end of the February session, the Circuit Court had stated in its order that the grand jury was "discharged." The Circuit Court rejected the defendant's argument the order completely discharged the grand jury and that under § 19.2-194, once discharge took place, it was improper to use the same panel of grand jurors to indict other persons. The Circuit Court found that its order merely meant that the jurors were "discharged" for that day, paid their per diem, and directed to come back in a month.

Held: Affirmed. The Court first found that the defendant's oral notice of appeal was insufficient and that ruled that Rule 8:20's plain language governs appeals of transfer decisions; Rule 8:20 specifically requires that appeals from the juvenile and domestic relations district courts be noted in writing, and Code § 16.1-269.4 requires appeals from JDR court transfer orders be filed within ten days of the order. Despite the defendant's reference to Rule 3A:19, the Court pointed out that Rule 3A:19 addresses only appeals from "convictions." The Court repeated that: "one who takes the shortcut of asking the clerk's employees to examine the record for him relies on the response at his peril." The Court agreed that the defendant failed to perfect an appeal of the transfer order.

The Court then repeated that, under its terms, § 16.1-269.6(B) only applies when a party appeals a transfer decision. The Court compared the current version of this statute to the previous version and also reviewed an Attorney General's opinion on the issue. The Court ruled that, just as the Circuit Court is no longer required to review cases that are not appealed, the entry of the enabling order before the Commonwealth may seek indictments is also no longer necessary in cases that have not been appealed. In this case, the defendant failed to properly appeal and therefore the Commonwealth could seek indictments after the transfer hearing without an order from the Circuit Court once the appeal period had expired.

Lastly, the Court held that the trial court properly interpreted its own order and determined that it did not "discharge" the grand jury in February, but merely discharged them for the day.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1092173.pdf

Smith v. Commonwealth: July 17, 2018

Dickenson: Defendant appeals his convictions for Child Sexual Assault, alleging Prosecutorial Vindictiveness.

Facts: The defendant sexually assaulted a child on fifteen separate occasions. The Commonwealth first obtained ten warrants against the defendant. While those charges were pending in J/Dr Court, the Commonwealth obtained four direct indictments against the defendant for additional charges. The JDR court then dismissed the original ten charges at the conclusion of a preliminary hearing. The trial court then granted the defendant's motion to dismiss the four direct indictments on the grounds that the grand jury returned those indictments before his preliminary hearing, in violation of Code § 19.2-218. The Commonwealth immediately reconvened the grand jury, which subsequently returned a thirty-count indictment against the defendant.

The defendant moved to dismiss the new indictment, claiming prosecutorial vindictiveness. The trial court quashed the twenty additional counts of the thirty-count indictment that had not originally been pending in J/Dr Court. The trial court found that the twenty additional counts were not based on actual prosecutorial vindictiveness, but granted the motion anyway based on the "appearance" of such retaliatory motivation. The trial court permitted the original ten charges to proceed.

Held: Affirmed. The Court found that, while the indictment on twenty additional charges following his successful challenge of the prior charges against him may have had the "appearance of vindictiveness," the Commonwealth did not act in a retaliatory manner by simply proceeding on the original charges against him. The Court observed that, as the Commonwealth intended to charge the defendant with ten offenses at the outset of the proceedings, the trial court's refusal to quash ten counts of the thirty-count indictment left the defendant in the same position he was in before he challenged the initial charges against him. Thus, the defendant did not face additional or more severe charges as a result of the exercise of his legal rights.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0231173.pdf

Arrate v. Commonwealth: February 12, 2019

Caroline: Defendant appeals his conviction for Credit Card Forgery on variance with the Indictment

Facts: The defendant presented several fraudulent cards at a convenience store. The Commonwealth indicted the defendant for Credit Card Forgery. The indictment alleged that the defendant "did unlawfully and feloniously commit credit card forgery with intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported credit card, in violation of § 18.2-193." The indictment did not allege any "uttering" of the card, nor did it include language from subsections (b) or (c) of that statute.

Held: Reversed. The Court held a fatal variance existed between the indictment and the conduct for which the trial court convicted the defendant. The Court found that it was error to convict the defendant under this indictment when there was no evidence that the defendant either made or embossed the card and the indictment failed to charge the defendant with uttering.

The Court commented that the Commonwealth could "easily have avoided this outcome by broadening the descriptive text of an indictment or by making disjunctive factual allegations." "Had the indictment been so broad as to encompass the entirety of Code § 18.2-193, [the defendant] could have sought a bill of particulars in order to determine the specific conduct the Commonwealth intended to prove. By including the narrowing language of making and embossing, and excluding any mention of "uttering," the indictment failed to provide adequate notice to [the defendant] that the Commonwealth intended to show he uttered the forged card."

The Court refused to extend the presumption that possession of a forged instrument is *prima facie* evidence that he either forged the instrument or procured it to be forged to credit card forgery.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0518182.pdf

Nolle Prosequi

Virginia Supreme Court

In Re: Gregory Underwood, Commonwealth's Attorney: May 2, 2019
(Unpublished)

Norfolk: The Commonwealth seeks a writ of mandamus to order the Circuit Court to enter a dismissal regarding two misdemeanor charges of Possession of Marijuana.

Facts: Two defendants appealed their GDC convictions for misdemeanor possession of marijuana to circuit court. The Commonwealth subsequently instituted a policy under which the office will not prosecute simple possession of marijuana and "will move to nolle prosequi or dismiss any marijuana-possession cases that fall within [its] purview." The Commonwealth's Attorney moved to dismiss the defendants' cases. When the circuit court inquired as to the reasons for the dismissals, the prosecutor responded, in relevant part, that he was entitled to dismiss the charges without offering any rationale or justification. The circuit court refused to dismiss the charges and continued the trials.

The Commonwealth sought a writ of mandamus to compel the circuit court to grant the Commonwealth's Attorney's motion to enter an order of dismissal on charges for misdemeanor possession of marijuana.

Held: Writ Denied. Concluding that a circuit court has no clear and unequivocal duty to enter an order of dismissal, the Court dismissed the petitions for writs of mandamus. The Court rejected the Commonwealth's argument that its unfettered discretion to dismiss criminal charges is inherent in the executive authority to exercise prosecutorial discretion and that constitutional separation of powers principles require that the Commonwealth be allowed to exercise that discretion free from judicial restraint.

The Court reaffirmed that a "nolle prosequi and a motion to dismiss are separate and distinct procedures" and that "dismissal at the request of the Commonwealth does not require a showing of good cause," but distinguished the *Roe* case at length. In this case, the Court found that, because there is no material distinction between a Commonwealth's Attorney's "motion to dismiss a charge without prejudice" and a nolle prosequi, a circuit court must exercise its discretion when it is asked to grant either and, thus, cannot be compelled to do so by mandamus.

The Court then explained that mandamus also does not lie to compel a circuit court to grant a Commonwealth's Attorney's motion for the dismissal of a criminal charge with prejudice. Unlike a dismissal without prejudice or a nolle prosequi, the Court observed that a dismissal with prejudice conclusively resolves the dispute between the defendant and the Commonwealth with respect to the subject charges. The Court noted that dismissal with prejudice operates as a judgment of the court because it is a determination "of the rights of the parties upon matters submitted to it in a proceeding."

Full Case At:
https://www.dropbox.com/s/7db8m6qr4kt0cai/Norfolk%20Mandamus.pdf?dl=0
(note: decision not available online)

Preliminary Hearing

Virginia Supreme Court

Stokes v. Commonwealth: May 30, 2019 (Unpublished)

Gloucester: Defendant appeals his conviction for Rape, 2nd Offense, on denial of a preliminary hearing

Facts: Defendant attacked raped the victim. The defendant already had a prior conviction for Rape. The district court held a preliminary hearing on the charge of Rape, First Offense and certified the matter to the Grand Jury. The Grand Jury subsequently returned an indictment charging him with Rape, Second Offense, in violation of §§ 18.2-61 and 18.2-67.5:3. The trial court denied the defendant's motion to dismiss that charge on the ground that he had not had a preliminary hearing on that new charge. In a *per curiam* ruling, the Court of Appeals held that the defendant had no right to a preliminary hearing under § 19.2-218 because he was not initially arrested on the charge of rape, second offense, but rather was first directly indicted on it.

Held: Affirmed. The Court reaffirmed its holding in *Waye* that a defendant was not entitled to a preliminary hearing on a directly-indicted charge because he "was not arrested on [that] charge" prior to his indictment on it. The Court explained that a defendant's right to a preliminary hearing under the statute is limited to the particular felony charge(s) upon which the defendant was arrested, if any, prior to indictment on the same. The Court found that it was irrelevant that, in this case, the charge of Rape, Second Offense superseded the original charge of Rape upon which the defendant was arrested and provided a preliminary hearing.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/180510.pdf

Plea Agreements

Fourth Circuit Court of Appeals

U.S. v. Edgell: January 28, 2019

N.D. W.Va: Defendant appeals his sentence for Distribution of Methamphetamine on Breach of a Plea Agreement

Facts: The defendant agreed to plead guilty to one count of possessing a firearm as an unlawful drug user and one count of distributing methamphetamine. In exchange for that plea, the government agreed to a stipulation limiting the defendant's total drug conduct to less than five grams of a substance containing methamphetamine, rather than pure methamphetamine. That agreement would have given the defendant an advisory sentencing range of 10 to 16 months' imprisonment, although the sentencing court was not bound by the parties' stipulations and was not required to accept them.

However, after the parties signed the agreement, the government received lab results showing that the substances in question were pure methamphetamine, and once the government shared that information with the probation office, the defendant's sentencing range increased to 30 to 37 months.

At sentencing, the government advocated for a 30-month sentence and the trial court sentenced the defendant to 30 months in prison.

Held: Reversed. The Court agreed that the government's disclosure of the lab results, which went directly to the offense charged in the indictment and to the defendant's guidelines calculation, was consistent with both the parties' plea agreement and the government's broader duty to provide complete and accurate information to the sentencing court. The Court discussed how the government must carefully balance its duty of candor to the sentencing court with the sometimes competing – but equally solemn – duty to honor its commitments under a plea agreement. The Court, however, explained that this balance is achieved where the government makes the necessary disclosures to the sentencing court, but nevertheless "continues to advocate for acceptance of the agreement."

In this case, the Court found that the government's breach of the plea agreement affected the defendant's substantial rights and seriously affected the "fairness, integrity, or public reputation of judicial proceedings." The Court remanded the case and ordered, per the defendant's request, specific performance of the plea agreement.

Full Case At:
http://www.ca4.uscourts.gov/opinions/174432.P.pdf

Restitution

Virginia Court of Appeals
Published

Fleisher v. Commonwealth: January 29, 2019
69 Va. App. 685, 822 S.E.2d 679
Franklin: Defendant appeals her sentence on Unauthorized Use of a Motor Vehicle on Restitution issues.

Facts: The defendant took the victim's vehicle without permission. Although the victim later recovered the vehicle in another jurisdiction, both the keys to that car and the keys to her other car, which were in the car when defendant took it, were missing. The defendant claimed that she left the keys in the car when she abandoned it, unlocked.

At sentencing, the trial court ordered the defendant to pay restitution in the amount necessary to replace the locks and cylinders on both cars and to reprogram one of the computers to prevent unauthorized access. The defendant had argued that she should only be responsible for the cost of replacing the lost key, not the cost of changing the locks and completely reprogramming the computer.

Held: Affirmed. The Court found that the trial court simply made the victim whole by returning her to the pre-crime status when she controlled access to her cars. The Court reasoned that, by unlawfully taking the victim's car and its contents, the defendant compromised the victim's ability to

protect her vehicles from unwanted intrusion. The Court distinguished this case from *Howell,* where the trial court had ordered the defendant to pay restitution for the cost of a new security system.

[*Note: Credit to Duncan Vick, ACA, for obtaining the restitution order for the victim in this case - EJC]*

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0220183.pdf

Virginia Court of Appeals
Unpublished

Lewis v. Commonwealth: October 16, 2018

Richmond: Defendant appeals his sentence for Grand Larceny on the award of Restitution.

Facts: The defendant stole items of both jewelry and silver from the victim and sold them. At trial, beyond finding the defendant guilty of grand larceny, the trial court did not specify which of the missing items formed the basis of the conviction. At sentencing, the Commonwealth introduced a letter from the victim's insurance company requesting restitution for loss payouts made to the victim in the amount of $58,054.80. The victim testified that this payment was for her missing silver and not for any of her other possessions. The trial court ordered the defendant to pay the entire amount in restitution.

Held: Affirmed. The Court repeated that the amount of restitution "is not limited to the proof put forth at the guilt phase of the trial." The Court agreed that the trial court reasonably could have concluded beyond a reasonable doubt that the defendant had taken all of the missing jewelry and silver. Thus, the Court noted that, applying the appropriate and lower standard of "preponderance of the evidence," the trial court could even have ordered a greater amount of restitution.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1093172.pdf

Sixth Amendment: Right to Counsel

U.S. Supreme Court

Garza v. Idaho: February 26, 2019

Idaho: Defendant appeals his conviction for Aggravated Assault on Sixth Amendment grounds.

Facts: The defendant pled guilty to Aggravated Assault. In his plea agreement, he entered a waiver of his right to appeal. After sentencing, the defendant asked his attorney to appeal, but his

attorney refused to file the appeal, based on the waiver. The defendant sought *habeas* relief, but the Idaho courts denied his petition.

Held: Reversed. The Court construed its holding in *Flores-Ortega,* which held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." In a 6-3 ruling, the Court held that the presumption of prejudice applies regardless of whether the defendant has signed an appeal waiver.

The Court reasoned that appeal waivers do not serve as an absolute bar to all appellate claims. Instead, the Court repeated that filing such a notice is a purely ministerial task that imposes no great burden on counsel. However, the Court found that the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make.

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-1026_2c83.pdf

Virginia Supreme Court

Wright v. Woodson: October 18, 2018
(Unpublished Order)

Rockingham: Defendant seeks *Habeas* relief from his conviction for Grand Larceny, arguing that it is not a lesser-included offense of Robbery.

Facts: During a Robbery trial, the defendant's attorney did not object to the trial court's instruction to the jury that listed Grand Larceny as a lesser-included offense of Robbery. The jury convicted the defendant of Grand Larceny. During a *Habeas* hearing, the attorney explained that he agreed to the jury instruction because a conviction on the grand larceny offense would allow the jury to impose a lesser sentence. The defendant also argued that the instruction was improper and that trial court lacked subject-matter jurisdiction to convict him of the grand larceny offense.

Held: Habeas petition dismissed. The Court concluded that, based on his explanation, the attorney's decision was not objectively unreasonable. The Court also rejected the subject-matter jurisdiction argument, noting that Va. Code § 17.1 13 confers subject-matter jurisdiction on all circuit courts to try all felonies, wherever committed within the Commonwealth.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/170163.pdf

Virginia Court of Appeals
Unpublished

Weatherholt v. Commonwealth: December 26, 2018

Frederick: Defendant appeals his convictions for Conspiracy and Distribution of Drugs, 3rd Offense, on Right to Counsel and Recusal Issues.

Facts: While pending trial for Conspiracy and Distribution of Drugs, 3rd Offense, the State Bar suspended the defendant's attorney. The two suspensions were based solely on his attorney's failure to comply with a subpoena duces tecum issued by the Bar. After being informed that his counsel's license had been suspended temporarily, the defendant appeared *pro se* and specifically chose to proceed with his trial as scheduled if his counsel's suspension was lifted as expected. The Bar lifted both suspensions upon her compliance with the subpoenas.

At trial, one of the Commonwealth's witnesses was a police informant. After trial, the defendant filed a motion to dismiss, arguing that the trial judge had a conflict of interest and should have recused himself. The defendant indicated that the trial judge, while Commonwealth's Attorney for the City of Winchester, prosecuted the confidential informant, on multiple occasions. In addition, the trial judge presided over a separate matter in which the informant entered guilty pleas in a different jurisdiction. The trial judge had no recollection of having prosecuted the witness. The trial judge determined that he was not impacted by the former interactions with the witness and had impartially presided over the defendant trial.

After trial, the defendant alleged that the trial court violated his Sixth and Fourteenth Amendment right to counsel and due process by failing to appoint standby counsel, requiring he appear without counsel during the pendency of the instant charges, and by failing to set aside the verdicts rendered against him due to the multiple suspensions of trial counsel's law license.

[Note: The State Bar later revoked the defendant's counsel's license until at least 2023 – EJC]

Held: Affirmed. Regarding the defendant's complaint regarding his attorney, the Court agreed that, because the defendant's substantial rights were not affected during the brief periods of his counsel's suspension, and the defendant made clear his desire to proceed to trial as scheduled knowing that his counsel's license had been suspended, the defendant was represented by competent counsel during all critical stages of the proceedings. The Court refused to consider any other issues with his counsel, repeating that claims raising ineffective assistance of counsel must be asserted in a *habeas corpus* proceeding and are not cognizable on direct appeal.

Regarding the recusal issue, the Court pointed out that the trial court did not become aware or was not reminded, in this case, until after the defendant's trial was complete. The Court noted that the defendant failed to demonstrate any actual bias or prejudice.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1797174.pdf

Jones v. Commonwealth: January 29, 2019

Roanoke: The defendant appeals his convictions for Distribution, 2nd offense, on Sixth Amendment grounds.

Facts: The defendant sold cocaine after a previous conviction. The trial court initially appointed the Public Defender to represent him, but then allowed the defendant to substitute new counsel. After that second relationship soured, the trial court appointed a third attorney, and then appointed a fourth attorney when the third attorney advised the trial court that he needed to withdraw. The trial court observed that each of the attorneys "enjoy stellar reputations," yet the defendant developed issues with each of them.

The defendant's fourth attorney then asked to withdraw. The trial court gave both the defendant and his attorney the opportunity to set forth the nature of their disagreements and why they believed the attorney-client relationship was damaged to the point of requiring dissolution. The only specific issue they could identify was that the defendant "threatened to file a 'Habeas Corpus' on" the attorney. The trial court denied the motion. On the day of trial, the defendant asked for a continuance to hire new counsel, whom he indicated he would retain but had not retained yet. The trial court denied that motion as well.

The defendant then decided to plead "no contest." The trial court engaged the defendant in an extensive plea colloquy to ensure that he, among other things, understood the nature of a no contest plea, whether he had any more complaints about his fourth attorney, and whether the defendant understood that he was giving up his right to appeal. The trial court found that the defendant's pleas were made voluntarily and that he had been "capably represented by competent counsel."

Held: Affirmed. The Court first agreed it was proper to refuse the defendant's request for a continuance to allow him to retain a new lawyer. The Court found that the defendant's guilty pleas waived the issue of whether he was entitled to a continuance, and therefore, the Court declined to address the merits of the claim on appeal.

Regarding the defendant's attorney's request to withdraw, the Court observed that the defendant's issues "seemed to come to the fore when a significant milestone in the proceedings, such as trial or sentencing, was reached." The Court agreed that it appeared that the defendant's "problems" with counsel were a delaying tactic designed to gain some unknown advantage and that, no matter who was representing him, it appeared that problems would continue. Accordingly, the Court found it was proper to refuse to allow the fourth attorney to withdraw from the case.

The Court rejected the argument that the defendant's threat of filing a *habeas* petition created an impermissible conflict of interest. The Court repeated that a client's threat to assert that his trial counsel was ineffective does not, without more, give rise to a conflict of interest between the client and trial counsel.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0281183.pdf

Sentencing

Virginia Supreme Court

Thomas v. Commonwealth: October 18, 2018
296 Va. 301, 819 S.E.2d 437
Carroll: Defendant appeals her sentence for Felony Child Neglect on the imposition of a Post-Release Sentence.

Facts: At sentencing for felony child abuse and neglect, the trial court sentenced the defendant to serve seven years in prison, consistent with the jury's recommendation. However, the trial court then imposed a sentence of ten years, suspending three of those years upon various conditions. Although the trial court appeared to be relying on the post-release supervision statute, the trial court's sentencing order did not reflect that.

Held: Reversed. The Court ruled that the trial court's sentencing order, as drafted, did not comply with §§ 19.2-295 and 19.2-295.2 and therefore impermissibly lengthened the sentence fixed by the jury from seven years to ten years. The Court explained that the order did not specify that the additional time was imposed pursuant to §§ 18.2-10 and 19.2-295.2. Furthermore, the Court pointed out that the period of post-release supervision imposed by the trial court was not "under the supervision and review of the Virginia Parole Board" as required by § 19.2-295.2(B).

The Court repeated that the purpose of post-release supervision is not punishment; rather, this period is designed to foster good behavior and rehabilitation upon release from confinement. The Court also noted that the length of the term of post-release supervision and of the suspended term of incarceration fall within the discretion of the trial court.

In a footnote, the Court suggested a possible format for a corrected order in this case:

"The Court SENTENCES the defendant to:

Incarceration with the Virginia Department of Corrections for the term of: Seven (7) years. The total sentence imposed is Seven (7) years.

In addition to the above sentence of incarceration, pursuant to Code § 18.2-10 and § 19.2-295.2, the court imposes an additional term of three (3) years of incarceration. This additional three-year term is suspended, conditioned upon successful completion of a three-year period of post-release supervision under the supervision of the Virginia Parole Board. The period of post-release supervision is to commence upon release from incarceration. The defendant shall comply with all the rules and requirements set by the Virginia Parole Board."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170707.pdf

Commonwealth v. Botkin: November 1, 2018
Aff'd Court of Appeals ruling of October 24, 2017
68 Va. App. 177, 805 S.E.2d 412

Scott: The Commonwealth appeals the running of two sentences for Possession of a Firearm by Felon concurrently.

Facts: The defendant pled guilty to two counts of possession of a firearm by a convicted nonviolent felon, in violation of Code § 18.2-308.2(A). The trial court ordered the two mandatory sentences of two years to run "concurrent to each other"; the Commonwealth appealed. The Court of Appeals held that multiple mandatory minimum terms of imprisonment, imposed for multiple convictions under Code § 18.2-308.2(A), are required to be served consecutively.

Held: Sentence Reversed. Like the Court of Appeals, the Court ruled that mandatory minimum terms of confinement ordered pursuant to Code § 18.2-308.2(A) must run consecutively with any other sentence, including other mandatory minimum terms ordered pursuant to Code § 18.2-308.2(A). In this case, because the trial court ran the defendant's sentences concurrently, the Court vacated those sentences and remanded this case for resentencing.

The Court distinguished this case from *Brown*, noting that unlike § 18.2-53.1, § 18.2-308.2(A) uses the phrase "any other sentence," and the plain meaning of "any other sentence" is one or more remaining sentences, "without limitation or restriction." The Court wrote: "In other words, 'any' means 'any.'" In a footnote, the Court also pointed out that Va. Code §§ 18.2-255.2 and 18.2-308.1 use the same phrase regarding their mandatory sentences.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1171555.pdf

Cox v. Commonwealth: March 28, 2019

Loudoun: Defendant appeals his sentence for Hit & Run, DUI, and Drug Possession on refusal to reconsider his sentence.

Facts: The trial court convicted the defendant of felony Hit & Run, DUI, and Drug Possession. In its sentencing order, the trial court reserved jurisdiction to act on the defendant's sentence after he served a year at DOC, stating: "the Court will reconsider the sentence after serv[ing] One (1) Year in the Virginia Department of Corrections, if the Defendant finds an inpatient program to attend." After DOC had taken custody of him, the defendant found an inpatient program and filed a motion to reconsider. The trial court denied the motion, finding that it no longer had jurisdiction to modify his sentence. The Court of Appeals denied the defendant's appeal.

Held: Reversed. The Court ruled that, because the presence of an ultra vires provision in a sentencing order renders the entire sentencing order void *ab initio*, the sentencing order was a nullity and therefore vacated the entire sentencing order. The Court repeated that the sentencing court lacked the authority to modify or suspend the defendant's sentence once he was transferred to DOC.

Full Case At:

http://www.courts.state.va.us/courts/scv/orders_unpublished/171380.pdf

Commonwealth v. Watson: May 30, 2019

Rockingham: The Commonwealth appeals the vacating of the defendant's sentence for Possession of a Firearm by Convicted Felon

Facts: In 2007, the trial court convicted the defendant of four counts of using a firearm in the commission of a felony. The trial court imposed terms of three years' imprisonment for each count, to be served consecutively. Ten years later, the defendant filed a motion to vacate three of the four sentences imposed upon him as void *ab initio*. He noted that the statute imposed a mandatory minimum term of five years' imprisonment for any second or subsequent offense. Consequently, he argued that three of his three-year sentences were void *ab initio* for being shorter than the statutorily prescribed five-year minimum. The trial court agreed and granted the motion.
[*Note: This case is related to Watson v. Commonwealth, decided the same day – EJC*]

Held: Reversed. The Court found that, unlike an excessive sentence, a sentence for less than what the legislature has allowed is merely legal error, and when a court has power to render a judgment, it has the power to render an erroneous one. The Court ruled that the trial court therefore lacked jurisdiction under Rule 1:1 to consider the defendant's motion to vacate his sentences.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180940.pdf

Watson v. Commonwealth: May 30, 2019

Rockingham: The defendant appeals the dismissal of his lawsuit to void the sentences of 12 felons.

Facts: The defendant, while filing a motion to vacate his own sentence, also filed a motion to vacate as void 30 sentences imposed upon 12 felons for violations of § 18.2-53.1. Twenty-eight of the challenged sentences were for terms of three years' imprisonment, one was for two years' imprisonment, and one was for five years' imprisonment with four years suspended. The defendant argued that all of the defendants had, like him, been convicted of multiple violations of the statute and that the statute imposed a mandatory minimum term of five years' imprisonment for any second or subsequent offense. Consequently, he argued, each of the challenged sentences was void *ab initio* for being shorter than the statutorily- prescribed five-year minimum.

The trial court dismissed the defendant's motion for lack of standing. [*Note: This case is related to Commonwealth v. Watson, decided the same day – EJC*]

Held: Affirmed. The Court agreed that the defendant lacked standing to challenge the other felons' sentences. While the Court acknowledged that it has repeatedly stated "a judgment may be challenged collaterally by any one, in any place, at any time, and even by a court sua sponte," in this

case the Court pointed out that the other felons are unquestionably necessary parties to an action to declare their sentences void, which, if successful, would result in the imposition of new sentences. Without their participation, the Court concluded it would not even consider in this case whether the other felons' sentences are void.

Full Cases At:
http://www.courts.state.va.us/opinions/opnscvwp/1180819.pdf

Virginia Court of Appeals
Published

Baldwin v. Commonwealth: July 17, 2018
69 Va. App. 75, 815 S.E.2d 809
Fairfax: The defendant appeals his sentence for sending a written threat to kill or do bodily harm on admission of victim impact testimony.

Facts: The defendant sent threatening letters to the victim in 2012, went to jail for that, then violated the court's no-contact order, went back to jail, and then sent more threatening letters to the victim in 2016. At sentencing for the new threats, the victim testified. The trial court overruled the defendant's objection to the victim's testimony about the underlying facts of the prior convictions.

Held: Affirmed. The Court examined § 19.2-299.1 and wrote: "to restrict the victim's reference to the previously adjudicated threats to the cold record would be to sanitize the facts of the case and ignore the foundation of terror that Baldwin constructed prior to the current offense. Such restriction would be the antithesis of the goal of the Crime Victim and Witness Rights Act, which is to ensure that the victim has the opportunity to convey to the court the full impact of the crime. Baldwin's prior detailed threats amplified the psychological injury M.T. suffered from the current offense. M.T. was entitled to identify these details to the court. Details about the prior threats also provided vital information for the trial court's determination of a proper sentence."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0740174.pdf

Virginia Court of Appeals
Unpublished

Willard v. Commonwealth: August 7, 2018

Patrick: The defendant appeals his sentence for Aggravated Sexual Battery on the terms of his probation.

Facts: The defendant sexually assaulted an eight-year old child. At sentencing, the defendant introduced evidence that he suffers from significant mental and physical limitations, including a traumatic brain injury. A psychiatrist found that the defendant suffered from a "progressively dementing condition," and that he would "inevitably continue to manifest increasingly severe limitations associated with organically based dementia regardless of time, tincture, or treatment."

The defendant had already had one charge of sexual assault of a child dismissed a few years earlier, on condition that his family adequately supervise him. Based on the facts of this case and the previous case, the trial court imposed an indefinite period of probation. As a condition of probation, the trial court prohibited the defendant from leaving his home without being accompanied by an adult other than his father, unless the defendant was attending certain appointments.

The trial court rejected the defendant's arguments that this condition was an unreasonable restraint on his liberty and that the indefinite term of his probation was unnecessary.

Held: Affirmed. The Court concluded that the indefinite term of probation and the particular condition at issue were reasonable when viewed in light of the defendant's offense, background, and the unique circumstances surrounding this case. The Court also concluded that the condition at issue and indefinite term of probation were not unduly intrusive on his constitutional rights. While the condition requiring the defendant to be accompanied by an adult when he left his home limited his ability to move freely within his community, the Court noted that it was designed to prevent the defendant from committing similar offenses in the future and thereby protect the public.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1326173.pdf

Blackwell v. Commonwealth: November 22, 2018

Warren: Defendant appeals his sentence for Possession with Intent to Distribute.

Facts: Police arrested the defendant after he brought a large quantity of heroin to Virginia for sale. At sentencing, the Commonwealth and the trial court made reference to the defendant being from Baltimore, Maryland. The defendant argued that these references were euphemisms for the defendant's race. The defendant sought to enter one of the DOC's Community Corrections Alternative Programs, but the trial court refused. Instead, the trial court imposed five years with only six months suspended. The trial court noted that the reason it departed upwards from the recommended sentencing guideline range was the "heroin epidemic."

Held: Affirmed. The Court accepted the explanation that the references to Maryland referred to that state not taking "drug cases seriously," rather than to the defendant's race. As for the defendant's complaint that the trial court did not offer him significant probation in lieu of incarceration, the Court reaffirmed that a defendant is not entitled to probation; rather, it "represents 'an act of grace on the part of the Commonwealth to one who has been convicted and sentenced to a term of confinement.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1986174.pdf

McInnis v. Commonwealth: December 4, 2018

Virginia Beach: Defendant appeals his sentences for Use of a Firearm in Commission of Murder, Robbery and related offenses on admission of evidence at sentencing.

Facts: The defendant and his confederate robbed a man at gunpoint during a drug deal. During the robbery, the defendant told his confederate to "pop him." The defendant's confederate shot and killed the victim, ripped a bag of Xanax pills from his hands, and fled with the defendant. At sentencing before the jury, the Commonwealth introduced Facebook posts made by the defendant; in those posts, made the day after the robbery and murder of the victim, the defendant stated that he had Xanax pills for sale. The defendant objected based on relevance and prejudice, but the trial court overruled the objections.

Held: Affirmed. The Court first agreed that the evidence was relevant, as it clearly provided circumstantial evidence of the defendant's involvement with illegal drugs and his lack of remorse for the crimes for which he had been convicted. The Court found that the Facebook posts allowed the jury to infer that the victim was killed and robbed merely for pecuniary gain. Additionally, the Court concluded that evidence that the defendant was selling drugs stolen from the victim was relevant and probative of him being a danger to society and therefore would assist a sentencing authority in determining the kind and extent of punishment to be imposed within limits fixed by law.

Regarding the potential prejudice, the Court saw nothing in the evidence that would inflame the passions of the jurors, particularly when compared with the brutality of the offense for which he was being sentenced.

In a footnote, the Court noted that § 19.2-295.1 limits the evidence the Commonwealth may present at sentencing before a jury in its case-in-chief, but also noted that the defendant never raised that issue during the trial and refused to consider it on appeal.

In another footnote, the Court noted that it saw no principled reason why the relevancy of evidence, as opposed to its admissibility, should be governed by different principles in a jury trial than in a bench trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1934171.pdf

Massey v. Commonwealth: March 5, 2019

Norfolk: Defendant appeals the revocation of his probation on Imposition of Probation Conditions

Facts: The trial court convicted the defendant of taking indecent liberties with a child. In its sentencing order, the trial court expressly allowed the defendant to have contact with children under

the supervision of an adult who knew about his prior conviction. However, the defendant's probation officer imposed a condition that prohibited the defendant from having any contact with children at all. The trial court had also ordered the defendant to "comply with all the rules and requirements set by the Probation Officer."

While on probation, the defendant had contact with children while an adult who was aware of his conviction supervised the contact. The trial court found that, although he had not violated the trial court's original order, the defendant violated his probation officer's no-contact condition.

Held: Reversed. The Court ruled that the probation officer could not modify a specific probation condition expressly set forth in trial court's sentencing order without obtaining approval from the trial court pursuant to the requirements of § 19.2-304. The Court explained that, pursuant to Rule 1:1 and §19.2-304, only a court could modify the conditions expressly stated in that order.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1670171.pdf

Speedy Trial

Virginia Court of Appeals
Published

Harvey v. Commonwealth: June 19, 2018,
En Banc, Rev'd Published Opinion of February 21, 2017
69 Va. App. 66, 814 S.E.2d 548
Roanoke: Defendant appeals his convictions for Aggravated Malicious Wounding and Attempted Murder on speedy trial grounds.

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

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

Commonwealth: Your Honor …. we have picked a trial date I believe June 12th.
Defendant: Yes.
Commonwealth: [Counsel] and I both have done the math and that is still within the -
Defendant: Yes.

Commonwealth: - the time frame set.

Defendant: Yes, yes.

Commonwealth: We both agree that that is within the Commonwealth's statutory limit of speedy trial. And that is as the Court has stated there may be need for a further continuance on this case.

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

On appeal, a divided panel of the Court of Appeals reversed, finding that the defendant did not agree to the continuance on April 24, 2015 that set the trial on June 12, 2015, and that this objection was noted on the record and in the order dated April 24, 2015. Thus, since the defendant objected to the continuance, the panel found that speedy trial had not tolled from April 24, 2015 to June 12, 2015 and, as a result, when the case went to trial it was outside the five-month speedy trial period.

Held: Trial Court Affirmed, Panel Reversed. In an unusual ruling, the Court sitting *en banc* simply issued a one-page ruling stating: "In accordance with the unpublished order of this Court entered on June 19, 2018, the opinion previously rendered by this Court on February 21, 2017 is withdrawn, the mandate entered on that date is vacated, and the judgment of the trial court is affirmed."

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

Virginia Court of Appeals
Unpublished

Price v. Commonwealth: June 5, 2018

Norfolk: Defendant appeals his conviction for Abuse and Neglect on Speedy Trial grounds.

Facts: The Commonwealth arrested the defendant for his felony offense on April 25, 2016 and held him in custody. The defendant waived his right to a preliminary hearing and was indicted by a grand jury on July 6, 2016. On July 7, 2016, the circuit court entered a scheduling order setting the matter for a guilty plea on August 3, 2016, but on that day he changed his mind and asked for a trial. With no earlier dates available on the court's calendar, and with the agreement of the parties, the court set December 5, 2016 as the trial date. The Commonwealth agreed that the time period between the initial 31-day portion of the continuance and October 17, 2016, the first date that the Commonwealth was available for a jury trial, would be counted against the Commonwealth for speedy trial purposes.

However, on December 2, the Commonwealth moved to continue the matter because there had been a death in the family of the assistant Commonwealth's attorney who was to try the case, requiring her to attend an out-of-town funeral on December 5, 2016, the day trial was set to commence. Over the defendant's objection, the trial court continued the case until March 1, 2017.

On February 28, 2017, the defendant moved to dismiss the charge on speedy trial grounds. The trial court rejected the defendant's motion. The defendant entered a conditional guilty plea that day and appealed.

Held: Affirmed. The Court first found that the speedy trial clock began to run on July 7, 2016, the day after the Commonwealth indicted the defendant. The Court also pointed out that, although the defendant's trial ultimately was rescheduled for March 1, 2017, February 28, 2017, became his trial date for speedy trial purposes when he entered his conditional guilty plea. The Court then analyzed the 237 days between his indictment and trial date.

The Court agreed that the twenty-eight-day period from the defendant's indictment to the originally-scheduled trial date was chargeable to the Commonwealth. The Court then charged the next delay against the defendant, repeating that, when a defendant's request for a continuance causes the delay, the period of delay to the next trial date is chargeable to the defendant under § 19.2-243(4). As the Court noted, absent unusual circumstances, the "period of delay" will include the delay associated with finding the next available date for the Commonwealth and the court, and thus is chargeable to the defendant. However, in this case, because the Commonwealth agreed that the time period between September 4, 2016 and October 17, 2016 should be counted against the Commonwealth, the Court accepted that stipulation.

The Court then turned to the delay caused by a death in the assigned prosecutor's family. The Court ruled that the death tolled the speedy trial clock for the same reasons as stated in *Wallace*. The Court could find no reasonable distinction between a prosecutor's absence to attend to a family medical situation and such an absence to attend a family funeral. In both cases, the unavailability of the prosecutor in that case was sufficiently similar in nature to the absence of a witness to deem the delay excusable under the statute. Thus, the Court found that the defendant was tried in a timely fashion under the statute.

In a footnote, the Court also pointed out that the Court's orders sometimes counted one time period as chargeable to the defendant and another consecutive period as chargeable to the Commonwealth. In order to interpret those time periods, the Court applied the counting convention set out in Code § 1-210(A), interpreting the order as including the last date in its description in the first period of time and begin counting for the next period of time on the next day. For example, it counted September 3 as part of the time chargeable to the defendant and the next period, which the order charged to the Commonwealth, began on September 4.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0384171.pdf

Commonwealth v. Craighead: June 12, 2018

Franklin: The Commonwealth appeals the dismissal of charges on speedy trial grounds.

Facts: The Commonwealth indicted the defendant in June 2016 for distribution of drugs. The defendant, released on bond, received a court-appointed attorney and an October trial date. On the

October trial date, the defendant requested a continuance, which the Court granted until December. In December, the Commonwealth moved to continue and the trial court granted the motion over the defendant's objection to February.

On the third trial date, defense counsel did not appear. Neither the Commonwealth nor the defendant was able to contact defense counsel. The trial court continued the case to April for trial. The Commonwealth also obtained a capias for the informant from the drug deal, who had also failed to appear. In April, defense counsel again failed to appear at trial, sending an email to the prosecutor indicating that he would be going to the hospital and would not be able to make it to court. The trial court continued the case again, this time to September. The Commonwealth also obtained a second capias for the missing informant from the drug deal, who at that point had never appeared at any trial date.

The defendant obtained new counsel and moved to dismiss the charges on speedy trial grounds. The trial court refused to admit the email regarding defense counsel's absence in April and granted the motion to dismiss, finding that the continuances due to defense counsel's absence were charged to the Commonwealth.

Held: Reversed, motion improperly granted. The Court first rejected the argument that the defendant himself should have objected to the continuance. The Court explained that it would not "require criminal defendants to effectively waive their Sixth Amendment right to effective counsel and to step into the shoes of their attorney to make tactical decisions with legal consequences or otherwise assume the responsibility for conducting their own defense when their attorney is not present to do so." However, the Court noted that the defendant's attorney never voiced an objection to the continuances.

The Court then rejected the argument that the Commonwealth, by protecting the defendant's right to be represented at trial by counsel, violated the defendant's right to speedy trial. The Court held that, barring clear evidence of bad faith on the part of the Commonwealth, the absence of defense counsel that resulted in his failure to object to the *sua sponte* continuances by the trial court tolled the deadline for providing a speedy trial as provided by Code § 19.2-243. The Court wrote: "To hold otherwise would also encourage defense through absence."

The Court refused to impute "bad faith" to the Commonwealth simply because its witness did not appear at trial. The Court also refused to consider the trial court's refusal to admit the email on the grounds that § 19.2-398 does not allow the Commonwealth to appeal evidentiary rulings.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0131183.pdf

Lewis v. Commonwealth: October 2, 2018

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

Facts: The defendant, a felon, possessed a firearm. A jury trial was set for October 20, 2016. Ultimately, the defendant's trial began 607 days after his arrest on July 28, 2015, but 254 days (February 9, 2016 to October 20, 2016) of the delay were attributable to the defendant's repeated continuances.

However, on October 12, 2016, the trial court removed the defendant's case from the docket at the request of the prosecutor, who was scheduled to try another case on the same date. The defendant's counsel did not learn of the change until October 17. The Court set the defendant's case for docket call on November 7, where the parties agreed to a trial date on March 27. Ten days later, at a bond hearing, the defendant's counsel objected, arguing that the case had been continued without her knowledge. She conceded that she had not objected to the continuance until November 17, even though she had learned of the continuance on October 17 and had already agreed to the March 27 trial date several days before. The trial court overruled her objection.

In March, the defendant's attorney moved to dismiss the case for both a statutory and Constitutional speedy trial violation, but the trial court denied the motion.

Held: Affirmed. The Court held the trial court did not violate the defendant's statutory or Constitutional speedy trial rights because the defendant did not timely object to continuing the trial from October 20, 2016. The Court relied on the fact that the defendant agreed the trial date in March before he voiced his objection to the continuance. The Court repeated that the old rule, which had been that a defendant who "remains silent," rather than demanding a trial date in compliance with speedy trial limits, did not waive his right to a speedy trial, was decided before Code § 19.2-243(4) was amended in 1995 to require that a defendant timely object to a continuance.

The Court also explained that the absence of a court order from docket call was not dispositive because other parts of the record showed that the defendant agreed to the delay in the case. For example, the defendant's counsel stated in her motion to dismiss that she had "agreed to the next available date for . . . trial on March 27, 2017." By signing the motion and filing it with the court, the Court pointed out that counsel averred that the statements made in the motion were correct.

Although the Court did not condone the trial court's continuing the case ex parte, in a footnote, the Court explained that the continuance, by itself, was not reversible error.

Regarding Constitutional speedy trial, the Court found that the delay was not presumptively prejudicial, foreclosing further analysis. The Court pointed out that much of the delay was attributable to the defendant. In addition, the defendant never claimed that the delay impaired his defense. The Court also disagreed that having to comply with the conditions of his bond was unduly stressful.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0632172.pdf

Commonwealth v. Vinson: May 28, 2019

Richmond: The Commonwealth appeals a dismissal on Speedy Trial grounds.

Facts: Charged with Robbery and Use of a Firearm, the defendant had a preliminary hearing on June 28, 2018. After indictment, the circuit court held the docket call on September 4, 2018. During the

docket call, an attorney represented the defendant, and the circuit court scheduled the trial for January 22, 2019. There was no transcript of that proceeding, but there was no record of any objection by the defendant to the trial date. The defendant was in custody, so the statutory speedy trial period of 152 and a fraction of days would have expired on November 28, 2018.

After November passed, the defendant moved to dismiss the charges, asserting there was no precedent to suggest he had a duty to object to the trial date. In January 2019, the trial court granted the defendant's motion to dismiss the charges for violation of the speedy trial statute. The Commonwealth filed an interlocutory appeal pursuant to § 19.2-398(A)(1).

Held: Dismissal Reversed. The Court held that the defendant waived his statutory speedy trial rights when neither the defendant nor his counsel objected to the circuit court setting his trial date beyond the speedy trial limit before filing a motion to dismiss. The Court agreed that the trial date set was after the speedy trial period would have run, but then considered the effect of § 19.2-243(4) and the defendant's failure to object.

The Court repeated that a defendant or his counsel's failure to object when the court fixes "a trial date which is beyond the speedy trial limit, where no trial date has previously been set, is the functional equivalent of failing to object to a continuance requested by the Commonwealth that places the trial date beyond the speedy trial limit." In a footnote, the Court cautioned that "reliance on pre-1995 cases addressing speedy trial issues is often misplaced," in light of the 1995 amendment to § 19.2-243 to include the additional exception in section (4).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0104192.pdf

Trial Issues

Fourth Circuit Court of Appeals

In Re: Murphy Brown, LLC: October 29, 2018
907 F.3d 788
E.D.N.C.: Petitioner challenges a "gag order" issued by the trial court on First Amendment and Due Process grounds.

Facts: Petitioner is a media organization that is covering ongoing and interrelated civil nuisance suits involving hog farming. The suits are set for eleven seriatim trial, three of which have already delivered large verdicts in the plaintiffs' favor and have generated enormous publicity in North Carolina.

Of the jury pool for the first trial, two of the fifty potential jurors had been exposed to the issues of the case in some way; Of the second jury pool, eleven of fifty; Of the third, twenty-three of fifty. The majority of potential jurors with prior exposure to the case testified that they could impartially serve on one of the juries—two did in fact serve on the second one. During the second trial, one juror conducted

outside research and shared the results with other jurors, but the trial continued when jurors stated that they could remain impartial.

During the second trial, the district court issued a "gag order" *sua sponte* that prohibited all parties and their lawyers, representatives, and agents, as well as "all potential witnesses," from:

> "giv[ing] or authoriz[ing] any extrajudicial statement or interview to any person or persons associated with any public communications media or that a reasonable person would expect to be communicated to a public communications media relating to the trial, the parties or issues in this case which could interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice and which is not a matter of public record. Statements of information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party."

As the second trial ended, the petitioner filed for a writ of mandamus. The trial court vacated its gag order, but asked the parties to brief the issue of a new order for the third and subsequent trials.

Held: Petition granted. Finding that the issue was not moot, the Court held that the gag order contravened the First Amendment in basic respects. The Court explained that gag orders warrant strict scrutiny, the most rigorous form of review, because they rest at the intersection of two disfavored forms of expressive limitations: prior restraints and content-based restrictions. The Court repeated that a gag order may issue only if there is a likelihood that "publicity, unchecked, would so distort the views of potential jurors that [enough] could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court."

The Court further emphasized that an impartial jury need not be wholly unaware of information—including potentially prejudicial information—outside the record. Instead, the question is whether the judge finds it likely that he or she will be unable to guide a jury to an impartial verdict; if judges can guide the jury to an impartial verdict, then no gag order may issue. In this case, the Court found that the record demonstrated that the trial court assembled impartial juries each time it needed to do so. The Court noted that plenty of potential jurors remained unfamiliar with the case, and most of those with prior exposure remained able to serve impartially.

The Court also repeated that even when a gag order furthers a compelling interest, it must be the "least restrictive means" of furthering that interest. The Court pointed to less restrictive tools such as enlarged jury pools, voir dire, changes to a trial's location or schedule, cautionary jury instructions, and, in more unusual circumstances, sequestration, and complained that the gag order failed to explain if and why these alternatives had proven ineffective.

The Court wrote: "The gag order was not narrowly tailored. It included no findings specific to the various individuals it restricted. It treated lawyers no differently from parties, who in turn were treated the same as potential witnesses. It assumed all covered individuals were identically situated vis-à-vis pending and future litigation. Moreover, the gag order applied blanket restrictions to more than twenty cases that will be tried over a period of years. Participants in any given trial appear to remain restricted until the resolution of the final case."

Lastly, the Court also found that this gag order was unconstitutionally vague because it forced individuals to "guess at its contours," and it only vaguely specified whom it covered.

Full Case At:
http://www.ca4.uscourts.gov/opinions/181762.P.pdf

Virginia Court of Appeals
Unpublished

Harris v. Commonwealth: October 9, 2018

Charlotte: Defendant appeals his convictions for Use of a Firearm in Commission of Robbery and Possession of a Firearm by Felon on inconsistent jury verdicts and sufficiency of the evidence.

Facts: The defendant and his confederate robbed the victim at gunpoint while she was at home. Throughout the robbery, the defendant's confederate held a shotgun and pointed it at the victim; the defendant never handled any firearm. The defendant asked the victim where her money was. When she denied having money, he searched her house. Afterward, the victim discovered that money was missing from her purse. As they fled, the defendant told his confederate to shoot into the house. The defendant initially fled from police and lied about his confederate being in the car with him.

At trial, the jury rendered an inconsistent verdict by acquitting the defendant of robbery but finding him guilty of use of a firearm in the commission of robbery. The jury also convicted him of possession of a firearm by felon.

Held: Affirmed. Regarding the inconsistent verdict, the Court repeated that in case of an inconsistent jury verdict, where the evidence is otherwise sufficient to support the offense for which the accused was actually convicted, the inconsistent verdicts do not constitute reversible error.

Regarding sufficiency for Possession of a Firearm, the Court agreed that the defendant, who was acting in concert with his confederate, was guilty as a principal in the second degree of possessing and using the firearm used by his accomplice.

Regarding sufficiency for Use of a Firearm under § 18.2-53.1, based on principles of concert of action, the Court concluded that a jury could find that the defendant effectively used the shotgun through his confederate to further his own participation in their shared criminal activity. The Court noted that the defendant instructed his confederate to shoot the gun into the house and took advantage of the victim's detention at gunpoint to search her bedroom and personal belongings.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1084172.pdf

Young v. Commonwealth: October 30, 2018

Portsmouth: Defendant appeals her convictions for Fraud on Failure to Properly Sequester Witnesses.

Facts: During a trial for welfare fraud, the trial court granted the defendant's motion to "separate" the witnesses, excluding them from the courtroom. The trial court did not order the

witnesses not to discuss their testimony; rather, the trial court told all counsel not to discuss the case with any witness once the trial court swore in the first witness.

During the trial, an Assistant Attorney General asked one of the witnesses to make sure that she was familiar with a claims data sheet which has been referenced in another witness' prior testimony; the witnesses then briefly conferred regarding the document. The defendant objected to allowing the second witness to testify because the witnesses violated the separation order by discussing evidence at the direction of the attorney. The trial court examined the witness and found no evidence that the brief conversation shaped, or had an adulterating effect on, the second witness' testimony. The trial court permitted the witness to testify and admitted the document.

Held: Affirmed. The Court acknowledged that the attorney caused a second witness to discuss potential evidence with a prior witness, contrary to the trial court's order to counsel not to discuss the case with any witnesses once the first witness was sworn. However, even accepting the attorney's actions as a violation of the trial court's orders, the Court found that it was not an abuse of discretion to allow the witness to testify so long as the defendant suffered no prejudice. The Court found no evidence of prejudice in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1744171.pdf

Withdrawal of Guilty Plea

Virginia Supreme Court

Brown v. Commonwealth: May 2, 2019
Aff'd Court of Appeals Ruling of March 27, 2018
Portsmouth: The defendant appeals her conviction for Petit Larceny, 2nd offense, on refusal to permit her withdrawal of a guilty plea.

Facts: The defendant stole items from a store after having a previous conviction for larceny. The defendant entered into a written plea agreement acknowledging that she understood her rights, wished to waive them, and was pleading guilty freely and voluntarily. The trial court confirmed that the defendant understood the charges against her and was prepared to plead guilty. The trial court accepted the plea agreement, which included an agreed-upon sentence.

However, two days later, the defendant moved to withdraw her plea, claiming that she "didn't know what the circumstances would be," and that pleading guilty would make her lose her house and her job. She also argued that she had "evidence to fight against" the case, claiming that she did not leave the store with the property. The trial court denied the motion.

Held: Affirmed. The Court first rejected her proffered defense, finding that the defendant's asserted defense was not viable as a matter of law. The Court repeated that, to prove petit larceny, the Commonwealth is not required to establish that the merchandise left the store.

The Court then rejected the defendant's argument that she had not understood her conviction could cause her to lose her job and home. The Court concluded that actual or potential adverse employment or housing consequences that flowed from the defendant's guilty plea do not satisfy the manifest injustice standard and, therefore, do not provide a basis upon which to set aside her guilty plea. In a footnote, the Court noted that it did not have to decide whether, in general, a trial court may consider collateral consequences when deciding a pre-sentence motion to withdraw a guilty plea.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180537.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0269171.pdf

Virginia Court of Appeals
Published

Thomason v. Commonwealth: July 17, 2018
69 Va. App. 89, 815 S.E.2d 816
Campbell: Defendant appeals his convictions for Murder and related offenses on refusal to permit him to withdraw his guilty plea and on his sentence.

Facts: The defendant invited the victim to his house, accused him of theft, and murdered him in front of the victim's wife. The defendant entered a plea agreement with the Commonwealth whereby the Commonwealth both reduced and nolle prosequied various charges. The defendant's plea agreement contained an express waiver of his ability to withdraw his guilty plea, but the trial court did not question the defendant about his understanding of the waiver provision during the plea colloquy.

On the day of the sentencing hearing, the defendant learned of a witness to whom the victim's wife had allegedly given inconsistent statements. The defendant moved to withdraw his guilty plea. The Commonwealth objected and proffered that it would be required to put two witnesses on the stand to rebut the new witness's testimony, neither of which it could then locate. The trial court denied the defendant's motion.

The defendant objected to his sentence on the grounds that the trial court failed to consider the good deeds he had done for the victim before killing him.

Held: Affirmed. Although it did not find the defendant's waiver invalid, the Court declined to decide the case based on the defendant's waiver, in view of the lack of an express colloquy by the trial court. Instead, the Court simply found that the defendant failed to meet the standard to withdraw his plea set by *Parris*.

The Court first noted that potential impeachment of witness testimony does not satisfy the *Parris* standard; a mere conflict of testimony is insufficient. The Court then rejected the defendant's argument that the Commonwealth would not suffer prejudice because "it would have had to expend those resources anyway" if the defendant had not pled guilty. The Court found that the Commonwealth sufficiently demonstrated prejudice and that the trial court properly denied the motion to withdraw the guilty plea.

Regarding the length of the defendant's sentence, the Court observed that the defendant: "does not suggest what level of his hospitality toward [the victim] the circuit court should have found outweighed committing his murder." In a footnote, Judge Humphreys wrote: "Indeed, Thomason's legal argument is not markedly different from the apocryphal and oft ridiculed example that one who kills his parents deserves sentencing consideration for being an orphan."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1290173.pdf

Virginia Court of Appeals
Unpublished

Hunt v. Commonwealth: November 14, 2018

Chesapeake: Defendant appeals his conviction for Possession of Heroin with Intent to Distribute on refusal to determine his competency and refusal to permit him to withdraw his guilty plea.

Facts: The defendant faced a charge of Distribution of Heroin, 2nd Offense. After the trial court found the defendant incompetent to stand trial, a state hospital restored the defendant to competency. However, the defendant then obtained new counsel who asked for another competency evaluation. The second evaluation found the defendant to be competent to stand trial.

The defendant decided to plead guilty. The defendant signed a guilty plea form and entered a guilty plea. In the plea form and before the trial court, the defendant stated that he understood that there was no plea agreement regarding sentencing and that the court could sentence him "anywhere within the range of [the] maximum punishment." Six months later, at sentencing, the defendant moved to withdraw his guilty plea, alleging that his sentencing guidelines were higher than he anticipated. The trial court denied the motion. On appeal, the defendant alleged that the trial court failed to establish his competency to plead guilty

Held: Affirmed. The Court agreed that the defendant failed to establish a good-faith basis to withdraw his guilty plea and failed to proffer evidence of a reasonable basis for contesting guilt. The Court explained that the fact that the sentencing guidelines were higher than the defendant had hoped does not constitute a good faith basis for rescinding his plea. The Court wrote that the defendant "should have known his own criminal record and was clearly aware of the potential range of punishments available to the court at the time he pleaded guilty." The Court also pointed out that the defendant proffered no evidence of a reasonable basis for contesting guilt.

The Court also rejected the defendant's complaint that the trial court did not explore his competency, noting that competency is not a "defense" to possession of heroin with the intent to distribute, or any charge. The Court pointed out that the trial court found the defendant competent to stand trial before he entered his guilty plea, and any argument as to the propriety of the trial court accepting his plea was waived.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1745171.pdf

Washington v. Commonwealth: April 23, 2019

Shenandoah: Defendant appeals his convictions for Attempted Robbery, Eluding, and related offenses on refusal to permit him to withdraw his guilty plea.

Facts: The defendant attempted to rob a diner with a gun. He fled and later dangerously eluded police in a vehicle and then on foot. He pled guilty to the offenses.

The trial court agreed to continue the sentencing so that the defendant could obtain records from DSS regarding his childhood in foster care and possible mental health issues. Two months later, the defendant filed a motion to withdraw his guilty pleas, although he did not file a supporting memorandum until a month after that. At the hearing on his motion, however, the defendant did not introduce any records or testimony regarding the facts of his childhood or mental health, but merely sought to explore the possibility of an insanity defense. The trial court denied the motion.

Held: Affirmed. The Court held that the defendant failed to establish a good faith basis for withdrawing his guilty pleas or proffer evidence of a reasonable basis for contesting guilt. The Court explained that the unsubstantiated assertion that an insanity defense is "possible" does not rise to prima facie evidence that the defendant was legally insane at the time of the offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0083184.pdf

CRIMES & OFFENSES

Abduction

Virginia Court of Appeals
Published

Carr v. Commonwealth: July 25, 2018
69 Va. App. 106, 816 S.E.2d 591
Virginia Beach: Defendant appeals his convictions for Sex Trafficking, Abduction, Conspiracy and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant and his co-conspirators enlisted and forced the victim to engage in prostitution for their benefit. The defendant and his group stayed in two rooms at a hotel, rented with the victim's prostitution earnings, telling the victim that "she couldn't live for free." The group used one room for sleeping and waiting for prostitution appointments, and the victim used the other room for her prostitution appointments.

When the victim tried to leave, the defendant, along with three other men, confronted the victim and accused her of giving someone else her money. One co-defendant prominently displayed a handgun during this confrontation, while the defendant encouraged him to "slam-dunk on her ass," referring to pistol-whipping the victim. When the victim said that she was not going to work for the men any longer, the co-defendant held the firearm to her head and told her that "the only way [she] was leaving was either with [them] or in a body bag."

The defendant then helped gather and carry the victim's bags back to their rooms. The victim the continued to stay in hotel rooms with the defendant and his co-conspirators and resumed prostitution. Later, however, the victim escaped.

The defendant possessed keys to the two hotel rooms at the time that law enforcement arrested him. At trial, a detective testified as an expert in the field of human trafficking operations and sex worker victimizations. He explained various facts to the jury, including that sex traffickers often rent two hotel rooms: one for prostitution appointments, and the other as a place for prostitutes or pimps to sleep or wait for appointments.

Held: Affirmed. The Court reviewed each of the offenses in detail. First, the Court found that the crime of Abduction was complete when the defendant and his co-conspirators forced the victim to return under duress. The Court pointed out that the victim's eventual escape from that hotel did not preclude the fact finder from concluding that the defendant intended to deprive the victim of her personal liberty at the time he forced her to return there.

The Court then construed the Sex Trafficking statute, § 18.2-357.1, for the first time in a reported case. The Court noted that the sex-trafficking statute does not require force or coercion. Instead, the Court ruled that the defendant's involvement in the victim's return to the hotel to resume prostitution, and the payment of his hotel room from her prostitution earnings, were sufficient to prove

the defendant's guilt under this code section. The Court rejected the defendant's argument that the victim was a "willing participant" who engaged in prostitution to support her heroin habit and acquire money to obtain "a better life."

The Court also agreed that the evidence was sufficient to prove Conspiracy. The Court found sufficient evidence for the fact finder to conclude that the defendant went with the other men under an agreement to coerce the victim to return. The Court also agreed that the circumstantial evidence proved that the defendant formed an agreement with his co-conspirators to encourage and coerce the victim to commit prostitution. The Court repeated that the Commonwealth was not required to show a specific conversation among the men establishing the conspiracy.

Lastly, concerning the Use of a Firearm, the Court repeated that is not necessary for a defendant to physically possess a firearm to be convicted under § 18.2-53.1, if the defendant is acting in concert with the gunman to commit the underlying felony. In this case, the Court explained that the fact that the defendant was not the person who held the gun to the victim's head was immaterial; he was acting in concert with the man who was threatening and detaining her.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1054171.pdf

Virginia Court of Appeals
Unpublished

Livingston v. Commonwealth: June 5, 2018

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

Facts: The defendant and his co-defendant abducted a drug-addicted veteran who owed money for previous drug deals. The victim had been buying drugs from the co-defendant and owed a considerable amount. Both the defendant and his co-defendant threatened the victim at his residence, demanding money. The co-defendant showed the victim a firearm and said he was "going to have to take blood." The defendant approached the victim and said, "Let's smoke him now. We have enough room in the trunk. Let's do it right now."

The defendant then waited at another location while the co-defendant forced the victim to walk away from his own house to a nearby convenience store. After the co-defendant and the victim arrived at the 7-Eleven, the defendant kept watch over the victim to prevent him from escaping, while the co-defendant entered the store. At trial, the victim testified that he felt helpless because he was afraid he would be shot if he tried to run away. The defendant testified that he did not know of the plan and thought they were going to the victim's house to "get high."

Held: Affirmed. The Court first held that the evidence was sufficient to prove that the defendant was guilty of abduction for pecuniary gain. The Court found that the threat to "smoke" the victim,

coupled with the co-defendant's threat and display of a handgun in his waistband, were intended to collect the debt by intimidating the victim.

Regarding the conviction for Conspiracy, the Court observed that, in this case, each member of the conspiracy performed his part so as to obtain the goal. The Court held that the evidence sufficiently proved the defendant was guilty of conspiracy to abduct for pecuniary gain.

Regarding the conviction for Use of a Firearm in Commission of a Felony, the Court repeated that the defendant did not need to have had actual possession of the gun, so as long as he acted in concert with his co-defendant, who displayed the weapon.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0888171.pdf

Animal Offenses

Virginia Supreme Court

Frouz v. Commonwealth: December 6, 2018
821 S.E.2d 324
Fairfax: Respondent appeals the determination of her dog as a Dangerous Dog

Facts: A dog living at respondent's property attacked and severely injured her neighbor's dog. The attack began on the respondent's property, but the dogs were on the neighbor's property when the dog inflicted the serious injuries. The dog belonged to the respondent's son, but at trial, the Commonwealth demonstrated that the respondent owned the house and had full ownership of the property with her husband. The respondent also referred to the dog as "her dog" and had sent emails to neighbors concerning the dog.

The neighbor's dog spent several hours in surgery on the day of the attack. A few days later he suffered a rupture that needed to be repaired. He was in the hospital for at least a week and had several follow-up visits with the veterinarian. The evidence showed that the dog was in good health prior to the attack and that he suffered no additional injuries from any other source after the attack.

The trial court found that the dog was a "dangerous dog" within the meaning of § 3.2-6540(A), that the respondent was the custodian or harborer of the dog, and ordered her to pay restitution for the injuries to a dog belonging to the victim.

Held: Affirmed. The Court first determined that an appeal under Code § 3.2-6540(B) is civil in nature and, by operation of Code § 8.01-670, the Virginia Supreme Court has appellate jurisdiction. The Court then held that the evidence was sufficient to find that the respondent's dog was a dangerous dog within the definition of Code § 3.2-6540(A), that the respondent was the custodian or harborer of the dangerous dog, and that the respondent owed restitution to her neighbor.

The Court noted that if the attack is confined to the dog's property, the safe harbor in Code § 3.2-6540(A)(iii) applies. However, once the attack extended beyond the owner or custodian's property, the safe harbor no longer applied.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1171450.pdf

Virginia Court of Appeals
Unpublished

Sutter v. Commonwealth: September 26, 2018

Albemarle: Defendant appeals her convictions for Animal Cruelty and Malicious Killing of Livestock on Jury Instructions and sufficiency issues.

Facts: The defendant worked as a veterinary assistant at the ASPCA. Police officers captured a pig that was running loose in a residential neighborhood and turned it over to the ASPCA shelter. The defendant told the ASPCA that she was taking the pig home with her and that it would live in her dog run.

Instead, the defendant called her fiancé to the parking lot of the ASPCA, where they attempted to hogtie the animal so that they could take it home with them. When the animal resisted and bit the fiancé through his boot, the fiancé instructed the defendant to get his hunting knife from his vehicle, which the defendant promptly did. The defendant then held the animal as it thrashed and kicked while the fiancé repeatedly stabbed the pig more than thirty-one times in the neck with his hunting knife.

The pig received numerous wounds, including one wound that was approximately five inches long, one and a half inches wide, and approximately three and half inches deep. An Animal Control Officer surmised that it was an apparent attempt to "decapitate the pig." The defendant later admitted in her testimony that she believed the animal suffered during this botched apparent attempt at a quick "slaughter." An expert testified at trial that the pig would have taken about ten minutes to die and must have suffered.

Police later asked the defendant about the whereabouts of the pig, but the defendant lied and concealed the fact that the pig was already dead and that they had killed the pig the day before. When police discovered what really happened, the fiancé was adamant that the pig was feral and that he had the right to kill it. At trial, the defendant argued that the officers gave her permission to kill the pig by turning it over to her at the ASPCA.

At trial, the defendant objected to the jury instruction that the jury may infer malice from the deliberate use of a deadly weapon, arguing that any killing of a pig requires the use of a deadly weapon.

At trial, the Commonwealth offered the model jury instruction defining "malice." The defendant proposed additional language that read: "Malice is intended to denote an action flowing from any wicked and corrupt motive, done with an evil mind and purpose and wrongful intention." The trial court denied that additional language. The defendant also offered an instruction on the definition of "willful" that required a finding of "malevolent purpose", but the trial court denied that instruction as well.

Held: Affirmed. Regarding the jury instructions generally, the Court agreed that the plain language of the statute was sufficient to instruct the jury on all issues which the evidence fairly raised. The Court saw no reason to provide the jury with a distinction between lawful killing and unlawful killing, because in this case the killing was inconsistent with approved methods of slaughter.

Regarding the definition of "malice", the Court decided that the Commonwealth's jury instruction was an accurate statement of the law and that therefore there was no need for additional instruction. Regarding the instruction on the inference of malice from the use of a deadly weapon, the Court found that here, the jury could infer, but it was not required to presume, malicious intent based on the use of a deadly weapon to kill the pig

Regarding the instruction defining the term "willful", the Court ruled that where, as here, the conduct at issue was indisputably voluntary and intentional, the definition in the jury instruction that the defendant proposed was unnecessary. The Court also found that the defendant's proposed instruction was not an accurate statement of Virginia law because Virginia does not require the jury to find that the defendant acted with a "malevolent purpose"

Regarding sufficiency, the Court found that, even though the defendant did not personally wield the knife and inflict any of the numerous wounds that the pig sustained, the jury could find – based upon her actions of retrieving the knife for her fiancé and then holding the pig as he stabbed it over thirty-one times – that she acted as a principal in the second degree and that she was guilty of the malicious killing of the pig and of animal cruelty.

The Court also rejected the defendant's argument that the officers gave her the authority to kill the pig by turning the pig over to her. The Court noted that the officers were not the owners of the pig and could not have transferred ownership of the pig. In addition, the Court explained that even if the defendant had the police officers' "permission" to take the pig, that would have no bearing on whether the defendant's actions were malicious or cruel.

The Court concluded by cautioning: "our holding in this particular case should not be interpreted in any way as somehow criminalizing the lawful conduct of the thousands of individuals (be they farmers, butchers, or otherwise) or businesses that routinely slaughter livestock, which they lawfully possess, in the normal course of their daily business. Rather, our opinion in this case bears specifically on the bizarre decision and conduct of appellant and her co-defendant, who decided to kill an animal – which was not theirs – in the yard and parking lot of the local SPCA and animal shelter, where appellant was then employed."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0977172.pdf

Assaults

Virginia Court of Appeals
Published

Kelly v. Commonwealth: January 8, 2019
9 Va. App. 617, 822 S.E.2d 375
Loudoun: Defendant appeals his conviction for Assault and Battery on sufficiency of the evidence.

Facts: The defendant assaulted a woman at a party. He grabbed the victim's face against her will while she was trying to pull away from him as she repeatedly told him "no." He argued that he had "implied consent" to the touching because he and victim were coworkers. He argued that his "legal justification" for his action was that he did it "in an effort to express his gratitude."

Held: Affirmed. The Court agreed that the attack was rude, angry or vengeful, and that the defendant provided no legal basis upon which his holding of the victim's face against her will, while trying to kiss her, was justified or excused.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1063174.pdf

Aggravated Malicious Wounding

Virginia Court of Appeals
Published

Ellis v. Commonwealth: May 28, 2019

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

Facts: The defendant savagely attacked and killed his mother while she was asleep with his bare hands, punching her numerous times in the face and head and suffocating her to the point that she was "basically dead." She remained alive, however, begging the defendant to stop and calling for her dog. The defendant then pulled his mother to the floor and jumped onto her chest with his knees, breaking her chest, and then proceeded to kick her in the head multiple times. Although the victim was no longer communicating, the defendant still did not think she was dead, so he beat her with a hammer, causing severe damage to her skull, face, and teeth, and then forced the hammer down her throat.

The medical examiner found that the victim had suffered numerous injuries that would have been fatal if inflicted in isolation. At trial, the medical examiner, Dr. Gormley, testified that the victim suffered multiple contusions, which develop only while a victim remains alive. The trial court convicted the defendant of First Degree Murder and Aggravated Malicious Wounding of the victim.

Held: Affirmed. The Court ruled that if, as in this case, it is established by the evidence and reasonable inferences therefrom that there was a temporal interval between the initial malicious

wounding, with the victim remaining alive, and the subsequent death of the victim, then the defendant can be convicted of both aggravated malicious wounding and murder.

The Court rejected the defendant's argument that, for an injury to be considered permanent and significant, the Commonwealth must prove that the victim survived it, for at least some period of time. Instead, the Court reasoned that to accept the defendant's argument would be to read into § 18.2-51.2(A) an element of proof – survival of the injury for some specific interval of time – that the statute does not contain.

The Court agreed that the evidence demonstrated that the victim was alive after the defendant punched her in the face, tried to suffocate her, pulled her off the bed, and beat on the floor. The Court explained: "We can conceive of no injury more significant and permanent as one which causes a victim's death." Although the Court agreed that a victim must survive, if only briefly, for an injury to be considered "permanent" within the context of § 18.2-51.2, in this case the evidence proved that the victim remained alive during intervals of the attack.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0256184.pdf

Strangulation

Virginia Court of Appeals
Published

Wandemberg v. Commonwealth: April 2, 2019

Chesterfield: Defendant appeals his convictions for Strangulation and Interfering with 911 on sufficiency of the evidence.

Facts: The defendant attacked the victim twice, strangling her during the attacks. The defendant also destroyed her cellphone while she was attempting to call 911, although he claimed that she destroyed it herself. In the first attack, the defendant squeezed and pressed down upon the victim's neck with enough force to restrict her ability to breathe. The victim suffered abrasions around her neck.

In the second attack, the defendant got on top of the victim, straddled her, placed both hands on her neck, and started choking her. The defendant strangled the victim for so long that the victim's face and lips went numb. The victim also testified that her neck hurt and was red after the strangulation.

The Commonwealth indicted the defendant for both strangulation attacks, as well as for destruction of the cellphone and interference with a 911 call. The indictment for Interference with a 911 call stated that the defendant "did unlawfully destroy, deface, damage, a telephone . . . with the intent to prevent another person from summoning law-enforcement, fire or rescue services[.]"

At trial, the trial court acquitted the defendant of Destruction of Property but convicted the defendant of Interference with a 911 call. In doing so, the trial court stated that it could not resolve an evidentiary dispute regarding who destroyed the phone, the victim or the defendant.

Held: Affirmed in part, reversed in part. The Court affirmed the convictions for Strangulation, but reversed the conviction for Interference with a 911 call.

The Court affirmed both convictions for Strangulation. Regarding the first attack, the Court explained that, while a brief restriction of a victim's ability to breathe standing alone may not be enough to constitute a bodily injury, in this case the victim's visible injuries established that the defendant caused the victim to suffer a bodily injury within the meaning of § 18.2-51.6. Regarding the second attack, the Court ruled that it constituted "the definition of strangulation."

The Court reversed the conviction for interference with a 911 call, however. The Court pointed out that, while the indictment cited to Code § 18.2-164(B), the descriptive text of the indictment narrowed the factual allegation in the indictment to a violation of § 18.2-164(B)(2). The Court concluded that the Commonwealth, to meet the indictment, had to prove that the defendant disabled or destroyed the victim's cell phone. However, the Court noted that the trial court explicitly found that the evidence did not prove who destroyed the phone.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0137182.pdf

Attempts

Virginia Supreme Court

Secret v. Commonwealth: October 11, 2018
Aff'd Court of Appeals Ruling of February 14, 2017
819 S.E.2d 234
Louisa: Defendant appeals his convictions for Arson and Attempted Murder on sufficiency of the evidence and Fifth Amendment grounds.

Facts: The defendant poured fuel throughout a rooming house in the early morning hours when people were still sleeping and attempted to burn the building down. A deputy responded and located the defendant, who was surrounded by residents of the building. The deputy detained the defendant and placed him in handcuffs. The deputy asked the defendant if he would be willing to come to the Sheriff's Department to talk to a State Police Investigator. The defendant agreed. The deputy told the defendant he would have to transport him handcuffed, per policy, but that he was not under arrest. The deputy removed the handcuffs when the defendant arrived at the Department.

An investigator then spoke with the defendant in a closed room for almost an hour. The investigator did not believe that the defendant was in custody, but instead thought he was there "on his own accord" and willing to speak. The defendant admitted to setting the fire and that he could hear people in the building while he was setting it on fire. After the defendant admitted to setting the fire, the investigator read the defendant his *Miranda* rights. Thereafter, the defendant explained that he set

the fire to eliminate the "holograms" that lived inside the building. During his interview, the defendant denied being under the influence of either drugs or alcohol.

The defendant moves to suppress his statement, arguing that by first obtaining a confession, and then administering *Miranda* warnings, the investigator violated *Elstad* and *Seibert*. During the motion to suppress, however, the investigator denied deliberately using a "two-step interrogation technique. The defendant also argued that his statement was involuntary due to his mental state, but the trial court found no evidence of impairment.

At trial, the defendant argued that the Commonwealth failed to prove the specific intent to kill each individual victim. The trial court disagreed and convicted the defendant of arson and nine counts of attempted murder. The Court of Appeals affirmed.

Held: Affirmed. [*Note: The Court assumed but did not rule that the defendant was in custody – EJC]*. Rejecting the defendant's *Seibert* argument, the Court relied on Justice Kennedy's "subjective-intent" test, where the key inquiry is whether the investigator purposefully utilized a "two-step interrogation technique". The Court, like Justice Kennedy, rejected an "objective" test that would find any statement automatically inadmissible when the defendant is in custody. Instead, the Court agreed that the statement was admissible because the investigator neither deliberately employed a two-step interrogation technique, nor employed any deliberately coercive or improper tactics in obtaining the initial statement.

The Court also agreed with the Court of Appeals that the defendant failed to demonstrate impairment sufficient to render his statement involuntary.

Finally, the Court agreed with the Court of Appeals that the evidence proved the defendant's specific intent to kill all of the individuals located within the building at the time he started the fire, even though he did not know the specific identity of the individuals who were in the facility at that time. The Court explained that the Commonwealth needed only prove that the defendant knew that the building was occupied at the time he started the fire and that the natural and probable consequence of his actions was that all of them—whomever they happened to be— would be killed by the fire.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170540.pdf

Virginia Court of Appeals
Published

Jones v. Commonwealth: May 7, 2019 (*En Banc*)
Aff'd Unpublished Opinion of October 2, 2018

Petersburg: The defendant appeals his convictions for Attempted Robbery and Use of a Firearm on sufficiency of the evidence.

Facts: Two officers saw a man get out of a car and then walk across the street. A few minutes later, they saw the defendant and his accomplice get out of the same car, adjust their clothing and put

on hooded sweatshirts, and then walk down an alley between two buildings in the same direction as the first man had gone. The officers followed the men to an alley between two residences. They saw the defendant and his accomplice at the corner behind one of the houses, but not near the door.

When the men saw the officers, they started to walk down the alley toward the street. The officers exited their truck and announced their presence. The accomplice stopped walking, but the defendant fled and drove away. However, another officer apprehended the defendant a short time later, searched his car, and discovered a ski mask. He located another ski mask in a street that the defendant had travelled before he stopped.

Several hours later, in response to a telephone call, the officer searched a fenced-in area where he had seen the defendant running and found a sawed-off shotgun under a bush inside the gate. After his arrest, the defendant made conflicting statements about the incident, but eventually admitted that he and his accomplice were there to "make sure Trip didn't get hurt." According to the defendant, his accomplice had intended to rob a known drug dealer.

The trial court convicted the defendant of Conspiracy, Attempted Robbery, and Use of a Firearm. [*Note: The defendant did not pursue an appeal of the Conspiracy conviction*]. A panel of the Court of Appeals reversed, concluding that the evidence showed only some possible preparation for the intended crime, rather than any overt act.

Held: Affirmed, Conviction Reversed. The *En Banc* Court held that the evidence did not show that the defendant committed an overt act sufficient to constitute the commencement of the consummation of the crime of robbery despite having the requisite criminal intent. The Court wrote that "current public policy does not attach criminal liability for a substantive offense until the point where a crime is actually commenced."

In the context of a robbery, the Court ruled that, despite having the intent to do so, if no person has been subjected to force, violence or intimidation and no demand to part with personal property made, neither robbery nor attempted robbery has yet occurred, although other crimes may well be complete. On the other hand, the Court provided that, if an act constituting any of the elements of robbery has commenced, the crime of attempted robbery has occurred even if the enterprise is abandoned or interrupted before completion.

The Court found that, in order for a crime to be attempted, and thus for criminal liability to attach, the intended crime must be in progress to some extent. In a footnote, the Court rejected the argument that "the element must be completed." The Court agreed that an act constituting an attempt can be "slight." However, an overt act constituting an attempted crime must have linkage to an element of the offense, rather than merely the overall criminal intent.

As far as "preparation," the Court clarified that preparation is "every act, slight or not, that serves as a prelude to the commission of the crime." Thus, the Court concluded that preparation necessarily ceases when the commission of that crime actually begins through the commencement of an act—not the "last proximate act"—that constitutes one or more elements of the crime.

In this case, the Court noted that the record contained no evidence that the intended victim lived in the vicinity and explained that, while it was possible that the defendant and his co-conspirators were in the vicinity of the victim's residence and may have been moments away from the process of commencing the planned robbery, the record lacked evidence to prove that.

Four justices concurred, but offered vastly different reasoning, rejecting the majority's "bright-line test." In a long and detailed argument, the concurring justices would have overturned "the wrongly decided decisions in the companion cases of *Hopson* and *Jordan*."

Tags: Attempt - Elements

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1764162.pdf

Burglary

Virginia Court of Appeals
Unpublished

Shabazz v. Commonwealth: March 12, 2019

Danville: The defendant appeals his conviction for Burglary and Larceny on sufficiency of the evidence

Facts: the defendant broke into the victim's house and stole cash. The victim testified that before the burglary, she placed $50 on top of a chest of drawers in her bedroom; when she returned six weeks later, the money was gone. The defendant had broken in by smashing a window. After the break-in, police located blood on an interior door. The DNA profile matched the defendant.

Held: Affirmed. The Court noted that the defendant's unlawful entry into the victim's home supported the inference that his entry was made for an unlawful purpose. The Court also reasoned that the money's disappearance demonstrated that the purpose or intent of the defendant's unlawful entry was to steal from the victim.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0470183.pdf

Child Abuse & Neglect

Virginia Court of Appeals
Unpublished

Caswell v. Commonwealth: July 24, 2018

Stafford: Defendant appeals her conviction for Child Cruelty on sufficiency of the evidence.

Facts: The defendant provided babysitting for a two-year-old child and a three-year-old child. The older child expressed a desire to go swimming that morning. The defendant was aware that the older child knew how to unlock a sliding door in the house but could not swim without floatation devices and supervision. The children's mother asked the defendant to secure a sliding door that led to the family's swimming pool. The defendant did not secure the door.

After the mother left in the morning, a neighbor saw the children playing outside, alone, and not under the defendant's supervision. The evidence demonstrated that the defendant did not have contact with the children again for about two hours, even though their playroom was visible from the kitchen, where she claimed she had been. In the afternoon, neighbors found the younger child standing in a ditch next to the street with no shoes or shirt on, very sweaty, and crying. They returned to the home and found the defendant, who told them that she had fallen asleep. They discovered that the three-year-old child had drowned in the pool.

At trial, the defendant testified that she did not let the children outside at any point in the morning.

Held: Affirmed. Applying the five *Barnes* factors, the Court agreed that the defendant's conduct was criminally negligent. The Court observed that leaving the sliding glass door in the playroom unsecure meant exposing the children to extreme danger, specifically the access to a five-foot-deep swimming pool that was just steps away from their playroom. The Court distinguished the *Ellis* case, noting that in this case, there was a known risk of danger to the children in the apartment, the defendant knew of the dangers likely to occur, and the defendant failed to eliminate those dangers.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1081174.pdf

Child Pornography & Solicitation

Virginia Supreme Court

Commonwealth v. Murgia: May 16, 2019
Reversed Court of Appeals Opinion of May 30, 2017

Chesapeake: Defendant appeals his conviction for Computer Solicitation of a Minor on sufficiency of the evidence.

Facts: Defendant worked as a track coach for the victim's school. The victim, a sixteen-year-old female high school student, asked the defendant to help her prepare for an upcoming event. In response, the defendant began sending the victim sexually suggestive messages, including one in which he described in lengthy detail a dream in which he engaged in various sexual acts with the child. The defendant referred to the victim in text messages as "yo sexy self and told her, "I'm gonna stretch your

tight ass legs out and loosen them hips up too." The victim alerted a friend, who contacted law enforcement.

At trial, the trial court convicted the defendant of solicitation of a minor under 18.2-374.3(D). The Court of Appeals reversed, finding that the messages sent to the victim did not show the defendant intended to induce the victim to commit a criminal offense and that his conduct essentially constituted "words alone."

Held: Conviction Re-Instated, Court of Appeals Reversed. Even though this conviction involved § 18.2-374.3(D), rather than § 18.2-374.3(B), the Court found that *Dietz* was directly on point with this case. The Court ruled that the Commonwealth was not required to prove that the defendant actually committed a crime of solicitation, only that he used a communications system for the purpose of soliciting the act. The Court explained that when the use of the technology is an element of the offense, intent may be inferred from the "words alone" used by the accused.

In this case, the Court concluded that the evidence plainly supported the conclusion that the defendant used a communications system for the purpose of soliciting the victim to commit sexual acts proscribed by Code § 18.2-374.3(D). The Court pointed out that the defendant's pattern of communications shows that he regularly departed from the topic of the victim's athletic training to discuss matters of a personal nature.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180946.pdf
Previous Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0788161.pdf

Virginia Court of Appeals
Unpublished

Stoltz v. Commonwealth: June 19, 2018

Fairfax: Defendant appeals his conviction for Using a Computer to Solicit a Minor on Constitutionality grounds.

Facts: The defendant posted an Internet personal seeking a sexual partner. A detective, posing as a thirteen-year-old girl, responded. The detective repeatedly affirmed that he was only thirteen, but the defendant arranged for them to meet for a sexual encounter. At trial, the defendant argued that § 18.2-374.3 is unconstitutional because it criminalizes conduct that is protected by the First Amendment, and this overbreadth violates his right to due process. He also contended that he was convicted for innocent conduct because no child was involved and he "reasonably, objectively and correctly believed" that he was communicating with an adult. The trial court rejected those arguments.

Held: Affirmed. The Court pointed out that the jury was required to determine that the defendant "knew or had reason to believe" that he was communicating with a minor and that the

evidence supported the jury's conclusion that he did. The Court rejected the defendant's analogy to *Reno v. Am. Civil Liberties Union*. In *Reno*, the US Supreme Court struck down two provisions of the Communications Decency Act ("the CDA"), finding that the contested provisions of the CDA placed an undue burden on protected speech by requiring a person sending an online message to determine whether a minor was likely to view it. The Court found that § 18.2-374.3 differs significantly from the CDA, in that nothing in the Virginia statute restricts constitutionally safeguarded communication between adults.

The Court also rejected the defendant's analogy to *Sandstrom v. Montana*, a US Supreme Court case that ruled that a jury instruction that "a person intends the ordinary consequences of his voluntary acts" violated the constitutional requirement that the prosecution prove every element of the offense beyond a reasonable doubt. The Court noted that in this case, the trial court properly instructed the jury that it was the Commonwealth's burden to prove beyond a reasonable doubt every element of the crime of using a computer to solicit a minor and that "reason" is "the capacity to distinguish truth from falsehood."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0352174.pdf

Conspiracy

Virginia Court of Appeals
Published

Carr v. Commonwealth: July 25, 2018
69 Va. App. 106, 816 S.E.2d 591
Virginia Beach: Defendant appeals his convictions for Sex Trafficking, Abduction, Conspiracy and Use of a Firearm on sufficiency of the evidence.

Facts: The defendant and his co-conspirators enlisted and forced the victim to engage in prostitution for their benefit. The defendant and his group stayed in two rooms at a hotel, rented with the victim's prostitution earnings, telling the victim that "she couldn't live for free." The group used one room for sleeping and waiting for prostitution appointments, and the victim used the other room for her prostitution appointments.

When the victim tried to leave, the defendant, along with three other men, confronted the victim and accused her of giving someone else her money. One co-defendant prominently displayed a handgun during this confrontation, while the defendant encouraged him to "slam-dunk on her ass," referring to pistol-whipping the victim. When the victim said that she was not going to work for the men any longer, the co-defendant held the firearm to her head and told her that "the only way [she] was leaving was either with [them] or in a body bag."

The defendant then helped gather and carry the victim's bags back to their rooms. The victim the continued to stay in hotel rooms with the defendant and his co-conspirators and resumed prostitution. Later, however, the victim escaped.

The defendant possessed keys to the two hotel rooms at the time that law enforcement arrested him. At trial, a detective testified as an expert in the field of human trafficking operations and sex worker victimizations. He explained various facts to the jury, including that sex traffickers often rent two hotel rooms: one for prostitution appointments, and the other as a place for prostitutes or pimps to sleep or wait for appointments.

Held: Affirmed. The Court reviewed each of the offenses in detail. First, the Court found that the crime of Abduction was complete when the defendant and his co-conspirators forced the victim to return under duress. The Court pointed out that the victim's eventual escape from that hotel did not preclude the fact finder from concluding that the defendant intended to deprive the victim of her personal liberty at the time he forced her to return there.

The Court then construed the Sex Trafficking statute, § 18.2-357.1, for the first time in a reported case. The Court noted that the sex-trafficking statute does not require force or coercion. Instead, the Court ruled that the defendant's involvement in the victim's return to the hotel to resume prostitution, and the payment of his hotel room from her prostitution earnings, were sufficient to prove the defendant's guilt under this code section. The Court rejected the defendant's argument that the victim was a "willing participant" who engaged in prostitution to support her heroin habit and acquire money to obtain "a better life."

The Court also agreed that the evidence was sufficient to prove Conspiracy. The Court found sufficient evidence for the fact finder to conclude that the defendant went with the other men under an agreement to coerce the victim to return. The Court also agreed that the circumstantial evidence proved that the defendant formed an agreement with his co-conspirators to encourage and coerce the victim to commit prostitution. The Court repeated that the Commonwealth was not required to show a specific conversation among the men establishing the conspiracy.

Lastly, concerning the Use of a Firearm, the Court repeated that is not necessary for a defendant to physically possess a firearm to be convicted under § 18.2-53.1, if the defendant is acting in concert with the gunman to commit the underlying felony. In this case, the Court explained that the fact that the defendant was not the person who held the gun to the victim's head was immaterial; he was acting in concert with the man who was threatening and detaining her.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1054171.pdf

Speller v. Commonwealth: November 6, 2018
69 Va. App. 378, 819 S.E.2d 848
Virginia Beach: The defendant appeals his convictions for Burglary, Grand Larceny, and Conspiracy on sufficiency of the evidence.

Facts: The defendant and several other men broke into two residences and stole property. At each residence, an eyewitness saw three men go into and take property out of the house, placing it in the trunk of a silver Buick. The victims returned home to discover their doorframes broken out of the door where the deadbolt and the lock had been secured. Soon after, police found the silver Buick and followed it as it parked in a driveway in a residential area. Three men got out of the silver Buick, and police identified the defendant as one of them. When police asked the men to stop, they all fled. Police recovered some of the victims' property in the car. Police found the defendant's fingerprint on a stolen firearm.

At trial, the victim described his firearms in detail, including the make and model, and also described where he kept the ammunition for the firearms. The defendant argued that the Commonwealth did not prove the value of the stolen firearms.

Held: Affirmed. The Court held that to obtain a conviction for grand larceny of a firearm, when a value of more than $200 is not shown, the Commonwealth must prove that the item stolen was "any instrument designed, made, and intended to fire or expel a projectile by means of an explosion." However, the Court declined to require the Commonwealth to present specific testimony that the object was designed, made, and intended to fire or expel a projectile by means of an explosion.

In this case, the Court held that the circumstantial evidence was sufficient to demonstrate that the instruments that the defendant stole were designed, made, and intended to fire or expel a projectile by means of an explosion. The Court wrote: "Common sense dictates that a reasonable fact finder could conclude that the "shotguns, rifles, and pistols" locked in a gun safe along with ammunition were items designed, made, and intended to fire a projectile."

The Court also found that it was reasonable to conclude that the defendant and his cohorts conspired together and then broke and entered with the intent to commit larceny.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1826171.pdf

Virginia Court of Appeals
Unpublished

Livingston v. Commonwealth: June 5, 2018

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

Facts: The defendant and his co-defendant abducted a drug-addicted veteran who owed money for previous drug deals. The victim had been buying drugs from the co-defendant and owed a considerable amount. Both the defendant and his co-defendant threatened the victim at his residence, demanding money. The co-defendant showed the victim a firearm and said he was "going to have to take blood." The defendant approached the victim and said, "Let's smoke him now. We have enough room in the trunk. Let's do it right now."

The defendant then waited at another location while the co-defendant forced the victim to walk away from his own house to a nearby convenience store. After the co-defendant and the victim arrived at the 7-Eleven, the defendant kept watch over the victim to prevent him from escaping, while the co-defendant entered the store. At trial, the victim testified that he felt helpless because he was afraid he would be shot if he tried to run away. The defendant testified that he did not know of the plan and thought they were going to the victim's house to "get high."

Held: Affirmed. The Court first held that the evidence was sufficient to prove that the defendant was guilty of abduction for pecuniary gain. The Court found that the threat to "smoke" the victim, coupled with the co-defendant's threat and display of a handgun in his waistband, were intended to collect the debt by intimidating the victim.

Regarding the conviction for Conspiracy, the Court observed that, in this case, each member of the conspiracy performed his part so as to obtain the goal. The Court held that the evidence sufficiently proved the defendant was guilty of conspiracy to abduct for pecuniary gain.

Regarding the conviction for Use of a Firearm in Commission of a Felony, the Court repeated that the defendant did not need to have had actual possession of the gun, so as long as he acted in concert with his co-defendant, who displayed the weapon.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0888171.pdf

Clark v. Commonwealth: September 24, 2018

Virginia Beach: Defendant appeals his convictions for Larceny and Conspiracy on sufficiency of the evidence.

Facts: The defendant and his confederate walked through a store and placed various items on a cart. As the defendant walked out of the store with the cart, store personnel stopped him and asked for a receipt. The defendant objected, complaining that they were only asking for a receipt because of his race, and continued out of the store without paying for the item. Store employees watched the defendant and his confederate load the stolen items in a car.

Police showed one employee a photo array of six pictures, one of which included the defendant. When she first reviewed the pictures, she said "maybe" when she saw the defendant's photo. Reviewing the array a second time, she said: "I think that's him. I believe this is the one." At trial, the witness explained that when she saw the photo array she was suffering from a tumor that affected her vision. At trial, she positively identified the defendant as the person who had stolen merchandise, as did two other employees.

The defendant also used a similar scheme to steal items from another store, but this time, when staff confronted him, he brandished a razor and threatened them, escaping again. The loss prevention officer who tried to stop the defendant also reviewed other videos from other thefts and identified the defendant in the videos also stealing other items. At trial, the loss prevention officer identified the defendant as the person whom he had seen in the store and in the videos.

The defendant argued that the identifications were insufficient to prove his identity. He also argued that there was insufficient evidence of a conspiracy regarding the first theft.

Held: Affirmed. The Court found that the witnesses each sufficiently identified the defendant, either based on their opportunity to view him in person, or having seen him on video. The Court repeated that inconsistencies in the eyewitnesses' testimony did not render their identifications unreliable.

Regarding the Conspiracy conviction, the Court observed that the defendant and his co-conspirator engaged in "very intricate" movements while in the store, "specifically and quite deliberately" selecting items and placing them on a flat cart. The Court also noted that the defendant and his co-conspirator loaded the items in a car and left together in that car.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1579171.pdf

Credit Card Offenses

Virginia Court of Appeals
Unpublished

Arrate v. Commonwealth: February 12, 2019

Caroline: Defendant appeals his conviction for Credit Card Forgery on variance with the Indictment

Facts: The defendant presented several fraudulent cards at a convenience store. The Commonwealth indicted the defendant for Credit Card Forgery. The indictment alleged that the defendant "did unlawfully and feloniously commit credit card forgery with intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported credit card, in violation of § 18.2-193." The indictment did not allege any "uttering" of the card, nor did it include language from subsections (b) or (c) of that statute.

Held: Reversed. The Court held a fatal variance existed between the indictment and the conduct for which the trial court convicted the defendant. The Court found that it was error to convict the defendant under this indictment when there was no evidence that the defendant either made or embossed the card and the indictment failed to charge the defendant with uttering.

The Court commented that the Commonwealth could "easily have avoided this outcome by broadening the descriptive text of an indictment or by making disjunctive factual allegations." "Had the indictment been so broad as to encompass the entirety of Code § 18.2-193, [the defendant] could have sought a bill of particulars in order to determine the specific conduct the Commonwealth intended to prove. By including the narrowing language of making and embossing, and excluding any mention of

"uttering," the indictment failed to provide adequate notice to [the defendant] that the Commonwealth intended to show he uttered the forged card."

The Court refused to extend the presumption that possession of a forged instrument is *prima facie* evidence that he either forged the instrument or procured it to be forged to credit card forgery.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0518182.pdf

Destruction of Property

Virginia Court of Appeals
Published

Spratley v. Commonwealth: October 9, 2018
69 Va. App. 314, 818 S.E.2d 823
Loudoun: Defendant appeals his conviction for Felony Destruction of Property on sufficiency of the evidence.

Facts: During an argument at a grocery store, the defendant deliberately destroyed a scale used to weigh food. The scale was unrepairable, and the store could not find an exact replacement. However, the store found a different model that was "virtually identical" to replace the destroyed scale. The new scale cost over $4,000. The trial court rejected the defendant's argument that the Commonwealth never proved the value of the scale that he destroyed and convicted the defendant of felony property destruction.

Held: Affirmed. The Court held that the Commonwealth was permitted to prove felony destruction of property with evidence that the cost of replacing the original scale with an equivalent substitute was at least $1,000. By establishing that the store purchased a new scale to replace the old one and that the two models were "virtually identical," the Commonwealth met its burden. The Court explained that the term "replacement" in § 18.2-137 contemplates the cost of obtaining a substitute item to take the place of the original, destroyed item. While in other statutes, the Court noted that the General Assembly used the phrase "fair market value," inclusion of this term in the statute allows a specific inquiry into the value of the substitute item to establish the "amount of loss."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1715174.pdf

Driving Suspended or Revoked

Western District of Virginia

Stinnie v. Holcomb: December 21, 2018

Charlottesville: Plaintiffs seek an injunction to prevent the DMV from suspending their licenses due to non-payment of fines and costs.

Facts: The DMV suspended the privilege to operate a motor vehicle in Virginia for each of five plaintiffs due to their failure to pay fines and costs from previous convictions. Each plaintiff alleges that they cannot pay due to poverty. They are seeking class action-status to challenge the constitutionality of Virginia Code § 46.2-395, which requires the automatic suspension of drivers' licenses for failure to pay state court fines and costs. The plaintiffs moved for a preliminary injunction to:

(1) Enjoin the Commissioner from enforcing § 46.2-395;

(2) Remove current suspensions of the plaintiffs' driver's licenses imposed under § 46.2-395; &

(3) Enjoin the Commissioner from charging a fee to reinstate the plaintiffs' licenses where there are no other current restrictions on their licenses.

Held: Injunction granted. The Court concluded that the plaintiffs are likely to succeed on the merits of their claim that § 46.2-395 violates procedural due process because the DMV suspends licenses without an opportunity to be heard. The Court found that the plaintiffs are likely to show they have been deprived of life, liberty or property, and that such deprivation occurred without the due process of law. The Court's injunction applied only to the five named plaintiffs; the Court made no determination as to the plaintiffs' motion to certify the case as a class action.

The Court repeated that a "driver's license is a property interest protected by the Fourteenth Amendment and, once issued, a driver's license may not be taken away without affording a licensee procedural due process." The Court explained that procedural due process requires fair notice of impending state action and an opportunity to be heard. The Court noted that, at the time of default, neither the judge nor the clerk enters an order regarding a driver's license suspension for failure to pay fines and costs, and no notice is sent to the licensee regarding the pending license suspension. The Court also observed that when suspension occurs pursuant to § 46.2-395, again, neither a judge nor a clerk enters an order suspending the license or notifies the debtor of a license suspension.

Thus, the Court complained that the DMV never gave the plaintiffs any opportunity to be heard regarding their default, nor did they have the opportunity to present evidence that they are unable to satisfy court debt. The Court rejected the various methods available under the Code to enter a payment plan or receive a reduction in fines and costs, finding that those procedures are not tailored "to the capacities and circumstances of those who are to be heard," nor do they ensure that licensees are "given a meaningful opportunity to present their case." For example, if the court forgives already-defaulted debt, the licensee would still have to provide the Commissioner with proof of satisfaction and pay DMV's $145 reinstatement fee, which cannot be waived.

The Court also considered the recent codification of Supreme Court of Virginia Rule 1:24, requiring courts to give written notice of the availability of deferred and installment payment plans helps to prevent erroneous deprivation, but found it was not persuasive. While enrollment in a payment plan does suggest the consideration of financial hardship, the Court reasoned that an individual who

fails to make the established payments will still have her license suspended pursuant to § 46.2-395. The Court described how the Rule may delay suspension, but it does not prevent, or allow a licensee to object to, a license suspension for failure to pay court fines and costs.

Full Case At:
https://scholar.google.com/scholar_case?case=9450296981932484953&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Virginia Court of Appeals
Unpublished

Yoder v. Commonwealth: December 11, 2018

Augusta: Defendant appeals her conviction for Driving After Forfeiture of her License, 3rd Offense, on sufficiency of the evidence.

Facts: The defendant drove on a revoked license in violation of § 18.2-272(A). When the police stopped her and asked her for her driver's license, the defendant produced a special identification card that is issued only to individuals without a valid driver's license. At trial, the Commonwealth introduced into evidence a certified copy of the defendant's 2010 and 2014 prior conviction. The 2014 conviction was on a summons for "driv[ing] on [a] revoked license 3rd offense" in violation of § 18.2-272. The defendant argued that the charge in 2014 would have been a felony and could not be issued on a summons and, consequently, that the prior was invalid.

Held: Affirmed. The Court held that the evidence was sufficient to prove beyond a reasonable doubt that the defendant received notice that her driver's license was revoked on the date of the instant offense. The Court noted that under § 46.2-345, the defendant's possession of a special identification card indicated that she did not have a valid driver's license. Further, the Court concluded that the defendant's production of the special identification card during the traffic stop signified her knowledge that her driver's license was revoked at that time.

The Court repeated that evidence relevant to proving notice in a driving offense includes a transcript of the defendant's driver history reflecting such notice obtained from the Department of Motor Vehicles, any statements made by the defendant indicating knowledge, as well as a defendant's presence at a prior trial for driving on a suspended or revoked license. In this case, the Court noted that the defendant's prior convictions demonstrated actual notice in 2014 of her license revocation.

In addition, the Court held that the evidence demonstrated that the offense was a third or subsequent violation of the statute. The Court explained that a conviction for § 18.2-272 as a third or subsequent offense requires only that the defendant received two or more convictions under Code § 18.2-272 in the previous ten years and does not require that either predicate offense was a felony. The Court found that the 2014 conviction order provided the trial court, as fact finder, with a sufficient basis for establishing a predicate offense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1023173.pdf

DUI

Virginia Court of Appeals
Published

Lambert v. Commonwealth: March 12, 2019

Russell: Defendant appeals his convictions for Aggravated Involuntary Manslaughter and DUI on refusal to permit cross examination and sufficiency of the evidence.

Facts: While intoxicated, the defendant drove his truck into oncoming traffic. The defendant slammed into a vehicle, killing the passenger and severely injuring the driver of that vehicle. Witnesses observed the defendant had glassy eyes, slurred speech, appeared sleepy, and needed to lean on a guardrail for support. Witnesses did not see him consume anything after the crash. The defendant first lied to a trooper and stated that he was not under the influence of anything, but ultimately admitted that he had just received a dose of methadone at a local treatment clinic.

Forensic analysis of the defendant's blood revealed the presence of methadone, alprazolam (Xanax), and nordiazepam. At trial, an expert testified that methadone can cause depressant effects that impair the ability to drive including lethargy, dizziness, slowed hand-eye coordination, and difficulty balancing and also that the level of alprazolam in the defendant's blood was also "significant" and could be especially "dangerous" when taken in combination with methadone.

At trial, the Commonwealth moved *in limine* to exclude evidence regarding the investigating trooper having solicited a prostitute and the reasons for his termination of employment with the Virginia State Police. The defendant argued that the evidence was relevant to "lessen the impact of the officer's unwavering testimony as a trooper and would have cast doubts on his ability to make proper judgment calls." The trial court granted the Commonwealth's motion to exclude the challenged evidence.

Held: Affirmed. The Court affirmed that the impeachment evidence the defendant sought to introduce consisted of specific acts of conduct expressly prohibited by Rule 2:608(b). The Court noted that the defendant did not argue that the witness was biased or had a motive to fabricate his testimony. The Court found that the evidence the defendant sought to introduce was not proper impeachment material under the Virginia Rules of Evidence.

Regarding sufficiency, the Court found that the evidence of the defendant's methadone use, coupled with the expert's testimony regarding its effect, was sufficient standing alone to prove that the defendant was under the influence of an intoxicant while driving. However, the Court added that the defendant's initial false statement, the observations of witnesses and medical personnel of the defendant's physical condition, and the lack of evidence that he consumed anything after the accident

also supported the conclusion that the defendant was driving under the influence of self-administered intoxicants at the time of the collision.

The Court rejected the defendant's argument that, because someone else gave him methadone, his intoxication was not "self-administered." The Court wrote: "Taken to its logical conclusion, appellant's position would allow heroin users who voluntarily inject each other with the controlled substance to claim that the drugs were not self-administered."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1762173.pdf

Taylor v. Commonwealth: April 16, 2019

Chesterfield: Defendant appeals his conviction for DUI 3rd on Fourth Amendment and sufficiency grounds.

Facts: Prior to the *Birchfield* ruling, the defendant drove while intoxicated despite his two previous convictions. An officer arrested the defendant and read him the pre-*Birchfield* implied consent form. The officer collected the defendant's blood under implied consent and the result was of 0.128%.

Held: Affirmed. The Court again refused to apply *Birchfield* retroactively. The Court found that the officer acted in good faith reliance on established law, writing: "we cannot fathom any deterrent purpose that would be served by excluding otherwise relevant evidence."

Regarding sufficiency, the Court ruled that the defendant's blood alcohol content of 0.128% permitted the trial court to infer that the defendant was under the influence of alcohol intoxicants when he was driving. The Court pointed out that the Commonwealth had limited the indictment with the "while under the influence of alcohol or other self-administered intoxicants, and or drugs" language, and therefore considered it an indictment charging a violation of § 18.2-266(ii), driving "while such person is under the influence of alcohol;" the Court did not consider whether the defendant violated the "per se" provisions of § 18.2-266(i).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0719182.pdf

Virginia Court of Appeals
Unpublished

Zinner v. Commonwealth: November 8, 2018

Virginia Beach: Defendant appeals his conviction for DUI on sufficiency of the evidence.

Facts: Defendant, driving intoxicated, crashed into a vehicle carrying a couple and their three children. After flipping the victims' vehicle repeatedly and sending it into oncoming traffic, the defendant fled the scene.

Police later located the defendant six hours later about a mile away, unconscious and smelling of alcohol. He smelled of alcohol, his speech was slurred, and his eyes were droopy. He seemed incoherent. He did not remember being in an accident.

Police analyzed his blood, revealing it to have a .20 BAC. The defendant admitted that he "shouldn't have been driving at all." He added that he had diabetes, had taken a Xanax, had been drinking, and was "guilty." He also told a detective that he had been "drinking and driving," explaining that he was "going through a lot with his business and that's why he was drinking."

At trial, the defendant objected to testimony from a forensic scientist regarding the defendant's blood alcohol content ("BAC") at the time of the offense based on "retrograde extrapolation."

The defendant also adduced his medical records at trial, which revealed he had only a "small abrasion" on his right scalp that was not bleeding. There was no evidence of intra-cranial injury, but a defense expert testified that he examined the defendant eleven months after the crash and diagnosed him with post-concussive syndrome.

Held: Affirmed. Assuming without deciding the trial court erred in allowing the expert's testimony, the Court found such error to be harmless. The Court examined the other evidence and found that it was sufficient to demonstrate that the defendant had drunk enough alcohol to affect his manner, disposition, speech, muscular movement, and behavior.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1289171.pdf

Francis v. Commonwealth: March 5, 2019

Hopewell: Defendant appeals her conviction for DUI Maiming on sufficiency of the evidence.

Facts: The defendant failed to brake at a pedestrian crossing at a crosswalk marked by a blinking light, maiming a pedestrian and careening her vehicle into a concrete barrier. After lying to the responding officer by claiming that she was not under the influence, the defendant failed to successfully complete three field sobriety tests. The defendant's BAC measured 0.12 more than thirty minutes after the crash.

Held: Affirmed. The Court ruled that the defendant's actions, coupled with her BAC, were sufficient to sustain her conviction for DUI maiming.

In a footnote, the Court repeated that any negligence on the victim's part would not have relieved the defendant of criminal liability, as criminal liability can attach to each actor whose conduct is a proximate cause unless the causal chain is broken by a superseding act that becomes the sole cause of the event.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0094182.pdf

Drugs

Virginia Court of Appeals
Published

Jones v. Commonwealth: December 26, 2018
69 Va. App. 582, 822 S.E.2d 19
Henrico: Defendant appeals his convictions for Distribution 2nd Offense, and related offenses, on sufficiency of his Prior Conviction.

Facts: The defendant sold drugs on numerous occasions after having a previous conviction for Possession with Intent to Distribute as an Accommodation. The Commonwealth invoked that prior Accommodation conviction to support indictments for distributing a Schedule I or II controlled substance, second offense, in violation of Code § 18.2-248(C). The defendant objected that his Accommodation prior did not qualify as a prior offense under that code section.

Held: Affirmed. The Court held that any prior conviction of an offense under § 18.2-248, including a conviction as an accommodation under § 18.2-248(D), triggers the enhanced punishment provisions of § 18.2-248(C). The Court clarified that the sole effect of the accommodation language in § 18.2-248(D) serves as what amounts to a partial affirmative defense to mitigate the punishment for the crime of distribution of a controlled substance; It is not a separate offense requiring that the Commonwealth prove different elements.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1504172.pdf

Distribution & Conspiracy

Virginia Court of Appeals
Unpublished

Lavalliere v. Commonwealth: April 9, 2019

Henrico: Defendant appeals his conviction for Conspiracy to Distribute Heroin on sufficiency of the evidence.

Facts: The defendant conspired with another to sell and distribute heroin. The defendant repeatedly purchased large quantities of heroin between fifteen and thirty times from his source. He also purchased it, even when he bought larger amounts, at the same rate, and did not negotiate or receive a discount. At trial, his source testified that the defendant was one of his best customers and that he "felt bad" about always charging the same rate. He also alerted the defendant when a batch of heroin was possibly subpar.

Held: Affirmed. The Court reasoned that, given the defendant's reliability in both demand and prompt payment for product, and how profitable his business was, his source had an interest in keeping him and his third-party customers happy in order to secure his continued business. The Court also explained that the source's "feeling bad" and desire to alert the defendant about sub-par heroin was further evidence that he valued their ongoing relationship that relied on the defendant's redistribution. Given that the source had such an interest and that he continued to supply the defendant, who was only able to be such a valuable customer because he was reselling, the Court found that the evidence was sufficient to show that the source furthered, promoted or cooperated in the defendant's redistribution.

In a footnote, the Court emphasized that the analysis in this case was highly fact-dependent. The Court wrote: "We expressly do not endorse courts extrapolating from this decision and inferring the existence of any bright-line rule in conspiracy cases involving the repeat sale of contraband. The existence of a chain of commerce does not, in and of itself, constitute a conspiracy solely because the goods sold, and re-sold, are illegal."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1709172.pdf

Sentencing - "Safety Valve"

Virginia Supreme Court

Hall v. Commonwealth: December 20, 2018
Rev'd Court of Appeals Ruling of January 9, 2018
821 S.E.2d 921
Lynchburg: Defendant appeals his sentences for Drug Distribution on imposition of mandatory minimum sentences.

Facts: The defendant committed and was found guilty of several offenses of 2nd Offense Distribution of Illegal Narcotics. On the morning of sentencing, the defendant filed a motion pursuant to the safety valve provision of Code § 18.2-248(C), attaching a disclosure stating:

"I'm sorry I don't have any information as far as the supplier goes. The only knowledge I had of the man was a phone number. We did not really associate on a personal level[;] the relationship was purely business. I only called and placed an order and I'd meet him, that was the extent of our relationship. He would only be recognizable to me by sight."

The trial court refused to apply the "safety valve," finding that the defendant did not comply with the code because he provided the disclosure just prior to the commencement of the sentencing hearing. The trial court refused to read the motion or the disclosure and imposed the mandatory sentences. The Court of Appeals held that the defendant did not provide the information in compliance with § 18.2-248(C)(e) because it failed to afford the Commonwealth the opportunity "to test [the] statement for veracity and completeness."

Held: Reversed. The Court agreed with the Court of Appeals' holding in *Sandidge* that the phrase "not later than the time of the sentencing hearing" means "prior to the commencement of the sentencing hearing." However, it looked to the cases that construed the federal "safety valve," 18 U.S.C.S. Appx. § 5C1.2 and noted that those cases hold that a disclosure is timely if made by the time of the commencement of a sentencing hearing, even if the disclosure is just immediately prior. Thus, in this case, the Court ruled that the defendant's disclosure was timely.

The Court criticized the trial court for not having read the motion and refusing to review the substance of the included disclosure. The Court explained that, while the timing of the disclosure may weigh into a trial court's consideration on the merits, the trial court may not bar a motion as untimely based on a last-minute disclosure when such disclosure was nonetheless timely made: that is, not later than the commencement of the sentencing hearing.

However, the Court also clarified that the burden of production and of persuasion lies with the defendant to demonstrate he has provided to the Commonwealth all information he has concerning the offenses. The Court warned: "The defendant enters this type of last minute disclosure at his own risk: the trial court is within its discretion to disbelieve a self-serving disclosure if it appears incomplete or untruthful, and the court is entitled to consider the last-ditch nature of the effort or previous untruths into that calculus.

The Court also allowed that: "The trial court is entitled to use its discretion in determining whether to allow the defendant to augment his filed disclosure through in-court testimony or through the granting of a continuance to allow the Commonwealth to investigate and verify that the information presented by the defendant is full and complete."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180197.pdf

Possession with Intent to Distribute

Virginia Court of Appeals
Published

Carlson v. Commonwealth: February 12, 2019

Chesapeake: Defendant appeals his convictions for Manufacturing Marijuana and Obstruction on Fourth Amendment and Sufficiency grounds.

Facts: Officers responded to a trailer park for an unrelated call. When they arrived, they immediately smelled an overwhelming odor of marijuana. The officers walked around the trailer park, sniffing the windows and doors of all the nearby trailers in an attempt to narrow down the source of the smell. Eventually they reached the defendant's trailer, where they approached from the side of the trailer and sniffed around the windows and doors and located the smell of marijuana. The officers called a detective, who walked straight up to the main entrance house and smelled the odor as well. The detective obtained a search warrant for the residence.

After a standoff with the defendant, officers entered the defendant's home. They located approximately 176 marijuana plants as well as other marijuana, cash, an AK-47, ammunition, a digital scale, and a device used to smoke marijuana. Officers discovered a police scanner that was tuned to the same channel the police were using to communicate during the investigation, and the officers inside could hear radio communication from officers still outside.

The defendant moved to suppress the search. The defendant did not challenge the warrant itself, nor did he challenge the detective's entry onto the property prior to obtaining the warrant; he argued only that the detective's presence at the scene and his observations, and therefore the evidence obtained from them, were the fruit of the officers' initial unlawful entry onto the curtilage to sniff around the doors and windows. The trial court found that the officers acted unlawfully by sniffing around the doors and windows but denied the motion on the grounds that the detective's own observations were an independent source of information for the search warrant and denied the motion.

At trial, an expert witness testified that the amount of marijuana found, as well as other evidence found, was inconsistent with personal use.

Held: Reversed. The Court accepted, for the purposes of the appeal, that the officers' entry onto the defendant's property to sniff around his widows violated the Fourth Amendment. The Court, in a footnote, explained that it would not consider the Commonwealth's argument that the initial warrantless search was lawful. Instead, the Court decided that it was bound by the trial court's finding that the search was unlawful.

As a result, the only issue the Court decided was whether the evidence was nevertheless admissible under an exception to the exclusionary rule. The Court concluded that the unlawful entry prompted the subsequent presence of, and investigation by, the detective, which then led to the search warrant. The Court complained that the record contained no evidence about how the evidence would otherwise have been lawfully obtained had the officers not conducted the unlawful search of the defendant's premises, or that of the other residences. Instead, the Court noted that the only reason the detective could walk immediately to the correct trailer was because of the conduct that the trial court found to be unlawful.

In a footnote, the Court rejected the argument that the officers' searches of other properties were irrelevant, even though the defendant did not have standing to object to those searches. The Court found that the other unlawful searches "demonstrate that the police conduct was sufficiently culpable to justify application of the exclusionary rule." The Court also concluded that the other unlawful searches were relevant to whether there was a reasonable probability the police would have inevitably discovered the evidence through lawful means, reasoning that without the unlawful conduct,

it is uncertain whether the officers would have been able to localize the odor of marijuana to the defendant's residence.

The Court agreed, however, that the evidence was sufficient to demonstrate that the defendant possessed the drugs with the intent to distribute them.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2058171.pdf

Virginia Court of Appeals
Unpublished

Taylor v. Commonwealth: June 12, 2018

Chesapeake: Defendant appeals his conviction for Possession with Intent to Distribute on sufficiency of the evidence.

Facts: The defendant possessed drugs in his home with the intent to sell them. Police executed a search warrant at the defendant's residence. When officers entered in the early morning hours, the defendant was standing in a hallway near a bedroom in a state of undress. There were two other residents. Police found a large quantity of cocaine in the kitchen, which was a common area of the residence. Near the cocaine, police also found the defendant's recent paystub and a recent letter from DCSE, both with his name on it. Police did not find anything belonging to any other person near the cocaine.

In a bedroom near where the defendant had been standing, officers found two firearms on a chest positioned next to a bag of cocaine, scales, and a document that identified the defendant. However, at trial, the Commonwealth did not introduce the document itself into evidence, nor any photographs of it. Officers merely testified to its contents.

The trial court convicted the defendant of possession with intent to distribute regarding the drugs that the defendant possessed in the kitchen, but acquitted him of possession of the firearms and drugs that police found in the bedroom. The trial court explained "we don't know when he was last in that room . . . or how the [firearms] got there." The defendant complained that the evidence was insufficient and that the conviction and acquittals were inherently inconsistent.

Held: Affirmed. The Court rejected the argument that the verdicts were inconsistent, pointing out that any inconsistency in the verdicts was explained on the record by the trial court articulating cogently and precisely why there was a sufficient nexus between the defendant and the cocaine in the kitchen but not a sufficient nexus between the defendant and the cocaine or firearms found in the bedroom.

The Court rejected the analogy to the *Pemberton, Boley*, and *Cordon* cases and instead likened this case to the *Lunceford* case. The Court found that the recent paystub and letter from DCSE supported the inference that the defendant resided at the home and possessed the drugs.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0687171.pdf

Williams v. Commonwealth: June 26, 2018

Chesterfield: Defendant appeals his conviction for Possession with Intent to Distribute on sufficiency of the evidence.

Facts: The defendant drove a car while carrying heroin packaged for sale. Police attempted to stop the defendant's car for running a red light, but he sped away and veered into the parking lot of a nearby school, stopping his vehicle close to a wooded area behind a fence. The defendant then fled on foot into the wooded area and emerged a few moments later. An officer searched the wooded area where the defendant had fled, finding a plastic baggie in the bushes about 10-15 yards into the wooded area, sitting on top of the leaves on the ground. The baggie contained a white, powdery substance that forensic testing confirmed was heroin.

The officer searched the defendant and found a large quantity of cash in order of denomination and two cell phones, one of which contained text messages referencing drug transactions. The defendant attempted to claim that the money was from a paycheck he had cashed earlier but could not provide the name of his supposed employer from whom he allegedly received the paycheck.

Held: Affirmed. The Court explained that the possibility that the defendant had never possessed the drugs, yet "just so happened" to flee into and immediately emerge from the exact area where the drugs were eventually found, was not a reasonable hypothesis of innocence. The Court noted that the possession of cash separated by denomination and the possession of two cell phones were evidence of intent to distribute. The Court also reaffirmed that the defendant's flight was evidence of guilt.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0827172.pdf

Possession

Virginia Court of Appeals
Unpublished

Howard v. Commonwealth: June 5, 2018

Chesapeake: Defendant appeals his convictions for Possession of Heroin and Possession of Fentanyl on sufficiency of the evidence.

Facts: An officer searched the defendant after smelling marijuana on his person. During the search, the defendant kept looking down in his right pocket and kept taking his hands off his head

during the times that he had been told not to. The officer found a single capsule that appeared to be a single, solid color in the defendant's pocket. The Department of Forensic Science determined the capsule contained a mixture of heroin, a Schedule I narcotic, and fentanyl, a Schedule II narcotic. At trial, the parties stipulated that the lab analyst could not visually tell the difference between fentanyl and heroin.

The defendant argued that the evidence failed to prove that he knowingly and intentionally possessed both substances, since they were visually identical.

Held: Affirmed. The Court ruled that, based upon the defendant's furtive movements while being searched and his continuing to look towards the pocket where the officer found the capsule, the evidence was sufficient. Regarding the presence of two substances in one capsule, the Court examined the statute and determined that the General Assembly selected "a" controlled substance and "any" controlled substance as the statute's unit of prosecution, deliberately permitting a defendant to be charged for each controlled substance he possesses. The Court likened this case to the *Johnson* case from the Virginia Supreme Court, which dealt with the failure to appear statute and reached a similar conclusion.

The Court repeated its holding in *Sierra* that, although "§18.2-250 requires a defendant to know that the substance he possesses is in fact a controlled substance, it does not require him to know precisely what controlled substance it is." Thus, a defendant who had the general *mens rea* to possess a controlled substance – but actually possessed more than one controlled substance in the same container – is not entitled to a reversal of each conviction.

In a footnote, the Court also rejected any similar double jeopardy claim, noting that the clear intent of Code § 18.2-250, as enacted by the General Assembly, is to punish a defendant for any controlled substances that he possesses.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0780171.pdf

Parker v. Commonwealth: November 20, 2018

Newport News: The defendant appeals his conviction for Possession of Cocaine on sufficiency of the evidence.

Facts: Police watched the defendant run a red light. The officers turned on their sirens, followed, and observed him run another red light, drive the car up on a curb and into a yard, and then flee on foot. Police found the drugs in plain view on the passenger seat in the car. Although the vehicle was not registered to the defendant, he had been the driver and sole occupant.

Held: Affirmed. The Court noted that the trial court was free to infer consciousness of guilt based on the defendant's flight. The Court rejected the argument that the Commonwealth failed to exclude his reasonable hypothesis of innocence that he was fleeing from the officers because he had an outstanding warrant.

The Court also repeated that drugs are not likely to be accidentally placed in places where others might find them, and thus it was rational for the trial court to infer that the drugs were not carelessly left in the vehicle by someone other than the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1488171.pdf

Eluding

Virginia Court of Appeals
Published

Johnson v. Commonwealth: March 5, 2019

Brunswick: Defendant appeals her conviction for Eluding on refusal to admit Expert Testimony of Diminished Capacity

Facts: The defendant fled a police officer at speeds exceeding 100 miles per hour, crossing into oncoming traffic, running red lights, and passing numerous cars, until her car literally came apart and she crashed. At trial, the defendant claimed the affirmative defense under § 46.2-817 that she reasonably believed that she was being pursued by a person other than a law-enforcement officer. She testified that PTSD distorted her perception of the pursuit. However, the trial court excluded her expert's testimony that her PTSD established her reasonable belief at the time of the police pursuit.

Held: Affirmed. The Court held that § 46.2-817 does not in any way contradict the Supreme Court's decision in *Stamper* and does not make expert testimony concerning a defendant's mental state at the time of the offense admissible at trial, absent an insanity defense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1478172.pdf

Embezzlement

Virginia Court of Appeals
Unpublished

Nordan v. Commonwealth: July 17, 2018

Powhatan: Defendant appeals his convictions for Embezzlement on sufficiency of the evidence.

Facts: The defendant embezzled money invested by his business partner in a joint venture. The defendant and the victim created various corporate entities together. The defendant fabricated fictitious lease agreements between the various companies and a company that the defendant owned. The defendant then transferred money from the joint venture to his own personal company, supposedly to pay rent, based on the false leases. The defendant embezzled from each of their joint businesses after the victim had transferred his own money into them. The defendant then used the embezzled money for a purpose unrelated to any of the companies from which the money was obtained, including personal expenses.

At trial, the defendant argued that the Commonwealth improperly named the victim personally as the victim, rather than the victim's corporate entity. The defendant also argued that the victim did not "entrust" the funds to him; instead, he contended that they were equal partners and thus owed each other no fiduciary duty. Lastly, the defendant contended that he lacked fraudulent intent and had a claim of right to the funds; he argued that he "absolute discretion" to spend the money as he wished. The trial court rejected those arguments.

Held: Affirmed. The Court first agreed that the victim was properly named in the indictment, noting that the victim directly invested money into the businesses pursuant to an agreement to be equal partners. Next, the Court described the defendant's argument regarding any duties owed or agency relationship between himself and the victim as a "red herring." The Court observed that the invested funds were the property of the businesses, and the defendant committed embezzlement when he "converted such property to his own use or benefit."

Lastly, the Court rejected the defendant's "claim of right" defense. The Court noted that a defendant's belief in a claim of right must, although mistaken, be genuine. In this case, the Court examined the defendant's numerous false statements and self-serving purchases using stolen money and found that they sufficiently demonstrated his fraudulent intent.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0238172.pdf

Failure to Appear

Virginia Court of Appeals
Published

Chavez v. Commonwealth: August 14, 2018
69 Va. App. 149, 817 S.E.2d 330
Alexandria: Defendant appeals his conviction for Failure to Appear on jury instructions and sufficiency of the evidence.

Facts: Defendant failed to appear at preliminary hearing for his charges of Burglary and Grand Larceny. The Commonwealth indicted the defendant for felony Failure to Appear. At trial, a detective

testified that he observed the defendant and his attorney in district court on September 30, where the district court continued the preliminary hearing to October 12. When the detective returned to court for the case on October 12, 2016, the defendant's attorney was present, but the defendant was not.

The Commonwealth also introduced into evidence a copy of the defendant's pretrial release form, which ordered him to appear on September 30, and copies of the defendant's two felony arrest warrants. The warrants included a space labeled "Hearing Date/Time," which contained the handwritten notation "9/30." The spaces immediately below contained the handwritten note "10/12/16-11 am set date or waiver." Below the October 12 date, the warrant was stamped with the words "Defendant failed to appear," followed by the handwritten notation "10/12." Handwritten initials appeared next to stamped text that read, "Judge."

The defendant offered a jury instruction that included the element: "That [defendant] received timely notice of the date and time at which to appear," but the trial court refused that instruction.

Held: Affirmed. The Court first examined the plain language of § 19.2-128(B) and rejected the argument that the *Thomas* case made "timely notice" an element of the offense. Instead, the Court repeated that there are multiple means by which the Commonwealth may prove that a defendant willfully failed to appear and that not all of those means rely upon an inference of willfulness derived from proof of timely notice. Thus, the Court explained that timely notice is an ancillary consideration in proving an element of felony failure to appear, and not an element of that offense in its own right.

The Court then held that the evidence proved that the defendant willfully failed to appear. The Court acknowledged that, in this case, the detective provided no testimony about when or if the defendant appeared before the judge on September 30. The Court also agreed that, as in *Thomas*, there was no testimony as to how the continuance occurred—"only that it happened." However, unlike *Thomas*, the Court concluded that the evidence demonstrated that the October 12 continuance date was clearly communicated to the defendant. The Court found that the defendant had actual personal notice of the October 12 hearing date and that his attorney had actual knowledge of that hearing date which the jury could reasonably infer was communicated to the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1189174.pdf

Merritt v. Commonwealth: November 13, 2018
69 Va. App. 452, 820 S.E.2d 379
Page: Defendant appeals her conviction for Failure to Appear on sufficiency of the evidence.

Facts: While on probation for misdemeanor fraudulent conversion, the defendant failed to appear on a show cause for failure to pay restitution. The trial court convicted the defendant of failure to appear in violation of § 19.2-128.

Held: Reversed. The Court ruled that § 19.2-128 does not provide a penalty for a failure to appear for a revocation proceeding regarding an alleged failure to comply with the terms of a previously suspended sentence. The Court likened this case to the *Lawson* case, where it had similarly held that the

phrase "'charged with a felony'" as used in Code § 19.2-128(B) did not encompass a person charged with failure to appear at a felony probation revocation.

[*Note: The defendant had not raised this argument at trial or on appeal, but the Attorney General requested that the Court dismiss the charge, based on the Lawson case* – EJC].

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1804174.pdf

Failure to Register as a Sex Offender

Virginia Supreme Court

Turner v. Commonwealth: April 11, 2019
Aff'd Court of Appeals Ruling of April 17, 2018
Richmond: Defendant appeals his conviction for Failure to Register as a Violent Sex Offender on sufficiency of the evidence of his prior conviction.

Facts: As a result of the defendant's conviction in Idaho for "sexual abuse of a child under the age of 16," Idaho ordered the defendant to register as a sex offender with the State of Idaho. In 2016, the defendant moved from Idaho to Virginia and registered as a violent sex offender. The defendant signed his re-registration form on August 23, but the registry did not receive his form until September 7, which was one week after the deadline.

At trial for failure to re-register as a violent sex offender, the defendant argued that the Commonwealth failed to prove that his prior conviction was "violent" under § 18.2-472.1(B). The trial court found that Virginia and Idaho's statutes were substantially similar. The Court of Appeals affirmed in an unpublished ruling in 2018.

Held: Affirmed. The Court concluded that the defendant was required to register as a sexually violent offender in Virginia. In a footnote, the Court agreed that "no obvious explanation emerges for why the General Assembly decided to treat all persons who must register in their state of conviction to register in Virginia as violent sex offenders and register under the criminal homicide and murder perpetrators and persons having committed one of the offenses listed in Code § 9.1-902(B), all for what may well be a lesser non-homicidal sex crime." However, the Court refused to apply the "absurdity canon", repeating that this doctrine is limited to two narrow situations: when "the law would be internally inconsistent," and when the law would be "otherwise incapable of operation."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180644.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/0826172.pdf

Virginia Court of Appeals
Unpublished

Raigoza v. Commonwealth: May 7, 2019

Newport News: Defendant appeals his conviction for Failure to Re-Register as a sex offender on sufficiency of the evidence.

Facts: Due to his rape conviction, the defendant needed to re-register as a sex offender every 90 days. At trial, the investigating officer explained that the form was sent to the defendant on November 2, 2015, and he was to required return it to the state police by November 17, 2015. However, the state police did not receive the defendant's required reregistration between November 2 and November 17, 2015. At trial, the Commonwealth also admitted an affidavit from the State Police pursuant to § 9.1-907(A) along with the underlying documents. The investigating officer testified that, when he asked the defendant about the form, the defendant claimed that he thought that he had sent it in but did not think "it was such a big deal to be a day or two late."

Held: Affirmed. The Court agreed that the evidence proved the reregistration was due within the period of time provided in the affidavit. The Court noted that the defendant's statements to the officer supported the inference that he knew that he had a duty to reregister with the State Police by November 17 and that he had not done so.

In a footnote, the Court repeated that Commonwealth need not prove the date that the reregistration was due in order to present evidence supporting the conviction, although presenting evidence of that date would be one way in which to establish that the defendant failed to reregister by the deadline.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0386181.pdf

False Pretense & Fraud

Virginia Court of Appeals
Unpublished

Brown v. Commonwealth: December 18, 2018

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

Facts: The defendant lured the victim to a car dealership where the defendant worked, using a photo of a truck for sale. After agreeing to sell the victim a truck at the dealership where he then

worked, and accepting $500 for that vehicle, the defendant – without prior notice to the victim – took the victim to a completely different dealership located a considerable distance away. There, he represented to the victim that he was an employee of that dealership and tried to sell the victim a completely different truck. As the victim then attempted to secure insurance on the truck, the defendant drove away and left the victim at the dealership. He kept the $500 and avoided further contact with the victim thereafter.

At trial, the defendant claimed that he was acting as the victim's agent at the other dealership. He testified that his children had accidentally burned the $500 in the fireplace, preventing him from immediately returning it to the victim.

Held: Affirmed. The Court rejected the defendant's argument that he was an agent for the victim. The Court noted that the victim gave the defendant money because the defendant was a salesman for the dealership, and the victim wanted to buy a truck from the dealership. Therefore, the Court concluded that when the victim gave the defendant the money, he conveyed both title and possession of the money, as is required for a conviction of obtaining money by false pretense. In addition, the Court agreed that the evidence demonstrated that the defendant intended to defraud the victim at the outset of the transaction.

The Court also explained in detail how this offense constituted larceny by false pretense, rather than larceny by trick. The Court repeated that larceny by false pretenses, unlike larceny by trick, requires that title or ownership pass to the perpetrator, although with currency, Virginia cases generally do not distinguish between ownership and possession.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1543172.pdf

Forgery

Virginia Court of Appeals
Unpublished

Thompson v. Commonwealth: April 9, 2019

Richmond: Defendant appeals his convictions for Forgery of a Public Record on sufficiency of the evidence.

Facts: The defendant was born in Panama with the name "Ray Alexander Thompson Riviere." The defendant moved to Virginia and obtained a driver's license under the name "Ray Alexander Thompson." The defendant was convicted of a felony, was deported, returned to the United States, was deported again, and returned to the United States yet again. In the interim, while in Panama, the defendant changed his name to "Ray Alexander Hughes," due to paternity proceedings that he pursued

in Panama that resulted in a new birth certificate. The defendant's new passport certified that his name was "Ray Alexander Hughes."

Upon his return to the United States, the defendant completed DMV forms to obtain a Virginia identification card and driver's license under the name "Ray Alexander Hughes." Although the applications contained a box stating: "If your name has changed, print your former name here," the defendant left that box blank on each of the applications. The defendant also failed to acknowledge his previous driver's license in Virginia as required. At trial, the defendant testified that he completed the DMV applications using the name "Ray Alexander Hughes" because he believed that was his legal name.

Held: Reversed. The Court concluded that the defendant's misrepresentations regarding his previous identity did not affect the genuineness or authenticity of the DMV applications, and the evidence failed to prove that the defendant completed the DMV applications using a false or fictitious name. The Court explained that the Commonwealth did not present any evidence to establish that the defendant's passport was invalid and therefore, the defendant did not commit forgery.

The Court repeated that a misrepresentation or false statement must affect the genuineness or authenticity of a document in order for the document to constitute a forgery. A mere misrepresentation of fact in a document may not support a forgery conviction when the alleged forger signs his or her legal name to the document, even when the misrepresentation itself was made with fraudulent intent. In this case, the Court agreed that the defendant misrepresented facts in the DMV applications at issue when he failed to indicate that he previously changed his name and held a Virginia driver's license. However, although the defendant may have made these misrepresentations with a fraudulent intent, the Court found that these misrepresentations, standing alone, were insufficient to support his forgery convictions.

The Court agreed that the defendant would have created documents that purported to be something other than what they actually were if he had completed the DMV applications using the name "Ray Alexander Hughes" when they were truly DMV applications for "Alexander Ray Thompson." However, although the defendant had DMV profiles as both "Ray Alexander Hughes" and "Alexander Ray Thompson," the Court found that the Commonwealth failed to establish that "Alexander Ray Thompson" was the defendant's name when he completed the DMV applications at issue.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0262182.pdf

Firearms and Weapons Offenses

Virginia Supreme Court

Jones v. Commonwealth: December 6, 2018
Aff'd Court of Appeals Ruling of December 19, 2017
821 S.E.2d 540

Petersburg: Defendant appeals his conviction for Shooting at an Occupied Vehicle on sufficiency of the evidence.

Facts: The defendant, while inside a vehicle, shot another person who was also inside the vehicle. At trial, the defendant argued that § 18.2-154 did not apply to him because he was also inside the vehicle. The Court of Appeals affirmed.

Held: Affirmed. Like the Court of Appeals, the Court ruled that the plain language of the statute does not require the prosecution to prove that the shooter was located outside of the vehicle when he fired shots at an occupied vehicle.

In a footnote, the Court noted that it was not deciding what intent the prosecution must establish to secure a conviction for shooting at an occupied vehicle, i.e., whether the perpetrator must intend to shoot at the occupied vehicle or whether it is sufficient that the perpetrator maliciously fired the gun and the shots happened to strike an occupied vehicle.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180052.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0574162.pdf

Hodnett v. Commonwealth: April 11, 2019 (Unpublished)

Pittsylvania: Defendant appeals his conviction for Possession of Ammunition by Felon on sufficiency of the evidence.

Facts: The defendant, a felon, drove a vehicle with shotgun shells in the pocket behind the passenger seat. The defendant owned the vehicle and drove it "all the time." He had been in close proximity to the ammunition on the same day that police executed a search warrant and searched the vehicle. Earlier that day, the defendant had driven the vehicle alone with the ammunition within arm's reach of the driver's seat; just prior to the execution of the search warrant, an officer had observed him doing "something on the inside" of the passenger's side of the vehicle for "a minute or so." At trial, an officer testified that the box of 12-gauge shotgun shells would have been "open and obvious" to anyone looking down at the pouch because the pouch protruded approximately 3 inches from the back side of the passenger's seat given the box's size.

A witness testified for the defendant at trial, but he never claimed ownership or responsibility for the shotgun shells in the defendant's vehicle, although he did explicitly claim ownership of a rifle that police found in the defendant's residence. The defendant never asked his witness, nor did the witness ever volunteer information regarding, whether the witness had ever left shotgun shells in the defendant's vehicle.

Held: Affirmed. The Court agreed that the evidence showed the defendant in constructive possession of the ammunition. The Court relied on the Commonwealth's evidence but also on the

defendant's own witness' equivocal testimony, noting that a fact finder may draw inculpatory inferences not only from the prosecution's evidence but also from the defendant's.

Two Judges dissented, arguing that there was no evidence that the defendant was ever in a position which would have allowed him to "look down" into the pouch on the back side of the passenger's seat.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/180528.pdf

Commonwealth v. Watson: May 30, 2019

Rockingham: The Commonwealth appeals the vacating of the defendant's sentence for Possession of a Firearm by Convicted Felon

Facts: In 2007, the trial court convicted the defendant of four counts of using a firearm in the commission of a felony. The trial court imposed terms of three years' imprisonment for each count, to be served consecutively. Ten years later, the defendant filed a motion to vacate three of the four sentences imposed upon him as void *ab initio*. He noted that the statute imposed a mandatory minimum term of five years' imprisonment for any second or subsequent offense. Consequently, he argued that three of his three-year sentences were void *ab initio* for being shorter than the statutorily prescribed five-year minimum. The trial court agreed and granted the motion.
[*Note: This case is related to Watson v. Commonwealth, decided the same day – EJC*]

Held: Reversed. The Court found that, unlike an excessive sentence, a sentence for less than what the legislature has allowed is merely legal error, and when a court has power to render a judgment, it has the power to render an erroneous one. The Court ruled that the trial court therefore lacked jurisdiction under Rule 1:1 to consider the defendant's motion to vacate his sentences.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180940.pdf

Virginia Court of Appeals
Published

Marshall v. Commonwealth: January 15, 2019
69 Va. App. 648, 822 S.E.2d 389
Campbell: Defendant appeals his conviction for False Statement on a Firearm Consent Form on sufficiency of his prior conviction.

Facts: The defendant purchased a firearm and indicated on the form that he had not been convicted of a "misdemeanor crime of domestic violence," despite his prior conviction for assault and

battery against his former wife in violation of Code § 18.2-57.2. At trial, he contended that, because an Virginia Assault and Battery conviction can be any offensive or rude touching, a conviction for violating § 18.2-57.2 does not necessarily involve "the use or attempted use of physical force," which is a necessary component of a "misdemeanor crime of domestic violence" under Federal Law.

Held: Affirmed. The Court addressed the question of whether all convictions for violating § 18.2-57.2 involve "the use or attempted use of physical force" as that phrase is used in 18 U.S.C. § 921(a)(33)(A)(ii). The Court noted that the U.S. Supreme Court, in *Castleman*, held that the requirement of 'physical force' is satisfied by the degree of force that supports a common-law battery conviction. Thus, the Court held that the defendant's conviction order for assault and battery of a family member in violation of § 18.2-57.2, coupled with his statement that the incident involved his former spouse, established that the defendant had previously been convicted of a misdemeanor crime of domestic violence for purposes of the ATF form.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0270183.pdf

Barney v. Commonwealth: January 8, 2019
69 Va. App. 604, 822 S.E.2d 368
Hampton: The defendant appeals his convictions for Use of a Firearm on jury instruction and sufficiency issues.

Facts: The defendant committed two robberies. During the robberies, the defendant made statements and gestures to imply that she had a firearm. Her co-conspirator kept his hand in his pocket and told the clerk not to move "and won't nobody get hurt." The defendant gave the clerk at the first robbery a note that said the clerk should give them the money "and not make a sound if she wanted to live." At the second robbery, the defendant actually told the clerk she had "two guns" facing her, and "if the clerk went any slower that she was going to shoot her."

At trial, the instructions given to the jury did not require the Commonwealth to prove that the defendant possessed either an actual firearm or an object that gave the appearance of an actual firearm.

Held: Reversed. Although the Court found the evidence sufficient, the Court ruled that the trial court improperly instructed the jury. The Court repeated that, to convict of 18.2-53.1, the Commonwealth must prove that the accused actually had a firearm or replica firearm in his possession. Thus, in the case, the Court ruled that the trial court erred in instructing the jury that it was not necessary that the object was in fact an actual or replica firearm so long as the victim perceived a threat or intimidation by a firearm.

The Court agreed, however, that the evidence was sufficient. The Court agreed that a jury was therefore free to infer that, because the defendant said she had a gun in the second robbery, she used one at the first robbery, even though, like in *Powell*, no firearm or facsimile of a firearm was ever seen or recovered.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1694171.pdf

Eley v. Commonwealth: April 16, 2019

Newport News: The defendant appeals his conviction for carrying a loaded firearm equipped with a high-capacity magazine on denial of his affirmative defense.

Facts: Police found the defendant in the driver's seat of a stolen truck and a handgun in a closed, latched console inside the truck. The defendant possessed the firearm, a loaded semi-automatic handgun equipped with a high-capacity magazine, in public in violation of § 18.2-287.4. At trial, the defendant argued that he was entitled to the statutory exemption in § 18.2-308(C)(8) for a firearm secured in a container or compartment in "a personal, private motor vehicle."

Held: Affirmed. The Court held that the exemption did not apply because the defendant knew that the truck in which he secured the firearm was stolen and, thus, it was not "a personal, private motor vehicle" within the meaning of the statutory exemption. The Court reasoned that the General Assembly did not intend to permit one to lawfully secure a dangerous firearm in a vehicle subject to personal ownership without consideration of who the owner or authorized user of that vehicle is. Consequently, the Court concluded that the adjective "personal" means at the very least that the vehicle in which one secures a firearm, in addition to being a "private" or non-public one, must also be one that the person claiming the exemption lawfully possesses or occupies.

In this case, the Court explained that, under the plain meaning of "personal" as used in the statutory exemption, the stolen vehicle was certainly not one intended "exclusively" for the defendant or one subject to his authorized use. The Court explicitly declined to decide whether one who is merely an authorized user of a vehicle qualifies for the exemption.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0625181.pdf

Virginia Court of Appeals
Unpublished

Thomas v. Commonwealth: October 2, 2018

Hampton: Defendant appeals his conviction for Possession of a Firearm as a Juvenile Felon on sufficiency of the evidence.

Facts: An officer stopped the defendant for a traffic infraction and learned that the defendant's privilege to drive was suspended. The officer smelled marijuana and asked the defendant if there were

any drugs or weapons inside the vehicle. The defendant stated that there was a small amount of marijuana in the center console and attempted to reach for the center console to open it. The officer stopped him and asked if there were any weapons in the car. The defendant replied, "I'm not sure."

The console had a latch but no lock and had two levels. In the top level, the officer found a single ammunition cartridge. In the bottom level, he found an unloaded firearm. In the floorboard on the driver's side, the officer discovered a magazine containing more ammunition. The magazine was in plain view and would have been right between the defendant's feet while he was driving the vehicle. The officer found no marijuana.

Held: Affirmed. The Court agreed that there were sufficient facts to prove that the defendant constructively possessed the firearm, because he was aware of its presence and character and it was subject to his dominion and control. The Court noted that the defendant was in close proximity to the firearm in the center console—a circumstance probative of constructive possession. The Court also pointed out that the defendant told the officer that there were drugs in the console and reached for the console. The Court reasoned that, although there were no drugs in that part of the car, a reasonable inference from the defendant's statement and conduct was that he knew that the console contained contraband—a firearm and a round of ammunition— and he wanted to retrieve or further conceal that contraband from police.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1322171.pdf

Harris v. Commonwealth: October 9, 2018

Charlotte: Defendant appeals his convictions for Use of a Firearm in Commission of Robbery and Possession of a Firearm by Felon on inconsistent jury verdicts and sufficiency of the evidence.

Facts: The defendant and his confederate robbed the victim at gunpoint while she was at home. Throughout the robbery, the defendant's confederate held a shotgun and pointed it at the victim; the defendant never handled any firearm. The defendant asked the victim where her money was. When she denied having money, he searched her house. Afterward, the victim discovered that money was missing from her purse. As they fled, the defendant told his confederate to shoot into the house. The defendant initially fled from police and lied about his confederate being in the car with him.

At trial, the jury rendered an inconsistent verdict by acquitting the defendant of robbery but finding him guilty of use of a firearm in the commission of robbery. The jury also convicted him of possession of a firearm by felon.

Held: Affirmed. Regarding the inconsistent verdict, the Court repeated that in case of an inconsistent jury verdict, where the evidence is otherwise sufficient to support the offense for which the accused was actually convicted, the inconsistent verdicts do not constitute reversible error.

Regarding sufficiency for Possession of a Firearm, the Court agreed that the defendant, who was acting in concert with his confederate, was guilty as a principal in the second degree of possessing and using the firearm used by his accomplice.

Regarding sufficiency for Use of a Firearm under § 18.2-53.1, based on principles of concert of action, the Court concluded that a jury could find that the defendant effectively used the shotgun through his confederate to further his own participation in their shared criminal activity. The Court noted that the defendant instructed his confederate to shoot the gun into the house and took advantage of the victim's detention at gunpoint to search her bedroom and personal belongings.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1084172.pdf

Custis v. Commonwealth: January 31, 2019

Accomack: Defendant appeals his sentence for Use of a Firearm, arguing it exceeded the Statutory Maximum.

Facts: In 2008, the trial court convicted the defendant use of a firearm in the commission of a felony in violation of § 18.2-53.1, as well as other charges. The trial court sentenced the defendant to five years for use of a firearm in the commission of a felony. In 2017, the defendant filed a motion to vacate, arguing that the sentencing order was void with regard to his sentence for use of a firearm in the commission of a felony because he was sentenced to a term of five years and the maximum sentence he could receive was three years. The trial court denied the motion.

Held: Reversed. The Court repeated that a sentence imposed in violation of a prescribed statutory range of punishment is void *ab initio* because "the character of the judgment was not such as the court had the power to render." In this case, the Court noted that the mandatory minimum and maximum sentence that may be imposed for the first conviction under Code § 18.2-53.1 is a three-year term of confinement, and therefore the trial court's sentencing order was void *ab initio.* The Court remanded this case to the circuit court for entry of a new sentencing order imposing a three-year term of confinement for the use of a firearm in the commission of a felony conviction.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/171103.pdf

Bush v. Commonwealth: March 5, 2019

Richmond: The defendant appeals his conviction for Possession of a Firearm by Felon on Admission of his Prior Conviction

Facts: The defendant possessed a firearm after being convicted of armed robbery and use of a firearm. At trial, the defendant objected to admission of the full convictions during the guilt phase of his

trial, instead offering to stipulate to having been convicted of a violent felony. The trial court overruled his objection.

Held: Affirmed. The Court repeated that the Commonwealth is not required to accept a defendant's offered stipulation, even when there are multiple convictions that the Commonwealth could choose to admit into evidence. The Court found that Rule 2:102 does not change that basic rule and refused to adopt the Federal interpretations of that rule. In this case, the Court also noted that the defendant failed to request a limiting or clarifying instruction that could have addressed his concerns for any undue prejudice.

Once again, the Court expressly dodged the question of whether the U.S. Supreme Court's decision in *Old Chief* applies in Virginia, although the Court did point out that *Old Chief* addresses a federal, non-constitutional rule of evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1628172.pdf

Tate v. Commonwealth: April 16, 2019

Hampton: The defendant appeals his two convictions for maliciously shooting at or into an occupied dwelling, arguing that he had only committed one offense.

Facts: The defendant fired multiple shots into two separate occupied rooms at a motel. At trial, the defendant argued that he had committed only one violation of § 18.2-279. The trial court convicted the defendant of two such offenses.

Held: Affirmed. The Court held that the unit of prosecution under § 18.2-279 is each separate act of shooting. The Court explained that the gravamen of the offense is the distinct act of shooting at an occupied building in a manner that may put the occupant or occupants in peril.

The Court likened this case to *Stephens*, which construed § 18.2-154, where the Virginia Supreme Court found that each of the shots was "a separate, identifiable act." The Court also analogized this case to *Kelsoe*, where the Virginia Supreme Court ruled that when the defendant frightened each of the three men by pointing his pistol at them, he committed three separate offenses of brandishing.

In a footnote, the Court also reaffirmed that § 18.2-279 is not a specific intent crime, and thus the evidence must establish only that the defendant intended to shoot at a building, and not that he specifically intended to cause bodily injury or place the victim in fear of harm.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0549181.pdf

Hit & Run

Virginia Court of Appeals
Unpublished

Butcher v. Commonwealth: November 6, 2018

Petersburg: Defendant appeals his conviction for Hit & Run on sufficiency of the evidence.

Facts: The defendant, angry with his girlfriend, waited after midnight for her to return home. When she saw him, she started to drive away, but he chased her at high speed chase and ran her off the road. As he approached her in her wrecked vehicle, he was yelling, banging on her car window, and "was in a rage." The victim drove away and escaped, notifying the police. An officer who responded soon after the attack testified that he never received a call from the defendant and that he never was provided the information required by the statute about the crash or the defendant's identity.

After the attack, the defendant called the victim's father on the phone. The defendant offered to pay for half of the damage to the car and expressed a desire to speak with the father about the defendant's relationship with the victim. He did not provide any of the information required by the statute about the crash or his identity.

At trial, the defendant claimed that, because the victim and her father knew him already, his failure to provide the required information was moot. He argued that the victim made it impossible for him to share his information because she fled the scene. He also argued that the Commonwealth failed to negate the possibility that he contacted some law enforcement officer somewhere.

Held: Affirmed. The Court held that, to meet the statutory command, the defendant only needed to report forthwith the required information to one person described in the statutory list, but that he failed to do so in this case. The Court repeated that the fact that the victim and her father knew the defendant did not excuse his failure to provide all of the required information.

In this case, the Court noted that the evidence did not suggest that the defendant was attempting to comply with the reporting requirement when he approached the victim, and therefore, her departure from the scene did not frustrate an attempt to do so. Furthermore, the Court pointed out that the statute contemplates situations in which communicating with the other driver is impossible; Such a scenario does not obviate the reporting requirement, but rather, requires that the driver notify one of the other listed people.

The Court equally found that the defendant's phone conversation with the victim's father did not satisfy his reporting obligation under the statute. The Court noted that the defendant did not provide her father with the required information.

The Court rejected the defendant's hypothesis of innocence that he might have, somewhere, contacted some unknown law enforcement officer. Absent even a suggestion to the contrary, the Court reasoned that trial court could infer that, if the defendant made any such call to law enforcement, the information would have been provided to the investigating officer.

The Court also concluded that the statutory command that the report be made "forthwith" requires an immediate report; the outer boundary of what can constitute communicating "forthwith" will depend on the circumstances. In this case, the Court found that the defendant's contact with the

victim's father more than an hour after the crash did not comply with the statutory command that the report be made "forthwith."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0974162.pdf

Homicide

Virginia Supreme Court

Smith v. Commonwealth: December 13, 2018
Aff'd Court of Appeals Opinion of January 16, 2018
821 S.E.2d 543
Spotsylvania: Defendant appeals her conviction for Voluntary Manslaughter on sufficiency of the evidence.

Facts: The defendant shot and killed a man. The defendant claimed that she did so accidentally, while emptying the firearm for storage, but the evidence demonstrated that she had been arguing with the victim just before shooting him and the physical evidence did not corroborate her statement. The Commonwealth presented evidence of the defendant's familiarity with firearms and the methods of unloading and checking to see whether a weapon is loaded. There was also evidence that the defendant and the victim had been arguing, that the defendant then went downstairs, got her gun, and came back upstairs and shot the victim.

The parties instructed the jury on the various grades of homicide, from first-degree murder to involuntary manslaughter. The jury found the defendant guilty of voluntary manslaughter. After the trial, the defendant sought to overturn the verdict, arguing that the Commonwealth failed to prove "sudden heat of sudden passion." The Court of Appeals ruled that the trial court found that the facts could have proven second-degree murder, and thus a voluntary manslaughter conviction was appropriate.

Held: Affirmed. Unlike the Court of Appeals, the Supreme Court agreed that the evidence was sufficient to prove voluntary manslaughter. The Court found that the jury could have found that the act of pulling the trigger was an intentional act and that the killing was therefore not an accident. The Court also concluded that the jury could have inferred that the defendant was angry and came upstairs and shot the victim while under a heat of passion produced by the argument.

Three judges wrote a concurrence in which they called attention to Justice Humphreys' concurrence from the Court of Appeals. Justice Humphreys had argued that "heat of passion" is a mitigating circumstance, rather than an element that the Commonwealth must prove beyond a reasonable doubt. The judges wrote: "The present case does not present an opportunity to test this thesis, but future cases no doubt will."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180198.pdf
Original Court of Appeals Opinion At:
http://www.courts.state.va.us/opinions/opncavwp/1058162.pdf

Virginia Court of Appeals
Unpublished

Davis v. Commonwealth: July 17, 2018

Sussex: The defendant appeals his conviction for Murder on sufficiency of the evidence.

Facts: The defendant broke into a woman's house and strangled her to death. In the days leading up to the offense, the victim had told several people that she feared the defendant based on his recent acts. The defendant later confessed to the offense. The medical examiner testified at trial that the evidence at autopsy was consistent with a death by asphyxiation.

The trial court convicted the defendant, but later the Fourth Circuit reversed the conviction on *Habeas* grounds, finding ineffective assistance due to counsel's failure to object the defendant being shackled in view of the jury. The Commonwealth re-tried the defendant.

Held: Affirmed. The Court rejected the defendant's argument that the evidence, other than his confession, was insufficient to establish the *corpus delicti* underlying his conviction. The Court examined the victim's statements and the physical evidence and noted that they corroborated the defendant's confession. The Court also repeated that forensic opinions regarding the precise cause of death are not necessary to establish that death was caused by another person's criminal agency.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0615172.pdf

Watson-Scott v. Commonwealth: December 4, 2018

Richmond: The defendant appeals his conviction for Second-Degree Murder on sufficiency of the evidence

Facts: The defendant, while shooting at another person, missed his target and killed a bystander who had been sitting in a car with her children and her mother. A witness saw that, immediately prior to the shooting, the defendant had been walking and talking with another man. The witness did not see anyone else in the area. Minutes later, the witness saw the defendant firing up the street. After the shooting, the witness no longer saw the other man, but heard the defendant curse.

At trial, the defendant argued that the Commonwealth failed to introduce evidence from which it could be inferred that he knew anyone was present in the direction in which he fired his gun.

Held: Affirmed. The Court found it reasonable to conclude that the defendant fired up the street in an attempt to shoot a specific person—i.e., the man with whom he had just been walking and talking. The Court then applied the concept of "transferred intent," agreeing that the evidence was sufficient that, when the defendant fired his gun multiple times up the street he acted with malice toward a specific individual. The Court agreed that the victim was a bystander who suffered direct and immediate harm that was within the scope of the defendant's effort to shoot the man he had been with.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1538172.pdf

Porter v. Commonwealth: December 26, 2018

Chesterfield: Defendant appeals his conviction for Murder in Commission of a Felony on denial of his Defense of Medical Malpractice

Facts: While eluding police at almost 100 miles per hour, the defendant struck another car, sending it into the air before it crashed. The driver of the other car died at the hospital several hours later. At trial, Dr. Jennifer Bowers explained to the jury that the victim died from blunt force injury. She observed that the blunt force trauma of the motor vehicle collision caused fluid buildup around the victim's heart, but that the hospital did not treat the victim for that because they did not catch it in time.

Prior to trial, the defendant offered an expert who testified that in his opinion, the hospital's failure to treat the fluid buildup was a breach of the standard of care. However, the expert agreed that the fluid buildup was likely caused by blunt force trauma and that the victim may have died even if treated properly. He did not disagree with the medical examiner's conclusion that blunt force trauma is essentially what killed the victim, and he could not testify whether the victim's other blunt force trauma injuries – his flailed chest, rib fractures, pelvic fractures, or pneumothorax – complicated treatment for the fluid buildup. The trial court excluded the expert's testimony.

Held: Affirmed. The Court rejected the defendant's request to create a new exception to the felony murder doctrine in which gross medical negligence in the course of treating the victim is an unforeseeable intervening cause that relieves an accused of liability for felony murder. The Court repeated its conclusion in *Levenson* that "medical treatment is not a superseding cause if the need for the treatment was put into operation by the defendant's wrongful act or omission."

In this case, the Court observed that the defendant failed to proffer any evidence that the alleged medical malpractice was a superseding event that acted as the sole cause of death. The Court noted that, although the expert testified that the failure to treat the pericardial effusion was a breach of the standard of care, he also agreed that the pericardial effusion was caused by the blunt force trauma from the accident. Therefore, the Court found that the defendant's proffered evidence demonstrated that his criminal acts not only "put into operation" the events causing the victim's death, but also directly caused the victim's death. As the evidence was incapable of showing that the victim's death resulted solely from medical malpractice, any evidence of medical malpractice was collateral, irrelevant, and properly excluded from the jury's consideration.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1761172.pdf

Capital Murder

U.S. Supreme Court

Madison v. Alabama: February 27, 2019

Alabama: Defendant appeals his Death Sentence on Eighth Amendment grounds.

Facts: The defendant snuck up on a police officer and shot him in the back of the head, killing him. After the trial, the defendant claimed that several strokes caused him to lose his memory of the murder. Psychologists who examined the defendant found that, while he claimed he did not remember committing the crime, the defendant understood both that he was tried and imprisoned for murder and that the state will put him to death as punishment for that crime. On *habeas*, the U.S. Supreme Court affirmed the defendant's punishment, ruling that it was not unreasonable to conclude that the defendant was competent to be executed because—notwithstanding his memory loss—he recognized that he would be put to death as punishment for the murder.

After granting a new hearing, the state court again found the defendant competent. The defendant appealed to the U.S. Supreme Court on direct appeal.

Held: Reversed and Remanded. The Court clarified that the Eighth Amendment may permit executing the defendant even if he cannot remember committing his crime. The Court wrote: "if you somehow blacked out a crime you committed, but later learned what you had done, you could well appreciate the State's desire to impose a penalty … Moral values do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall."

However, the Court also elucidated that the Eighth Amendment may prohibit executing the defendant even though he suffers from dementia, rather than delusions. The Court explained that the sole question on which the defendant's competency depends is whether he can reach a "rational understanding" of why the State wants to execute him. The Court remanded this case to the state court for renewed consideration of the defendant's competency.

The Court noted that, in this appeal, it was reviewing the case under a higher standard because it was a direct appeal, rather than the deferential standard it used in the previous *habeas* proceeding. The Court criticized the state court's opinion for finding that the defendant was "not delusional or psychotic" and that "dementia" could not suffice to bar his execution, finding that it reflected "an incorrect view of the relevance of delusions or memory." The Court also criticized the state court for using the term "insanity" to refer to the standard in this case. The Court explained that what matters is whether a defendant has a "rational understanding"—not whether he has any particular memory or any particular mental illness.

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-7505_2d9g.pdf

Bucklew v. Precythe: April 1, 2019

Eighth Circuit: Defendant appeals his death sentence on Eighth Amendment grounds.

Facts: In 1996, the defendant murdered a man, raped a woman at gunpoint, exchanged gunfire with police, and after his arrest escaped from jail and attacked the woman's mother with a hammer. Ten days before his execution, the defendant obtained a stay, arguing that the State's lethal injection protocol is unconstitutional as applied to him because of his unusual medical condition; the defendant suffers from a disease called cavernous hemangioma, which causes vascular tumors— clumps of blood vessels—to grow in his head, neck, and throat.

The district court and Eighth Circuit found a lack of evidence for the defendant's claim, but the Eighth Circuit remanded the case, instructing the defendant to identify "at the earliest possible time" a feasible, readily implemented alternative procedure that would address those risks. On remand, the defendant refused, arguing that he had no such burden, although he briefly offered "nitrogen gas" as an alternative.

Held: Affirmed in a 5-4 ruling. In a plurality opinion, the Court reaffirmed that, under *Baze*, a state's refusal to alter its lethal injection protocol could violate the Eighth Amendment only if an inmate first identified a "feasible, readily implemented" alternative procedure that would "significantly reduce a substantial risk of severe pain." The Court emphasized that identifying an available alternative is "a requirement of all Eighth Amendment method-of-execution claims" alleging cruel pain.

The Court pointed out that it has yet to hold that any state's method of execution qualifies as "cruel and unusual". The Court explained: "the law has always asked whether the punishment "superadds" pain well beyond what's needed to effectuate a death sentence. And answering that question has always involved a comparison with available alternatives, not some abstract exercise in "categorical" classification."

In this case, the Court concluded that, even if execution by nitrogen hypoxia were a feasible and readily implemented alternative to the State's chosen method, the defendant had still failed to present any evidence suggesting that it would significantly reduce his risk of pain.

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-8151_1qm2.pdf

Fourth Circuit Court of Appeals

Lawlor v. Zook: November 27, 2018

Fairfax: Defendant seeks *Habeas* relief for his Death Sentence on exclusion of a Prison Risk-Assessment Expert.

Facts: The defendant sexually assaulted and killed a tenant in an apartment complex where he worked. The evidence demonstrated that while he was striking her 47 times with a blunt object, she had been alive and conscious. During the capital murder trial, the two options at sentencing were death or life without parole

During sentencing, the defendant offered an expert on prison risk assessment and adaptation. The trial court excluded the expert's conclusion that the defendant "represents a very low risk for committing acts of violence while incarcerated." In recommending the death sentence, the sentencing jury found that there was a probability the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society."

The Supreme Court of Virginia affirmed the convictions and death sentence. In particular, the Virginia Supreme Court rejected the defendant's appeal on three grounds:

(1) Irrelevance of Prison Society

(2) Inadmissibility of Prison Conditions

(3) Inadmissibility of Characteristics, Not Character

The Virginia Supreme Court upheld the trial court's rulings regarding the expert, explaining that, as used to rebut the future dangerousness aggravator, evidence concerning the defendant's probability of committing future violent acts, limited to the penal environment, is not relevant. The Virginia Supreme Court repeated that "[g]eneral conditions of prison life . . . are inadmissible as mitigating evidence." The Virginia Supreme Court found that the expert "[m]erely extract[ed] a set of objective attributes about the defendant and insert[ed] them into a statistical model created by compiling comparable attributes from others, to attempt to predict the probability of the defendant's future behavior based on others' past behavior."

Held: Reversed. The Court relied on the U.S. Supreme Court's *Skipper* decision, repeating that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and "such evidence may not be excluded from the sentencer's consideration." Further, "evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense" is therefore relevant in capital mitigation cases. The Court also quoted *Skipper*'s ruling that "the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

The Court examined the Virginia Supreme Court's ruling in this case, as well as in the *Porter* case. The Court explained that expert testimony regarding probable conduct in prison is not per se inadmissible. In this case, the Court found that it was crucial that the defendant conceded that he would be a future danger in society outside of prison. The Court also found it essential that the jury had only two options: life without parole, or death. In light of those two factors, the only issue the jury had to consider was whether the defendant would also be a future danger to prison society,

In this context, regarding the first issue the Virginia Supreme Court identified, the Court concluded that predictive evidence of the defendant's risk of violence in prison society was relevant

because it could prove or disprove a fact the jury could deem to have mitigating value, that is, whether the defendant would "pose a danger if spared (but incarcerated)."

Regarding the second issue, that of "Prison Condition" testimony, the Court noted that the defendant, in this case, had not attempted to introduce generalized evidence of "conditions of prison life" as the Virginia courts have defined them, and so it did not address this issue.

Regarding the third issue, distinguishing "characteristics" from "character," the Court found that the Virginia Supreme Court's distinction between "character" and "characteristics" contravenes U.S. Supreme Court decisions discussing the admissibility of mitigation evidence in a capital case. The Court explained that *Morva* and *Porter* do not prohibit this type of testimony; rather, they simply require that the testimony be tailored to the individual defendant.

Full Case At:
http://www.ca4.uscourts.gov/opinions/176.P.pdf

Porter, et. al., v. Clarke: May 3, 2019

E.D.VA: The Commonwealth Appeals an injunction regarding prison conditions for death row inmates issued on Eighth Amendment grounds.

Facts: Plaintiffs, Thomas Porter, Anthony Juniper, and Mark Lawlor, are three death-row inmates. They filed a lawsuit arguing that the conditions of their confinement, including a lack of contact with other people and lack of recreation, create a substantial risk of psychological and emotional harm. The district court ruled that the conditions of confinement on Virginia's death row violated the Eighth Amendment and enjoined reinstatement of those conditions. The district court held that the death row inmates' long-term detention in conditions, amounting to solitary confinement, created a "substantial risk" of psychological and emotional harm and Virginia was "deliberately indifferent" to that risk.

Virginia changed the conditions prior to the ruling, adding new conditions for visitation, recreation, and showering. The plaintiffs conceded that the current conditions of confinement comply with the Eighth Amendment. On appeal, Virginia did not argue that the district court erred in disregarding the argument that legitimate penological considerations justified the challenged conditions on Virginia's death row. Instead, Virginia argued that the Court no longer had the authority to impose relief because the conditions had changed.

Held: Affirmed. The Court agreed that the challenged conditions on Virginia's death row deprived inmates of the basic human need for "meaningful social interaction and positive environmental stimulation." The Court explained that the undisputed evidence established that that deprivation posed a substantial risk of serious psychological and emotional harm and that Virginia was deliberately indifferent to that risk. Even though the conditions no longer existed, the Court did not construe the law as displacing courts' equitable authority to initially impose prospective relief, even when a violation is not "current and ongoing."

However, the Court agreed that legitimate penological justification can support even prolonged solitary detention of a particular inmate, even though such conditions create an objective risk of serious

emotional and psychological harm. "Put simply, if a prison official reasonably determines that, notwithstanding the emotional and psychological risks, prolonged solitary detention of an inmate is necessary to protect the well-being of prison employees, inmates, and the public, then confinement of the inmate in such conditions will not violate the Eighth Amendment."

Full Case At:
http://www.ca4.uscourts.gov/opinions/186257.P.pdf

Virginia Supreme Court

Severance v. Commonwealth: July 19, 2018
Aff'd Court of Appeals Ruling of May 23, 2017
295 Va. 564, 816 S.E.2d 277
Fairfax (Alexandria): Defendant appeals his convictions for Capital Murder on Double Jeopardy grounds for sentencing him to two sentences of Capital life.

Facts: The defendant murdered three people, first killing the wife of a Sheriff in 2003, next a local official in November 2014, and then the sister of a local judge in February 2014. [*Note: The crimes took place in Alexandria but the trial took place in Fairfax County, due to a venue change* – EJC].

The jury convicted the defendant of all three murders, including two counts of Capital Murder and one count of First-Degree Murder. The two counts of Capital Murder were charged under §18.2-31(8), as the killing of more than one person in a three-year period. The Court sentenced the defendant to two capital life terms over the defendant's objection. The Court of Appeals affirmed the conviction.

[*Note: The Court of Appeals also affirmed the joinder of the three charges at trial and affirmed the sufficiency of the evidence; the Virginia Supreme Court did not review those rulings on appeal.]*

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

Like the Court of Appeals, the Court also distinguished this case from the *Andrews* case, where the trial court had convicted the defendant of multiple capital murders under different subsections of §18.2-31. The Court pointed out that, in *Andrews*, the two killings occurred in the "same act or transaction" of one robbery, and therefore the *Andrews* Court held that one criminal offense was wholly subsumed within the other. However, in this case, the trial court convicted and sentenced the defendant for two criminal acts: murdering the second victim within three years of murdering the third victim and murdering the third victim within three years of murdering the second victim. The Court explained that the defendant committed these criminal acts at two separate dates and in two separate places, thus warranting punishment for two capital murder convictions.

Justice Powell wrote a dissent that relied on the commutative law of mathematics.

Full Case At: http://www.courts.state.va.us/opinions/opnscvwp/1170829.pdf

Involuntary Manslaughter

Virginia Supreme Court

Chapman v. Commonwealth: November 29, 2018
Aff'd Published Ct. App. Ruling of September 26, 2017
296 Va. 386, 820 S.E.2d 611
Frederick: Defendant appeals his conviction for Felony Reckless Driving Resulting in the Death of a Passenger on sufficiency of the evidence.

Facts: The defendant, while driving on a suspended license, fell asleep and drove off the road while carrying two passengers in his truck. The victim, who was a passenger in the back seat, was not wearing a seat belt and was ejected from the car. The victim died from his injuries.

The Commonwealth indicted the defendant with Felony Reckless Driving in violation of § 46.2-868(B), which provides for a higher penalty when "as the sole and proximate result of his reckless driving, [a person] caused the death of another." At trial, the defendant argued that the statute required his actions to be the "sole and proximate cause" of the defendant's death under the statute and, because the victim's failure to wear a seatbelt was also a cause of his death, he was not guilty.

Held: Affirmed. The Court simply stated: "for the reasons stated in the opinion of the Court of Appeals, we will affirm the judgment."

The Court of Appeals had held that the victim's failure to wear a seat belt was not a "proximate" cause of his death, leaving the defendant's reckless driving as the "sole and proximate" cause of the crash and resulting death. The Court construed the language of § 46.2-868(B) and defined the concept of "sole cause" as required by the code. The Court ruled that the concept of sole cause recognizes that, even if some act or omission contributes in some way to the occurrence of an event or injury, another act or omission still can be deemed the "sole cause" of the event or injury.

For example, the Court of Appeals pointed out that during the crash, the embankment also played a significant role in the crash and resulting death. The Court noted that if the place where the car ran off the road had been a flat, open field as opposed to an embankment, it is likely that the vehicle would not have flipped over and most, if not all, of the resulting damage (including the death) would not have occurred. However, the Court reasoned, the presence of the embankment was not, in the legally relevant sense, the result of an act or omission, but rather, was merely an attendant circumstance, and thus, was not a proximate cause of the crash.

In this case, the Court of Appeals explained that the failure of the victim to wear the seat belt is akin to an "attendant circumstance", in that nothing about the victim's failure to wear a seat belt caused or contributed to the crash. The Court ruled that the sole cause of the crash was the defendant's reckless driving.

The Court of Appeals also pointed out that it would be "anomalous to the point of absurdity" to conclude that the General Assembly, having determined that the failure to comply with a statutory duty to wear a seat belt cannot be considered a proximate cause of an injury or death in a tort action, intended for the failure of a rear-seat passenger to wear a seat belt when no such statutory duty exists to be considered a proximate cause for purposes of Code § 46.2-868(B).

Supreme Court Order At:
http://www.courts.state.va.us/opinions/opnscvwp/1171417.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/1948164.pdf

Identity Theft

Virginia Court of Appeals
Unpublished

Taylor v. Commonwealth: December 4, 2018

Hampton: Defendant appeals her conviction for Attempted Identity Theft on sufficiency of the evidence.

Facts: The defendant used checks belonging to the victim just hours after someone broke into the victim's home and stole the checks. The defendant entered a bank and signed the back of the check with her own name and presented her own identification to the bank teller. However, the bank teller discovered the fraud and contacted the victim and the police. The defendant fled while the police were responding.

The check bore the victim's name, bank account number, and forged signature. The defendant moved to strike because she only used her own name when attempting to cash a stolen check and argued that she did not use another's identifying information. The trial court overruled the motion.

Held: Affirmed. The Court rejected the defendant's argument as a strained reading of the statute, pointing out that, without the account number, name, and forged signature, the check would not have been useful to obtain money. Because presenting the check to be cashed with the victim's name, account number and forged signature, the Court ruled that the defendant "used" this identifying information within the meaning of the statute.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1855171.pdf

Interdiction

Fourth Circuit Court of Appeals

Manning v. Caldwell: August 9, 2018
900 F.3d 139
W.D.Va: Plaintiffs seek declaratory and injunctive relief to stop prosecutions against them as "Interdicted" habitual drunkards.

Facts: Plaintiffs, all homeless alcoholics, are "interdicted" persons in Richmond and Roanoke. A Circuit Court declared them all to be "habitual drunkards" and entered orders pursuant to § 4.1-333 prohibiting their possession or consumption of alcohol in their respective jurisdictions. In each case, a circuit court entered the order either *in absentia* or against the plaintiffs without counsel.

The plaintiffs filed a Federal Lawsuit seeking injunctions against two Commonwealth Attorneys from further prosecutions for violation of the Interdiction statute. In particular, they argued:

1. Enforcement of the Interdiction Statute results in cruel and unusual punishment because it punishes the status of being a homeless alcoholic.
2. Enforcement of the Interdiction Statute deprives them of due process because they lack counsel when interdicted, and because the interdiction proceedings do not require evidence beyond a reasonable doubt.
3. The Interdiction Statute is unconstitutionally vague.
4. Enforcement of the Interdiction Statute deprives them of equal protection.

The District Court dismissed the lawsuit on a 12(b)(6) motion for failure to adequately state a claim.

Held: Affirmed. The Court first rejected the "cruel and unusual" argument, finding that the U.S. Supreme Court's holding in *Robinson* makes clear that, although states may not criminalize status, they may criminalize actual behavior even when the individual alleges that addiction created a strong urge to engage in a particular act. The Court found that Virginia's interdiction scheme is constitutionally permissible, so long as Virginia scrupulously observes the line between status and act. The Court wrote:

"If human behavior is viewed as something over which human beings lack control, and for which they are not responsible, the implications are boundless... For instance, child molesters could challenge their convictions on the basis that their criminal acts were the product of uncontrollable pedophilic urges and therefore beyond the purview of criminal law."

Rejecting the plaintiff's Due Process argument, the Court repeated that there is no constitutionally protected liberty or property interest in the right to purchase, possess, or consume alcohol. Thus, the Court rejected the argument that the plaintiffs had a right to counsel at their interdiction hearing. The Court also ruled that the notice and hearing provided in § 4.1-333 satisfies the process that is due in the civil context.

Lastly, the Court rejected the plaintiff's Equal Protection argument. Finding no fundamental right or suspect class at issue in this case, the Court subjected the interdiction statute to mere "rational basis review." Analyzing the statute, the Court concluded that Virginia has a legitimate interest in discouraging alcohol abuse and its attendant risks to public safety and wellbeing.

Full Case At:

http://www.ca4.uscourts.gov/opinions/171320.P.pdf

Interference with 911 Call

Virginia Court of Appeals
Published

Wandemberg v. Commonwealth: April 2, 2019

Chesterfield: Defendant appeals his convictions for Strangulation and Interfering with 911 on sufficiency of the evidence.

Facts: The defendant attacked the victim twice, strangling her during the attacks. The defendant also destroyed her cellphone while she was attempting to call 911, although he claimed that she destroyed it herself. In the first attack, the defendant squeezed and pressed down upon the victim's neck with enough force to restrict her ability to breathe. The victim suffered abrasions around her neck.

In the second attack, the defendant got on top of the victim, straddled her, placed both hands on her neck, and started choking her. The defendant strangled the victim for so long that the victim's face and lips went numb. The victim also testified that her neck hurt and was red after the strangulation.

The Commonwealth indicted the defendant for both strangulation attacks, as well as for destruction of the cellphone and interference with a 911 call. The indictment for Interference with a 911 call stated that the defendant "did unlawfully destroy, deface, damage, a telephone . . . with the intent to prevent another person from summoning law-enforcement, fire or rescue services[.]"

At trial, the trial court acquitted the defendant of Destruction of Property but convicted the defendant of Interference with a 911 call. In doing so, the trial court stated that it could not resolve an evidentiary dispute regarding who destroyed the phone, the victim or the defendant.

Held: Affirmed in part, reversed in part. The Court affirmed the convictions for Strangulation, but reversed the conviction for Interference with a 911 call.

The Court affirmed both convictions for Strangulation. Regarding the first attack, the Court explained that, while a brief restriction of a victim's ability to breathe standing alone may not be enough to constitute a bodily injury, in this case the victim's visible injuries established that the defendant caused the victim to suffer a bodily injury within the meaning of § 18.2-51.6. Regarding the second attack, the Court ruled that it constituted "the definition of strangulation."

The Court reversed the conviction for interference with a 911 call, however. The Court pointed out that, while the indictment cited to Code § 18.2-164(B), the descriptive text of the indictment narrowed the factual allegation in the indictment to a violation of § 18.2-164(B)(2). The Court concluded that the Commonwealth, to meet the indictment, had to prove that the defendant disabled or destroyed the victim's cell phone. However, the Court noted that the trial court explicitly found that the evidence did not prove who destroyed the phone.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0137182.pdf

Larceny

Virginia Court of Appeals
Published

Speller v. Commonwealth: November 6, 2018
69 Va. App. 378, 819 S.E.2d 848
Virginia Beach: The defendant appeals his convictions for Burglary, Grand Larceny, and Conspiracy on sufficiency of the evidence.

Facts: The defendant and several other men broke into two residences and stole property. At each residence, an eyewitness saw three men go into and take property out of the house, placing it in the trunk of a silver Buick. The victims returned home to discover their doorframes broken out of the door where the deadbolt and the lock had been secured. Soon after, police found the silver Buick and followed it as it parked in a driveway in a residential area. Three men got out of the silver Buick, and police identified the defendant as one of them. When police asked the men to stop, they all fled. Police recovered some of the victims' property in the car. Police found the defendant's fingerprint on a stolen firearm.

At trial, the victim described his firearms in detail, including the make and model, and also described where he kept the ammunition for the firearms. The defendant argued that the Commonwealth did not prove the value of the stolen firearms.

Held: Affirmed. The Court held that to obtain a conviction for grand larceny of a firearm, when a value of more than $200 is not shown, the Commonwealth must prove that the item stolen was "any instrument designed, made, and intended to fire or expel a projectile by means of an explosion." However, the Court declined to require the Commonwealth to present specific testimony that the object was designed, made, and intended to fire or expel a projectile by means of an explosion.

In this case, the Court held that the circumstantial evidence was sufficient to demonstrate that the instruments that the defendant stole were designed, made, and intended to fire or expel a projectile by means of an explosion. The Court wrote: "Common sense dictates that a reasonable fact finder could conclude that the "shotguns, rifles, and pistols" locked in a gun safe along with ammunition were items designed, made, and intended to fire a projectile."

The Court also found that it was reasonable to conclude that the defendant and his cohorts conspired together and then broke and entered with the intent to commit larceny.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1826171.pdf

Pittman v. Commonwealth: January 8, 2019
69 Va. App. 632, 822 S.E.2d 382
Albemarle: Defendant appeals her conviction for Embezzlement on sufficiency of the evidence.

Facts: The defendant took a car that the victim rented, by asking if she could briefly borrow it for an errand. However, even though she said she as planning to return the car, she never brought it back. After several days, the victim called the police. The police found the defendant, who complained to the victim that he was "trying to get her in trouble." The defendant never returned the car, which finally showed up weeks later in an impound yard in New York, badly damaged.

The defendant argued that there is no evidence of a fiduciary relationship between herself and either the victim or the rental car company. She also argued the rental car was not the victim's personal property, and therefore could not have been entrusted to her within the meaning of the statute. Lastly, she argued that there was no evidence that she intended to deprive the rental car company of its use or that she knew the period of the rental agreement.

Held: Affirmed. The Court explained that there is no fiduciary or other special relationship required to prove embezzlement and that it is sufficient as a matter of law to "wrongfully and fraudulently use, dispose of, conceal or embezzle any . . . personal property . . . which shall have been . .. delivered to him by another." The Court held that the Commonwealth proved sufficient evidence to demonstrate both a delivery of personal property from the victim to the defendant and that the defendant had the requisite fraudulent intent to convert it to her own use.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1572172.pdf

Virginia Court of Appeals
Unpublished

Doss v. Commonwealth: June 12, 2018

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

Facts: The defendant's girlfriend owned a pickup truck. The defendant suggested to the victim that he and the victim "swap" cars in an even trade. They met and agreed to trade vehicles. The defendant's father and girlfriend attended as well. During the trade, the defendant's father handed the victim the title to the girlfriend's truck, which indicated that the titleholder was the girlfriend. The father asked the victim: "Do you need me to sign?" The victim replied: "Yes sir, I won't trade with you unless the title is signed." The father signed the title, gave it to the victim, and the victim took the key to the truck. The defendant left with the victim's vehicle.

The next day, the defendant returned with a spare key and took the truck back without speaking to the victim. He concealed the truck behind a locked fence at his residence. When police asked him

why, the defendant explained that he "felt like he could go get the truck" because the father, not the girlfriend, had signed the truck title, even though the girlfriend was the owner.

At trial, the defendant argued that he could not have stolen the truck because the truck did not legally belong to the victim. In convicting the defendant, the trial court invoked the ancient doctrine of "amanuensis," in which authority to sign a document can be impliedly given.

Held: Affirmed. The Court repeated that "Agency" is a fiduciary relationship arising from the manifestation of consent by the principal to the agent that the agent shall act on his behalf and subject to his control, and the agreement by the agent so to act. In this case, the Court pointed out that the girlfriend was present during the transaction, standing five feet away, and joined the defendant to test-drive the vehicle. The Court also noted that the girlfriend did not disagree with or object to the father signing the truck title, even though she was present and watched it happen from five feet away.

The Court criticized the defendant for conflating the concepts of implied authority and apparent authority. In this case, the Court found that the girlfriend gave "implied authority", which is a form of actual authority. Implied authority is "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." The Court distinguished that from "apparent authority," which "results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not, as when authority is created, to the agent."

The Court observed that manifestation of implied authority may consist of the principal's failure to object to unauthorized conduct. The Court also explained that an agent can reasonably infer that the principal wishes him to continue so to act when, in view of the relations between the principal and agent and all other circumstances, a reasonable person in the position of the principal, knowing of unauthorized acts and not consenting to their continuance, would do something to indicate his dissent.

In this case, the Court ruled that the girlfriend was the principal and the father was the agent. The Court found that the father reasonably inferred that the girlfriend wished him to continue to act because the girlfriend, the titleholder to the truck, witnessed the father signing the truck title. The Court pointed out that a reasonable person in the girlfriend's position that did not consent to the father's conduct would have done something to indicate her dissent. Instead, she watched the defendant and his father give the victim the key, left the truck, and departed the property.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0421173.pdf

Coleman v. Commonwealth: August 7, 2018

Virginia Beach: Defendant appeals his conviction for Felony Attempted Petit Larceny on sufficiency grounds.

Facts: The defendant attempted to steal a bicycle worth less than $200, but the victim confronted him and prevented the theft. The defendant had multiple prior larceny convictions. The trial court convicted the defendant of attempted petit larceny, third or subsequent offense, rejecting the

defendant's argument that an attempted petit larceny cannot be enhanced to a felony under § 18.2-104.

Held: Affirmed. The Court likened this case to *Pitts*, where it had determined that the phrase "punishable as larceny" as used in Code § 18.2-104 necessarily includes an attempted petit larceny conviction because Code § 18.2-27 imposes the same punishment for attempted and completed petit larcenies. The Court found no reasoned distinction between using an attempted petit larceny conviction as a predicate offense, as in *Pitts*, and allowing it to serve as the third or subsequent offense subject to punishment enhancement.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0650171.pdf

Darley v. Commonwealth: September 24, 2018

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

Facts: The victim left the back door of his home unlocked for approximately three and a half hours. During part of that time, an HVAC contractor arrived at the home to complete air conditioning work. When the victim returned home, he discovered numerous items missing from two small boxes in the victim's bedroom dresser. The victim found one box on top of the dresser and the other in a bathroom. The defendant did not have permission to be in the bedroom on that occasion, but on a previous occasion had visited the bedroom to check on a vent. Police found the defendant's fingerprint on the box that the victim found on top of the dresser.

At trial, the victim initially testified that the box had been in a drawer, but he acknowledged on cross-examination that the box could have already been on top of the dresser before the theft.

Held: Reversed and Dismissed. The Court held that the evidence failed to exclude a reasonable hypothesis of innocence, that the defendant handled the box when he first visited the bedroom, transferring his fingerprint at that time. The Court contended that, while there was no evidence that anyone other than the contractor was in the house during that time period in question, the evidence did not sufficiently exclude that possibility. Therefore, the Court concluded that the evidence did not eliminate the reasonable hypothesis that a third person entered the unlocked house and stole the missing items before or after the contractor was in the home.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1315171.pdf

Greene v. Commonwealth: April 23, 2019
Taybron v. Commonwealth: April 23, 2019

Hampton: Defendants appeal their convictions for Conspiracy, Burglary, Larceny, and related offenses on sufficiency of the evidence.

Facts: The defendants and two other men traveled together in a car to the victims' residence when no one was home. They removed numerous items from the residence. The defendants and their confederates left the scene together in their car. Police identified them while they were leaving the residence and tried to stop the car. However, the conspirators fled in the car, crashed, and then fled on foot until police captured them.

Police recovered the victims' property from the trunk of the vehicle and throughout the interior. Both defendants admitted to being in the vehicle before the theft took place, although both denied knowledge of the theft or the stolen items throughout the vehicle.

Held: Affirmed. The Court held that hold that the evidence established that the defendants committed the grand larceny and burglary and conspired to commit the offenses. The Court pointed to the defendants' failure to provide an explanation for their possession of the stolen items and found that their joint possession of the stolen items permitted the trial court to infer that the defendant was guilty of both the grand larceny and the statutory burglary.

Full Cases At:
http://www.courts.state.va.us/opinions/opncavwp/0641181.pdf
http://www.courts.state.va.us/opinions/opncavwp/0623181.pdf

Dunithan v. Commonwealth: April 30, 2019

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

Facts: The defendant stole money from the victim after police arrested the victim in a hotel room. While arresting the victim, the officer witnessed the victim remove money from an envelope and leave the envelope, still containing some undetermined amount of money, in his room. Immediately after the arrest, the defendant removed the victim's items. The defendant was the only person, excepting the motel manager, who entered the victim's room following his arrest. After obtaining a search warrant, police discovered property belonging to the victim in the defendant's room, but did not find the money. At trial, the victim testified to both the existence of this money and its amount.

Held: Affirmed. The Court agreed that the inference that the defendant took the victim's money flowed from the fact that the money existed, was in the victim's room, and that money was unaccounted for after the defendant emptied the victim's room immediately after the arrest.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0424183.pdf

Obstruction of Justice

Virginia Court of Appeals
Published

Hamilton v. Commonwealth: August 7, 2018
69 Va. App. 176, 817 S.E.2d 343
Richmond: Defendant appeals his conviction for Obstruction of Justice on *Batson* and sufficiency grounds.

Facts: Officers responded to the defendant's residence for a domestic assault call. When the officers arrived inside the residence, they explained to the defendant that they were the police and displayed badges. Despite identifying themselves as officers and informing the defendant that they were there to conduct an investigation, the defendant ignored their repeated directives to step into the main room, stating, "I don't care. Shoot me." The defendant then moved into the back bedroom and used force against the officers when he pushed the door closed while the officers pushed to keep the door open from the other side. The officers had to kick down the door. After the officers captured the defendant, he continued to pull his arms together so forcefully that he temporarily prevented the officers from handcuffing him.

At trial, using preemptory strikes, the prosecutor struck four individuals, three of whom were African-American. The defendant objected on *Batson* grounds. In response, the prosecutor explained one juror had previously been charged with a crime and indicated on a survey provided by the trial court that she was unemployed. The prosecutor also explained that the second juror was struck because she also indicated on the survey that she was unemployed. Regarding the third juror, the prosecutor explained "He did not answer any of the questions. I really didn't have much information as to him. I think going down the line, the jurors that remained on the panel… all gave answers to some questions and I had additional information about them which I did not have from" the last juror.

The trial court overruled the *Batson* objection, observing "I also had an opportunity to observe the jurors and in particular Ms. [T.W.] when she spoke of her former criminal charge. And with the other jurors, I'm satisfied that [the prosecutor] has offered a race-neutral basis for his strikes."

Held: Affirmed. The Court first addressed the *Batson* issue, relying on the trial court's determinations. The Court observed that many of the questions asked during voir dire solicited non-verbal responses from the jury or responses that could only be observed by witnessing the proceedings in person. The Court embraced the US Supreme Court's admonition not to "on the basis of a cold record easily second-guess a trial judge's decision about likely motivation."

In a footnote, the Court rejected the defendant's argument that: "'unemployed' is a code word for saying that they're African American," noting that it has previously held that unemployment can be a race-neutral basis for a peremptory strike. In another footnote, the Court also found that the trial court was under no obligation to review the voir dire or juror surveys in order to determine if there was a similarly situated Caucasian juror who was not struck – absent an argument from defense counsel at trial.

Regarding sufficiency, the Court found that the defendant's statements clearly illustrated his intention to prevent the officers from performing their investigation. The Court also noted that the officers had to kick down the door to continue their investigation while potentially putting themselves at risk if the defendant had retrieved a weapon or shot at them through the closed door. The Court agreed that this behavior violated § 18.2-460(A). The Court also found that the defendant also obstructed justice by physically resisting the officers' efforts to handcuff him.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0814172.pdf

Virginia Court of Appeals
Published

Commonwealth v. Mendez: March 12, 2019

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

Facts: The defendant was the victim of a violent assault. In 2009, the Commonwealth prosecuted the case and convicted the defendant's assailant of felony assault. For the next several years, the defendant pursued various issues concerning his injuries and his petition for a U-Visa. In 2014 the CA's office informed the defendant that it had rejected the defendant's U-Visa petition.

In 2015, the defendant attempted to contact the prosecutor again regarding his immigration status but the prosecutor refused. During an incident at the courthouse, sheriff's deputies banned the defendant from the courthouse. In 2016, the defendant left a message for the prosecutor stating:

"[H]ey stupid [DCA], why don't you listen? Why you don't come, you stupid cow, stupid cow, want me to ride it? I'm just - - - it's just cocaine motherf&%, I shoot you and your whole family you piece of shit. You going to court every day, every day, I find you my fucking self, I'm a fucking [inaudible] piece of shit."

At trial, the prosecutor testified the threat impeded her ability to "do justice generally" because her job required her to walk from building to building and she had to be escorted everywhere she went. She was concerned, due to the defendant's comments, that he knew she had to walk to court and that he had been around the area looking for her before, and, at times, even waited for her. She described that she and her family were worried.

After the threat, a detective arrested the defendant. During the arrest, the defendant said: "you mother&%, I'll get you too." The detective responded by saying "that sounds like a threat," and the defendant replied, "yes it is."

At trial for felony obstruction, the trial court found that the two felony obstruction charges "sprung" from the original 2009 malicious wounding offense prosecuted by the prosecutor, and thus, related to an enumerated felony as required by § 18.2-460(C).

Held: Reversed. Although the Court agreed that the evidence was sufficient to establish that the 2016 threats obstructed and impeded the prosecutor in the prosecutions she was conducting at the end of 2016 and the beginning of 2017, the Court ruled that the evidence did not establish that the 2016 threats represented an attempt to obstruct or impede her regarding the prosecution of the 2009 felony case. The Court wrote: "Concluding that a particular action is vile, abhorrent, and criminal … does not compel the conclusion that the activity violates a specific statute." The Court concluded that a fair reading of § 18.2-460(C) is that the threat and attempted obstruction must have a direct relationship to the enumerated felony.

The Court agreed that the evidence was sufficient to establish that the defendant's threats to the prosecutor and to the officer constituted a violation of § 18.2-460(B). Regarding the prosecutor, the Court explained that there "really can be no dispute that his threats to do her harm while she was walking to court represented "knowing[] attempts to intimidate or impede" her while she was "lawfully engaged in [her] duties . . . .", and further noted that the evidence established that his threats actually obstructed and impeded the prosecutor in the performance of her duties.

The Court remanded the case for retrial under misdemeanor § 18.2-460(B), which the Court noted is a lesser-included offense of § 18.2-460(C). The Court pointed out, in a footnote, that unlike subsection (A), which requires actual obstruction, the requirements of the threats clause of subsections (B) and (C) can be satisfied with evidence of a threat that represents a knowing "attempt[] to intimidate or impede" with no requirement that the attempt succeed.

In a footnote, the Court speculated that it is possible that the Commonwealth could have proved that the prosecutor was prosecuting felony cases falling within the definition in § 18.2-460(C) and that the defendant's threats obstructed her in the performance of her duties related to those cases, but in this case the Commonwealth offered no evidence to establish that fact. The Court also allowed that there may be circumstances when an individual covered by the statute has duties to perform that are directly related to an enumerated felony and arise after a conviction has been rendered.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0152182.pdf

Perjury

Virginia Court of Appeals
Published

Midgette v. Commonwealth: October 30, 2018
69 Va. App. 362, 819 S.E.2d 840
Virginia Beach: Defendant appeals his conviction for Perjury on Collateral Estoppel and Expert Testimony grounds.

Facts: During a trial for running a stoplight, the defendant submitted a video that he claimed was from the incident; it showed the light to be green. The defendant testified that the video "truly and

accurately" depicted the time prior to and during the traffic stop. At the end of the trial, the judge expressed concern about the authenticity of the video, but stated that he "had to go with the evidence before him" and acquitted the defendant. Nonetheless, over the defendant's objection, the trial court ordered that the flash drive containing the video be held in evidence "to be examined for accuracy."

A subsequent examination revealed that the video had been copied from an earlier video and then altered. The Commonwealth indicted the defendant for perjury. At trial, the Commonwealth asked a digital forensic expert if he believed that the video "was a true and accurate representation." The defendant objected that the testimony would go to the "ultimate issue" in the case, but the trial court overruled the objection. The expert testified that he did not "believe that it was a true and accurate representation as the two files themselves did contradict each other."

At the end of the trial, the defendant unsuccessfully argued that the issue of the accuracy and authenticity of a video and the defendant's testimony regarding it had already been determined in the prior proceeding.

Held: Affirmed. The Court first concluded that collateral estoppel did not bar the subsequent perjury prosecution. The Court reasoned that the judge's comment that he "had to go by the video" did not constitute a specific finding as to the truthfulness of the defendant's testimony regarding the video. The Court therefore held that the defendant failed to meet his burden of proving that the factual issue was actually litigated in the prior proceeding.

Regarding the expert's testimony, the Court explained that the ultimate issue to be determined in the perjury trial was whether the defendant, under oath, willfully swore falsely about a material matter—specifically, whether defendant testified falsely when he stated that the video introduced at the traffic-infraction trial was an accurate depiction of the traffic stop. Here, the court pointed out that the expert's testimony about the accuracy of the video was merely an evidentiary fact useful to the court in deciding the ultimate fact in issue.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1692171.pdf

Virginia Court of Appeal
Unpublished

Atkins v. Commonwealth: March 5, 2019

Petersburg: The defendant appeals his conviction for Perjury on sufficiency of the evidence

Facts: The defendant shot a man during a drug deal. The defendant faced two separate trials; the first trial was for malicious wounding, possession of marijuana with the intent to distribute, and related firearm charges. The second trial was for possession of a firearm by a convicted felon. At the first trial, the defendant denied that he was selling marijuana to the victim and claimed that he merely planned to give him marijuana for free. However, at the second trial, the defendant testified:

"I was selling to him and the reason why I said I was giving it to him because it was, you know, I wasn't trying to get charged with the marijuana charge. That's basically it." The prosecutor asked: "Just to be clear. You're telling us that you lied in your previous testimony about going to give the marijuana to him for free; is that correct?" The defendant replied: "Yes."

The Commonwealth indicted the defendant for perjury in light of his conflicting testimony. At trial for perjury, the defendant agreed that he lied but argued that his statement at the second trial was not material to that trial because it was not relevant to the charge of possession of a firearm by a convicted felon.

Held: Affirmed. The Court found that the defendant's statement was material to the second trial. The Court noted that, at the second trial, the defendant asserted a claim of necessity or self-defense, which would have been strengthened by the defendant's testimony that he was going to sell marijuana, since it would have made it more likely that the other man would have robbed the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0469182.pdf

Smith v. Commonwealth: May 14, 2019

Accomack: Defendant appeals his convictions for Suborning Perjury, Solicitation of Arson, and Participation in a Street Gang on sufficiency of the evidence.

Facts: The defendant, a gang member, shot at a residence. However, although two witnesses implicated the defendant in the shooting, at trial those witnesses disavowed their previous statements and claimed that they did not remember the shooting.

Later, the jail discovered several letters that the defendant wrote while in pretrial custody in which the defendant attempted to solicit individuals murder witnesses who were to testify against him at the trial and set fire to their homes. A letter also contained suggestions for how the two witnesses should disavow their prior written statements to law enforcement.

Based on the letters, the trial court convicted the defendant of Suborning Perjury, Solicitation of Arson, and Participation in a Street Gang.

Held: Reversed. The Court first reversed the defendant's conviction for suborning perjury, concluding that the evidence failed to establish that the defendant communicated to the two witnesses his plan for them to commit perjury. The Court complained that, despite contradictions between their statements to police and their testimony at the defendant's original trial, no evidence proved that either witness committed perjury, nor was there any evidence they received the letters written by the defendant.

The Court explained that, for the letters to procure or induce perjury, they had to be communicated to the two witnesses. However, the jail intercepted the letters and there was no evidence establishing the identity of the recipient(s) or relation to the witnesses. Therefore, the Court

found no causal connection between the letters and the two witnesses' perjury and no evidence that showed that the defendant prevailed upon the witnesses to perjure themselves.

The Court also reversed the defendant's conviction for solicitation of arson. The Court agreed that the defendant, in his letter, intended to recommend, and sought to obtain, the burning of a residence and that he also gave advice on how to commit the crime. However, in light of the jail's seizure of the letter, without a letter being communicated to the recipient, the Court ruled that the defendant could not aid, counsel, procure, or solicit any action by the recipient.

Regarding the defendant's conviction for Participation in a Criminal Street Gang, the Court held that solicitation of any enumerated offense under § 19.2-297.1 does not serve as a predicate act of violence. [*The Commonwealth conceded error on this issue – EJC].*

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0099181.pdf

Probation Violation

Virginia Supreme Court

Johnson v. Commonwealth: October 18, 2018
819 S.E.2d 425
King George: Defendant appeals the revocation of his probation on Sixth Amendment grounds regarding admission of Hearsay evidence.

Facts: While on probation for Rape, the defendant had contact with two children in violation of the terms of his probation. The children reported to police in a nearby jurisdiction that a man who identified himself using the defendant's first name approached the girls and gave them his phone number after learning their ages. When the girls asked the defendant, "Do you work?", he responded, "Yes, at Dollar Tree," which is the place the defendant worked at the time. The defendant also provided his correct age.

A sheriff's deputy investigated the case. He confirmed that the description that the girls gave of the man matched the defendant. The deputy also confirmed that the conversation that the girls reported was consistent with some of the things that were in the screenshots of the text messages.

At the violation hearing, the Court admitted the probation officer's major violation report, which contained the deputy's findings. The defendant objected to the admission of the girls' statements to the deputy without the opportunity to cross-examine the children. The trial court overruled the objection and revoked the defendant's probation.

Held: Affirmed. The Court reaffirmed that there are two alternative tests for admission of hearsay evidence at a probation revocation hearing, the "balancing test" and the "reliability test," and that a trial court may use either test. In this case, the Court observed that the evidence presented at the revocation hearing established that the defendant and the girls lived in the same area, that the girls'

statements to the deputy were consistent with statements in the text messages, and that the man who approached the girls shared the same age, place of employment, and physical appearance as the defendant. The Court held that this evidence, when viewed as a whole, established the reliability of the girls' assertion that the man who approached them was the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170963.pdf

Virginia Court of Appeals
Published

Green v. Commonwealth: July 17, 2018
69 Va. App. 99, 815 S.E.2d 821
Stafford: Defendant appeals the revocation of his suspended sentence, contending the trial court lacked authority.

Facts: In 1993, the trial court convicted the defendant of arson and suspended nine years of the defendant's ten-year sentence for ten years on condition that the defendant be of good behavior for those ten years. The order provided that the period of supervised probation did not commence until the defendant was released from incarceration, which did not occur until 2014. Prior to his release, though, the defendant was convicted of unrelated offenses that he committed prior 1993.

In 2015, the defendant violated probation. The trial court revoked the defendant's suspended sentence thereafter, rejecting the defendant's argument that he was no longer subject to the trial court's order.

Held: Reversed. The Court held that the trial court no longer had authority to revoke the defendant's previously suspended sentence for events that took place in 2015. The Court ruled that, under the terms of the trial court's order, the defendant's ten-year period of suspension period began in 1993, and expired ten years later, in 2003. The Court noted that § 19.2-306 contains no provision that would toll the period of suspension while the defendant was incarcerated for unrelated offenses that occurred prior to the commencement of the period of suspension. The Court repeated that the period of probation cannot exceed the period of suspension.

In a footnote, the Court distinguished the *Rease* case, where it had held that a defendant's arrest by a foreign jurisdiction tolls the provisions of § 19.2-306.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1338174.pdf

Mooney v. Commonwealth: August 7, 2018
69 Va. App. 199, 817 S.E.2d 354
Richmond: Defendant appeals his Probation Revocation on Hearsay grounds.

Facts: While on probation for grand larceny, the defendant was convicted of new violent offenses in another jurisdiction. At the probation revocation hearing, the prosecutor read from a newspaper article that quoted aspects of the victim's trial testimony from the other jurisdiction. The trial court overruled the defendant's objection to that hearsay evidence and revoked the defendant's probation.

Held: Affirmed. The Court ruled that the trial court did not violate the defendant's due process right of confrontation because newspaper article was not testimonial evidence. The Court noted that the article was not prepared in anticipation of trial; instead, the purpose of the article was to provide information to the public about the defendant's criminal trial. The Court also observed that the victim, whose trial testimony had been quoted, was subject to cross-examination at the underlying trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1055172.pdf

Virginia Court of Appeals
Unpublished

Cilwa v. Commonwealth: June 26, 2018
On Remand from Virginia Supreme Court Ruling of December 14, 2017

Fairfax: Defendant appeals her Probation Revocation on jurisdictional grounds.

Facts: In March 2008, the trial court convicted the defendant of Grand Larceny. In August 2008, the trial court found the defendant in violation of probation, but rather than revoke her suspended sentence, the Court ordered that her probationary period be extended one year to August 14, 2009. In 2009, the defendant committed a new larceny offense. In September 2009, the trial court issued an order extending the defendant's probation. However, that same month, the defendant continued to violate probation. As a result, in December 2009 the trial court found the defendant in violation, revoked her suspended sentence, and re-suspended a portion of that sentence "indefinitely in order for [her] to complete residential drug treatment and aftercare."

Although she completed a substance abuse treatment program in 2013, the defendant continued to violate probation. In 2015, the trial court issued a warrant for the defendant's arrest, found her in violation, and revoked her suspended sentence. The trial court rejected the defendant's argument that, because no order extending the probation was entered prior to that date and the court did not provide notice or a hearing before entering the September, 2009 order, her probation expired on August, 2009. The defendant had also argued that, after she completed substance abuse treatment in 2013, her probation terminated automatically and she was no longer on probation at the time of her December 2014 arrest.

The Court of Appeals dismissed the defendant's appeal as moot, but the Virginia Supreme Court reversed in an unpublished ruling in light of *Nelson v. Colorado*, as the defendant had a continuing obligation to pay fees, costs, and restitution.

[*Note: This case is different from the 2016 probation violation appeal by the same defendant, also from Fairfax*].

Held: Affirmed. The Court held that, even assuming the September, 2009 order was void, the trial court could still exercise jurisdiction over the defendant pursuant to Code § 19.2-306(B) for one year after her probation expired, until August, 2010.

The Court also rejected the defendant's argument that her probation "automatically" terminated when she completed substance abuse treatment, repeating that neither the suspension of sentence nor imposition of probation amounts to a contract with the accused. The Court also noted that the Court's 2010 order did not condition the defendant's term of probation upon her completion of substance abuse treatment, either directly or indirectly.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0687154.pdf
Supreme Court Unpublished Ruling At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/161278.pdf

Bost v. Commonwealth: July 24, 2018

Frederick: The defendant appeals his sentence on his probation revocation

Facts: The trial court convicted the defendant of two counts of distribution of cocaine in 2014 and placed him on 2 years of supervised probation. The defendant violated probation a year later and was arrested for probation violation in 2015. The defendant then continued the revocation hearing eight times. Finally, in 2017, the trial court revoked the defendant's two previously suspended sentences, which totaled eight years, and re-suspended four years.

The trial court overruled the defendant's objection to the trial court imposing another five-year term of unsupervised probation. He had argued that, because the statute does not address extensions of probation after the initial probation period has expired, the trial court could not impose another period of probation after the two-year probationary period expired.

Held: Affirmed. The Court repeated that, under § 19.2-306, upon a finding that the defendant had violated his probation by committing new offenses, the trial court had authority to revoke and re-suspend any part of the sentence and to impose new terms and conditions for the suspension or probation. The Court explained that § 19.2-306 does not prescribe the time period when the revocation hearing may be held when proper notice has been given, as it had in this case.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1302174.pdf

Porter v. Commonwealth: January 15, 2019

Warren: Defendant appeals the revocation of his probation on admission of hearsay evidence.

Facts: The defendant, while on probation for Rape, received a free motel room from his probation officer. However, he violated the terms of his probation by having another person stay in his room overnight.

During a meeting with the defendant, the probation officer told the defendant that he needed to re-register as a sex offender with the Police Department. When the defendant said that he did not know where the police department was located, the probation officer said that she would talk to his friend, a woman who was with the defendant. The defendant replied that "she was not from here," so the officer told him that she would give both of them directions. When the probation officer asked the defendant's friend where she was from, the woman said she was from out of town. When the officer asked where she had been staying, she told the officer she had been "staying with" the defendant.

At the violation hearing, the probation officer testified to the woman's statement. The defendant objected to the woman's statement as hearsay, but the trial court overruled the objection. The trial court also admitted a written statement from the woman regarding her stay with the defendant.

Held: Affirmed. The Court repeated that the admission of hearsay is subject to a confrontation challenge only if it is testimonial in nature. In this case, the Court reasoned that the officer elicited the woman's verbal statement in the course of trying to ascertain her familiarity with the area in order to give her directions, not in the course of investigating a possible probation violation.

The Court dodged the question of whether the trial court should have admitted the written statement, finding that any error was harmless. Justice Russell concurred in part and dissented in part, finding that the oral statement was testimonial. He would have remanded the case, complaining that the record was insufficiently developed to allow the Court to conclude that the trial court made the necessary findings to support either path to admission of the woman's verbal statement under *Henderson*.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0427184.pdf

Rape & Sexual Assault

Virginia Court of Appeals
Published

Cabral v. Commonwealth: July 17, 2018
69 Va. App. 67, 815 S.E.2d 805
Williamsburg/James City: Defendant appeals his conviction for Aggravated Sexual Battery on sufficiency of the evidence.

Facts: Armed with a Taser, the defendant abducted and sexually assaulted the victim. The defendant used the Taser in order to incapacitate the victim. The victim testified that, during the attack, she was "struck" with and "felt the shock of" the weapon, which was "very loud and audible" when the defendant turned it on. The victim's injuries included swelling to her neck, back, shoulders, and abdomen. An officer recovered and tested the Taser, and he testified that the Taser emitted "a charge," "sparked," and "made noise."

The trial court rejected the defendant's argument that the Taser was not a "dangerous weapon" within the meaning of § 18.2-67.3(A)(4)(c), and that the term "dangerous weapon" is synonymous with "deadly weapon."

Held: Affirmed. The Court held that a Taser, as used by the defendant during the course of his assault, qualified as a dangerous weapon pursuant to § 18.2-67.3 due to its classification as a stun weapon and its ability to inflict injury. The Court rejected the argument that "dangerous weapon" and "deadly weapon" have the same meaning. The Court also noted that 18.2-283.1 describes stun weapons as "dangerous weapons."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1186171.pdf

Davison v. Commonwealth: October 22, 2018
69 Va. App. 321, 819 S.E.2d 440
Fredericksburg: Defendant appeals his convictions for Forcible Sodomy and Aggravated Sexual Battery on Jury Instruction issues.

Facts: The defendant sexually assaulted a woman who was highly intoxicated. The trial court gave jury instructions that required the jury to find that the defendant's acts were done against the victim's will by force, or through her physical helplessness, or through her mental incapacity. The defendant objected that the instructions improperly combined the alternative theories of force, mental incapacity, or physical helplessness as the means by which the sexual acts were committed against the victim's will, and therefore the instructions were confusing and could have resulted in a non-unanimous verdict. The trial court overruled the objection.

Held: Affirmed. The Court explained that the means by which the victim's will was overcome is not an element of the offense that requires unanimity; rather, force, physical helplessness, and mental incapacity present "several possible sets of underlying facts" that determine whether the victim's will was overcome. In this case, the Court noted that the means of force and incapacity were stated in the disjunctive in the instructions, and the jury was told it had to find that the evidence proved "each" of the given elements beyond a reasonable doubt. As the evidence presented at trial sufficiently supported a finding that the defendant committed both sodomy and aggravated sexual battery against the victim's will by the means of force, her physical helplessness, or her mental incapacity, the Court concluded that the requirement of unanimity was satisfied "because, no matter which theory [the jury] accepted, all the

jurors convicted under a theory supported by the evidence and all the jurors convicted the defendant of the same offense."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0633172.pdf

Warren v. Commonwealth: January 15, 2019
69 Va. App. 659, 822 S.E.2d 395
Pittsylvania: Defendant appeals his conviction for Carnal Knowledge of an Animal on Due Process grounds.

Facts: The defendant videotaped sexual acts between himself, a woman, and her dog. At trial, the defendant argued that § 18.2-361(A) is unconstitutional, both facially and as-applied, under *Lawrence v. Texas,* because it criminalizes "private sexual conduct of consenting adults."

Held: Affirmed. The Court construed the *Lawrence*, *MacDonald v. Moose*, and *Toghill* cases, and agreed that § 18.2-361(A) is invalid to the extent its provisions apply to private, noncommercial and consensual sodomy involving only adults. However, consistent with *Toghill*, the Court concluded that there are constitutional applications of the Virginia bestiality statute and therefore the facial challenge to § 18.2-361(A) failed.

The Court also rejected the defendant's as-applied challenge, finding that §18.2-361(A) does not place any limitation on the rights of consenting adults to engage in private, consensual, noncommercial, sexual acts with each other. Instead, by its terms, it only prohibits sexual conduct involving a "brute animal." Because the statute prohibits only sexual activity between people and animals, the Court noted that the only right that it could possibly infringe would be a right to engage in bestiality. The Court ruled that there is no fundamental right to engage in bestiality and that there are rational reasons for the government to prohibit it.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2086173.pdf

Johnson v. Commonwealth: January 15, 2019
69 Va. App. 639, 822 S.E.2d 385
Henrico: The defendant appeals his conviction for Pandering and Sex Trafficking on sufficiency of the evidence.

Facts: The defendant drove two women from North Carolina to Virginia to engage in prostitution and, while the women worked, repeatedly collected their money and took it to his hotel room. When police arrested the group, they found some of the money in the defendant's possession and more in his hotel room. One of the prostitutes had previously worked independently and, after police arrested the defendant, she continued to work independently.

Held: Affirmed. The Court held that this evidence was sufficient to prove the defendant knowingly received money from a woman engaged in prostitution under § 18.2-357.1. The Court explained that a conviction under § 18.2-357.1(A) does not require the element of force, intimidation, or the threat of force or violence, although a conviction under subsection (B) does.

Furthermore, the Court found that the fact one of the women was engaged in prostitution before she met the defendant and continued to engage in prostitution after he was incarcerated did not change the fact that he solicited, invited, recruited, encouraged or otherwise caused her to engage in prostitution after she met him – and does not change the fact that she was travelling with him to Virginia. The Court noted that the statute does not require the accused to have been the sole cause or the original cause for the person to engage in prostitution.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2089172.pdf

Bondi v. Commonwealth: March 26, 2019

Virginia Beach: Defendant appeals his conviction for Object Sexual Penetration on sufficiency of the evidence.

Facts: The defendant, a minister, sexually assaulted the victim in 2001 when she was eighteen. The defendant had been a mentor and "father figure" to the victim. During the assault, the victim described how she was "completely frozen and in shock." Although she tried to leave the defendant's home, she stayed when he became "aggressive" and "insistent" in demanding that she remain on the sofa with him. She described her considerable physical pain and fear of the defendant after the attack.

The victim disclosed the assault to a friend in 2010. That friend testified at trial. Later, the defendant and the victim also met with a church pastor regarding the assault. At trial, the victim explained that she did not disclose more detail when she initially told her friends about the offense in 2001 because she felt distrustful and uncomfortable explaining the defendant's actions due to her modesty and traumatization.

The defendant moved for a new trial when he learned that, fifteen years after the incident and prior to trial, the victim underwent Eye Movement Desensitization and Reprocessing ("EMDR") therapy as part of counseling. He argued that the victim's testimony was a result of that therapy, not her independent recollection, and if he had possessed this information prior to trial, he would have presented evidence attacking the credibility of repressed memories and "debunked EMDR as a legitimate science." The trial court denied his motion.

Held: Affirmed. The Court agreed that the evidence demonstrated the defendant overcame the victim's mind and will by placing her in fear of bodily harm. The Court agreed that a factfinder could reasonably conclude that the defendant exercised emotional dominance over the victim through his actions. The Court observed that she was susceptible to psychological pressure as a result of her relationship with the defendant and her sexual inexperience as a teenager.

Regarding the defendant's motion for a new trial, the Court pointed out that the victim's recollection and reporting of the incident occurred without EMDR therapy.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1676171.pdf

Fahringer v. Commonwealth: April 30, 2019

Radford: Defendant appeals his convictions for multiple Sexual Assault offenses on refusal of a jury instruction.

Facts: The defendant and another man subjected the victim to series of sexual assaults, during which the victim was so intoxicated that she was drifting in and out of consciousness, incapable of consenting. A surveillance camera captured the assault. A witness summoned police, who arrested the defendant and his confederate while they were still assaulting the victim.

At trial, the defendant pointed to a witness' testimony that the victim had kissed the defendant prior to the attack, claiming that the victim consented to the sexual assault. The defendant asked the trial court to give a proffered jury instruction regarding the consideration of prior sexual conduct between him and the victim, arguing that the act of kissing fits the legal definition of "sexual conduct." The trial court refused.

Held: Affirmed. The Court held that the trial court did not err in refusing the defendant's proffered jury instruction concerning evidence of prior sexual conduct between him and the victim. The Court likened § 18.2-67.10(6)'s definition of "sexual conduct" to § 18.2-390(3), which anticipates the involvement of intimate parts, finding that it in no way includes "kissing" in this definition of "sexual conduct." Instead, the Court noted that "sexual" as used in § 18.2-67.10(6) anticipates the involvement of "intimate parts," which includes "the genitalia, anus, groin, breast, or buttocks of any person."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0370183.pdf

Virginia Court of Appeals
Unpublished

Robinson v. Commonwealth: January 15, 2019
Note: Rehearing En Banc Granted February 12, 2019
Amelia: Defendant appeals his conviction for Sexual Battery on sufficiency of the evidence.

Facts: The defendant assaulted a tenant living in his home, grabbing her breasts right behind her nipples and twisting as hard as he could. The defendant held on to her in that manner for about a minute, according to the victim's sister, who was standing next to her, stunned. The victim told him to "get off of her" and smacked his hands away. At trial, the defendant argued that the evidence was

insufficient to prove sexual battery by force, in violation of § 18.2-67.4(A)(i), in light of the *Woodard* case.

Held: Reversed. The Court ruled that, while the evidence demonstrated that the defendant accomplished the battery "by surprise," it was insufficient to prove he committed sexual abuse by force. The Court explained that the restraint that the defendant employed was inherent in the act itself; it was not used to overcome her will to accomplish the non-consensual touching. The Court distinguished two cases: *Clark*, where the defendant laid on top of the victim, and *Kanczuzewski*, where the defendant grabbed the victim prior to the assault. In this case, the Court contended that the durational evidence served only to demonstrate the non-consensual touching occurred.

Justice Beales filed a dissent, noting that the action was more than a mere touching.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1679172.pdf

Bush v. Commonwealth: April 16, 2019

Chesapeake: Defendant appeals his convictions for Aggravated Sexual Battery and Sexual Battery on sufficiency of the evidence.

Facts: The defendant sexually assaulted both his stepdaughter and his niece. One night, the defendant entered his 15-year-old stepdaughter's bed and touched her vagina and chest over her clothes. She spoke to him during the assault and he responded, but he refused to stop the assault. On another occasion, his daughter awoke in the middle of the night to find the defendant moving his cell phone under the blankets and a "bright light in her face." Later, the defendant sent her a text message that he missed seeing her nude. He told her: "I go back and look at pic's. I no [sic] I sound like a perv but it's the truth." The defendant's daughter delayed reporting the offense for about a year because she was scared and "wanted to pretend it never really happened."

On a separate occasion, the defendant's 16-year-old niece stayed overnight at his residence. She had been sleeping when she felt the defendant behind her, putting his hand in her shorts, touching her "private area." He also put his hand under her shirt, touching her chest.

At trial, the defendant denied assaulting his niece and claimed that, if he had assaulted his stepdaughter, he was asleep at the time.

Held: Affirmed in part, reversed in part. The Court affirmed the defendant's conviction for aggravated sexual battery of his stepdaughter but reversed his conviction for sexual battery of his niece.

The Court found that the defendant's intent to sexually abuse his daughter appeared not only on the date of the touching but also was "manifested in a course of conduct indicating he had a sexual attraction to" her. The Court referred to the defendant's numerous sexual comments about the victims' breasts, and also concluded that it was reasonable to infer that the defendant had taken nude photos of his daughter while she was asleep. [The defendant did not argue whether he was a stepparent under § 18.2-67.3.]

The Court rejected the argument that, because the victim delayed in telling anyone about the offense, her testimony was inherently incredible.

Regarding the defendant's assault on his niece, however, the Court found that, by the victim's own testimony, the defendant did not commit sexual battery by force, threats, intimidation, or ruse. The Court concluded that "clearly, the evidence is sufficient to prove appellant committed an assault and battery on A.S. by touching her "private area" and chest, although the evidence is insufficient to prove sexual battery.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0409181.pdf

Robbery

Virginia Court of Appeals
Unpublished

Pettis v. Commonwealth: November 27, 2018

Richmond: Defendant appeals his conviction for robbery on denial of a jury instruction

Facts: The defendant and his accomplice robbed a taxi cab driver at gunpoint. After the robbery, the defendant used the victim's credit card at various locations, where witnesses testified they saw the defendant using the card. Police later arrested the defendant and recovered the victim's stolen property.

At trial, the defendant sought an instruction that explained to the jury that the mere unexplained possession of stolen property, without more, is not sufficient evidence. The trial court denied his request.

Held: Affirmed. While the Court agreed that under *Bazemore*, the defendant's proffered instruction was a correct statement of law, the proffered instruction was merely duplicative and the defendant was able to present his theory of the case. The Court examined the robbery instruction that the trial court gave and noted that it advised the jury that unexplained possession of stolen property, by itself, is insufficient to prove robbery. The Court also pointed out that the jury had an instruction that it was to judge the credibility of witnesses and the weight of the evidence; thus it had "ample opportunity to acquit appellant if it determined that … appellant was merely in the unexplained possession of … stolen property."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1152174.pdf

Pritchett v. Commonwealth: March 19, 2019

Danville: The defendant appeals his conviction for Robbery on sufficiency of the evidence.

Facts: The defendant robbed the victim of her purse while she was sitting in her car in her own driveway. The victim described at trial how she "jerked down" when the defendant grabbed her arm and when the defendant pulled her arm and purse out of the car she "dropped [her] arm." She also indicated on cross-examination that "when whoever opened my door, they reached in and grabbed my arm and pocketbook and was gone. It was no hesitation."

Held: Affirmed. The Court reaffirmed that the actions of a "purse snatcher" constitute robbery only if the perpetrator, directly or indirectly, touches or violates the victim's person. The Court found that, in this case, the victim resisted the taking of her purse and that the perpetrator overcame that resistance by force directed at her person. The Court contrasted the *Winn* and *Mills* cases to emphasize the importance of resistance by the victim, and the thief's efforts to overcome that resistance.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0419183.pdf

Street Gang Participation

Virginia Court of Appeals
Unpublished

Smith v. Commonwealth: May 14, 2019

Accomack: Defendant appeals his convictions for Suborning Perjury, Solicitation of Arson, and Participation in a Street Gang on sufficiency of the evidence.

Facts: The defendant, a gang member, shot at a residence. However, although two witnesses implicated the defendant in the shooting, at trial those witnesses disavowed their previous statements and claimed that they did not remember the shooting.

Later, the jail discovered several letters that the defendant wrote while in pretrial custody in which the defendant attempted to solicit individuals murder witnesses who were to testify against him at the trial and set fire to their homes. A letter also contained suggestions for how the two witnesses should disavow their prior written statements to law enforcement.

Based on the letters, the trial court convicted the defendant of Suborning Perjury, Solicitation of Arson, and Participation in a Street Gang.

Held: Reversed. The Court first reversed the defendant's conviction for suborning perjury, concluding that the evidence failed to establish that the defendant communicated to the two witnesses his plan for them to commit perjury. The Court complained that, despite contradictions between their

statements to police and their testimony at the defendant's original trial, no evidence proved that either witness committed perjury, nor was there any evidence they received the letters written by the defendant.

The Court explained that, for the letters to procure or induce perjury, they had to be communicated to the two witnesses. However, the jail intercepted the letters and there was no evidence establishing the identity of the recipient(s) or relation to the witnesses. Therefore, the Court found no causal connection between the letters and the two witnesses' perjury and no evidence that showed that the defendant prevailed upon the witnesses to perjure themselves.

The Court also reversed the defendant's conviction for solicitation of arson. The Court agreed that the defendant, in his letter, intended to recommend, and sought to obtain, the burning of a residence and that he also gave advice on how to commit the crime. However, in light of the jail's seizure of the letter, without a letter being communicated to the recipient, the Court ruled that the defendant could not aid, counsel, procure, or solicit any action by the recipient.

Regarding the defendant's conviction for Participation in a Criminal Street Gang, the Court held that solicitation of any enumerated offense under § 19.2-297.1 does not serve as a predicate act of violence. [*The Commonwealth conceded error on this issue – EJC].*

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0099181.pdf

Throwing a Missile

Virginia Court of Appeals
Unpublished

Clark v. Commonwealth: July 24, 2018

Norfolk: The defendant appeals her conviction for Unlawfully Throwing a Missile at an Occupied Building on sufficiency of the evidence.

Facts: The defendant found the father of her child at the victim's home, became angry, and threw a rock at the victim's window, breaking it and causing injury. At trial, the victim testified that the piece of concrete that the defendant threw through her window hit her in the head, although she did not seek medical attention. The trial court rejected the defendant's argument that the evidence was insufficient to convict her of unlawfully throwing a missile at an occupied building because there is no evidence of any life being in peril.

Held: Affirmed. The Court ruled that the evidence was sufficient to establish that the defendant's actions may have put the victim's life in peril, and in fact that the defendant's actions actually had the potential to cause serious injury.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0980171.pdf

Traffic Generally

Virginia Court of Appeals
Unpublished

Bledsoe v. Commonwealth: June 5, 2018

Rockingham: Defendant appeals his conviction for Habitual Offender on sufficiency of the evidence.

Facts: The defendant, a habitual offender, drove his vehicle on a gravel road near a campsite in the George Washington National Forest, which is federal land. A U.S. Forest Service officer saw the defendant, learned he was a habitual offender, and arrested him. The officer testified that historically, there was an issue of unauthorized motor vehicle use in the national forest. He explained how the Forest Service installed an earthen berm, Carsonite posts, and a graveled access road to restrict access. Witnesses testified and photographs reflected that it appeared that motor vehicles were regularly driven around the campsite. There was a worn path around the center of the campsite riddled with ruts.

At trial, the defendant argued that the area where he drove was not a highway because it was not "open to the public for purposes of vehicular travel," but the trial court rejected that argument.

Held: Affirmed. The Court pointed out that §46.2-100 provides three definitions of "highway"—one general definition and two specific definitions. In particular, § 46.2-100(ii) concerns "any property owned, leased, or controlled by the United States government and located in the Commonwealth." Applying the *Kim* case, the Court stated that the test regarding whether a way or place on federal land situated in the Commonwealth is a "highway" is whether the "way or place" is "used for purposes of vehicular travel."

In this case, the Court agreed that the "way or place" at issue was located on federal land, the George Washington National Forest, situated within the Commonwealth. Based on the photographs and evidence in the record, the Court found that the evidence established that the area was "used for purposes of vehicular travel."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1835163.pdf

Unauthorized Practice of Law

Fourth Circuit Court of Appeals

Capital Associated Industries v. Stein: April 19, 2019

M.D.N.C.: Plaintiffs appeal the dismissal of their suit to enjoin enforcement of the statute prohibiting Unauthorized Practice of Law.

Facts: The plaintiffs, a private trade association of non-lawyers, challenged North Carolina's statutes prohibiting the unauthorized practice of law in federal district court, suing the attorney general of North Carolina and certain district attorneys. The plaintiffs wanted to be able to offer legal services as a corporation using attorneys employed by the corporation. The complaint sought declaratory and injunctive relief to prevent enforcement of North Carolina's UPL laws against the plaintiffs. The plaintiffs argued that the UPL statutes unlawfully burdened their associational rights and their freedom of speech. The plaintiffs also argued that the prohibition on the unauthorized practice of law was void for vagueness. The trial court dismissed the plaintiff's claims.

Held: Affirmed. The Court held that the UPL statutes did not violate the plaintiff's associational rights. The Court noted that the U.S. Supreme Court has ruled that associational rights do not control when the proposed practice of law would raise ethical concerns. In this case, the Court agreed that the plaintiff's proposed practice of law would raise ethical concerns.

Turning to the plaintiff's claim that the UPL statutes violated their free speech rights, the Court found that the practice of law has communicative and non- communicative aspects, and thus applied two different types of scrutiny in this case. The Court first held that intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech. Because North Carolina established a reasonable fit between its UPL statutes and a substantial government interest, the UPL statutes survived intermediate scrutiny. The Court agreed that barring corporations from practicing law is sufficiently drawn to protect the state's substantial interest in regulating the legal profession to protect clients.

Regarding the portions of North Carolina law that do not implicate the right to free speech, the Court found that the state's justifications sufficed for rational basis review. The Court held that the UPL statutes did not deny the plaintiffs due process.

The Court then held that North Carolina's UPL statutes are not void for vagueness, finding that a person of ordinary intelligence would have fair notice of what the UPL statutes prohibit. The Court noted that the plaintiff itself understood what it means to practice law well enough to avoid giving its members legal advice. Although the State Bar officials couldn't present a clear answer to every hypothetical question asked in their depositions, the Court explained that fair notice doesn't require certainty about every hypothetical situation.

The Court also addressed and dismissed various state-law based arguments.

Full Case At:
http://www.ca4.uscourts.gov/opinions/172218.P.pdf

Worthless Check

Virginia Supreme Court

McGinnis v. Commonwealth: December 13, 2018
Aff'd Court of Appeals Ruling of December 12, 2017
821 S.E.2d 700 (2018)
Lynchburg: The defendant appeals his conviction for Worthless Check on sufficiency of the evidence.

Facts: The defendant passed several bad checks in exchange for services. The defendant conceded that he knew that he did not have sufficient funds in his bank accounts when he delivered the checks. However, he argued that he had an understanding with the victim for an extension of credit and did not have the intent to defraud. The trial court convicted at trial.

After trial, the defendant raised the argument that it was not a crime to write a worthless check for services in a "motion to set aside verdict and for a new trial." Although the defendant had counsel, the defendant personally signed the motion; his counsel did not sign the motion. The trial court denied the motion. The defendant appealed based on the arguments raised in the motion

The Court of Appeals held that the motion was invalid because the defendant's trial counsel did not sign the motion.

Held: Affirmed. The Court first rejected the Court of Appeals conclusion that the motion was invalid because the defendant's counsel did not sign it. The Court noted that neither Rule 1:4 nor Rule 1:5, nor § 8.01-271.1, provides for any sanction for the failure to sign a pleading. Instead, the Court found that the only sanction provided where a pleading is not signed by either an attorney of record or a party is for that pleading to be stricken "unless it is signed promptly after the omission is called to the attention of the pleader or movant."

The Court then held that larceny by worthless check is not limited to checks passed as present consideration for goods and services. The Court noted that, prior to the 1978 amendment of § 18.2-181, labor and other services were not subject to prosecution under a common law theory of larceny "because neither time nor services may be taken and carried away," which was a necessary element of larceny at common law. However, the Court held that the 1978 amendment was not intended to limit the application of the statute in that way. Instead, the Court explained that the gravamen of the offense under Code § 18.2-181 is the passing of a worthless check with the intent to defraud. Thus, regardless of the object of the payment, the burden on the Commonwealth is to establish that the defendant knew or had reason to know that the check was worthless because there were insufficient funds in his bank account at the time the check was passed and that in passing the check he intended to defraud the receiver.

In this case, the Court agreed that there was sufficient evidence that the defendant knew that there were not sufficient funds to cover the checks and that he did so with the intent to defraud the victim.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1180055.pdf
Original Court of Appeals Ruling At:
http://www.courts.state.va.us/opinions/opncavwp/0117173.pdf

DEFENSES

Insanity

Virginia Court of Appeals
Published

Schmul v. Commonwealth: September 11, 2018
69 Va. App. 281, 818 S.E.2d 71
Fairfax: Defendant appeals his convictions for offenses of Abduction, Malicious Wounding, and related offenses on refusal to permit an "involuntary intoxication" defense.

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 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.

Held: Affirmed. The Court reaffirmed 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 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 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.

In a footnote, the Court also rejected the defendant's claim that the two Fentanyl patches that he claimed he had been wearing at the time of the offense supported his defense. The Court wrote that "given the extraordinary amount of fentanyl that appellant claims was on him at the time of the offenses (and the fact that the amount far exceeded his prescribed dosage), the defense of unconsciousness would simply not be available to appellant, even if he had been unconscious (which the evidence shows he was not), because any supposed unconsciousness would have been self-induced."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1572164.pdf

Johnson v. Commonwealth: March 5, 2019

Brunswick: Defendant appeals her conviction for Eluding on refusal to admit Expert Testimony of Diminished Capacity

Facts: The defendant fled a police officer at speeds exceeding 100 miles per hour, crossing into oncoming traffic, running red lights, and passing numerous cars, until her car literally came apart and she crashed. At trial, the defendant claimed the affirmative defense under § 46.2-817 that she reasonably believed that she was being pursued by a person other than a law-enforcement officer. She testified that PTSD distorted her perception of the pursuit. However, the trial court excluded her expert's testimony that her PTSD established her reasonable belief at the time of the police pursuit.

Held: Affirmed. The Court held that § 46.2-817 does not in any way contradict the Supreme Court's decision in *Stamper* and does not make expert testimony concerning a defendant's mental state at the time of the offense admissible at trial, absent an insanity defense.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1478172.pdf

Self-Defense

Virginia Supreme Court

Adkins v. Commonwealth: March 28, 2019 (Unpublished)

Alexandria: Defendant appeals his conviction for Murder on Fifth Amendment and Jury Instruction grounds.

Facts: The defendant shot and killed the victim during an argument. Some witness stated that, during the argument, the victim pushed the defendant. Police located the defendant and arrested him for possession of a firearm and interviewed him. After learning of his *Miranda* rights and making a few initial statements, the defendant stated: "I don't have no more to say to you." The officers terminated their interview immediately thereafter. However, a few minutes later, other officers began to ask the defendant about the murder. The defendant denied killing the victim in self-defense, claiming that he did not kill the victim at all.

The defendant moved to suppress his statements, arguing that the officers violated his *Miranda* rights when the detectives continued to interrogate him after he invoked his right to remain silent. The trial court denied the motion. At trial, the defendant requested a jury instruction on "mutual combat" but the trial court denied the instruction, although it allowed a self-defense instruction. The Court of Appeals denied the defendant's appeal.

Held: Reversed. The Court pointed out that a suspect may invoke his right to remain silent and terminate questioning by simply stating "I do not want to answer any more questions." In this case, the Court found that the defendant's statement "I don't have no more to say to you" was "not quite so eloquent, but it clearly conveys the same sentiment." The Court ruled that once the defendant invoked his right to remain silent, the Commonwealth was prohibited from interrogating him unless the defendant voluntarily reinitiated the interrogation or a significant period of time passed.

In a footnote, the Court explained that the defendant's statement, "I don't have no more to say to you," essentially meant: "I am invoking my right to remain silent" because the context did not reasonably support any other interpretation. However, depending on the circumstances, the Court allowed that this same statement could also be interpreted in another case to mean "I've told you everything I know about this subject, and there's no more for me to say about it." In such a situation, the suspect would not be invoking his right to remain silent but instead would merely be implying that saying more would just be an exercise in repeating himself.

The Court agreed, however, that the trial court properly denied an instruction on "mutual combat." The Court observed that the defendant and victim were engaged in an argument, during which the victim became the sole aggressor. The Court repeated that not every fight is mutual combat; where one party assaults another, "the ensuing struggle cannot be accurately described as a mutual combat."

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/180485.pdf

Virginia Court of Appeals
Published

Lienau v. Commonwealth: September 11, 2018
69 Va. App. 254, 818 S.E.2d 58
Aff'd En Banc February 12, 2019
Fairfax: The defendant appeals his conviction for Involuntary Manslaughter on refusal of a Self Defense jury instruction.

Facts: The defendant killed his tenant's brother after he broke into the defendant's home. The defendant had repeatedly told the brother that he could not enter the residence, due to his repeated intoxication and erratic behavior. The night before the killing, the tenant asked the defendant to help him deal with his brother, who was intoxicated, yelling and threatening to kill the tenant. The defendant ejected the brother from the home.

Later, the defendant heard a loud crash and discovered that an intruder had burst into the home with so much force that pieces of door trim and door frame lay in the living room with the metal deadbolt strike plate still attached. The defendant loaded his rifle and investigated, finding the tenant's brother coming from the second floor to the top of the stairs. He confronted the man and shot him in the calf; the victim died from the wound quickly thereafter.

Police interviewed the defendant, who stated that, although he said he did not intend to pull the trigger, the rifle discharged. The defendant stated that before he knew who the intruder was, he "just saw red" and responded in "rage."

The trial court refused the defendant's request for a self-defense jury instruction.

Held: Reversed. The Court noted that Virginia has long recognized the "castle doctrine," whereby a homeowner has the right to "meet force with force" when an intruder breaks into his or her home. The Court also repeated that, if while lawfully preparing to defend himself in his home, a homeowner accidentally kills an intruder, he still may be entitled to acquittal on the grounds of self-defense. Thus, the Court noted that the mere fact that the defendant did not, at the time of the killing, believe such killing was necessary did not divest him of the right to set up self-defense if the killing was not intended by him, but was incidental to his excusable defense of himself when assaulted.

In this case, in light of the violence of the break-in, the Court found that a reasonable ground existed for believing that the victim intended to do some serious bodily harm and that there was imminent danger. Thus, because there was credible evidence to support the defendant's theory of self-defense, the Court held that it was the jury's task to determine whether the defendant was acting in lawful self defense and therefore the defendant was entitled to a self defense instruction.

Judge Malveaux wrote an extensive dissent, contending that the record lacked sufficient evidence that the victim's acts made the immediate danger so apparent to the defendant that he reasonably believed he had to meet it with the use of force.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0685174.pdf

Anderson v. Commonwealth: November 8, 2018
69 Va. App. 396, 819 S.E.2d 857
Virginia Beach: Defendant appeals his conviction for Voluntary Manslaughter on refusal to admit the victim's criminal history.

Facts: The defendant stabbed and murdered his neighbor. At trial, he claimed self-defense. The defendant offered numerous charges and convictions from the victim's criminal history, but the trial court refused to admit many of them.

Held: Affirmed. The Court ruled that the excluded charges and convictions failed to demonstrate the victim's propensity to engage in violent or turbulent conduct, and therefore they were not relevant to the defendant's self-defense claim. The Court examined each item in detail.

Regarding dismissed assault charges from 1996, 1997, and 1999, the Court concluded that they failed to establish any violent or turbulent behavior from the victim, as the charges could have been dismissed for a variety of reasons. The Court noted that the defendant failed to adduce any evidence about the facts of those cases.

The Court then examined a 1999 larceny conviction, finding that it also failed to establish that he previously engaged in violent or turbulent conduct. Although the victim was initially charged with robbery, he was ultimately convicted of a larceny offense. The Court reasoned that the victim could have been convicted of larceny instead of robbery because he did not unlawfully acquire the property at issue through the use of violence. Thus, without additional evidence establishing the circumstances underlying the initial robbery charge, the Court agreed that the victim's larceny conviction did not establish that he previously acted in a violent manner.

The Court also agreed that the victim's 1998 and 1999 concealed weapon convictions also failed to establish his propensity to engage in violent or turbulent conduct. The Court explained that act of simply carrying a concealed weapon does not involve an act of violence, and the defendant failed to present any evidence suggesting that his concealed weapon convictions involved violent conduct.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1228171.pdf

Statute of Limitations

Virginia Court of Appeals
Unpublished

Rigdon v. Commonwealth: January 8, 2018

Portsmouth: Defendant appeals his convictions for Contributing on statute of limitations grounds.

Facts: The defendant abused two children in 2012. The Commonwealth brought the charges in 2016. After trial but before sentencing, the defendant argued that the Commonwealth should have brought the charges in or before 2013.

Held: Affirmed. In this case, because the defendant did not raise his affirmative defense until after the jury had returned a guilty verdict, the Court ruled that the defendant waived this argument. Repeating that the statute of limitations is not jurisdictional, the Court explained that, in order for his statute of limitations objection to be timely under Rule 3A:9, the defendant's objection should have been filed in writing at least seven days before trial or "at such time prior to trial as the grounds for the motion or objection shall arise."

However, the Court remanded the case to the trial court for re-sentencing trial because its sentencing order did not specify that the period of post-release supervision was imposed pursuant to Code §§ 18.2-10 and 19.2-295.2. In addition, the period of post-release supervision was not specified to be "under the supervision and review of the Virginia Parole Board."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1101171.pdf

EVIDENCE

Business Records

Virginia Court of Appeals
Published

Melick v. Commonwealth: July 31, 2018
69 Va. App. 122, 816 S.E.2d 599
Hampton: Defendant appeals his conviction for Grand Larceny on admission of Business Records.

Facts: The defendant stole jewelry from the victim's home and sold it at a local secondhand dealer. Per Hampton City code, the secondhand dealer uploaded the details of the transaction to LeadsOnline, an Internet service based in Texas that allows pawnshops, second-hand stores, and scrap and precious metal dealers to upload records regarding what they acquire for resale. Law enforcement has access to LeadsOnline, but cannot make any changes to the database.

The victim identified many of her stolen items at the secondhand dealer. At trial, the owners of the secondhand dealer testified about the transactions from the LeadsOnline records. Although neither remembered the specific transactions reflected in the documents, they were able to identify the documents as being downloaded from LeadsOnline. They testified that the documents were the result of the information collection and uploading process that was required to be done for every purchase at the store.

The witnesses explained that the information in the record, including the photograph of the jewelry and the copy of the seller's driver's license, is collected at the time of the transaction. Their testimony was that the uploading process only involved typing in the same information that had been collected at the time of the transaction and attaching the photographic files of the item purchased and the seller's photo identification. Although no one knew who uploaded the information or when, the witnesses' testimony was that the information had to come from one of the four employees who conducted the transaction.

The trial court admitted the LeadsOnline records as business records over the defendant's objection. The victim identified her items in the photos from the LeadsOnline transaction records.

Held: Affirmed. Initially, the Court found, although the information was stored by an entity other than the business where the records were made, that did not alter the fundamental nature of the records. The Court wrote: "In an era of computerized records being stored in the 'cloud,' it is not at all unusual for an entity's records to be stored on servers owned or controlled by a different entity. Nothing about the arrangement here causes the records created by the store to change character merely because the store uploaded the records to LeadsOnline."

In a footnote, the Court explicitly noted it was rejecting a Louisiana court's decision regarding LeadsOnline, where that court found the printouts inadmissible because of "the absence of testimony from the custodian of the records or other qualified witness" from LeadsOnline. The Court also explicitly

disregarded the witness' lack of specific memories of the transactions, pointing out that one of the main rationales for the business records exception is that an individual clerk will record the particulars of a transaction accurately when it occurs but that he or she will have no recollection of the specifics of the transaction, days, months, or even years later.

The Court then applied the business records, examining each element of Rule 2:803(6) of the Virginia Rules of Evidence, which provides that: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . [a] record of acts, events, calculations, or conditions if: (A) the record was made at or near the time of the acts, events, calculations, or conditions by--or from information transmitted by--someone with knowledge; (B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making and keeping the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."

Regarding sub-section (A), although the testimony failed to establish with certainty which agent of the store uploaded the information collected to LeadsOnline, the Court ruled that the information collected at the time of the transactions and subsequently uploaded to LeadsOnline was sufficiently trustworthy to allow the trial court to conclude that the timing requirement of Rule 2:803(6)(A) was satisfied. Regarding whether the records were "contemporaneous," the Court noted that there is no a definite time range in which a record must be created to satisfy Rule 2:803(6)(A)'s timing requirement; rather, the "contemporaneous" requirement can be satisfied in circumstances when the exact amount of time between the collection of the information comprising a record and the creation of the final record is "unknown."

The Court also found that the evidence was sufficient for the trial court to conclude that each owner was "someone with knowledge" of both the transactions and the information collected as a result of those transactions for the purpose of Rule 2:803(6)(A).

The Court then found the evidence was sufficient to satisfy the requirement of Rule 2:803(6)(B), noting that the records were made as a result of the store's purchases of pieces of jewelry and that the store regularly engaged in the activity of purchasing items of personal property. The Court also found the evidence was sufficient to satisfy the requirement of Rule 2:803(6)(C), as agents of the store were required to collect the information composing the records, including a photograph of the item and a copy of the seller's photo identification, for every such transaction.

Next, although both witnesses denied being the "custodian of the records," the Court found that they each was "another qualified witness" under Rule 2:803(6)(D). The Court explained that persons who are familiar with the regular operations of the business and the circumstances under which the subject records normally are created are competent to establish the requirements of the business records exception even if they are neither the creator nor the formal custodian of the record.

Lastly, the Court found that, given the testimony regarding the requirement that the information be collected and recorded and the benefits to the business of keeping accurate records, including but not limited to avoiding criminal liability, the evidence met the trustworthiness requirements of Rule 2:803(6)(E). In another footnote, the Court also acknowledged that, although the

businesses actually relying on the record is not part of the rule as written, past cases have often noted that the ultimate reliability of business records is established by the business reliance on the records. Nevertheless, consistent with the text of the rule, the Court did not read such reliance as a hard and fast requirement, but rather, as one way of establishing sufficient trustworthiness to meet the requirements of Rule 2:803(6)(E).

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1564171.pdf

Cross-Examination

Virginia Court of Appeals
Published

Lambert v. Commonwealth: March 12, 2019

Russell: Defendant appeals his convictions for Aggravated Involuntary Manslaughter and DUI on refusal to permit cross examination and sufficiency of the evidence.

Facts: While intoxicated, the defendant drove his truck into oncoming traffic. The defendant slammed into a vehicle, killing the passenger and severely injuring the driver of that vehicle. Witnesses observed the defendant had glassy eyes, slurred speech, appeared sleepy, and needed to lean on a guardrail for support. Witnesses did not see him consume anything after the crash. The defendant first lied to a trooper and stated that he was not under the influence of anything, but ultimately admitted that he had just received a dose of methadone at a local treatment clinic.

Forensic analysis of the defendant's blood revealed the presence of methadone, alprazolam (Xanax), and nordiazepam. At trial, an expert testified that methadone can cause depressant effects that impair the ability to drive including lethargy, dizziness, slowed hand-eye coordination, and difficulty balancing and also that the level of alprazolam in the defendant's blood was also "significant" and could be especially "dangerous" when taken in combination with methadone.

At trial, the Commonwealth moved *in limine* to exclude evidence regarding the investigating trooper having solicited a prostitute and the reasons for his termination of employment with the Virginia State Police. The defendant argued that the evidence was relevant to "lessen the impact of the officer's unwavering testimony as a trooper and would have cast doubts on his ability to make proper judgment calls." The trial court granted the Commonwealth's motion to exclude the challenged evidence.

Held: Affirmed. The Court affirmed that the impeachment evidence the defendant sought to introduce consisted of specific acts of conduct expressly prohibited by Rule 2:608(b). The Court noted that the defendant did not argue that the witness was biased or had a motive to fabricate his testimony.

The Court found that the evidence the defendant sought to introduce was not proper impeachment material under the Virginia Rules of Evidence.

Regarding sufficiency, the Court found that the evidence of the defendant's methadone use, coupled with the expert's testimony regarding its effect, was sufficient standing alone to prove that the defendant was under the influence of an intoxicant while driving. However, the Court added that the defendant's initial false statement, the observations of witnesses and medical personnel of the defendant's physical condition, and the lack of evidence that he consumed anything after the accident also supported the conclusion that the defendant was driving under the influence of self-administered intoxicants at the time of the collision.

The Court rejected the defendant's argument that, because someone else gave him methadone, his intoxication was not "self-administered." The Court wrote: "Taken to its logical conclusion, appellant's position would allow heroin users who voluntarily inject each other with the controlled substance to claim that the drugs were not self-administered."

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1762173.pdf

Virginia Court of Appeals
Unpublished

McCoy v. Commonwealth: November 13, 2018

Suffolk: Defendant appeals his conviction for Murder and related charges on Limitation of Cross-Examination.

Facts: The defendant and his confederates plotted and carried out a brutal murder. One of the defendant's co-defendants testified against him at trial. During the trial, the defendant sought to make reference to the statutory range of punishment the co-defendant would avoid by testifying against the defendant in accordance with the terms of his plea agreement. The defendant specifically wanted to ask and elicit that the statutory punishment for first-degree murder ranged from twenty years to a life sentence.

The trial court prohibited that cross-examination, but allowed the defendant to elicit testimony that the co-defendant had pled guilty to second-degree murder by mob, conspiracy to commit murder, and wounding in the commission of a felony. The co-defendant expressly stated that he hoped his cooperation would earn leniency, specifically that the Commonwealth would enter a nolle prosequi on the charge of first-degree murder.

Held: Affirmed. The Court ruled that, because the trial court considered the defendant's right to present evidence of the co-defendant's bias and motivation while also considering the relevance of the penalty facing appellant for the same charge, the trial court did not abuse its discretion by precluding the defendant from inquiring about the range of punishment for first-degree murder. The Court

expressed concern that, because the defendant was also charged with first-degree murder, any mention of the sentence that the co-defendant was potentially facing would have informed the jury of the sentencing range for a crime for which the defendant was then being tried.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1836171.pdf

Virginia Court of Appeals
Unpublished

Mancedo v. Commonwealth: May 14, 2019

Fairfax: Defendant appeals his Child Sexual Assault convictions on refusal to admit hearsay testimony.

Facts: The defendant sexually assaulted an eight-year-old child. At trial, the defendant attempted to introduce testimony that the victim told him: "I don't want you to go to jail. I don't want to say the things they're telling me to say." The trial court excluded the statement based on the "rape shield" statute.

At trial, the defendant also attempted to introduce testimony that one of the Commonwealth's witnesses had attempted to extort him in exchange for her silence. When asked on cross-examination, the witness denied threatening to extort the defendant. Although the trial court permitted the question on cross-examination of the Commonwealth's witness, it refused to permit the defendant to testify about the statement on the grounds that this testimony was extrinsic evidence of a collateral prior inconsistent statement. In his objections, the defendant never mentioned bias or motive as a basis for admission.

Held: Affirmed. The Court first concluded that the trial court improperly held that the rape shield statute barred admission of the victim's statement, because it did not involve her sexual conduct, nor did it discuss her past sexual activity.

However, the Court rejected the defendant's argument that the victim's statement qualified under the state-of-mind hearsay exception because it related to what she was thinking and feeling at the time she made the statement. The Court concluded that the victim's inadmissible hearsay did not become admissible under the state-of-mind hearsay exception because the statement contained an undercurrent of memory.

The Court pointed out that, in the very moment that the victim made her statement, no one was telling her to say anything, implying that the individuals she referenced must have told her these "things" previously. The Court explained that, because people individuals told the victim "things" previously, she relied on her memory during her statement to the defendant. Because there is a sense of memory implicit within that second sentence, the Court found that it was not admissible as state-of-mind hearsay.

Regarding the alleged extortion by the Commonwealth's witness, the Court agreed the testimony about the witness' statement was extrinsic evidence of a collateral prior inconsistent

statement. The Court repeated that, although a party may impeach a witness by cross-examining the witness about a prior inconsistent statement, the party may not introduce extrinsic evidence that the statement was made unless the inconsistent statement is material to the case.

In this case, the Court explained that the statements were not relevant except to impeach the witness and complained that the defendant did not explain how the alleged extortion made it more or less likely that the defendant touched the victim. The Court pointed out that the defendant would not be allowed to prove that the witness attempted to extort him if the witness had not testified, because any alleged extortion was collateral to the defendant's criminal trial.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0150184.pdf

Confessions

Virginia Court of Appeals
Unpublished

Davila v. Commonwealth: January 10, 2018

Fairfax: Defendant appeals his conviction for Aggravated Sexual Battery on corroboration on his confession.

Facts: The defendant sexually assaulted a six-year-old child. During a forensic examination, the victim complained of pain with urination and also experienced pain during her exam. The examiner did not find any injuries to the victim's genitals, but noted that the genitals of a child could be touched without leaving any evidence of contact. The examiner also testified that she stopped her examination because the child was feeling pain during the procedure, which was "not normal" for a six year old during such an examination.

The defendant confessed to the victim's mother after she confronted the defendant. During the meeting, the defendant began "shaking and crying" while apologizing. During a recorded phone call, the defendant initially denied the offense, but finally confessed to a police officer. After confessing to the officer, the defendant told the victim's mother in a letter that he knew his conduct was "terrible and unforgiveable" and that he had experienced "a bad lapse in judgment" which he "completely regretted."

Held: Affirmed. The Court held there was sufficient corroboration of the defendant's confession and thus that the *corpus delicti* requirement was met. The Court explained that the forensic evidence was consistent with a reasonable inference that the child experienced her pain because the defendant had earlier rubbed and digitally penetrated her genitals. The Court also found that the defendant's behavior constituted acts or conduct of the defendant after the crime, to show a consciousness of guilt. The Court also noted that the defendant's post-confession admissions supported a reasonable inference that the defendant committed the act of aggravated sexual battery to which he confessed.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/2013174.pdf

Electronic Evidence

Fourth Circuit Court of Appeals

Hatley v. Watts: March 6, 2019

W.D.Va: Plaintiff appeals the dismissal of his lawsuit regarding the Stored Communications Act.

Facts: The plaintiff was a student at Blue Ridge Community College. The defendant allegedly gained access to the plaintiff's email account and read the plaintiff's emails, using a password the defendant obtained from the mother of the plaintiff's child. The plaintiff sued the defendant, alleging that the defendant unlawfully accessed messages in the web-based email account in violation of the Virginia Computer Crimes Act and the federal Stored Communications Act.

The district court found that the plaintiff failed to demonstrate the requisite statutory injury under Virginia law, and that the plaintiff's previously opened and delivered emails stored by a web-based email service were not in statutorily protected "electronic storage" under federal law.

Held: Reversed. After addressing issues regarding estoppel and pleading for damages, the Court ruled that the district court erroneously concluded that previously opened and delivered emails stored in a web- based email client were not "electronic storage" for purposes of the Stored Communications Act (SCA). The Court found that the SCA protects emails that a user stores in a web-based email service after reading them. Therefore, previously delivered and opened emails stored by an electronic communication service are "wire or electronic communications" in "storage" by an "electronic communication service."

The Court agreed that the plaintiff's emails constituted "wire or electronic communication" as the Stored Communications Act uses that term. The Court then found that, because Blue Ridge College's email service enables account holders, like the plaintiff, to "send or receive" email messages, it falls within the plain language of the Stored Communications Act's definition of "electronic communication service."

The Court concluded that companies such as Microsoft and Google function as an electronic communication services when they provide email services through their proprietary web-based email applications. But the Court cautioned that its ruling does not mean that Microsoft and Google necessarily function as electronic communication services regarding other applications and services they offer, like cloud- based data processing and analytics services, or goods or products they sell or license, like hardware or software. The Court explained that an entity that acts as an electronic communication service in one context may act as only a remote computing service in another context or, in still other contexts, may not act as either an electronic communication service or a remote computing service.

The Court rejected an argument raised by Orin Kerr and others and concluded that, because an entity can simultaneously function as an electronic communication service and a remote computing service, an entity's status as a remote computing service in no way precludes a determination that the entity also was acting as an electronic communication service. Thus, a user's opened messages "continue to be covered" by remote computing service provisions in no way precludes a finding that the entity also "continue[d] to" act as an electronic communication service after the user opened the messages.

The Court further found that such emails are in "electronic storage" for purposes of 18 U.S.C. § 2701 and 18 U.S.C. § 2510(17) (B), rather than (A), if that storage is for "backup protection purposes." The Court rejected the argument that backup copies should receive less protection than "originals," pointing out that all copies of an email held by a recipient's email service, web- based or otherwise, are "copies," rather than "originals."

Full Case At:
http://www.ca4.uscourts.gov/opinions/181306.P.pdf

Virginia Court of Appeals
Published

Reed v. Commonwealth: October 16, 2018
Aff'd Court of Appeals Ruling of August 30, 2016
69 Va. App. 332, 819 S.E.2d 446
Alexandria: Defendant appeals his conviction for Distribution of Drugs on issuance of a Subpoena Duces Tecum for phone records.

Facts: Defendant sold illegal drugs. Police obtained an *ex parte* court order for the defendant's cellphone records under Va. Code § 19.2-70.3 and 18 U.S.C. §2703(d) and obtained roughly five months of records, including historical cell-site location information (CSLI) for the phone.

The Commonwealth indicted and arrested the defendant for distribution. Prior to trial, the Commonwealth requested the same cell site data, text message data, and incoming and outgoing detail records that it already had, this time using a subpoena duces tecum. The defendant moved to quash the subpoena duces tecum. The trial court granted the motion, in part, limiting the scope to two days before and two days after the offense, but otherwise rejected the defendant's argument that the court order and subpoena duces tecum violated his Constitutional rights.

The Court of Appeals affirmed, but in June 2018, the U.S. Supreme Court ruled in *Carpenter v. U.S.* that the government may not obtain large amounts of historical CLSI without a search warrant supported by probable cause. The Court remanded this case to Virginia to reconsider in light of its ruling.

Held: Affirmed. The Court agreed with the Fourth Circuit's recent ruling in *Chavez* that, by complying with existing law at the time, the officers acted in good faith when they obtained the historical CLSI using a court order, rather than a search warrant. Thus, as there was no police or

governmental conduct that needed to be deterred at the time it occurred, the Court did not apply the Exclusionary Rule.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1305154.pdf

Virginia Court of Appeals
Unpublished

Wood v. Commonwealth: October 4, 2018

Norfolk: Defendant appeals his convictions for Murder and related offenses on admission of text messages as hearsay.

Facts: The defendant shot and killed a man during a robbery. At trial, the Commonwealth introduced text messages that were on the defendant's cell phone from the morning of the shooting. Included in these messages was one sent from the defendant's cell phone at 5:53 a.m., stating: "Ride past that sence bhro." After this message, there were several incoming text messages received on the defendant's phone, which had been deleted but recovered, the first received at 6:00 a.m. and the last received at 6:22 a.m. Those messages, received from an unknown number, stated, "Pray for some heavy rain," "It's lite," "D's following me," and "He gone 13 news." The defendant objected to the admission of the incoming messages as inadmissible hearsay, but the trial court ruled that the text messages from the unknown declarant did not constitute hearsay because they were not being offered for the truth of the matter asserted in the messages.

Held: Affirmed. The Court ruled that the incoming text messages received by the defendant the morning of the shooting did not constitute hearsay because they were not offered "as an assertion to show the truth of the matters asserted therein" and did not rest "for [their] value upon the credibility of the out-of-court asserter." Rather, the Court found, the messages were offered into evidence to demonstrate what an unknown declarant did in response to the defendant's message to ride past the crime scene, and to show that the declarant reported back with details about the crime scene and the victim's subsequent death, tending to show that the defendant was involved in the homicide.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0937171.pdf

Wright v. Commonwealth: October 30, 2018

Franklin: Defendant appeals his conviction for Concealment on sufficiency of the evidence

Facts: The defendant concealed an item from the shelves of an ABC store. The store's video system captured the offense and an officer watched the video afterwards. At trial, the officer testified

that he saw the defendant take an item from the shelf and conceal it, and then conceal another item that his companion handed to him. The officer acknowledged that he did not check the shelves of the store to attempt to see or determine what items were missing. An ABC employee then testified that nothing at the store is free or without value. However, she was not present or employed by that ABC store on that day. No other witnesses testified; the trial court never viewed or admitted the video itself.

Held: Reversed. The Court reasoned that the trial court must have inferred that the video accurately depicted events that took place in that ABC store. However, the Court complained that no evidence was presented regarding the date or time stamp on the video, and no witness testified that the video was taken on the date of the alleged crime. The Court distinguished the *Veney* case, noting that in *Veney*, there was no question as to when the events on the video occurred because there was testimony corroborating – or at least providing the necessary context for – the events depicted in the video, including the victim's testimony, and therefore there was no necessary inference to be made concerning the timing of the events depicted in the video or the accuracy of the events depicted.

The Court also noted that the trial court must have inferred that the items that the defendant placed in his pocket were items that belonged to the store and were worth some value. The Court found that these inferences were improperly built on other inferences; due to the lack of sufficient credible evidence, the Court reversed and dismissed the convictions.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1373173.pdf

Experts

Virginia Court of Appeals
Published

Midgette v. Commonwealth: October 30, 2018
69 Va. App. 362, 819 S.E.2d 840
Virginia Beach: Defendant appeals his conviction for Perjury on Collateral Estoppel and Expert Testimony grounds.

Facts: During a trial for running a stoplight, the defendant submitted a video that he claimed was from the incident; it showed the light to be green. The defendant testified that the video "truly and accurately" depicted the time prior to and during the traffic stop. At the end of the trial, the judge expressed concern about the authenticity of the video, but stated that he "had to go with the evidence before him" and acquitted the defendant. Nonetheless, over the defendant's objection, the trial court ordered that the flash drive containing the video be held in evidence "to be examined for accuracy."

A subsequent examination revealed that the video had been copied from an earlier video and then altered. The Commonwealth indicted the defendant for perjury. At trial, the Commonwealth asked a digital forensic expert if he believed that the video "was a true and accurate representation." The

defendant objected that the testimony would go to the "ultimate issue" in the case, but the trial court overruled the objection. The expert testified that he did not "believe that it was a true and accurate representation as the two files themselves did contradict each other."

At the end of the trial, the defendant unsuccessfully argued that the issue of the accuracy and authenticity of a video and the defendant's testimony regarding it had already been determined in the prior proceeding.

Held: Affirmed. The Court first concluded that collateral estoppel did not bar the subsequent perjury prosecution. The Court reasoned that the judge's comment that he "had to go by the video" did not constitute a specific finding as to the truthfulness of the defendant's testimony regarding the video. The Court therefore held that the defendant failed to meet his burden of proving that the factual issue was actually litigated in the prior proceeding.

Regarding the expert's testimony, the Court explained that the ultimate issue to be determined in the perjury trial was whether the defendant, under oath, willfully swore falsely about a material matter—specifically, whether defendant testified falsely when he stated that the video introduced at the traffic-infraction trial was an accurate depiction of the traffic stop. Here, the court pointed out that the expert's testimony about the accuracy of the video was merely an evidentiary fact useful to the court in deciding the ultimate fact in issue.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1692171.pdf

Wakeman v. Commonwealth: November 27, 2018
69 Va. App. 528, 820 S.E.2d 879
Shenandoah: Defendant appeals his conviction for rape on admission of SANE expert testimony

Facts: The defendant raped a child. At trial, a forensic nurse, Raymer Balciunas, testified for the Commonwealth as an expert in "sexual assault forensic examination." The nurse had an extensive nursing background and additional education and training regarding the performance of forensic examinations, including completing all of the training necessary to obtain SANE certification. She also had extensive experience, having served in the hospital's forensic nursing program for years.

The defendant objected to her qualification on the grounds that the nurse had never taken the SANE certification examination, and therefore, did not carry the formal certification of a SANE. The trial court overruled the objection.

Held: Affirmed. The Court ruled that the expert was qualified to give expert testimony regarding forensic examinations in sexual assault cases. The Court found that Rule 2:702(a) governs whether a nurse should be qualified as an expert on the subject. The Court observed that the nurse possessed relevant expertise and that such expertise stemmed from her "knowledge, skill, experience, training, or education" as required by Virginia Rule of Evidence 2:702(a)(i).

The Court rejected the defendant's argument that there was any special requirement to qualify a SANE nurse, noting that the General Assembly has not enacted any statute regarding the qualifications of nurses to testify as experts about forensic examinations in sexual assault cases.

In a footnote, the Court also pointed out that even if the nurse was not an expert, none of her testimony as a fact witness, including her discussions with the victim, what she observed, and what she did (including the performance of the PERK) would be subject to being stricken.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1631174.pdf

Hearsay

Virginia Court of Appeals
Published

Bennett v. Commonwealth: November 20, 2018
69 Va. App. 475, 820 S.E.2d 390
Amherst: Defendant appeals his conviction for Distribution of Drugs on Sixth Amendment Confrontation grounds and sufficiency of the evidence.

Facts: The defendant arranged a drug transaction with a police informant. The investigators provided the informant with buy-money, searched the informant before and after the transaction, monitored his movements throughout the relevant period of time, and kept him in view except for the period during which he met the defendant. The meeting took place at a location that the defendant selected. The investigators monitored the transaction over a live audio feed.

After the incident, police watched the informant return immediately after he left the apartment complex. The informant produced two PCP-dipped cigarettes and 2.8 ounces of crack cocaine in separate plastic bags, along with the remaining cash. Law enforcement again searched him to be sure that he possessed no other drugs or money.

Investigators also recovered an audio and a video recording of the incident. The video, which was silent, showed the defendant in possession of "two plastic baggies with substances in them" and also depicted the defendant holding two discolored cigarettes that closely resembled PCP-dipped cigarettes that the informant later turned over to the investigators. In the audio recording, the informant stated to the defendant that he has "money now" and "want[s] two of them funny sticks" and "a whole three and a half." At trial, an investigator explained those words meant PCP-dipped cigarettes and 3.5 grams of crack cocaine. The defendant responded, "O.k.," to each of the two specific requests for drugs and concluded with, "I gotcha." Most of the recording was unintelligible.

The informant did not testify at trial. However, the Commonwealth introduced both the video and audio from the offense, along with the investigators' testimony. The trial court overruled the defendant's objection to the admission of the recordings.

Held: The Court held that the admission of the silent video recording and photographs did not violate the Confrontation Clause. The Court explained that such visual depictions are not hearsay unless they include conduct intended as assertive, and the video did not reflect any actions that could be construed as an assertion. Regarding the audio recording, the Court concluded that the informant's statements were not hearsay because they were offered merely to provide context for the defendant's statements and not for the truth of their content.

The Court explicitly did not address whether the audio recorded statements would have been testimonial if offered for their truth. Instead, the Court simply found that the video and photographs made from it were admitted as silent witnesses.

The Court also agreed that the evidence was sufficient, even in the absence of testimony from the informant. In this case, the Court found it virtually impossible for the informant to have obtained the contraband from any other location other than the defendant.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1200173.pdf

Virginia Court of Appeals
Unpublished

Wood v. Commonwealth: October 4, 2018

Norfolk: Defendant appeals his convictions for Murder and related offenses on admission of text messages as hearsay.

Facts: The defendant shot and killed a man during a robbery. At trial, the Commonwealth introduced text messages that were on the defendant's cell phone from the morning of the shooting. Included in these messages was one sent from the defendant's cell phone at 5:53 a.m., stating: "Ride past that sence bhro." After this message, there were several incoming text messages received on the defendant's phone, which had been deleted but recovered, the first received at 6:00 a.m. and the last received at 6:22 a.m. Those messages, received from an unknown number, stated, "Pray for some heavy rain," "It's lite," "D's following me," and "He gone 13 news." The defendant objected to the admission of the incoming messages as inadmissible hearsay, but the trial court ruled that the text messages from the unknown declarant did not constitute hearsay because they were not being offered for the truth of the matter asserted in the messages.

Held: Affirmed. The Court ruled that the incoming text messages received by the defendant the morning of the shooting did not constitute hearsay because they were not offered "as an assertion to show the truth of the matters asserted therein" and did not rest "for [their] value upon the credibility of the out-of-court asserter." Rather, the Court found, the messages were offered into evidence to demonstrate what an unknown declarant did in response to the defendant's message to ride past the crime scene, and to show that the declarant reported back with details about the crime scene and the victim's subsequent death, tending to show that the defendant was involved in the homicide.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0937171.pdf

Prior Convictions

Virginia Supreme Court

Barker v. Commonwealth: October 23, 2018

Montgomery: Defendant appeals his conviction for Possession of a Firearm by Violent Felon on Admission of his Prior Conviction, in violation of *Old Chief*

Facts: The defendant carried a firearm after having been convicted of two prior violent felonies. Before trial, the defendant moved to exclude the orders of conviction and details of his prior convictions, instead offering to stipulate that he had been convicted of a violent felony for the purposes of Code § 18.2-308.2. He argued that the adoption of the Virginia Rules of Evidence Rule 2:403 and the United States Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 172, 191 (1997) abrogated *Glover v. Commonwealth*.

The trial court denied the motion, but instructed the jury that: "Evidence that the defendant was previously convicted of a violent felony is not proof that he possessed a firearm on August 7, 2016, and such evidence may not be considered by you in determining whether the defendant possessed a firearm on August 7, 2016."

Held: Affirmed. The Court assumed without deciding it was error to admit the conviction orders in place of the defendant's stipulation to his status as a violent felon. However, the Court ruled that any such error was harmless, in light of the substantial evidence that the defendant possessed a firearm and the minimal prejudice that could have arisen in light of the cautionary instruction.

The Court also distinguished this case from *Old Chief,* noting that unlike the instruction in Old Chief, which the Supreme Court noted was confusing, in this case the trial court's instruction was clear that the prior convictions were not evidence the defendant possessed a firearm in this instance. The Court noted that the defendant did not point to anything in the record to suggest the jury disregarded the cautionary instruction.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0870173.pdf

Virginia Court of Appeals
Unpublished

Bush v. Commonwealth: March 5, 2019

Richmond: The defendant appeals his conviction for Possession of a Firearm by Felon on Admission of his Prior Conviction

Facts: The defendant possessed a firearm after being convicted of armed robbery and use of a firearm. At trial, the defendant objected to admission of the full convictions during the guilt phase of his trial, instead offering to stipulate to having been convicted of a violent felony. The trial court overruled his objection.

Held: Affirmed. The Court repeated that the Commonwealth is not required to accept a defendant's offered stipulation, even when there are multiple convictions that the Commonwealth could choose to admit into evidence. The Court found that Rule 2:102 does not change that basic rule and refused to adopt the Federal interpretations of that rule. In this case, the Court also noted that the defendant failed to request a limiting or clarifying instruction that could have addressed his concerns for any undue prejudice.

Once again, the Court expressly dodged the question of whether the U.S. Supreme Court's decision in *Old Chief* applies in Virginia, although the Court did point out that *Old Chief* addresses a federal, non-constitutional rule of evidence.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1628172.pdf

Miscellaneous Evidentiary Issues

Virginia Supreme Court

Garcia-Tirado v. Commonwealth: August 9, 2018
Aff'd Unpublished Court of Appeals Opinion of March 7, 2017
817 S.E.2d 309
Arlington: Defendant appeals his conviction for Rape on Fifth Amendment and Hearsay grounds.

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

During a motion to suppress, the defendant alleged that he did not waive his *Miranda* rights and voluntarily make the incriminating statements that followed because his native language is Mam, not

English or Spanish, and that he was not provided a Mam interpreter to translate the exchange he had with the police regarding his rights. The defendant pointed out that his written apology was riddled with grammatical and spelling errors. The defendant also argued that the video of his interview was inadmissible, as was a transcript and translation of that interview.

The Court of Appeals affirmed the conviction in an unpublished opinion.

Held: Affirmed. The Court first rejected the argument that the Court of Appeals erred by relying on evidence adduced at trial, in addition to evidence adduced at the motion to suppress. The Court also rejected the argument that the video and transcript were inadmissible, pointing out that, at the suppression hearing, as well as at trial, the detective testified that the recording accurately depicted her interview. The Court further found that the officers' testimony established the foundation of the recording and transcript as accurate translations of the statements.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170458.pdf

Virginia Supreme Court

Bondi v. Commonwealth: March 26, 2019

Virginia Beach: Defendant appeals his conviction for Object Sexual Penetration on sufficiency of the evidence.

Facts: The defendant, a minister, sexually assaulted the victim in 2001 when she was eighteen. The defendant had been a mentor and "father figure" to the victim. During the assault, the victim described how she was "completely frozen and in shock." Although she tried to leave the defendant's home, she stayed when he became "aggressive" and "insistent" in demanding that she remain on the sofa with him. She described her considerable physical pain and fear of the defendant after the attack.

The victim disclosed the assault to a friend in 2010. That friend testified at trial. Later, the defendant and the victim also met with a church pastor regarding the assault. At trial, the victim explained that she did not disclose more detail when she initially told her friends about the offense in 2001 because she felt distrustful and uncomfortable explaining the defendant's actions due to her modesty and traumatization.

The defendant moved for a new trial when he learned that, fifteen years after the incident and prior to trial, the victim underwent Eye Movement Desensitization and Reprocessing ("EMDR") therapy as part of counseling. He argued that the victim's testimony was a result of that therapy, not her independent recollection, and if he had possessed this information prior to trial, he would have presented evidence attacking the credibility of repressed memories and "debunked EMDR as a legitimate science." The trial court denied his motion.

Held: Affirmed. The Court agreed that the evidence demonstrated the defendant overcame the victim's mind and will by placing her in fear of bodily harm. The Court agreed that a factfinder could reasonably conclude that the defendant exercised emotional dominance over the victim through his actions. The Court observed that she was susceptible to psychological pressure as a result of her relationship with the defendant and her sexual inexperience as a teenager.

Regarding the defendant's motion for a new trial, the Court pointed out that the victim's recollection and reporting of the incident occurred without EMDR therapy.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1676171.pdf

MISCELLANEOUS

False Arrest

Gapanovitch v. Hazelwood: May 2, 2019
(Unpublished)

Richmond: Appeal regarding civil lawsuit by man resulting from his arrest after another man assaulted him.

Facts: The plaintiff suffered an assault by two men, including the defendant, who followed him home from a club after a dispute. The two men attacked the plaintiff with bare hands, but the plaintiff shot them both, injuring the defendant and killing one his companion. Police arrested the plaintiff and initially charged him with manslaughter and malicious wounding. However, a court dismissed both charges at preliminary hearing and the Commonwealth terminated the prosecution.

The plaintiff then sued the defendant, seeking damages because he was "arrested, spent time in jail, was required to post bond, and retain an attorney to defend himself on the resulting criminal charges," and was "evicted from his apartment and was not able to rent an apartment in his own name." A jury awarded the plaintiff damages at trial.

Held: Reversed. The Court concluded that the defendant's assault and battery upon the plaintiff was not a proximate cause of any of the awarded damages.

Full Case At:
http://www.courts.state.va.us/courts/scv/orders_unpublished/171707.pdf

FOIA

Virginia Supreme Court

Bergano v. City of Virginia Beach: December 6, 2018
821 S.E.2d 319
Virginia Beach: Plaintiff appeals the denial of his FOIA request on Attorney-Client Privilege and Work-Product grounds.

Facts: The plaintiff is involved in litigation against the City of Virginia Beach. He submitted a request under the Virginia Freedom of Information Act ("VFOIA"), asking for records of "all legal fees and expert invoices relating to all of the [City's] expenses" in litigating against him in federal court. The City responded by providing extensively redacted records. The plaintiff then filed a petition for a writ of mandamus asking the circuit court to compel the City to limit the scope of the redaction. The circuit

court conducted an *in camera* review and denied the petition, holding that two VFOIA exceptions, the attorney-client exception and the work-product exception, justified the City's redactions.

Held: Reversed. The Court concluded that the trial court's application of the attorney-client and work-product exceptions was excessively broad. The Court agreed that, as a threshold matter, a court's *in camera* review of the records constitutes a proper method to balance the need to preserve confidentiality of privileged materials with the duty of disclosure under VFOIA. The Court also agreed that billing records might fall within the attorney-client and work-product exceptions to disclosure under VFOIA if they reveal confidential information, including the motive of the client in seeking representation, or if they reveal litigation strategy. The Court equally agreed that records indicating the specific nature of the services provided, such as researching particular areas of law, might also fall within these exceptions when the disclosure would compromise legal strategy. Lastly, the Court acknowledged that disclosures that would reveal analytical work product or legal advice are also exempt from disclosure under VFOIA.

However, in this case the Court found that the City's redactions were too broad and included items that are not shielded from disclosure by the attorney-client or work-product exceptions. The Court reviewed a few in detail to demonstrate why the redactions were too broad.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1171183.pdf

Habeas

Virginia Supreme Court

Brown v. Booker: April 11, 2019

Albemarle: Defendant seeks *Habeas* relief based on newly discovered evidence.

Facts: In 1969, the defendant entered a woman's home without permission and demanded she have sex with him. When she refused, he beat her into unconsciousness and stabbed her repeatedly. When she awoke, she could not move. Her sister found her and her four-year-old-child, stabbed to death in his bed. Rescue workers found the knife blade lodged in the mother's body and her underwear nearby. After treating the mother, the hospital took a vaginal smear slide and preserved it.

The Commonwealth only charged the defendant with the murder of the four-year-old-child. At trial, a witness testified that he saw the defendant go to the victim's house. When he saw the defendant later, the defendant was washing up and told the witness that he "messed up," although the defendant later told police he had never gone to the victim's property at all. The jury convicted the defendant of first-degree murder and imposed a death sentence, although the defendant later received a life sentence on remand after appeal.

During parole interviews over the next decades, the defendant repeatedly took responsibility for the crime and explained what happened in detail. However, in 2016 he filed a writ of actual innocence, arguing that analysis of the vaginal smear slide by an independent lab exonerated him by "clear and convincing evidence" such that "no rational trier of fact would have found proof of guilt beyond a reasonable doubt" pursuant to § 19.2-327.5. The defendant located the slide, now partially damaged, still in the hospital's storage, forty-seven years later.

DFS performed a DNA analysis of the slide and the victim's nightgown to compare them with other DNA developed in this matter. DFS created a DNA profile for the victim from DNA recovered from the nightgown but could not create a DNA profile from the vaginal smear slide. However, the defendant sent the slide to a third-party lab for MiniFiler DNA analysis of the remaining, but highly-degraded, DNA on the slide. The portion they analyzed, however, was not sperm. The third-party lab found little to no DNA, but was able to eliminate the defendant as a contributor to what little DNA they did find on the slide.

In 2018, the Virginia Supreme Court dismissed the defendant's writ of actual innocence, ruling that it has no authority to go outside the boundaries of the statute to grant a writ of actual innocence based on test results uncertified by DFS. The Court also ruled that the defendant had failed to prove, by clear-and-convincing evidence that no rational factfinder would have found him guilty.

The defendant filed a *habeas* petition, arguing that the scientific evidence admitted against him was flawed. In his petition, he conceded that his petition was untimely but argued that the statutory limitation period in § 8.01-654(A)(2) violates the bar against suspension of the writ of *habeas corpus* as set forth in the Suspension Clause of Article I, § 9 of the Virginia Constitution, because his claims are based on newly discovered evidence and he could not have brought them within the time permitted under the statute.

Held: Petition dismissed. The Court rejected the defendant's attempts to raise a freestanding claim of actual innocence in *habeas* and to argue that his innocence should exempt him from the limitation period. The Court explained that "*habeas corpus* is not a vehicle for raising claims of actual innocence, nor does the statute of limitations include any exception for claims of innocence."

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1161421.pdf

Name Change

Virginia Supreme Court

Leonard v. Commonwealth: December 13, 2018
821 S.E.2d 551
Prince George: Defendant appeals the denial of her name-change petition.

Facts: The defendant is serving a federal sentence for possession of child pornography and is currently incarcerated in Virginia. The defendant filed a name-change petition with the circuit court. The circuit court referred the application to the Commonwealth's Attorney for a response before finding whether the application had good cause. After the Commonwealth responded, the circuit court denied the petition, marking the box on the form order indicating that that "good cause does not exist for consideration of the application."

Held: Reversed. Under the standard for good-cause review articulated in Code § 8.01-217(D), the Court found that the application set forth good cause to be accepted for merits consideration. The Court agreed that the circuit court retained broad discretion to grant or to deny the petition. In doing so, however, the Court explained that the circuit court is bound to follow the procedure in § 8.01-217(D).

The Court also found that the circuit court's procedure in sending the petition to the Commonwealth's Attorney before making a finding of "good cause" was inconsistent with the strict mandate of § 8.01-217(D). Under the statute, the Court noted that a court must refer an application to the Commonwealth's Attorney after finding that good cause exists to consider it on the merits, but it cannot do so prior to making that initial determination. After finding that good cause exists, the court must make the referral and then hold a hearing.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1170965.pdf

Prosecutor Liability

Fourth Circuit Court of Appeals

Savage v. Maryland: July 13, 2018
896 F.3d 260
Baltimore: The plaintiff appeals the dismissal of his lawsuit against a prosecutor on Civil Rights grounds.

Facts: The plaintiff, an African-American police officer working on a drug task force, participated in a series of drug arrests. During a pretrial meeting, the plaintiff provided letters written by several of the criminals charged in the plaintiff's case to the prosecutor; the letters repeatedly used a racial slur that was offensive to the plaintiff and others. The prosecutor began to read them aloud to determine which, if any, to use at trial. The letters used the offensive word so frequently that another prosecutor left the room.

The plaintiff filed a complaint with the EEOC and the state of Maryland, contending that the prosecutor's frequent use of offensive language was deeply offensive and that, since the meeting, he was having problems having his cases accepted by the State's Attorney and having trouble sleeping. Thereafter, the prosecutor sent a letter to the Mayor and City Council, implying that he would not allow the plaintiff to testify in court because of concerns about his veracity. The prosecutor wrote: "If we are

unable to independently corroborate his testimony and therefore must rely solely on his word, the likely outcome will be a dismissal of the case."

Later, the prosecutor spoke directly with the City Manager. The prosecutor was adamant that the plaintiff would never be able to testify again and was thus useless to the police department. The police department fired the plaintiff soon thereafter.

The plaintiff sued the prosecutor in his personal capacity under 42 U.S.C. §§ 1981, 1983, and 1985, alleging violations of his civil rights. Specifically, the plaintiff claimed that the prosecutor created a racially hostile work environment. The plaintiff also claimed that the prosecutor violated the First Amendment by retaliating against the plaintiff after he spoke out. The plaintiff also sued his employer, the state of Maryland, for terminating him.

The trial court dismissed the lawsuit against the prosecutor on prosecutorial immunity grounds. The trial court permitted the lawsuit to continue against the defendant's own employer, the state of Maryland, however.

Held: Affirmed in part, reversed in part. The Court agreed with the trial court that prosecutorial immunity bars the plaintiff's claims against the prosecutor. The Court agreed that reviewing and evaluating evidence in preparation for trial, making judgments about witness credibility, and deciding which witnesses to call and which cases may be prosecuted all are directly connected to the judicial phase of the criminal process and therefore protected by absolute immunity. The Court then reversed the trial court's ruling regarding the plaintiff's claims against the state of Maryland and dismissed those claims as well.

Regarding the prosecutor's conduct at the pre-trial meeting, the Court concluded that the prosecutor was acting within his role as advocate during the trial-preparation meeting, entitling him to absolute immunity from damages liability. While the Court acknowledged that the plaintiff was deeply offended, the Court pointed out that the immunity analysis does not turn on the harm that the prosecutor's conduct may have caused, but rather on the function the prosecutor was performing at the time.

Regarding the prosecutor's conduct in notifying the locality about the decision not to prosecute the plaintiff's cases, the Court found that the prosecutor's actions were "intimately associated with the judicial phase of the criminal process and therefore were absolutely immune." The Court explained that assessments about which witnesses to call are among the "sensitive issues" that prosecutors must address, especially so when, as here, assessments of witness credibility are tightly intertwined with determinations about which cases to charge.

The Court cited a long list of cases where prosecutors conveyed to an officer's employer that the officer no longer could perform the basic functions of the job, leading to predictably negative employment repercussions. The Court acknowledged that in each case, the officer alleged that the prosecutor's decision was driven by retaliatory or malicious motives. However, the Court noted that, whether or not that was so, courts have concluded that it was "immaterial" to the immunity analysis.

The Court likened this case to the long line of cases holding prosecutors absolutely immune from claims that they have failed to meet their *Brady* obligations to disclose exculpatory evidence. Just as prosecutors enjoy absolute immunity from claims that they should have identified witness credibility issues and then shared that information with defendants, or that they should have identified evidence

as exculpatory and then provided it to the defense, the Court wrote that "the same rule must apply when, as here, a prosecutor cites an effort to comply with his disclosure obligations in making an adverse credibility determination about a state witness and declining to put that witness on the stand or to prosecute cases that turn on his testimony."

The Court then reversed the district court's ruling regarding the plaintiff's claims against the state of Maryland and dismissed them. The Court ruled that, because no reasonable employee could believe that the prosecutor violated Title VII at the trial-preparation meeting to which the plaintiff objected, the plaintiff's allegations fail to state a claim under Title VII, and should be dismissed for that reason.

Full Case At:
http://www.ca4.uscourts.gov/opinions/171636.P.pdf

Recusal

Virginia Court of Appeals
Unpublished

Weatherholt v. Commonwealth: December 26, 2018

Frederick: Defendant appeals his convictions for Conspiracy and Distribution of Drugs, 3rd Offense, on Right to Counsel and Recusal Issues.

Facts: While pending trial for Conspiracy and Distribution of Drugs, 3rd Offense, the State Bar suspended the defendant's attorney. The two suspensions were based solely on his attorney's failure to comply with a subpoena duces tecum issued by the Bar. After being informed that his counsel's license had been suspended temporarily, the defendant appeared *pro se* and specifically chose to proceed with his trial as scheduled if his counsel's suspension was lifted as expected. The Bar lifted both suspensions upon her compliance with the subpoenas.

At trial, one of the Commonwealth's witnesses was a police informant. After trial, the defendant filed a motion to dismiss, arguing that the trial judge had a conflict of interest and should have recused himself. The defendant indicated that the trial judge, while Commonwealth's Attorney for the City of Winchester, prosecuted the confidential informant, on multiple occasions. In addition, the trial judge presided over a separate matter in which the informant entered guilty pleas in a different jurisdiction. The trial judge had no recollection of having prosecuted the witness. The trial judge determined that he was not impacted by the former interactions with the witness and had impartially presided over the defendant trial.

After trial, the defendant alleged that the trial court violated his Sixth and Fourteenth Amendment right to counsel and due process by failing to appoint standby counsel, requiring he appear without counsel during the pendency of the instant charges, and by failing to set aside the verdicts rendered against him due to the multiple suspensions of trial counsel's law license.

[Note: The State Bar later revoked the defendant's counsel's license until at least 2023 – EJC]

Held: Affirmed. Regarding the defendant's complaint regarding his attorney, the Court agreed that, because the defendant's substantial rights were not affected during the brief periods of his counsel's suspension, and the defendant made clear his desire to proceed to trial as scheduled knowing that his counsel's license had been suspended, the defendant was represented by competent counsel during all critical stages of the proceedings. The Court refused to consider any other issues with his counsel, repeating that claims raising ineffective assistance of counsel must be asserted in a *habeas corpus* proceeding and are not cognizable on direct appeal.

Regarding the recusal issue, the Court pointed out that the trial court did not become aware or was not reminded, in this case, until after the defendant's trial was complete. The Court noted that the defendant failed to demonstrate any actual bias or prejudice.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/1797174.pdf

Police Use of Force

U.S. Supreme Court

Nieves v. Bartlett: May 28, 2019

Certiorari to the 9th Circuit: Police Officers appeal the denial of their motion to dismiss a First and Fourth Amendment lawsuit.

Facts: During a public festival, the plaintiff intervened when a police sergeant asked some attendees to move a beer keg. The plaintiff belligerently told the attendees not to talk with or cooperate with the police. The sergeant attempted to explain what he was doing to the plaintiff, but the plaintiff yelled loudly at the sergeant to leave. The sergeant decided to avoid a conflict and left.

Later, however, the plaintiff again intervened when he saw a trooper interviewing a few minors about possible underage drinking. The plaintiff, who was intoxicated, again was belligerent and stood between the trooper and the minors, yelling and getting very close to the trooper. The trooper pushed the plaintiff away. The sergeant who had seen the plaintiff before saw this interaction and stepped in. The trooper and the sergeant arrested the plaintiff for Disorderly Conduct. The officers later testified that they perceived the plaintiff to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication.

The plaintiff sued the officers, claiming that the officers violated his First Amendment rights by arresting him in retaliation for his speech. The plaintiff alleged that, when he arrested the plaintiff, the sergeant stated: "bet you wish you would have talked to me now." The district court granted the officers' motion to dismiss the charges, but the 9th Circuit reversed and reinstated the lawsuit.

Held: Reversed. The Court held that, because there was probable cause to arrest the plaintiff, his retaliatory arrest claim failed as a matter of law. The Court analogized this case to the *Hartman* case, in which it had stated that for a plaintiff to proceed on a claim that the government retaliated against him for exercising First Amendment rights, the plaintiff must plead and prove the absence of probable cause for an underlying criminal charge. In this case, the Court agreed that a reasonable officer in the sergeant's position could have concluded that the plaintiff stood close to the trooper and spoke loudly in order to challenge him, provoking the trooper to push him back.

The Court explained that, because this inquiry is objective, the statements and motivations of the particular arresting officer are "irrelevant" at this stage. The Court reaffirmed that this objective inquiry "avoids the significant problems that would arise from reviewing police conduct under a purely subjective standard."

Nevertheless, the Court created an exception to the rule, explaining that, although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so. Then, after making the required showing, the plaintiff's claim may proceed in the same manner as claims where the plaintiff has met the threshold showing of the absence of probable cause. The Court explained:

"For example, at many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest."

Justice Sotomayor dissented from the Court's ruling, arguing that probable cause should not defeat a lawsuit for violation of First Amendment rights. Justices Gorsuch and Ginsburg also filed dissents, disagreeing in part with the Court's fundamental holding on different grounds.

Full Case At:
https://www.supremecourt.gov/opinions/18pdf/17-1174_m5o1.pdf

Fourth Circuit Court of Appeals

Wilson v. Prince George's County: June 18, 2018
893 F.3d 213
Maryland District Court: Plaintiff appeals the dismissal of his 4th Amendment lawsuit against a police officer that shot him.

Facts: An officer responded to a 911 call reporting that the plaintiff had kicked in the door of his former girlfriend's residence, attacked her, and caused her phone to fall into a drain. The plaintiff armed himself with a knife and re-entered her apartment with the intention of taking his own life.

When the officer arrived, the girlfriend directed him to the plaintiff, who had left her apartment, armed himself with a pocket knife, and returned to the girlfriend's apartment. The officer encountered the plaintiff outside the apartment, where the plaintiff was standing. The officer confronted the plaintiff,

but the plaintiff pulled out the pocket knife. The officer repeatedly ordered the plaintiff to drop the knife, but the defendant refused. Instead, the plaintiff began walking towards the officer and started to stab himself in the chest and cut his own throat. When he got close to the officer (the parties dispute whether the distance was 20 feet or 10 feet), the officer shot the plaintiff.

The plaintiff survived and sued the officer for violation of his Fourth Amendment rights. The trial court dismissed the lawsuit on qualified immunity grounds, ruling that the officer did not violate the plaintiff's Fourth Amendment rights. The trial court also dismissed the defendant's Maryland state law claims.

Held: Affirmed in Part, Reversed in Part. The Court agreed that the officer violated the plaintiff's Fourth Amendment rights, but found that the violation was not sufficiently established at the time of the shooting to justify a finding of liability. However, the Court reversed the trial court's ruling on Maryland state law matters.

The Court contended that the facts showed that the plaintiff did not threaten the officer, the girlfriend, or any other individual present at the scene during the encounter. The Court argued that the defendant never pointed the knife in the direction of anyone but himself, nor did he move suddenly or act in a threatening manner toward the officer or others. Thus, the Court found that, viewing the evidence in the light most favorable to the plaintiff, the officer violated the Fourth Amendment by using deadly force against someone who posed no immediate threat to the officer and no threat to others.

However, the Court held that, at the time of the shooting, it was not clearly established that an officer would violate a suspect's Fourth Amendment right to be free from excessive force by shooting a person who: (1) was suspected of having committed a burglary and a battery; (2) was standing about 20 feet from the officer holding a knife, inflicting harm on himself and stumbling, but not threatening others or making sudden movements; and (3) was refusing to obey the officer's repeated commands to drop the knife at the time he was shot. The Court therefore concluded that the officer was entitled to qualified immunity, because it was not sufficiently clear to a reasonable officer at the time that what he did violated the Fourth Amendment.

The Court concluded, however, by writing: "We emphasize, however, that as of the date this opinion issues, law enforcement officers are now on notice that such conduct constitutes excessive force in violation of the Fourth Amendment."

Full Case At:
http://www.ca4.uscourts.gov/opinions/171856.P.pdf

Brooks v. Johnson, et. al.: May 10, 2019

South Carolina: Plaintiff appeals the dismissal of his Use of Force on Eighth Amendment groups.

Facts: While being booked at jail, the defendant refused to allow guards to take his photograph. The defendant was at the facility for only one night, while being transported from prison to court for a court appearance, and already on his way out by the time the incident occurred, and jail officers already had access to the defendant's inmate photo ID card and other photographs of the defendant. A guard

used a taser on the plaintiff was standing and refusing to hold still for a picture. The defendant then went to the ground; while the defendant was on the ground, a guard then used a taser for approximately 16 seconds on the plaintiff, and then again a few moments later.

The plaintiff sued for damages under the Eighth Amendment. The trial court dismissed the case at summary judgment on qualified immunity grounds.

Held: Reversed. The Court concluded that a reasonable jury could find that the guard violated the Eighth Amendment by using force maliciously and found that the guard was on "fair notice" of the prisoner's right not to be subjected to excessive force in the form of the wanton infliction of pain, intended to punish rather than to induce compliance. Accordingly, the Court ruled that the defendants were not entitled to summary judgment on qualified immunity grounds.

The Court did not question the legitimacy of the Detention Center's photograph policy and agreed with the district court that the ability to "accurately identify inmates" is "essential to maintain security at correctional facilities." The Court also agreed that the first use of the taser, while the plaintiff was standing and refusing to hold still for a picture, did not suggest anything other than a "good faith effort" to restore discipline. However, regarding the remaining taser uses, the Court repeated that prison officials "cannot, no matter their creativity, maliciously harm a prisoner on a whim or for reasons unrelated to the government's interest in maintaining order."

Full Case At:
http://www.ca4.uscourts.gov/opinions/177261.P.pdf

Writs of Actual Innocence

Virginia Supreme Court

In Re: Phillips: December 13, 2018
822 S.E.2d 1
Virginia Beach: The defendant seeks a writ of actual innocence based on DNA results, or in the alternative, to nonsuit that writ.

Facts: The defendant attacked and raped a ten-year-old child in 1990. Police captured him and he confessed. At trial, he denied that he confessed and presented an alibi; however, his alibi witnesses presented inconsistent testimony. In 2015, the defendant obtained an order for the testing of biological evidence from his case. An independent lab analyzed the trace evidence and developed a "weak and incomplete" DNA profile from the material extracted from the interior of the victim's underwear. The lab concluded that the defendant was a possible contributor to that DNA profile. DNA collected from the exterior of the garment, according to the lab determined, came from multiple people, but the lab excluded the defendant as a possible contributor.

After the defendant filed his petition for a writ of actual innocence, the Virginia Supreme Court decided *In re: Brown* in 2018. Based on that ruling, the defendant moved to nonsuit his petition.

[*Note: The Court of Appeals denied the defendant's writ of actual innocence last week in another case as well.*]

Held: Affirmed. The Court first denied the defendant's motion for nonsuit. The Court explained that the General Assembly intended that a petition for a writ of actual innocence be deemed a proceeding that is criminal in nature, as opposed to one that is civil. Accordingly, the Court held that the defendant's petition was not a civil action to which the nonsuit statute applies.

The Court then repeated that, under *Brown*, the Court is limited to issue a writ of actual innocence based on certified DFS test results and does not have the authority to issue a writ of actual innocence based on the results of tests not performed or certified by DFS. In this case, because the defendant's petition did not rely upon test results provided by DFS to support his claim of actual innocence, the Court dismissed the petition.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1171438.pdf

In Re: Scott: March 7, 2019

Fairfax: Defendant seeks a Writ of Actual Innocence based on biological evidence.

Facts: In 1976 the defendant was tried and convicted of Rape. The victim had initially stated that she did not get a good look at her attacker, but a couple of months after the offense, the victim identified the defendant in a second photo array. The victim identified the defendant at trial.

During serology review, DFS did a DNA test on samples from a semen stain found in the crotch of the jeans allegedly worn by the victim. The DNA testing developed a DNA profile that revealed the same contributor for the sperm fractions found in both samples. Further, DFS DNA testing conclusively eliminated the defendant and the victim's boyfriend as the contributors of the sperm found in the crotch of the victim's jeans. DFS also did a DNA test on a vaginal swab taken from the victim within hours of the rape. A male profile from sperm that cannot be attributed to the defendant or the victim's boyfriend was in both the jeans crotch samples and the vaginal swab of the victim.

Based on the DNA analysis, the defendant sought a writ of actual innocence. The Commonwealth opposed granting the writ, noting the lack of evidence that the jeans in evidence were even the correct jeans. The Commonwealth also pointed to the fact that the victim's DNA was not present on the jeans. Lastly, the Commonwealth argued that the semen stain may have been deposited on the jeans before or during laundering and that the defendant could not demonstrate when the contributor of the DNA deposited the DNA on the clothing.

Held: Writ granted. The Court ruled that the defendant proved, by clear and convincing evidence, all of the allegations required under Code § 19.2-327.3(A) and that no rational trier of fact would have found him guilty beyond a reasonable doubt, in that he has been scientifically proven by DNA analysis to not be the source of the sperm found on the victim's jeans or the male DNA found on the vaginal swab obtained from the victim.

The Court rejected the Commonwealth's arguments, reasoning that the concentration of semen in that place on the jeans, the visible stain that an expert hypothesized may have been wet when the jeans were collected, and a positive acid phosphatase result would indicate that the stain was not deposited on the jeans by laundering.

Full Case At:
http://www.courts.state.va.us/opinions/opnscvwp/1171286.pdf

Virginia Court of Appeals
Published

Phillips v. Commonwealth: December 4, 2018
69 Va. App. 555, 820 S.E.2d 892
Virginia Beach: Defendant seeks a Writ of Actual Innocence from his convictions for Sexual Assault.

Facts: In 1991, a jury convicted the defendant of the sexual assault of a 10-year-old girl. The defendant attacked the child, a stranger, in a park. The victim gave a detailed description of the defendant and his clothing. Police quickly located the defendant, who was still nearby. He confessed to the attack, providing an accurate description of the victim and the attack. After his conviction, the defendant obtained a new DNA test of evidence from the attack. The new analysis excluded the defendant as a contributor to samples from certain parts of the victim's clothing and other evidence tested. However, in other samples from different parts of the victim's clothing that were also tested, the defendant was a possible contributor.

The Innocence Project found the victim and told her that a new analysis found the touch DNA of several men on her shorts, which her attacker had pulled off her. They also told the victim that the defendant's DNA was not found on the shorts. They got the victim to sign an affidavit stating that she "could have identified the wrong man as [her] attacker." However, they later admitted that they did not tell her that the defendant's DNA was on other evidence; instead they simply provided her with a written copy of the full DNA results.

The defendant sought a writ of actual innocence based on unknown or unavailable DNA evidence and a "recantation from the victim."

Held: Dismissed. The Court first repeated that courts view recantations with "great suspicion." In this case, the Court found that the victim's statement, while certainly relevant, is not a recantation and comes more than a quarter of a century after the attack. The Court then noted that the DNA results on the DNA do not exonerate the defendant, as the defendant was included as a possible contributor. The Court then pointed out that the defendant confessed and, when police located him near the scene, he matched the detailed description that the victim gave of her attacker.

Full Case At:
http://www.courts.state.va.us/opinions/opncavwp/0788181.pdf

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