Criminal Law News

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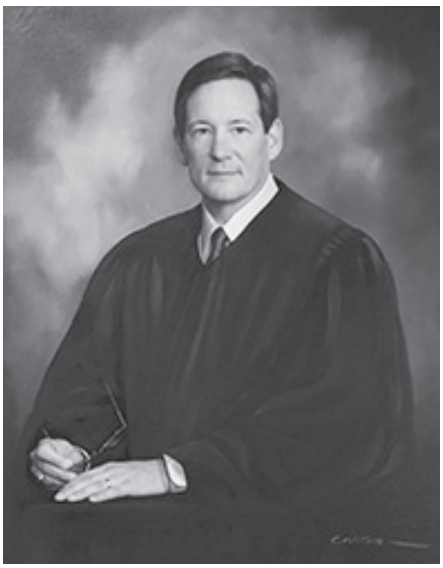
The Newsletter of the Criminal Law Section of the Virginia State Bar

The Hon. Donald W. Lemons Receives the 2022 Carrico Professionalism Award

The Honorable Donald W. Lemons, recently retired Chief Justice of the Supreme Court of Virginia, has been named the recipient of the Harry L. Carrico Professionalism Award by the VSB Criminal Law Section.



The Carrico Award recognizes an individual (judge, defense attorney, prosecutor, clerk, or other citizen) who has made a singular and unique contribution to the improvement of the criminal justice system in the Commonwealth of Virginia.

In his nomination, Judge Gordon S. Vincent of Accomack said of Chief Justice Lemons, "Chief Justice Lemons leads by inspiring all judges to remember our important role in assuring fairness to all. As the Chief Justice and the other members of the Court stated after the George Floyd incident, 'As Judges, we must take all steps possible to ensure that in the courtrooms of the Commonwealth, all people are treated equally and fairly and with dignity under the law. It is a moral imperative that we do so.'"

The son of a Secret Service agent for President Harry S. Truman, Justice Lemons began his career as a probation officer where he interacted with lawyers and judges in the courtroom. These experiences later inspired him to attend law school. Justice Lemons went on to work in private practice handling civil, criminal, and domestic trials in all courts prior to joining the bench.

Justice Lemons has served as a judge or justice on every level of the Virginia judiciary beginning on the Circuit Court for the City of Richmond where he was appointed by Governor George Allen in 1995. There, he established one of the Commonwealth's first drug courts designed to help those non-violent offenders with addiction issues. He was then elected by the General Assembly to the Virginia Court of Appeals in 1998 before being elected to the Supreme Court of Virginia in 2000.

A graduate of the University of Virginia for both undergraduate and law school, Justice Lemons has been a professor of law at Washington & Lee Law School, University of Richmond Law School, and the University of Virginia Law School. In 2016, he received the William R. Rakes Leadership in Education Award from the Virginia State Bar. In 2019, he was the recipient of the Lewis F. Powell Award for Professionalism and Ethics presented by the American Inns of Court.

A prolific writer and extensive speaker, Justice Lemons has served in numerous civic and legal leadership roles including honorary member of the Middle Temple Inn of Court in London and president of the American Inns of Court.

In his nomination, Judge Vincent recalls a speech Justice Lemons gave to members of the Virginia judiciary in 2018 where he outlined the important qualities for a good judge: "These qualities, he said,

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Lemons (continued from page 1)

are 'allegiance to the Oath of Office, deference to the legislative and executive branches, courage to follow the law even if a decision will be unpopular, and humility.' Chief Justice Lemons epitomizes all of these qualities."

Justice Lemons will receive the Carrico Award on June 15, 2022, at the VSB Council dinner in Virginia Beach. ✧

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Brown v. Davenport, S.Ct. (2022). When a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant habeas relief without applying both the test outlined in *Brecht v. Abrahamson*, 507 U. S. 619, which held that a state prisoner seeking to challenge his conviction on the basis of a state court's *Chapman* error [prisoner must show that the error had a "'substantial and injurious effect or influence'" on the trial's outcome] **and** the test prescribed in AEDPA. The Sixth Circuit erred in granting habeas relief based solely on its assessment that the *Brecht* standard had been met.

United States v. Zubaydah, 142 S Ct. 959 (2022). The state secrets privilege permits the Government to prevent disclosure of information when that disclosure would harm national security interests and in certain circumstances, the Government may assert the state secrets privilege to bar the confirmation or denial of information that has entered the public domain through unofficial sources.

Fed. Bureau of Investigation v. Fazaga, 142 S Ct. 1051 (2022). Congress did not intend the Foreign Intelligence Surveillance Act of 1978 to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Walker, F.4th (4th Cir. 2022). Appellant argued that eyewitnesses' statements were not helpful to the jury because the surveillance video from the robbery was played during the trial, and, therefore, the jury could judge the situation for themselves. But the witnesses offered a unique viewpoint of the robbery that is not reflected in the surveillance video. Therefore, their statements were properly admitted.

The Court also held that "if the Government seeks to introduce a law enforcement agent's testimony about statements made during recorded telephone calls and the agent was neither a party to the conversation nor contemporaneously listening to the conversation, the law enforcement agent should generally be proffered as an expert witness. And the expert testimony he offers must qualify as expert testimony, such as defining slang words used in the conversation, that the jury would not be able to decipher on its own."I

U.S. v. Perez, F.4th (4th Cir. 2022). "In sum, though the stop could have been shorter (and begun more efficiently), it wasn't impermissibly prolonged…. The officers investigated defendant's license and the car's expired and fictitious tag, and then wrote multiple citations. Considering the attendant circumstances, we agree with the district court that the stop was not unreasonably prolonged." Thus the accompanying dog sniff was constitutional.

Witherspoon v. Stonebreaker, 30 F4th 381 (4th Cir. 2022). Trial counsel's failure to object to the court's order [following the close of evidence] for defendant to stand next to a video freeze-frame "was objectively deficient, prejudiced the defendant, and amounted to constitutionally ineffective assistance of counsel."

U.S. v. Buster, 26 F.4th 627 (4th Cir. 2022). *Terry v. Ohio*, 392 U.S. 1 cannot "be stretched to cover a warrantless search of a bag recently possessed by a person who was—by the time the bag was opened—handcuffed and face-down on the ground."

U.S. v. Hobbs, F.3d (4th Cir. 2022). Case of first impression, Held that "exigent circumstances permitted the officers' search and use of Hobbs' cell phone location data obtained without a warrant." Exigent circumstances justified the warrantless search because Hobbs had a criminal history of violent offenses, presently was armed, and had threatened imminent harm to numerous people, including his former girlfriend, her child, and any law enforcement officers who might try to arrest him.

U.S. v. White, F.3d (4th Cir. 2022). The Virginia Supreme Court stated that an individual can be convicted of robbery by means of threatening to accuse the victim of having committed sodomy, "if the accusation of 'sodomy' involves a crime against nature under extant criminal law." Thus, the appellant's Virginia conviction for robbery did not qualify him as an armed career criminal under 18 U.S.C. § 924(e) which requires that predicate offenses involved the "use, attempted use, or threatened use of physical force."

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Cortez-Rivas v .Commonwealth, 300 Va. 442 (2022). "Assuming, without deciding, that statements translated from one language into another by a translator can constitute testimonial evidence, thus triggering the protections of the Confrontation Clause, those protections were satisfied here because the translator testified." The fact that another person originally translated at the scene is immaterial for Confrontation Clause purposes, because the original translator was not a witness and no statements at all from him, testimonial or otherwise, were offered into evidence.

Smallwood v. Commonwealth, Va. 1/13 "The decision to require that Smallwood pay his court costs as a term or condition of his deferred disposition falls squarely within the broad discretion granted to the circuit court by the General Assembly." Statutes that permit the trial court to impose alternatives to incarceration . . . are highly remedial and should be liberally construed to provide trial courts valuable tools for rehabilitation of criminals. As such, the use of these tools lies within the broad discretion of the circuit court.

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Woodson v. Commonwealth, Va.App. (5/3). The "parental privilege" to discipline children excuses what would otherwise be battery. To fall within this justification, discipline must be reasonable and not excessive. In all of our cases finding excessive discipline, the parent inflicted significant physical harm on the child. The harm was readily evident from the presence of more than transient physical pain or temporary marks. "Parenting is an inordinately difficult task, and a criminal prosecution cannot rest on a debatable parenting decision without other evidence that the conduct was excessive. Disagreement with defendant's decision to use corporal punishment, combined with evidence of only transient marks from the soft end of a belt, falls short of what a reasonable factfinder could conclude is excessive." Conviction reversed.

Conley v. Commonwealth, Va.App. (5/3). "To hold that a person can give prior consent to sexual activity taking place when they are asleep would deny that person the ability to withdraw that consent. Regardless of whether consent might have ever been given, …because consensual sexual activity requires 'continued consent' during the duration of the activity, whenever a sleeping person is unable to express consent, that person consequently cannot consent to sexual activity."

Park v. Commonwealth, Va.App. (5/3). The fact that the appellant ultimately was not charged or convicted of driving under the influence is irrelevant

to the legality of an arrest for that offense. The Court also held that Code § 18.2-267 obliges the officer to specifically tell the defendant that he is entitled to a preliminary breath test and offer him one, even though the appellant declined "field sobriety tests." However, failure to comply with Code § 18.2-267 did not invalidate the arrest.

Goldman v. Commonwealth, Va.App. (4/19). "Taking the evidence as presented, the EVMS video shows only that Goldman had access to the job box at least nine months before tools were stolen from the job box. That evidence is insufficient to prove that Goldman stole the tools."

Keene v. Commonwealth, Va.App. The [trial] court did not rely on any incorrect or inappropriate considerations; instead, it considered the escalating seriousness of appellant's charges, which were alleged to have occurred while he was awaiting trial for other offenses against the same victim, as well as the balance of several factors enumerated in Code § 19.2-120(B). Accordingly, we do not find that the court abused its discretion in denying appellant a pretrial bond, and we affirm the court's decision."

Haas v. Commonwealth, Va.App. "The evidence was sufficient to support Haas' convictions…. however, sufficiency is no longer the standard. … we are convinced by a preponderance of the evidence that no rational factfinder considering all of the evidence, … would find beyond a reasonable doubt that Haas committed the offenses. Accordingly, we conclude that he has met his burden and is entitled to a writ of actual innocence.

Walker v. Commonwealth, 74 Va.App. 475 (2022). In the course of a bank robbery defendant struck a customer across the face and neck. In response to being hit, the customer "threw myself to the ground and stayed there fearful" until the defendant left the bank. At a minimum, this evidence was sufficient to raise jury questions as to whether defendant seized or detained a person within the meaning of the abduction statute. Code § 18.2-47(A).

The court also held the trial judge did not err in admitting a witness' in-court identification of defendant as the perpetrator or in refusing defendant's request to implement protective identification procedures. The dissent argued that an initial identification during trial is unnecessarily suggestive and that, therefore, the court should have applied Due Process considerations (See *Neil v Biggers*, 93 S.Ct. 375). to determine whether the witness' identification of defendant was reliable enough to be presented to the jury.

Tomlin v. Commonwealth, 74 Va.App. 392 (2022). The trial court lacked sufficient evidence to conclude that B.T. was mentally incapacitated with respect to financial matters. "Accordingly, we reverse and dismiss with respect to the conviction for financial exploitation of a mentally incapacitated adult, but we affirm the conviction for abuse or neglect of an incapacitated adult." [B.T.'s "condition was life-threatening because of the combination of bed sores, leg sores, and the increased risk of infection created by the ubiquitous bed bugs, feces, and urine covering her body"].

Lundmark, v. Commonwealth, 74 Va.App. 4711 (2022). The Court of Appeals lacked jurisdiction and dismissed the appeal because appellant failed to join an indispensable party. Appellant was charged and convicted under a Henrico County Ordinance thus Henrico County "was the necessary party to be identified in [the] notice of appeal as the appellee." Appellant did not name Henrico County as a party in the appeal and instead incorrectly listed "Commonwealth of Virginia" as the prosecuting party. As a result, the notice of appeal "failed to satisfy the minimum requirements to confer jurisdiction" on this Court

Mackey v. Commonwealth, 74 Va.App. 348 (2022). Defendant was indicted under Code § 18.2-374.3(C), which prohibits the use of a communications system to solicit, with lascivious intent, a person the accused knows or believes to be younger than fifteen years old. He was convicted under subsection (D) which applies to a victim of at least fifteen but younger than eighteen. Conviction reversed because subsection (D) is not a lesser included offense of subsection C, and the trial court never amended the original indictment to allow for defendant's conviction under subsection D.

Palmer v. Commonwealth, Va.App. (2/8). "Appellant's request for pre-trial bail became moot when the circuit court convicted him of the charged offenses." The concurrence discussed the difference

between pre-conviction bail and post-conviction pre-sentencing bail.

Ray v. Commonwealth, 74 Va.App. 291 (2022). "The due process clause applies as a check on eyewitness identifications where the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." The identification of this defendant occurred as part of a controlled drug buy, and thus prior to a crime being committed. The trial court did not err in denying the motion to suppress the "pre-crime" identification

Sorrell v. Commonwealth, 74 Va.App. 243 (2022). Code 8.01-4.3 "simply requires two elements in an attestation clause: that the written declaration acknowledges that it is made under threat of penalty of perjury and attests to the information's accuracy." The appellant's signed attestation clause in his application for a concealed handgun permit substantially followed the relevant language in Code § 8.01-4.3 and was sufficient to support the conviction for perjury.

Glass v. Commonwealth, 74 Va.App. 214 (2022). Case of first impression defining the term "fair market cost of repair" in the destruction of property statute - Code § 18.2-137. Held that fair market cost of repair inherently includes what the market deems reasonable profit.

Hammer v. Commonwealth, 74 Va.App. 225 (2022). Appellant argued that, once the trial court orally permitted a nolle pros, it lost jurisdiction to reinstate the charge until another indictment issued. The Court rejected this argument because although a nolle pros order "cannot be revisited" once the order "becomes final and incapable of reconsideration under Rule 1:1," the rule allows an order to be "modified, vacated, or suspended for [21] days after the date of entry."

Richie v. Commonwealth, Va.App (2/8). Case of first impression holding that Code § 16.1-242 is a statutory exception to Rule 1:1 and the rule and the statute are not in conflict. Rule 1:1(a) provides "all final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." However, Rule 1:1(b) provides "unless otherwise provided by rule or statute, a judgment, order, or decree is final if it disposes of the entire matter before the court." Rule 1:1(b) clearly contemplates that there may be statutory exceptions to the general rule of finality. And there is such a statutory exception. Code § 16.1-242, dealing with juvenile and domestic relations district courts provides: "When jurisdiction has been obtained by the court in the case of any child, such jurisdiction, which includes the authority to suspend, reduce, modify, or dismiss the disposition of any juvenile adjudication, may be retained by the court until such person becomes 21 years of age."

Massie v. Commonwealth, 74 Va.App. 309 (2022). Although the defendant will have participated in the sexual act in the lion's share of prosecutions for rape and forcible sodomy, the plain language of the statutes makes clear that does not have to be the case. Both statutes prohibit a person from causing a "complaining witness . . . to engage in the prohibited sexual conduct 'with *any other person*.' (Emphasis added). Thus, so long as the evidence was sufficient to establish that Massie caused another to engage in the sexual acts with the victim against her will through threat, force, or intimidation, it matters not that Massie did not engage in the sexual acts or that he was not in the room when the acts occurred."

SAVE THE DATE!

The Criminal Law Seminar will be back in-person in February 2023.

Friday, February 3, 2023

Charlottesville DoubleTree Hotel

Friday, February 10, 2023

Williamsburg DoubleTree Hotel

Mark your calendar now and plan to attend.

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- Lawyer Wellness - Maximizing Performance and Avoiding Pitfalls in Practice and in Life
- Heirs Property and Partition Reform in Virginia: How Attorneys are the Key to Stabilizing Land Ownership in Vulnerable Communities

Friday, June 17, 2022

- The Future of Law Came Quickly, Didn't It? A Review of a Quick Evolution of the Profession and Advice on What to Do About It
- Adult Guardianships/Conservatorships – Prevention and Performance
- Death and Divorce: Avoiding Landmines and Adding Value at the Intersection of Family Law and Estate Planning
- Health Laws and Waivers in a Post-Pandemic World
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