Criminal Law News
Volume 52, Number 4
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The Newsletter of the Criminal Law Section of the Virginia State Bar

2023 Annual Meeting – Virginia State Bar
June 14-17, 2023 • Virginia Beach, Virginia

Co-sponsored Programs:

"Budding" Cannabis Law From Four Perspectives:
A "Joint" Presentation from the Litigation, Criminal, Health, and Real Estate Sections of the VSB

Friday, June 16 • 8:30 - 10:00 am • Hilton Oceanfront • (1.5 hours CLE)

The speaker from the Criminal Law section will be Tyson Daniel. **Tyson Daniel** is the founder of The Daniel Law Firm PC in Roanoke, Virginia. He has served as an assistant public defender, and with the Capital Defense Unit for the Southwest Region. Tyson is a member of the VACDL, the VTLA and the Virginia Criminal Justice Commission. With respect to Cannabis Law, he helped form and served as president of the Cannabis Business Association of Virginia. He remains a Lifetime Member of [National] NORML and retains his memberships with the Virginia Hemp Coalition, the Global Hemp Association, the Midwest Hemp Council, and the International Cannabis Bar Association. He is also the founder and managing partner of, the newly formed, Virginia Cannabis Lawyers PLLC.

Protective Orders - Defense and Pleas
Sponsors: Criminal Law and Family Law Sections

Friday, June 16 • 2:00 - 3:00 pm • Hilton Garden Inn • (1.0 hours CLE)

Using hypothetical fact patterns, the panel will discuss best practices in advising clients served with protective orders as well as the possible criminal law implications.

Jennifer Gebler will represent our section. She focuses her practice on criminal defense and traffic law. She practices in all of Hampton Roads (Norfolk, Virginia Beach, Chesapeake, Newport News, Portsmouth, Hampton, and Suffolk) as well as Isle of Wight county. Gebler is a Norfolk native and a double graduate of Old Dominion University, having received both her Bachelor of Science in Criminal Justice and her Master of Arts in Applied Sociology with an emphasis in Criminal Justice. She continued her schooling at Regent University, where she received her Juris Doctor.

Section Lunch & Elections
Friday, June 16 • 11:45 am • Hilton Hotel

Register online at bit.ly/VSBAnnualMeeting

Chair's Column

Jacqueline M. Reiner, Esquire

Thank you all for all of your efforts in making this a most productive year for our Criminal Law Section of the Virginia State Bar. During my tenure as your Chair, so many of you have so graciously volunteered your time and feedback to make our section stronger and our service to our colleagues and community more fulsome.

Through your work, we have been able to juice up our federal, circuit, and appellate court appointed service with talented attorneys of varying levels of experience. We enjoyed a phenomenal 53rd Annual Criminal Law Seminar in both Williamsburg and Charlottesville and awarded our prestigious Harry L. Carrico Professionalism Award to a most deserving recipient, The Honorable Robert E. Payne, Senior District Court Judge for the Eastern District of Virginia. Our Young Lawyers Conference Scholarship program for the Annual Seminar was so well received that we will continue to offer it in years to come. In conjunction with VA CLE, our Board is also working on creating a half day Advanced Criminal Law Seminar to be held in Richmond. Your feedback about mentorship has been invaluable and, in conjunction with the Virginia State Bar, we hope to create a program that interests everyone at every level of practice.

I hope to see you all at the upcoming 2023 Virginia State Bar Annual Meeting to be held in Virginia Beach on June 14-17, 2023. This year our section is sponsoring two CLEs. On June 16, 2023 at 8:30am, M. Tyson Daniel will speak on behalf of our section at "Budding" Cannabis Law from Four Perspectives: A "Joint" Presentation from the Litigation, Criminal, Health, and Real Property Sections of the VSB. At 2:00pm, Jennifer Gebler of The Decker Law Firm will present on behalf of our section at Protective Orders - Defense and Pleas, which we are co-sponsoring with the Family Law Section. The Criminal Law Section's luncheon and annual meeting will begin at 11:45am. ✧

Maisey Reiner enjoying a little fun in the sun between CLEs

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S.v. Ravenell, F.4th (4th Cir. 2023) approved this instruction on conscious avoidance: "in determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with (or that the defendant's ignorance was solely and entirely the result of) a conscious purpose to avoid learning the truth (e.g., that the statement was false), then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken."

U.S. v. Lopez-Alvarado, F.4th (4th Cir. 2023). The Sixth Amendment's fair-cross-section requirement does not apply to the district court's decision to strike the unvaccinated potential jurors for cause related to COVID-19 safety risks.

U.S. v. Vladimirov, F.4th (4th Cir. 2023). "Because neither the Supreme Court nor this Circuit has provided any precedent addressing the constitutional implications of witnesses wearing masks while testifying during the COVID-19 pandemic, and our sister circuits have not adopted a uniform position on this issue, we will not find plain error in the district court's ruling requiring the wearing of masks."

U.S. v. Ebert, 61 F.4th 394 (4th Cir. 2023). Found that probable cause was not stale. "The staleness inquiry is somewhat different when the alleged unlawful activity involves digital images depicting child pornography and other sex crimes against minors, in part because the nature of the property to be seized is not a consumable, like narcotics. Instead, such child pornography is found on computers and other digital equipment that can be readily stored by offenders for years and also can be retrieved during a digital search even after its ostensible deletion. In addition, law-enforcement experience supports the conclusion that individuals who possess such images rarely if ever dispose of such material, and store it for long periods…."

U.S. v. Peters, 60 F.4th 855 (4th Cir. 2023). Stop and frisk held unreasonable. "After insisting that Peters lift his shirt, Officer Butler made a clear show of authority when he proposed taking Peters to jail for trespass. Once Peters responded by claiming that he had done nothing wrong, Officer Butler countered that he should, therefore, not 'mind' if Officer Cooper patted him down. A reasonable person would not feel free to leave if an officer says he can take the person to jail for a specific crime, or threatens that he will do so. This is especially true after being accused of the specific crime several times."

In finding a lack of reasonable suspicion for the seizure, the Court criticized use of "caution data"—information indicating the defendant had "priors" and a suspended license— and a "gang alert," noting that "at least one gang task force in Virginia has stopped using its gang database after noting its 'declining utility.'"

U.S. v. Linville, 60 F.4th 890 (4th Cir. 2023). "Normally, one seeking the Fifth Amendment's protection against self-incrimination must invoke the right and remain silent rather than answering questions that might lead to incriminating evidence. But when a criminal defendant faces what the law calls a 'classic penalty situation,' the Fifth Amendment's rights are self-executing—meaning they apply whether or not expressly invoked. …. In a classic penalty situation, statements and other evidence obtained in response to questions may be excluded under the Fifth Amendment even if it was not invoked." Here, appellant contends that his admission was not voluntary because he was faced with a penalty situation—if he declined to answer his probation officer's question on grounds that the answer would incriminate him, he would be violating the condition of his supervised release requiring him to "answer truthfully all inquiries of the probation officer. If he answered truthfully, he would incriminate himself and become subject to a new criminal prosecution.

There is a two-step inquiry for courts considering classic penalty situation arguments in the context of supervised release conditions. First, do the conditions actually require a choice between asserting the Fifth Amendment and revocation of supervised release?

Second, even if they do not, is there a reasonable basis for a defendant to believe they do?

In sum, the government did not expressly or implicitly assert that it would revoke Linville's supervised release if he invoked his Fifth Amendment right to remain silent. And even if Linville believed invoking the Fifth Amendment would have risked revocation, his belief was not reasonable. For these reasons, we affirm the denial of the motion to suppress.

U.S. v. Tucker, 60 F.4th 879 (4th Cir. 2023). " Involuntary medication orders 'carry an unsavory pedigree,' and prolonged pretrial detention of a presumptively innocent person 'is serious business.' …. This case involves a criminal defendant who has been declared mentally incompetent to stand trial and languished in pretrial custody for more than five years. The district court found that involuntary medication is substantially likely to render the defendant competent and ordered a final extension of confinement to permit that medication to work. …. Given the deferential standards of review, we conclude the district court committed no reversible error in deciding an involuntary medication order was warranted and finding it appropriate to grant one final four-month period of confinement to attempt to restore Tucker's competency. We emphasize, however, that '[a]t some point [the government] can't keep trying and failing and trying and failing, hoping to get it right,' and we trust no further extensions will be sought once the current appeal is finally resolved." 7

U.S. v. Sueiro, 59 F.4th 132 (4th Cir. 2023). Although rejecting "the proposition that the ubiquity of cell phones, standing alone, can justify a sweeping search for such a device," it was "fairly probable" that evidence of a crime committed electronically would be found on "computers or other devices" at the defendant's home.

Ivey v. U.S., 60 F.4th 99 (4th Cir. 2023). Although harmless error, the court found a show-up unduly suggestive, and a violation of the best evidence rule. Appellant was the only individual that the witnesses viewed during the show-ups…. On top of that, without asking the witnesses to describe the perpetrators prior to their viewing, the defendant was handcuffed and emerged from the back of a police cruiser while the witnesses watched. Police told the witnesses that Appellant fit the description of someone involved in an incident.

As to the best evidence rule - when the proponent asserts that an original may have been lost or destroyed, the proponent "must demonstrate to the satisfaction of the court that although [the original] once existed, it cannot be found despite a diligent and unsuccessful search and that there is no reasonable probability that it has been designedly withheld or suppressed." The Government did not endeavor to do this, nor did the district court require it to before overruling Appellant's objection. This was an abuse of discretion.

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Comonwealth v. Barney, 884 S.E.2d 81 (2023). [A 4 to 3 decision overruling the court of appeals.] The only contested issue was a purely factual one: While threatening to murder Daugherty during a robbery, did Barney point a firearm or a finger at the victim? The Commonwealth said it was a firearm, not a finger. Barney said it was a finger, not a firearm. No one said it could have been a finger and a firearm at the same time. In short, the trial court did not abuse its discretion in refusing to issue a specific instruction explicitly saying that a finger is not a firearm "We have addressed on several occasions the limits of rational factfinding in cases like this. But we have never said that a criminal could escape liability for unlawfully using a firearm by the simple expedient of concealing it."

Colas v. Tyree, 882 S.E.2d 625 (2023). In a civil suit for battery when a police officer shot and killed a person threatening another officer, the court held that "the plaintiff's own evidence, including testimony the plaintiffs adduced from an adverse party, establishes defense of another as a matter of law." Although the basic theory could apply in criminal cases, the court cautioned that: "We note an important difference in how self-defense operates

in a criminal trial as opposed to a civil trial. In a criminal prosecution, the burden of proving self-defense is on the defendant, but the defendant is only required to raise a reasonable doubt as to his guilt. In a civil case, self-defense, or defense of others, is an affirmative defense that the defendant must prove by a preponderance of the evidence." [There is a three person dissent].

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Holman v. Commonwealth, Va.App. 4 /18 The evidence, coupled with the trial court's granting of the motion to strike, affirmatively shows that Holman acted without malice. Thus, Holman's conviction for use of a firearm in the commission of a felony cannot stand. To the extent that the Commonwealth argues that Holman stipulated to the crime of use of a firearm in the commission of a felony, we note that such a stipulation would amount to a mere concession of law, and an impossible concession of law, at that. . In other words, the trial court asked Holman's counsel to concede a legal impossibility. Here, use of a firearm in the commission of a felony required a finding of malicious wounding. The trial court had already affirmatively found that no malice occurred.

Fary v Comm Va.App 4/18 "When reviewing the sufficiency of the evidence on appeal, we neither rubber-stamp a trial court's rejection of the defendant's reasonable hypothesis of innocence nor reweigh the evidence and reach our own conclusion. Rather, we examine 'whether a rational factfinder could have found that the incriminating evidence renders the hypothesis of innocence unreasonable.'"

Vera v. Com Va.App 4/11 Case of first impression finding: "The plain meaning of induce in Code § 18.2-248(E3) is neither ambiguous nor does its application produce absurd results." To induce is to "bring about," "to move by persuasion or influence," or "to call forth or bring about by influence or stimulation." The circuit court was not plainly wrong in finding that Vera had induced the girls to consume GHB and that he failed to prove, by a preponderance of the evidence, that his actions constituted an accommodation. See also, *Harper v. Com* [conviction for inducing false testimony].

Taylor v. Commonwealth Va.App. 3/28 Issue of first impression: "Three rapid-fire shots at the same person in the same instance are sufficient to sustain three counts of malicious shooting within an occupied building in violation of Code § 18.2-279." The court also rejected the argument that convictions for malicious shooting in an occupied building are subsumed by a conviction for voluntary manslaughter.

Warren v. Commonwealth, 76 Va.App. 788 (2023). "The essential elements of [a necessity] defense include: (1) a reasonable belief that the action was necessary to avoid an imminent threatened harm; (2) a lack of other adequate means to avoid the threatened harm; and (3) a direct causal relationship that may be reasonably anticipated between the action taken and the avoidance of the harm. …. Here the necessity defense fails because Warren proffered no evidence to support the second element: a lack of other adequate means to avoid the threatened harm."

Calokoh v. Commonwealth, 76 Va.App. 717 (2023). The purpose of newly enacted Code § 19.2-271.6 "is not to amend the intent element of any criminal offense, but rather, … to abrogate the common law rule that prohibited evidence of a defendant's mental condition short of legal insanity. Because Code § 19.2-271.6 does not create an affirmative defense and did not amend the elements of rape or animate object penetration, the trial court did not err when … it answered the jury question by telling the jury that the evidence of Calokoh's mental condition could not be considered in relation to whether the victim consented."

Wallace v. Commonwealth, 76 Va.App. 696 (2023). Rejected the Commonwealth's argument that if a defendant uses a computer[here an ATM machine] to deposit forged checks—or for unlawful purposes more generally—her use is per se without authority under the computer fraud statute. "Under Code § 18.2-152.3, 'without authority' is an element

of the crime, for which the Commonwealth has the burden of proof. In this case, the Commonwealth presented no evidence to establish the scope of Wallace's authority to use the ATM or her knowledge that she exceeded such authority. As a bank customer, she had authority to use the ATM to deposit checks and withdraw cash. By depositing a forged check, she used the ATM for an unlawful purpose, but not in an unauthorized manner." The dissent would have affirmed Wallace's convictions for computer fraud in violation of Code § 18.2-152.3 because BB&T did not authorize Wallace to use its ATM to obtain money by false pretenses or to utter a forged check,

Reedy v. Commonwealth, 884 Va.App. 264 (2023). Trial court did not err in finding appellant's constitutional right to a speedy trial was not violated; any presumptive prejudice as a result of the Commonwealth's negligence in arresting appellant was overcome by the specific facts in this case and appellant failed to establish actual prejudice.

Nottingham v. Commonwealth, 884 Va.App. 254 (2023). After finding that the probationer has committed a "third or subsequent technical violation," "[t]he [trial] court may impose whatever sentence might have been originally imposed." Accordingly, the trial court did not abuse its discretion by revoking the balance of appellant's suspended sentences.

Baskerville v. Commonwealth, 76 Va.App. 673 (2023). "The officers had no reason to believe that appellant had committed a serious, violent offense before they entered his apartment. '[T]he exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense' is involved." [Here, the initial complaint referred to a "disorderly," a verbal altercation and a TV thrown to the floor]. We therefore hold that the warrantless entry by police into appellant's home violated the Fourth Amendment. Under the circumstances, a reasonably well-trained officer would have known that warrantless entry into appellant's apartment was illegal and unnecessary. "The police misconduct here is flagrant and thus triggers the exclusionary rule."

Osman v. Commonwealth, 76 Va.App. 613 (2023). "A plain reading of Code § 18.2-47 leads to a single interpretation: a parent who abducts their child in violation of Code § 18.2-47 may be punished for a Class 5 felony under subsection (C) only if such abduction cannot be punished as contempt of court in any other pending proceeding. Thus, where a parent's abduction of the child is "punishable as contempt of court in any proceeding then pending," the parent can only be punished under subsection (D) for either a Class 1 misdemeanor or Class 6 felony depending on whether the parent removed the child from Virginia. …. Thus, the trial court erred in denying appellant's motion to strike the charge of felony abduction."

Rock v. Commonwealth, 76 Va.App. 419 (2023). "Code § 19.2-262.01's provision allowing the parties to inform jurors of the 'potential range of punishment' applies only when a defendant 'is tried by a jury and has requested that the jury ascertain punishment' under Code § 19.2-295."

Harvey v. Commonwealth, 76 Va.App. 436 (2023). Only after the jury retired to deliberate, after defense counsel stated the basis for her objection for the record, and after the court declared a recess, did she ask the court to return to the bench so that she could make a motion for a mistrial on the same grounds on which she objected. As a result, the request for relief came too late. We hold that the appellant failed to preserve the trial court's denial of his objection because he did not make a timely mistrial motion or ask for a cautionary instruction. [Only after the jury retired to deliberate did counsel make a motion for a mistrial].

The court also held that the challenged search warrant satisfied the constitutional particularity requirement because it listed the specific crimes about which the evidence was sought and the specific places on the appellant's cell phone where the officers were authorized to look for that evidence. Despite more than 21 months passing from when the phone was seized until the prosecution obtained the search warrant the total period of delay was not unreasonable under the Fourth Amendment.

Delaune v. Commowealth, 76 Va.App. 372 (2023). Failure to remain "drug free" is a "technical violation" of probation, and the trial court erred by concluding otherwise. By statute, the trial court was required to group together violation's for using controlled substances with violations for

absconding from probation. Code § 19.2-306.1(A) Because the violation for absconding from probation is automatically treated as a "second technical violation," the maximum sentence the court could impose was 14 days of active incarceration. Reversed because the court imposed a sentence in excess of this statutory limit..

Yanov v. Commonwealth, 76 Va.App. 347 (2023). "Well-settled precedent from both this Court and the Supreme Court have given approval to the use of prior convictions as predicate offenses even though execution of the sentence (or judgment) was suspended or the conviction was pending on appeal. Consequently, the trial court did not err in this case in finding that the second DUI conviction was a final judgment that could be used as a predicate conviction, even though execution of the sentence had been suspended for ninety days and the conviction was pending on appeal at the time of appellant's trial on his third DUI offense. Therefore, for these reasons, we affirm appellant's conviction."

Criminal Law News

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