Volume 53, Number 1
November 2023

Criminal Law News

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

Chair's Column

George Neskis, Esquire

It is my great honor to serve as the Chair of the Criminal Law Section of the Virginia State Bar. Traditionally our chairs wait till their January newsletter to remind our members of our Section's seminars, which are held in Charlottesville and Williamsburg, the first and second Friday in February, respectively, and which are considered two of the premier criminal law seminars held in the Commonwealth.. I felt it important to promote them now and highlight why I believe attending these seminars in person is so important. I attended my first seminar in 1985 in Williamsburg, where I have attended every year since. As a young Assistant Commonwealth Attorney in Norfolk. I was able to catch up with my classmates and our law school's resident wit, Bruce Blanchard,, who made every experience in law school fun, if not downright hilarious. Back then there would be over 700 attendees and there was even an overflow room.. Several Commonwealth Attorneys' offices would send as many of their prosecutors to this seminar as possible. Unfortunately, the overall attendance at live seminars across all sections of the Bar has declined, especially since Covid and the prevalence of online and streaming seminars.. I say unfortunately because I believe that attending our seminars in person provides much more than the updates and training for which our Section's seminars have been so well known.. The nuts and bolts learning opportunity is secondary to the greatest benefit of attending our seminars in person.. It is the opportunity to see old friends and make new acquaintances, and the collegiality and comradery experienced, that I believe make up the heart of our Section's seminars.

I had the privilege of serving as the moderator at last year's seminars in both locations. There in attendance was my dear friend, Bruce, now a successful partner in a large Northern Virginia law firm and a brilliant lawyer. In between introducing the amazing and impressive presenters that we were fortunate to have, I received several jabbing texts from Bruce that left me chuckling out loud. While we were close in law school, I think Bruce would agree that our common experiences of practicing criminal law and seeing each other year after year at these seminars have brought us and our families closer together. Over the years we have referred each other many clients,and every January we would call each other to make sure we would see each other in February.

(continued on next page)

REGISTRATION OPEN

See page 6 for details

The 54th Annual Criminal Law Seminar

Friday, February 2, 2024 Charlottesville DoubleTree Hotel

Friday, February 9, 2024 Williamsburg DoubleTree Hotel

New Board Members

Aaron L. Cook founded Cook Attorneys, a Harrisonburg-based criminal defense firm, when he left the Rockingham/Harrisonburg Commonwealth's Attorney's office in 2000. A 1994 graduate of the University of Virginia School of Law, Aaron tries cases primarily in the 26th Judicial Circuit and in the Western District of Virginia. Aaron is currently Vice President of the Virginia Association of Criminal Defense Lawyers and serves as a member of the Indigent Defense Commission. He was recently awarded the Change Agent of the Year Award by the Gemeinschaft Home for his contributions to the local restorative justice community in Harrisonburg.

James C. Turk, Jr. has served the Radford area since 1985, when he received admission to the Virginia Bar; U.S. Court of Appeals, Fourth Circuit; U.S. Supreme Court; and the U.S. District Court, Eastern and Western Districts of Virginia. A Radford native, Turk received a B.A. from Roanoke College in 1979, and a J.D. from Samford University's Cumberland School of Law in 1984.

Chairs Column *(continued from page 1)*

Last year, my son and I ran into Bruce and his family at the ACC Tournament in Raleigh. Bruce and his wife, Ann, had just had their first grandchild. I consider him a great friend and colleague and look forward to his texts at the next seminar.

Live attendance at our seminars provides another valuable experience not duplicated elsewhere. It is one of the few places where prosecutors and defense attorneys can come together outside the hallways of the courtroom and shore up friendships, exchange ideas and lightly pester each other in a friendly forum. I can't help but think that there are some cases that have been resolved as a result of the collegiality promoted at these seminars. Most attorney's leave with a better appreciation of the value and responsibilities of practicing criminal law. Judge Shadrick recently reminded me that criminal attorneys are the closest thing to doctor's dealing with life and death issues. The decisions we make,, the consequences that we have to live with, are unique to our type of practice. I leave our Section's seminars reinvigorated, less frustrated, and more ready to deal with the pressures and problems of practicing criminal law. So while somewhat early, I urge our members to mark their calendars for our upcoming Section's seminars (Charlottesville on February 2nd and Williamsburg on February 9th). I also encourage Commonwealth Attorneys and Public Defenders across the Commonwealth to find the resources to send and/or encourage their attorneys to attend one of the seminars that we offer. The Criminal Law Section of the Virginia State Bar is the second oldest and second largest section of the State Bar, and one of its finest traditions has been getting together, sharing ideas, making new friends and catching up with people like my dear friend Bruce. ✧

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Howell, 71 F.4th 195 (4th Cir. 2023). "We conclude that the Chesapeake law enforcement officers had a reasonable suspicion of drug-trafficking activity, justifying stopping the vehicle and that, after stopping, they diligently engaged in what was necessary to allay their suspicion and therefore did not unnecessarily prolong the stop." (the K-9 officer arrived within 5 minutes of the stop and the dog sniff was completed within 10 to 11 minutes).

U.S. v. Robertson, 68 F.4th 855 (4th Cir. 2023). A court may enforce in a later trial a stipulation entered into in an earlier trial. "A stipulation does not continue to bind the parties if they expressly limited it to the first proceeding or if the parties intended the stipulation to apply only at the first trial." But where the stipulation was "an open-ended concession of liability without limitation to the ensuing trial," there is no reason to relieve a party from an earlier-made stipulation in a later proceeding.

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Tomlin v. Commonwealth, 888 S.E.2d 748 (2023). Upheld conviction of abuse or neglect of an incapacitated adult causing serious injury in violation of Code § 18.2-369(B). "Neither the rule of ejusdem generis [of the same class or nature] nor the maxim noscitur a sociis [it is known by its associates] supports an interpretation of Code § 18.2-369(C) that categorically excludes bedsores (no matter how serious) from the list of injuries covered by the statute …The expression 'serious bodily injury' is not a term of art borrowed from the lexicon of medical terms. When a statute uses the term 'serious' but does not define it, both we and the Court of Appeals employ these common-sense meanings."

Walker v. Commonwealth, 887 S.E.2d 544 (2023). "The Due Process Clause does not require a court to pre-screen an eyewitness identification made for the first time in court."

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Cheripka v, Commonwealth, ___ S.E.2d ___ (2023). "Where, as here, a defendant is prosecuted for incest against two daughters of similar age living in the same household. When the two daughters provide substantially similar testimony that describes the defendant's same pattern of abuse, each daughter's testimony has significant probative value of demonstrating the defendant's incestuous disposition toward his daughters and that his offenses against both were inspired by one purpose."

Bista v. Commonwealth, ___ S.E.2d ___, (2023). (en banc). Code § 19.2-268.3 provides a hearsay exception for out-of-court statements of child victims of specified crimes. A child's incompetence to testify does not categorically bar the admissibility of the child's out-of- court statements because a child's competence to testify is a distinct issue from the admissibility of the child's out-of-court statements under Code § 19.2-268.3. Admissibility of a child's out-of-court statement, however, hinges on the statement's inherent trustworthiness largely determined by six nonexclusive factors: a. The child's personal knowledge of the event; b. The age, maturity, and mental state of the child; c. The credibility of the person testifying about the statement; d. Any apparent motive the child may have to falsify or distort the event, including bias or coercion; e. Whether the child was suffering pain or distress when making the statement; and f. Whether extrinsic evidence exists to show the defendant's opportunity to commit the act. The court also held

that the admission of the child's forensic interview video did not violate defendant's Confrontation Clause right. However, seven judges dissented on the confrontation holding.

Smith v. Commonwealth, ___ S.E.2d ___ (2023). "No error in the trial court's decision to permit the Commonwealth's expert to testify about the effects of alcohol on the body to corroborate that what the troopers observed was, in fact, the behavior of an intoxicated driver."

Taylor v. Commonwealth, 890 S.E.2d 634 (2023). "Code § 18.2-287.4 required proof beyond a reasonable doubt that Taylor's pistol was "center-fire." Because the Commonwealth failed to prove that element, the trial court erred in denying Taylor's motion to strike the Commonwealth's evidence. We therefore vacate his conviction and dismiss the charge."

Miles v. Commonwealth, 889 S.E.2d 663 (2023). Case of first impression. "Given the legislature's intent to protect all people inside any building against physical harm, we hold that the term 'occupied' in Code § 18.2-279 [discharging a weapon in an occupied building] refers to the physical presence of any individual in the building when a firearm is discharged." The court rejected the argument that the statute applies only to someone who lives in the building.

Hackett, v. Commonwealth, 889 S.E.2d 672 (2023). Judgment reversed as Code §18.2-460(E) [fleeing-from-arrest] was not applicable where the officer got no closer than 20 yards from the appellant and therefore did not have the "immediate physical ability" to arrest appellant before he fled. The court noted that "Virginia appears to be the only State in the country that includes as an element of its fleeing-from-arrest law that the defendant must be within the officer's 'immediate physical ability to place the person under arrest.'"

Parady v. Commonwealth, 888 S.E.2d 771 (2023). "The Commonwealth bears the burden of proving that a warrantless search fits under an exception to the warrant requirement of the Fourth Amendment. While the exceptions are many, mere probable cause to arrest is not one of them. Nor can a search be incident to an arrest when the arrest comes two months after the search. As such, we must reverse" the trial court's denial of the suppression motion.

Swezey v. Commonwealth, 887 S.E.2d 795 (2023). "Our jurisprudence reflects that when a court determines whether the detention at issue is an intrinsic element of another crime, the Lawlor test [285 Va. at 225] is mandatory and consideration of the Hoyt factors [44 Va. App. 489] is permissive. Under Lawlor, we must determine 'whether any detention exceeded the minimum necessary to complete the required elements of the other offense.' But because Lawlor did not overrule Hoyt, the Hoyt factors may be considered when helpful." Those factors are: (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

Abouemara v. Commonwealth, 887 S.E.2d 751 (Va. Ct. App. 2023). The crime of bribery is complete when a defendant "offers…any pecuniary benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant." The defendant offered to the town council that he would pay $500 a month to the town if the council would write a letter supporting placing gaming machines in his convenience store. "Taken in the light most favorable to the Commonwealth, the evidence sufficed to show that Abouemara violated subsection (1)(a) of the statute because he 'offer[ed] …to confer upon another…any pecuniary benefit as consideration for or to obtain or influence the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant.'" Code § 18.2-447(1)(a).

King v. Commonwealth, 887 S.E.2d 766 (2023). Trial court did not err in finding appellant's due process rights were not violated when he assumed a Pennsylvania probation officer's advice about gun possession in Pennsylvania would apply to gun possession in Virginia; The trial court correctly refused to take judicial notice of a Pennsylvania statute because the "statute is not controlling in Virginia, making it both irrelevant and unnecessary

to the trial court. King's conduct in Virginia is governed by the Virginia Code."

Orndoff v. Commonwealth, 887 S.E.2d 774 (2023). "The power of summary contempt was unavailable to the circuit court because some of the essential elements of the alleged contemptible conduct of testifying while intoxicated did not occur in the presence of the circuit court and were not personally observed by the judge. The circuit court's impermissible exercise of the summary contempt power violated Ms. Orndoff's due process rights to notice of the contempt charge, a fair plenary hearing, and representation by counsel."

Maust v. Commonwealth, 887 S.E.2d 192 (2023). "The trial court, sitting as fact finder, determines which reasonable inferences should be drawn from the evidence, and whether to reject as unreasonable the hypotheses of innocence advanced by a defendant. Appellant has failed to show that the trial court's rejection of her alternative hypotheses of innocence was plainly wrong." The dissent maintained that "the totality of the evidence does not form an unbroken chain of circumstances necessary for a rational fact-finder to find beyond a reasonable doubt that defendant—and not someone else— distributed the oxymorphone pills recovered from the informant."

Hargrove v. Commonwealth, 886 S.E.2d 322 (2023). Rejected the argument that the admission of a co-defendant's confessions violated appellant's Sixth Amendment confrontation rights under Bruton v. United States, 391 U.S. 123 (1968) (at a joint trial, the admission into evidence of a non-testifying co-defendant's out-of-court confession violates the Confrontation Clause if the confession incriminates the other defendant). "However, Crawford limited the scope of the Confrontation Clause to testimonial statements, and it therefore follows that Crawford limited Bruton's protections to those statements that implicate the Confrontation Clause— testimonial statements. Therefore, we hold that Bruton does not apply to nontestimonial statements such as the statement of a co-defendant made unknowingly to a government agent."

Morris v. Commonwealth, 886 S.E.2d 722 (2023). Code § 18.2-251.03(B)(1) requires an individual experiencing an overdose to remain at the location where the 'life-threatening condition' began, or at the location to which he has been transported by another. The overdose reporting statute is designed to save lives and to encourage individuals experiencing an overdose, and those around them, to seek medical attention without fear. An interpretation that would permit individuals actively under the influence of controlled substances or alcohol to operate a motor vehicle could endanger lives." The statute did not apply to defendant who smoked crack cocaine in a car and drove around for a "little bit" before heading to the emergency room.

FIFTY-FOURTH ANNUAL

CRIMINAL LAW SEMINAR

Recent Developments and Criminal Law Update

•

Demystifying Federal Practice

•

Artificial Intelligence and New Legal Questions

•

Mechanics, Themes, and Theories of a Case – Voir Dire, Opening, Closing

•

Vicarious Trauma/Wellness

FRIDAY, FEBRUARY 2, 2024 ~ Charlottesville
DoubleTree by Hilton • Live and Webcast/Telephone
Register to attend in Charlottesville at bit.ly/4673N3C

FRIDAY, FEBRUARY 9, 2024 ~ Williamsburg
DoubleTree by Hilton
Register to attend in Williamsburg at bit.ly/3ubmZQC

8:15 a.m. – 4:30 p.m.

6.0 CLE hours *pending*
(including 1.0 ethics/1.0 wellness credit)

VIRGINIA CLE® AND VIRGINIA STATE BAR

Criminal Law News

Virginia State Bar
1111 East Main Street, Suite 700
Richmond, Virginia 23219-0026