

Criminal Law News

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



The Criminal Law section is co-sponsoring the session -

“I Have to Produce What?!”

The Ins and Outs of eDiscovery in Civil and Criminal Cases

Our chair, Hon. Joseph D. Platania, Commonwealth’s Attorney, City of Charlottesville, will be a panelist joining: Hon. James P. Fisher, Judge, 20th Judicial Circuit, John Cycon, Partner, Holtzman Vogel, Ian Wilson, Founder & Chief Executive Officer, Servient, Jonathan P. Lienhard, Holtzman Vogel, Moderator.

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Chair's Column

Joseph Daniel Platania



An Alternative Approach?

We are all used to the adversarial system as a means by which to resolve allegations of criminal conduct. Often times, this process leaves victims feeling unfulfilled and empty and defendant's leaving court asking "so what just happened?" Is there an alternative approach? Perhaps. Restorative Justice, when utilized in the appropriate case, attempts to promote safety and stability through healing and repair. What is Restorative Justice? It is a process that facilitates giving those impacted by harm a voice to address their needs and those responsible for harm an opportunity to take accountability. Restorative Justice practitioner Fania Davis describes it as "a justice that seeks not to punish, but to heal. A justice that is not about getting even, but getting well. A justice that seeks to transform broken lives, relationships, and communities rather than damage them further." Charlottesville and

Albemarle County are fortunate to have such a program: Central Virginia Community Justice (communityjusticeva.org.) A recent prosecution involved the assault of a law enforcement officer. Traditionally, these cases are simple prosecutions resulting in a felony conviction and at least a mandatory minimum six-month jail sentence. The officer, who was shoved and not seriously injured, wanted a face-to-face apology more than jail and a felony conviction. The responsible individual (who had a minimal criminal history and was intoxicated at the time) was more than happy to attend a facilitated conference where he heard what he had put the officer through and made a heartfelt (and sober) apology. While Restorative Justice is not the answer in every case, it does offer an alternative approach that oftentimes leaves both the harmed and responsible parties more satisfied than traditional criminal prosecution.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Parham, F.4th (2/26). The Virginia Supreme Court found that Virginia robbery can be committed by threatening to accuse the victim of engaging in sodomy, it “does not require as an element the actual, attempted, or threatened use of physical force.” Thus, it is not a crime of violence under federal law [§ 4B1.2(a)(1)].

U.S. v Mayberry, F.4th (1/7). A district court’s determination that a defendant “abandoned his privacy interest” in certain property is “a finding of fact.” This is true even though a well-supported factual finding of abandonment necessarily answers the ultimate legal question whether a defendant retains a reasonable expectation of privacy in the property at issue. Because a finding of abandonment is factual in nature, we will only reverse a district court’s finding in this regard if it was “against the clear weight of the evidence considered as a whole.”

U.S. v. Garrett, F.4th (2/19). This case presents a rare and extraordinary situation where the prosecution’s actions during the pre-plea process evince a lack of candor that deprived Garrett of due process. To be valid, a plea must be made “with sufficient awareness of the relevant circumstances and likely consequences.” The gross misconduct that began with the police poisoned the investigation process which led to the discovery of evidence against Garrett and his ultimate arrest. Later, the issues intensified with the prosecution’s repeated misrepresentations which prevented Garrett, his counsel, and the district court from understanding the true facts of the case. Thus, we hold that the totality of circumstances reveal extraordinary circumstances that amount to misconduct at both the police and prosecutorial levels that impeded Garrett’s ability to voluntarily plead guilty to the charges levied against him.

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Canales v. Commonwealth, Va (4/10). “Code § 19.2-306.1 does not require a court to address all of the probation violations that are set forth in a major violation report in the same revocation hearing. Furthermore, we conclude that the circuit court permissibly determined that the probation violations at issue were not part of a “single course of conduct” under Code § 19.2-306.1.” A “single course of conduct” under Code § 19.2-306.1 refers to an uninterrupted and unbroken series of actions. The actions underlying a “single course of conduct” are necessarily connected by time, place, and other circumstances.

Poulson v. Commonwealth, Va (4/10). A voluntary encounter, not a seizure, occurred when Poulson initiated the encounter when he emerged from his house and engaged the officers in conversation. The overall discussion between Poulson and police was cordial rather than peremptory. Poulson was not handcuffed. When Poulson asked to go inside to put on some clothes, The police agreed and did not follow him inside. Finally, the questioning lasted about four minutes. Although the encounter occurred on the curtilage, when the officers are lawfully present in the home or on the curtilage, and the arrest is otherwise proper, they may proceed to effect an arrest without the additional step of obtaining an arrest warrant.

Kuang-Ming Welsh v. Commonwealth, Va. (3/20). At issue in this case is whether an expert “opines on the credibility of another witness” when that expert criticizes the methodology utilized by, and hence, the conclusions drawn by, another expert. When the witnesses involved are both experts, such a reading of the cases and of Rule 2:702 allows for the proverbial “battle of the experts” with the factfinder ultimately responsible for determining which of the conflicting expert opinions to believe. The fact that



each expert criticized the other's methodology for the purpose of causing the factfinder to disbelieve that expert's opinion did not run afoul of the rule prohibiting an expert from opining on the credibility of another witness or otherwise render the opinions inadmissible. As a result, the trial court erred in concluding that Tobin's proffered testimony was prohibited by Rule 2:70. There is also a lengthy discussion of the harmless error standard.

Watkins v Commonwealth, Va. (1/28). To successfully assert a duress defense under our case law, someone who is not legally allowed to possess a firearm must rid himself of it as soon as any imminent threat of danger has passed.



VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Jordan v. Commonwealth, Va.App (4/15). Victim's descriptions of defendant's physical abuse, threats on her life, and her desire to leave him reflected her belief that Jordan would harm her and she feared him. Her state of mind was, in turn, relevant to establish defendant's state of mind. Thus evidence of defendant's prior physical abuse toward her was relevant to establish the parties' relationship and was probative of the element of malice.

Claramunt v. Commonwealth, Va.App (4/7). Defendant could not be guilty of violating an emergency protective order because the emergency protective order was not enforceable once a subsequent preliminary protective order took effect. The purpose of an emergency protective order under Code § 16.1-253.4 is to protect the health or safety of a person whom a judge or magistrate finds is in "probable danger" of being harmed by a family member. The protected person has 72 hours to obtain a preliminary protective order, but once a preliminary protective order is issued or becomes effective, the emergency protective order ceases to have legal effect. "As correctly understood, emergency protective orders are intended to be

effective until the order statutorily expires or until the court, after a hearing, issues a preliminary protective order."

Curry v Commonwealth, Va.App. (4/1). Reversed conviction when the trial court abused its discretion by admitting into evidence the inculpatory portions of defendant's statement but excluding the exculpatory parts. Unlike Rule 2:106, the common-law version of the rule of completeness applies to oral statements as well as written and recorded statements. This common-law doctrine constitutes an exception to the rule against hearsay even though the Rules of Evidence do not specifically delineate it as an exception. As the concurring opinion phrased it: "The rule of completeness in Virginia, at least as applied to oral statements, trumps a hearsay objection to the exculpatory portions of the defendant's statement."

Flowers v Commonwealth, Va.App (3/18) The video from their high school shows an argument between the two that quickly escalated to a brief physical altercation until they were separated. As a result, we hold that the evidence of their prior scuffle was relevant to prove present motive and intent. Although the school altercation occurred about two years before the shootings, the trial court acted within its discretion in determining that the evidence was not "so remote that it lack[ed] probative value."

Ferguson v Commonwealth, Va.App (3/11). The evidence was sufficient to prove that defendant voluntarily assumed responsibility for a person whose drug overdose rendered her a vulnerable adult under Code § 18.2-369. His failure to assist, and his active interference with those trying to help constituted neglect under the statute. Further, because the broad language of Code § 18.2-164(A)(4) does not require physical interference, defendant's interference with others - "You're not to get near her Don't call 911" supported his conviction for attempted interference with a 9-1-1 call.

Myers v. Commonwealth, Va.App (3/4). A third party who consents to a search must have either "actual or apparent authority over the object of the search" for the search to be constitutional. Here the purse was "located in a place open to all occupants" when it was found on the floorboard of

the car. But Myers's purse bore a clear "indic[ation] of ownership." The driver was male, and the item was a woman's purse. Moreover, the purse was located on the back seat floorboard, close to the female passenger, and not the male driver, who did not claim ownership of the purse, further suggesting that the purse belonged to Myers and not the driver. Thus, we conclude that it was not objectively reasonable for police to assume the driver's consent encompassed Myers's purse.

Fayne v. Commonwealth, Va.App (3/4). When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights. . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Here, the police continued their interrogation in disregard of an explicit request for counsel. To repeat, "[w]hen police do not cease interrogation, their statements constitute an 'initiation' of further discussions with a suspect, and any incriminating statements gained during that discussion are deemed inadmissible."

Williams v. Commonwealth, Va.App (3 4). Here, the trial court found that the jury mistakenly returned a verdict form that contained two guilty verdicts, seemingly not realizing that option two on the form was a lesser-included offense of option one and that only one offense could be selected. Before the jury had been discharged or had left the presence of the court, the court acknowledged the jury's mistake in selecting both offenses, and the court followed the course of action proposed by Williams—that the court instruct the jury to pick only one offense or find him not guilty. The jury here heeded the court's curative instructions on two separate occasions and remedied its errors, presenting no evidence that it "ceased to function as a jury." Because the jurors were capable of, and willing to, follow the court's instructions, there is no evidence that the trial court


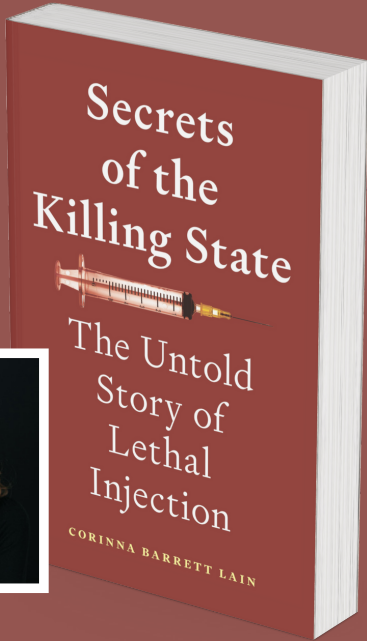
abused its discretion in denying a mistrial. For these reasons, the trial court did not err.

Johnson v Commonwealth, Va.App (1/7). Contrary to Johnson's argument, the Commonwealth need not concur "on" the record, but enter its concurrence "of" record. The distinction is meaningful. "On the record," colloquially, refers to oral representations before the circuit court, often memorialized in a transcript. On the other hand, for something to be "of record" is for it to be in the "official report of the proceedings in a case, including filed papers, a verbatim transcript of the trial or hearing (if any) and tangible exhibits." Thus for something to be "of" record, it should be part of the case file. This is like saying that something is "in" the record. Here, the jury call-off form dated December 1, 2021, removed the December 7, 2021 jury trial from the court's docket and rescheduled it for a December 9, 2021 bench trial. The form was signed by the prosecutor assigned to the case, filed in the clerk's office, later included in the record of proceedings for Johnson's case, and served upon counsel of record. The jury call-off form was therefore "in" the, or "of" record. Additionally, the jury call-off form, together with the absence of any formal objection by the Commonwealth to a bench trial, sufficiently established the Commonwealth's concurrence in the waiver of a jury. "


Harris v. Commonwealth Va.App (2/18). Trial court erred finding evidence sufficient to establish two convictions for obscene sexual display with proof of only one act of masturbation. Code § 18.2 387.1 requires proof of multiple acts to support multiple convictions.

Stamps v. Commonwealth, Va.App (2/18). Trial court did not err denying motion to suppress controlled substance as fruit of an unlawful inventory search. It was objectively reasonable to impound and tow the car as appellant was not licensed, the car was unregistered, and the car posed a traffic hazard. "Absent a showing of pretext, an inventory search is not invalid simply because the officer failed to strictly follow the inventory-search procedures."

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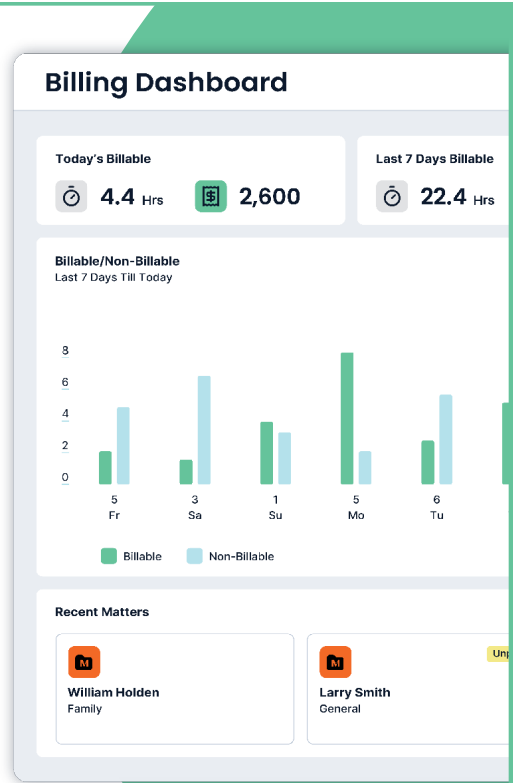
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