Criminal Law News

Volume 48, Number 1
October 2018

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

Criminal Law Section Board Elected to Lead Section in 2018-2019

Left to Right: Dan Vinson, Michael Doucette, Gene Fishel, Ron Bacigal, David Lett, Maria Jankowski, Richard Doummar, Theresa Royall, Judge Gordon Vincent, Joseph Platania, Jim Plowman, and (*not pictured*) **Chair**; Nancy G. Parr.

Save the date!

The **49th Annual Criminal Law Seminars** are February 1, 2019 in Charlottesville and February 8, 2019 in Williamsburg

Details at http://www.vsb.org/site/sections/criminal/annual-seminar

New Board Members

Hon. Gordon S. Vincent is Chief Judge of the General District Court for District 2-A, which includes Accomack and Northampton Counties on the Eastern Shore. He was elected to the bench in 2006. Judge Vincent received a Bachelor of Arts, with high distinction, in Government and Economics in 1979, and a law degree in 1983, from the University of Virginia. As a law student, he was a Notes Editor of the Virginia Tax Review. Early in his career he practiced in a large law firm in Columbia, South Carolina. In 1989, he returned to his native Eastern Shore and opened his own office. After several years as a solo practitioner, he joined with two other lawyers as a partner in Vincent, Northam & Lewis, a general practice law firm in Accomac. He has served on the boards of various civic, religious and non-profit organizations, including a term as President of the Eastern Shore Bar Association, and as Chairman of the Board of Broadwater Academy. As a judge, he has served on the Education Committee and the Executive Committee of the Judicial Conference of Virginia for District Court Judges. He is also a member of the Board of the Association of District Court Judges and the James Kent American Inn of Court. He and his wife Carol have an adult son and daughter who live in the DC area.

Hon. Tasha D. Scott was appointed in 2015 to serve as a judge in the Norfolk General District Court. She received her undergraduate degree from the College of William and Mary and her law degree from the George Washington University Law School. Prior to the bench she served as an Assistant City Attorney for the City of Norfolk where her primary areas of practice were criminal prosecution and civil litigation. She is a member of the Virginia State Bar Harry L. Carrico Professionalism Course Faculty, and currently serves on the Virginia Association of District Court Judges. She and her husband are the proud parents of two daughters.

Hon. Joe Platania was elected Charlottesville Commonwealth's Attorney in 2017 after serving in the office since 2003. He was also a cross-designated special assistant U.S. attorney for the Western District of Virginia from 2008-17. Prior to becoming a prosecutor, Platania was an assistant public defender at the Charlottesville-Albemarle Public Defenders Office from 1999-2003. From 1998-99 he was an appellate attorney at the Virginia Capital Representation Resource Center, where he represented Virginia inmates who had been convicted of capital murder and sentenced to death. He currently is the Board President of the Charlottesville Albemarle Drug Treatment Court and is also a member of the 7th District Disciplinary Committee of the Virginia State Bar. He graduated from Washington and Lee University School of Law in 1998 and Providence College in 1994.

Hon. Theresa J. (Terry) Royall A native of Crewe, Terry Royall serves the residents of Nottoway County as Commonwealth's Attorney. Terry earned her BS from Longwood University in 1986 and taught high school chemistry, physics, and biology before changing careers to attend the University of Richmond T.C. Williams School of Law, where she completed her JD in 2003. She worked as an Assistant Commonwealth's Attorney in Chesapeake and Chesterfield, then practiced criminal defense, before returning to Nottoway in 2012 to run for Commonwealth's Attorney. In addition to the Criminal Law Section Board of Governors, Terry was recently appointed to the VSB Third District Disciplinary Committee. As a member of the Virginia Association of Commonwealth's Attorneys, she serves on the Board of Directors and is a member of the Legislative and Curriculum Committees. Terry is also a member of the Virginia Criminal Justice Conference.

Chair's Column

Nancy Parr

I missed my first meeting as Chair (and photo op) because I was sitting in the airport in Newark. I would have rather been in Richmond. However, my twenty-two hour trek from Montana back to Virginia reminded me that there are many things we cannot control and that often we forget the important things. The plane left Kalispell an hour and a half late because of damage to the fuselage which resulted in a missed connection and complete re-route. When the plane finally landed in Norfolk, I remembered that the only important thing was that the plane landed safely. I am not complaining. We all need to be reminded about important things and things we can control.

As criminal trial lawyers, we advocate strongly for our respective positions and we enjoy "the fight". However, if we are honest with ourselves, sometimes that advocacy turns ugly and personal and results in uncalled for snide and untrue comments and questionable tactics. We can control ourselves during our advocacy.

It is too easy to categorize and label our colleagues in unflattering, unfair and unfounded ways when we only see each other as opponents and in situations where we "fight about everything". When I started practicing law, attorneys talked more with each other about cases, upcoming trials, their families, their backgrounds and the foundations of their beliefs in non-adversary situations and locations. Yes. That was before social media, texting, emails, twitter, etc. were the "go to" means to communicate. Yes. I suggest that we return to the "old fashioned" way of communicating known as "talking" to each other and really "getting to know each other". Think about the times you have read an email, text, or social media post and become angry because you added a "tone" to the message that was not there.

One of the easiest ways to accomplish this is to get involved in your local bar associations, the Virginia State Bar and your community. No matter where you live or practice, there is a project just waiting for you. The Virginia State Bar relies on volunteers for their committees and boards. Look for the vacancies posted in Virginia Lawyer. The Criminal Law Section Board of Governors is comprised of prosecutors, defense attorneys and judges and we work together to advance the practice of criminal law.

I served on the VSB Discovery Reform Task Force. There were many different views, opinions and positions voiced during those meetings but we were able to get to know each other and appreciate the differing viewpoints. Just because someone did not agree with me did not mean he/she was anything but of a different opinion. Whether you like or dislike the recommendations that were the result of that Task Force, there can be no question that defense attorneys, prosecutors, judges and academicians worked hard and together to issue that report.

A fair and ethical criminal justice system is vital to our society and we all play such an important role in the system. We should never forget this. We should remember why we chose to be prosecutors and defense attorneys. I hope that we all chose our paths because we believe in vigorous and ethical representation for the Commonwealth and those charged with crimes. What we must never forget is that just because we disagree and oppose each other on many issues, we do not have to be enemies. It is difficult to see someone as an enemy when you have taken the time to understand them. ✧

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Collins v. Virginia, 138 S.Ct. 1663 (2018). The Court rejected Virginia's claim that the automobile exception permits the warrantless search of a vehicle anytime, anywhere. The exception does not permit a warrantless entry of curtilage in order to search a vehicle therein.

Currier v. Virginia, 138 S.Ct. 355 (2018). Upheld the Virginia Court of Appeals decision that neither Double Jeopardy nor collateral estoppel apply when charges are severed and two trials occur with the defendant's consent and for his benefit.

Carpenter v. U.S., 138 S.Ct. 2206 (2018). "We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI [cell-site location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment." And thus requires a search warrant based on full probable cause.

Dahda v. U.S., 138 S.Ct. 1491 (2018). A court may authorize interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." A judge for the district of Kansas authorized interception from a listening post within Kansas, but also within Missouri. However, the authorization respecting Missouri was deemed to be mere surplusage and did not negate the validity of the interceptions in Kansas.

Byrd v. U.S., 138 S.Ct. 1518 (2018). The Court rejected two "absolute" rules: (1) that a driver not listed on the rental agreement has no expectation of privacy in the vehicle; and (2) anyone in possession and control of a vehicle has a legitimate expectation of privacy. Instead, the expectation of privacy comes from lawful possession and control and the attendant right to exclude others. Breach of the vehicle rental contract may have civil consequences, but it does not determine the expectation of privacy in the vehicle.

McCoy v. Lousisiana, 138 S.Ct. 1500 (2018). Counsel's admission of a client's guilt over the client's express objection is structural error, for it denies the defendant's right to make a fundamental choice about his own defense. As structural error, a new trial is required without any need to show prejudice, and the error is not subject to harmless-error review.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

US. v. Bell, F.3d (4th Cir. Aug. 28, 2018). A conclusion that the law enforcement officer "should have known that his question to [defendant's wife] was likely to prompt an incriminatory response from [defendant] cannot be reconciled with the record before us …. Nor could such a conclusion be reconciled with the holding of " *Rhode Island v. Innis*. The court also upheld the "well settled principle 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.'"

Porter v. Zook, 898 F.3d 408 (4th Cir. 2018). The district court erred in dismissing, without a hearing, defendant's actual bias claim against a juror. "To withhold information that one's brother was an officer in the adjacent jurisdiction certainly suggests an unwillingness to be forthcoming, and at the very least, discloses the need for an evidentiary hearing."

U.S. v. Kehoe, 895 F.3d 232 (4h Cir 2018). In determining reasonable suspicion, the Court addressed the relevance of highly publicized racial incidents. "We do not condemn the court's outrage over racially motivated violence; indeed, we share it. The desire to ensure that police can investigate and detain suspects to prevent such incidents is admirable. But the mere fact that a person of one race is present among a group that is predominantly of another race does not provide a basis of suspicion of criminal activity. The district court's repeated reference to Kehoe's race during the

suppression hearing was clearly improper." Such remarks before a jury could well have interfered with the jury's ability to be impartial. But the district court made its comments during a suppression hearing with no jury present, thus the references to race did not prejudice defendant, and so do not require reversal.

Malvo v. Mathena. 893 F.3d 265 (4th Cir. 2018). "Even though Malvo's life-without-parole sentences were fully legal when imposed, they must now be vacated because the retroactive constitutional rules for sentencing juveniles adopted subsequent to Malvo's sentencings were not satisfied during his sentencings. Accordingly, we affirm the district court's order vacating Malvo's four terms of life imprisonment without parole and remanding for resentencing to determine (1) whether Malvo qualifies as one of the rare juvenile offenders who may, consistent with the Eight 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."

U.S. v. Burfoot, 899 F.3d 326 (4th Cir. 2018). Juries are presumed to follow the judge's instructions, including the instruction to fully deliberate. "A jury is not required to deliberate for any set length of time. Brief deliberation, by itself, does not show that the jury failed to give full, conscientious or impartial consideration to the evidence… If the evidence is sufficient to support the verdict, the length of time the jury deliberates is immaterial."

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Severance v. Commonwealth, 816 S.E.2d 277 (2018). Defendant "was not punished twice for 'one criminal act,' because killing two victims at two different times in two different places constitutes two different criminal acts…. Two murders, two convictions, two punishments."

Tirado v. Commonwealth, 817 S.E.2d 309 (2018). "Both federal and state courts have concluded that, in a review of a denial of a motion to suppress for alleged violations of the Fifth Amendment, an appellant court considers the record from the suppression hearing as well as the record from the trial." The court also held that "the admissibility of videotape films is governed by the same rules which apply to the admission of photographs or motion pictures."

Curley v. Commonwealth, 816 S.E.2d 587 (Va. 2018). The court pointed to three main factors: defendant's "furtive movements while in his vehicle after the traffic stop, causing the officers to be concerned that defendant might be in possession of a weapon; defendant's overly nervous demeanor; and defendant's possession on his person of a digital scale with suspected cocaine residue, which was consistent with drug distribution. Considering these factors in their totality, through the lens of a trained police officer's view, we hold there was sufficient evidence to establish that the officer had probable cause to search defendant's vehicle as there was a fair probability that contraband or evidence of a crime would be found."

Gerald v. Commonwealth, 295 Va. 469, 813 S.E.2d 722 (2018). A perjury conviction does not require proof of "the precise questions" to which the defendant responded. Evidence was sufficient to establish the context of defendant's statement that she was not driving the vehicle. The court also found proper venue because "crimes committed in the Albemarle County Courthouse are treated as having been committed 'within' either the jurisdiction of the county or the city and therefore, are subject to the 'joint jurisdiction' of the county and city courts."

Lewis v. Commonwealth, 295 Va. 454, 813 S.E.2d 732 (2018) Rejected argument that "a predicate conviction" does not exist until the trial court completes the final phase of adjudication - imposition of sentence. The conviction was complete when the judge stated: "the court finds the defendant guilty." Delay in imposing sentence or entering the written order does not alter the fact that the conviction occurred when the trial judge announced the finding of guilty.

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Lienau v. Commonwealth, Va. App. (Sept. 11, 2018). The victim's "overt act of breaking through the door, defendant's immediate response of loading the rifle he kept for self-defense, followed immediately by his confronting of the intruder constituted 'more than a mere scintilla' of credible evidence that defendant had a 'reasonable apprehension of death or great bodily harm to himself.' …. Where the conflicting evidence tends to sustain either the prosecution's or defense theory of the case, the trial judge must instruct the jury as to both theories. Accordingly, the trial court erred by refusing the requested self-defense instruction to guide the jury in its deliberations." The dissent maintained that after the initial break-in there was no "immediate danger" at the time defendant accidentally discharged his weapon.

Schmuhl v. Commonwealth, Va. App. (Sept. 11, 2018). "Involuntary intoxication can be another means to prove insanity if the defendant can satisfy the *McNaghten* rule. In other words, involuntary intoxication only negates *mens rea* if the accused can show that he met the legal standard for insanity – that he did not understand the nature, character, and consequences of his act or that he was unable to distinguish right from wrong – at the time he committed the offense. The accused may not put forth expert evidence of his mental state as to his specific intent, pursuant to an involuntary intoxication defense, unless the evidence shows that he passed the legal threshold of insanity due to his involuntary intoxication."

Campbell v. Commonwealth, 817 S.E.2d 663 (2018). Defendant's request to sever the charges and have two separate trials "dispels any specter of double jeopardy abuse that holding two trials might otherwise present." The double jeopardy clause "which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." The concurring opinion criticizes *Campbell I*, 294 Va. 486, for upholding a search that violated Code 19.2-54's requirement that the affidavit for a search warrant must be filed within 30 days of issuance.

Chavez v. Commonwealth, 69 Va.App.149, 817 S.E.2d 330 (2018). Timely notice of the time and place to appear "is an ancillary consideration in proving an element [willfulness] of felony failure to appear, and not an element of that offense in its own right." Thus the trial court properly refused to give an instruction that included notice as a element of the offense.

Melick v. Commonwealth, 69 Va. App. 122, 816 S.E.2d 599 (2018). The Court reviewed the requirements for the business records exception to hearsay, and noted: "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."

Mooney v. Commonwealth, 69 Va.App. 199, 817 S.E.2d 354 (2018). The newspaper article admitted into evidence "was not testimonial hearsay because it was not prepared for the primary purpose of investigating or prosecuting a crime, and because the victim, whose trial testimony had been quoted, was subject to cross-examination at the underlying trial."

Baldwin v. Commonwealth, 69 Va.App. 75, 815 S.E.2d 809 (2018). Not only are prior convictions admissible during sentencing, but so too are the details of the prior convictions in order to "ensure the victim has the opportunity to convey to the court the full impact of the crime." Such details also provide "vital information for the trial court's determination of a proper sentence."

Cabral v. Commonwealth, 69 Va.App. 67, 815 S.E.2d 805 (2018). "Dangerous weapon" and "deadly weapon" are not synonymous. "Accordingly, the Commonwealth did not have the burden of proving that the Taser qualified as a 'deadly weapon,' just that the Taser was a 'dangerous weapon' for purposes of Code 18.2-673." [aggravated sexual battery].

Green v. Commonwealth, 69 Va.App. 99, 815 S.E.2d 821 (2018). The "suspension period began from the moment of its pronouncement…. Code 19.2-306 contains no provision that would toll *the period of suspension* while defendant was incarcerated for unrelated offenses that occurred prior to the commencement of the period of suspension."

Thomason v. Commonwealth, 69 Va.App. 89, 815 S.E.2d 816 (2018). "A knowing, voluntary, and intelligently entered into pleas agreement involves concessions and negotiations by both parties, and the resulting contract binds both parties." The Commonwealth had reduced and *nole prosequied* charges in reliance on defendant's guilty plea, and could no longer locate two witnesses. Accordingly, the trial court correctly refused to allow defendant to withdraw his guilty plea.

Davis v. Commonwealth, 68 Va.App. 725, 813 S.E.2d 547 (2018). "Convicting an individual who has reasonably relied on the advice of a state actor is so fundamentally unfair as to raise due process concerns." The defendant admitted that he possessed a firearm while subject to a protective order, but he relied on assurances from the JDR judge that the protective order had been dismissed. The trial court erred in concluding that the JDR judge was not a "government official" within the meaning of the due process defense.

Moore v. Commonwealth, 69 Va. App. 30, 813 S.E.2d 916 (2018). Exigent circumstances were present when the lone officer on the scene saw a firearm in plain view on the floorboard of the vehicle from which defendant had just fled, leaving the door open. At that time, defendant was still at large and possibly could have returned to his vehicle to arm himself. In addition, a crowd had already gathered around the vehicle. "Therefore, taking control of the uncovered and loaded firearm was necessary for officer safety as well as for the safety of the gathered crowd."

Brown v. Commonwealth, 68 Va. App 746, 813 S.E.2d 557 (2018). In a question of first impression the court refused to extend procedures for obtaining information used to select petit jurors to the selection of grand juries.

Ellis v. Commonwealth, 68 Va. App. 706, 813 S.E.2d 16 (2018) "The trial court abused its discretion by ordering restitution for damages or loss caused by offenses for which defendant was not convicted." Defendant was convicted of receiving stolen goods – a $450 TV. The trial court had erroneously ordered defendant to pay $1,500 restitution for all items stolen from the victim's house.

Camp v. Commonwealth, 68 Va. App. 694, 813 S.E.2d 10 (2018). Conviction of felony child neglect requires that injury to the child is likely to result from the act or omission of the defendant. "Although a level of intoxication at or near the legal limit, in and of itself, nay be insufficient to allow a factfinder to conclude that injury is probable, the same is not true at higher levels of intoxication…. Driving with a BAC far above the legal standard for driving while intoxicated can be sufficient to allow a rational factfinder to conclude that the risk of injury is probable."

Bush v. Commonwealth, 68 Va. App 797, 813 S.E.2d 582 (2018). In granting a petition for a Writ of Actual Innocence the Court acknowledged that prior cases have often found that a petitioner cannot establish by clear and convincing evidence that "recantation evidence" is true. "However, the instant case involves not recantation evidence, but the unique situation of an unprompted confession by another person. We find that the nature of this evidence itself – another person's confession to the crimes – supports the finding that this evidence is 'true,' and thus material."

McGuire v. Commonwealth, 68 Va. App 736, 813 S.E.2d 552 (2018). "In cases where a false report is given across jurisdictions, venue is appropriate in both the jurisdiction where the report is made and the jurisdiction where the report is received pursuant to the general venue provision contained in Code 19.2-244. In such cases, the crime occurred in both jurisdictions, and therefore, it may be prosecuted in either venue."

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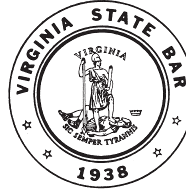
Criminal Law News



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