Criminal Law NEWS
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PUBLISHED BY THE CRIMINAL LAW SECTION OF THE VIRGINIA STATE BAR FOR ITS MEMBERS

2014 Annual Meeting – Virginia State Bar
FRIDAY, JUNE 13, 2014

'Friending' Electronic Evidence – How to Subpoena, Obtain and Present Electronic Evidence at Trial

SPONSORS: Corporate Counsel, Criminal Law & Litigation Sections

Sheraton Oceanfront Hotel – 36th Street & Atlantic Avenue

TIME: 9-11 am

2.0 MCLE Credits (including 1.0 Ethics)

For many years lawyers and clients have regularly communicated by email, and, more recently, on social media sites. As a matter of course, emails and Social Media communications regularly contain Attorney-Client Privilege notices that may be lost if not properly protected. Many courts are confronted with evidentiary issues regarding email and social media communications, and, depending on the context, the results of court rulings may vary.

Ethics Session 9-10 am

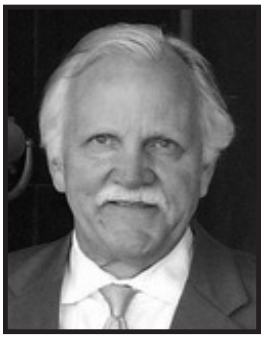
This portion of the program will focus on the issues of finding and obtaining emails, texts and social media evidence and related attorney-client issues.

Alfred L. Carr – Mr. Carr received his bachelor's degree in Business Administration and Management from Virginia Commonwealth University, and his Jurist Doctor degree from the Washington College of Law at American University. Mr. Carr was admitted to the Virginia State Bar in 2001. Mr. Carr currently serves as an Assistant Bar Counsel for the Virginia State Bar in the Disciplinary Section. He is responsible for investigating and prosecuting attorneys in disciplinary proceedings before disciplinary tribunals and courts across the Commonwealth of Virginia. Previously, Mr. Carr was an Associate with Fredericks & Stephens where he practiced law in the areas of residential real estate matters, conservator, trustee and guardianship matters, family law, and estate administration issues. Prior to joining Fredericks & Stephens, Mr. Carr was an Associate with the law firm of Mitchell I. Mutnick, P.C. where he also practiced in the areas of real estate law, criminal law, and conservator, trustee and guardianship matters. He joined the law firm of Smith and Greene, PLLC, where he concentrated on the general practice of law including domestic relations, criminal law and civil litigation.

The next portion of the program will focus on how to subpoena and present emails, texts and social media evidence at trial- including where to send the subpoena; what to do if the recipient does not respond; who should serve as custodian; and how to present the evidence with or without a custodian.

Hon. John M. Tran – Circuit Court of Fairfax County, Fairfax. Prior to his appointment on the bench, Judge Tran shaped his trial experience as a state and federal prosecutor in Alexandria, Virginia in the late 1980's and eventually joined the Old Town Alexandria litigation boutique law firm of DiMuroGinsberg, P.C. Before leaving the practice of law, Judge Tran was an "AV" rated lawyer under Martindale Hubbell, a Virginia Super Lawyer and Best Lawyer in the area of commercial litigation, and inducted into the Class of 2010 Fellow of the Virginia Law Foundation and Class of 2011 Virginia Lawyer's Weekly Leader in the Law. Judge Tran is a product of the Arlington County public school system, a 1981 graduate of the George Washington University and a 1984 graduate of the George Washington University Law School.

Michael E. Barnsback – LeClair Ryan, Alexandria. Mr. Barnsback counsels and represents Virginia employers in all aspects of employment law. He has frequently lectured on and assisted employers with disability accommodation and leave issues under the ADA and FMLA. He is experienced defending employers in Department of Labor wage/hour audits and FLSA individual and collective action overtime cases. He also has significant background representing employers before the EEOC and state/local administrative agencies. He has over twenty years of courtroom experience litigating employment related cases. His practice also focuses on protecting employers from unfair competition and theft of trade secrets and confidential information, and breaches of fiduciary duties by employees, officers and directors. Mr. Barnsback has worked extensively with federal government contractors and employers in the healthcare and construction fields. He is an editor of the Virginia Employment Law Letter, a monthly newsletter published by M. Lee Smith Publishers, LLC. Mr. Barnsback also lectures frequently on employment law and human resources issues.



Chair's Column

Francis McQ. Lawrence

Our criminal law section board meets each April for its strategic planning session. In many ways, this meeting is a sendoff for the next year. At the session we plan topics and speakers for our February seminar and select new members and officers who will take office at the Bar meeting in Virginia Beach in June. We also do a last minute "tune up" to our program at the annual Bar meeting.

We had an excellent strategic planning session and it has been a good year. Our February seminars were well attended despite weather issues. Our section continues to be the second largest in the Bar with an enthusiastic membership.

At the June meeting, Collette McEachin will become our secretary, Andrea Moseley our vice chair and will take on responsibility for next February's seminar, and Joel Branscom will become chair.

Our new board members will include Halifax County Commonwealth Attorney Tracy Quackenbush Martin, Seth C. Weston, a criminal defense attorney from Roanoke, and Judge Will Jarvis, who sits on the General District Court for Prince William County. Each brings to the board their unique vision as lawyers, judges and citizens. We bid farewell to Judge Charles Sharp who has been a wonderful board member.

We thank Ron Bacigal who is the heart of our committee and continues to edit our newsletter and keep us abreast of developments in criminal law. Likewise, Bet Keller and Terry Patrick of the State Bar are both invaluable to this committee.

As a board, we have followed closely the developments in the review and possible revision of criminal discovery rules. As I have mentioned in each of my earlier articles, in my judgment, a defendant's access to statements of witnesses against him is a critical part of a fair criminal justice system. While our board has taken no specific position on revisions, we have unanimously supported the review and we have asked the Supreme Court Committee to let us know its thinking at a point at which we might have some input as a board representing basically all of the actors in the criminal justice system.

It was my honor to serve as your chair and it is a continuing honor to me to be an active participant in our criminal justice system.

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Fernandez v. California, 134 S. Ct. 1126 (2014). The Court refused to extend *Georgia v. Randolph*, 547 U.S. 103 to "the very different situation in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared." This holding applied even though the defendant was absent "only because the police had taken him away," and even though he previously "objected to the search while he was still present."

Kansas v. Cheever, 134 S. Ct. 596, 187 L. Ed. 2d 519 (2013). "Where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence." "'Mental status' is a broader term than 'mental disease or defect,' … and includes those based on psychological expert evidence as to a defendant's *mens rea*, mental capacity to commit the crime, or ability to premeditate. Defendants need not assert a 'mental disease or defect' in order to assert a defense based on 'mental status.'"

Hinton v. Alabama, 134 S. Ct. 1081 (2014). "The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance" under *Strickland*.

Burrrage v. United States, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014). "Where the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious injury, a defendant cannot be liable … unless such use is a but-for cause of the death or injury." [Controlled Substance Act imposes a 20-year mandatory minimum sentence when death or injury "results from" the substance]

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

United States v. Green, 740 F.3d 275 (4th Cir. 2014). The dog's success rate in alerting to drugs in the field was between 25% and 43%. The Court found the dog to be reliable because he "maintained a 100% success rate in controlled testing environments" and noted that in most cases "a drug-detection dog's field performance has relatively limited import and that the better measure of a dog's reliability comes from his performance in controlled testing environments."

United States v. Johnson, 734 F.3d 270 (4th Cir. 2013). "While the facts of *Innis* [446 U.S. 291] led the Court to emphasize the possibility of a *Miranda* interrogation without express questioning, it made clear that the opposite is also possible." Thus when defendant volunteered, "I can help you out … I've got information for you," the officer responded, "what do you mean?" The officer's query was not interrogation because a reasonable officer could not anticipate that defendant would attempt to "extricate himself from a misdemeanor by implicating himself in a felony."

United States v. Hashime, 734 F.3d 278 (4th Cir. 2013). "Although a statement that the individual being interrogated is free to leave may be 'highly probative of whether, in the totality of the circumstances, a reasonable person would have reason to believe he was 'in custody,' such a statement 'is not talismanic or sufficient in and of itself to show a lack of custody." [here the totality of the circumstances established that the defendant was in custody]. The court also held that a suspect's "tone and demeanor" during the interrogation are relevant to the question of voluntariness, but not to the question of custody. Defendant had told the police: "I want to help you, I love helping cops. I've always loved cops. I always wanted to be a cop."

United States v. Fisher, 711 F.3d 460 (4th Cir. 2013). "Given the totality of the circumstances of this case – a law enforcement officer intentionally lying in a affidavit that formed the sole basis for searching the defendant's home, where evidence forming the basis of the charge to which he pled guilty was found – Defendant's plea was involuntary and violated his due process rights." Defendant permitted to vacate his plea.

United States v. Beckton. 740 F.3d 303 (4th Cir. 2014). When the pro se defendant attempted to testify in narrative form, the judge held that defendant must either withdraw as his own counsel or testify in a question and answer format. I.e., "The defendant will have to ask himself a question and then answer the question…." When defendant refused to accept the question and answer format, the court held that he forfeited his right to testify.

MacDonald v. Moose, 710 F.3d 154 (4th Cir. 2013). The predicate felony for defendant's criminal solicitation offense was sodomy as defined in Va. Code §18.2-361(A). The Virginia Supreme Court held that the anti-sodomy provision was constitutional as applied because defendant's victims were minors. *MacDonald*, 645 S.E.2d 918. However, the Fourth Circuit held that Lawrence v. Texas rendered the Virginia prohibition of sodomy between two persons without any qualification, is facially unconstitutional. **BUT SEE** *Saunders v. Commonwealth*, 62 Va. App. 793, 753 S.E.2d 602 (2014). "Only decisions of the U.S. Supreme Court can supersede binding precedent from the Virginia supreme Court. Moreover, though state courts may for policy reasons follow the decisions of the court of appeals whose circuit includes their state, they are not obliged to do so. Thus the Fourth circuit's holding in *MacDonald* is merely persuasive and does not bind this Court."

MEMBER RESOURCES AREA

http://www.vsb.org/site/sections/criminal/

ELECTRONIC NEWSLETTERS FOR SECTION MEMBERS

Receive your newsletters electronically. Visit the VSB's website at https://member.vsb.org/vsbportal/ to post/verify your email address. You will be given the opportunity to limit the use of your email on this site.

The newsletters also will be posted on the section's website. Access the newsletter using this info:
Username: **criminallawmember**
Password: **48gLsj47**

This site is available only to Section members

VIRGINIA SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Allen v. Commonwealth, 287 Va. 68, 752 S.E.2d 856 (2014). In reversing the conviction for aggravated sexual battery the court extensively reviewed the "corpus delicti rule" applicable to the corroboration of confessions. Virginia does not require that the corpus delicti be independently established, but rather that there be "slight corroboration" of the confession. Under the facts of this case, the court held: (1) "evidence merely placing the defendant within the geographic proximity of a crime is insufficient corroboration of a confession to having committed such crimes within the area;" (2) "if the facts offered to satisfy the slight corroboration requirement are 'just as consistent with non-commission of the offense as … with its commission,' then slight corroboration does not exist." [fact that defendant and grandson sometimes shared the same bed showed no more than opportunity to commit the crime and did not support "an inference of the occurrence of any criminal activity"].

Starrs v. Commonwealth, 287 Va. 1, 752 S.E.2d 812 (2014). Even after accepting and entering defendant's guilty pleas in a **written order**, the trial court "still retained the inherent authority to withhold a finding of guilt, to defer the disposition, and to consider an outcome other than a felony conviction." In contrast, "once a trial court enters a formal adjudication of guilt, it must impose the punishment prescribed by the legislature; it has no inherent authority to depart from that range of punishment." *See also, Maldonado-Mejia v. Commonwealth*, 287 Va. 49, 752 S.E.2d 833 (2014). Again trial court accepted and entered defendant's guilty plea on the record. But unlike Starrs, the trial court **expressly** withheld a finding of guilt.

Linnon v. Commonwealth, 287 Va. 92, 752 S.E.2d 822 (2014). As a matter of first impression, the court held that "one party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection."

Findlay v. Commonwealth, 287 Va. 111, 752 S.E.2d 868 (2014). Overturned court of appeals holding because defense counsel's assignment of error "goes beyond the bare-bones allegations prohibited by Rule 5!:12(c) (1) (ii)." The court also rejected the Commonwealth's argument that defense counsel "must go one step further and state within his assignment of error precisely why" the trial court was in error. "Where, as here, the assignment of error identifies a particular preliminary ruling of the trial court, as opposed to broadly criticizing the trial court's judgment as being contrary to the law, it is sufficiently detailed to warrant consideration on the merits."

Amin v. Commonwealth, 286 Va. 231, 749 S.E.2d 169 (2013). "Once the Court of Appeals acquired appellate jurisdiction over Amin's appeal, it was required to review the merits of Amin's argument that the conviction order he was appealing was void ab initio. *** This issue may be advanced 'directly or collaterally by all persons, anywhere, at any time, or in any manner.'" The Court also stated that this principle of law implicates constitutional principles of due process and cannot be superseded by a rule of court [Rule 5:17] governing the effect of a failure to assign errors in the petition for appeal.

Linnon v. Commonwealth, 287 Va. 91, 752 S.E.2d 822 (2014). The opinion defines a "custodial or supervisory relationship with a student within the meaning of Code 18.2-370.1(A)." Defendant's "mere status as a teacher is insufficient to warrant conviction. Conversely, the facts that the proscribed acts occurred at his home and were unrelated to any school activity are insufficient by themselves to warrant acquittal." The conviction was upheld because "although the acts occurred at defendant's home outside school hours and during the winter recess, school was due to resume in a few weeks and he and [student] would again see each other there on a daily basis as he performed assigned administrative duties."

Maldonado-Mejia v. Commonwealth, 287 Va. 49, 752 S.E.2d 833 (2014). Defendant subsequently charged with making a false statement on an ATF form that she was not "under indictment." Court rejected her argument that entering the guilty plea on the record had terminated the indictment. Held that under Code 19.2-231 a person remains under indictment until "the jury returns a verdict or the court finds the accused guilty or not guilty." As to "willfully" making the false statement, the Court distinguished *Smith*, 282 Va. 449. Smith's ignorance as to what is an indictment was not willful, but here there was sufficient evidence that she knew she was under indictment and willfully lied about it.

VIRGINIA COURT APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Simmons v. Commonwealth, 63 Va. App. 69, 754 S.E.2d 545 (2014). Several jurors expressed their view that one should not drink and drive. They were not subject to challenge because "no one indicated they would convict [of DUI] simply because a defendant drank alcohol."

Cheung v. Commonwealth, 63 Va. App. 1, 753 S.E.2d 854 (2014). Defendant "undertook a trip of substantial distance and time while in a tired and sleepy condition and had been operating his vehicle for a number of hours in this impaired state when the bus crashed. … The deliberate failure of a driver to heed clear warnings signs of drowsiness is evidence of a reckless disregard for human life." [involuntary manslaughter conviction upheld].

Case v. Commonwealth, 63 Va. App. 14, 753 S.E.2d 860 (2014). Trial court properly rejected – as a reasonable hypotheses of innocence – that "someone moved defendant from the passenger seat to the driver's seat while he was unconscious." [upheld conviction for DUI].

Claytor v. Commonwealth, 62 Va. App. 644, 751 S.E.2d 686 (2014). "A driver's habitual offender status continues under a restricted license and is terminated only when his driving privileges have been fully restored." Although defendant claimed that he reasonably and in good faith believed he was no longer an habitual offender, "the Due Process Clause is not implicated simply because a defendant misreads or misunderstands a court order."

Murry v. Commonwealth, 62 Va. App. 179, 743 S.E.2d 302 (2013). "Although more commonly encountered in cases when probation is imposed following convictions for contraband offenses (drug offenses, firearm offenses, etc.) conditions requiring the waiver of a probationer's Fourth Amendment rights are also proper under certain circumstances in cases involving sex offender probationers."

Rideout v. Commonwealth, 62 Va. App. 779, 753 S.E.2d 595 (2014). Defendant lacked a reasonable expectation of privacy in his computer files because he "installed file-sharing software onto his computer – the very purpose of which is to share files with other users of the same software. Even though appellant claimed to be under the impression that he had applied settings that would prevent others from accessing his computer files, law enforcement – through means available to any member of the public – was nonetheless able to access appellant's files depicting child pornography."

Bonner v. Commonwealth, 62 Va. App. 206, 745 S.E.2d 162 (2013) (en banc). Under the language of Code §18.2-311 [altering the serial number of a firearm] "the offense is complete once the person tampers with the serial number of the firearm…. Thus, the offense constitutes a discrete act rather than a continuing offense [like larceny]." Proper venue lies only where the alteration took place, not all localities into which the firearm was taken.

Papol v. Commonwealth, 63 Va. App. 150, 754 S.E.2d 918 (2014). Defendant "committed the first violation [of Code 18.2-374.1(B)] when he possessed the first offending image. Each of the other images he possessed was a subsequent violation of the statute. Having possessed twelve different images of child pornography, defendant was properly charged with, and convicted of, one violation under subsection A of Code 18.2-374.1and eleven second or subsequent violation under subsection B." The Court also held that "when multiple images are downloaded on a single occasion, one of those images invariably constitutes the first image possessed while all the other qualify as second or subsequent images possessed."

Linnon v. Commonwealth, 287 Va. 92, 752 S.E.2d 822 (2014). As a matter of first impression, the court held that "one party may not rely on the objection of another party to preserve an argument for appeal without expressly joining in the objection."

Bailey v. Commonwealth, 62 Va. App. 499, 749 S.E.2d 544 (2013). Case of first impression. Defendant's "decision to invoke his Fifth Amendment right not to testify did not render him unavailable to himself for purposes of the statement-against-penal-interest exception to Virginia's hearsay rule."

Snowden v. Commonwealth, 62 Va. App. 482, 749 S.E.2d 223 (2013). "Following a felony indictment, the district court certifies its records to the circuit court and the records become a part of the circuit court's file. At the point when the records were certified to the circuit court, the circuit court became the court where the records were preserved." Thus it is the circuit court that must certify the records, not the district court where the records originated.

Ferrell v. Commonwealth, 62 Va. App. 142, 743 S.E.2d 284 (2013). "When a principal in the first degree and a principal in the second degree in the same offense have separate trials, the judgment against one, whether of conviction or of acquittal, has no bearing upon a judgment against the other."

Whitehurst v. Commonwealth, 63 Va. App. 132, 754 S.E.2d 910 (2014). "In this case, appellant failed to comply with the Commonwealth's rules [14 day notice] for objecting to admission of a certificate of analysis without the analyst present." Defense counsel can waive the defendant's right of confrontation.

***Bruton v. Commonwealth*, Va. App (4/1).** Information on defendant's pretrial confinement "ordinarily is not presented to the jury." However, defendant "interjected into this case the issue of his incarceration while awaiting trial." When a juror asked the relevance of the pretrial confinement, the Judge replied: "He gets credit for any time he's been in custody." The trial judge acted properly because the "jury is to be given the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision."

***Johnson v. Commonwealth*, Va. App (3/25).** *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). "forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders." It did not hold that "*all* life sentences for juvenile offenders violate the Eight Amendment." The Court of Appeals upheld the defendant's life sentence.

Blunt v. Commonwealth, 62 Va. App. 1, 741 S.E.2d 56 (2013). The Sixth Amendment right of confrontation is a "trial right" and does not apply in post-trial sentencing proceedings. The Due Process Clause defines what information is available during sentencing hearings.

***Foley v. Commonwealth*, Va. App (3/25).** Code 18.2-308 prohibits carrying a concealed weapon but provides that it does not apply to any person while in his own place of abode or the curtilage thereof. The court reversed the trial court's holding that a non-exclusive easement is per se excluded from being considered part of a home's curtilage. Instead, the Court adopted the common law definition of curtilage - "a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling."

Wagoner v. Commonwealth, Va. App. , S.E.2d (4/8). Upheld conviction of abuse or neglect of an incapacitated adult resulting in death. Code 18.2-369(B). It was a "quintessential jury question" as to the cause of death when medical testimony indicated that without treatment the risk of death was 100%, but with treatment there was a thirteen to twenty-five percent chance of survival. The defendant caretaker failed to seek professional medical treatment for an elderly person who had suffered second and third degree burns.

Dennos v. Commonwealth, 63 Va. App. 139, 754 S.E.2d 913 (2014). The single-larceny doctrine means that "a series of larcenous acts can constitute a single larceny if the factfinder reasonable concludes that the several acts were done pursuant to a single impulse *and* in execution of a general fraudulent scheme. The standard is conjunctive. It is not enough for a series of larcenous acts to take place during the execution of a general fraudulent scheme. Each act must be the product of a common single impulse." In this case there were two separate larcenous impulses because "there were two advances of money, on two separate dates, involving two different promises."

Grimes v. Commonwealth, 62 Va. App. 470, 749 S.E.2d 218 (2013). "The plain language of the applicable [burglary] statutes does not exclude from their scope any of the spaces that are encompassed within the walls of the dwelling house." Thus entry of the crawl space was entry of the dwelling. The Court also held that the replacement value of the stolen copper pipes does not establish fair market value because there was no evidence of the deterioration of the pipes.

Henry v. Commonwealth, 63 Va. App. 30, 753 S.E.2d 868 (2014). Forgery requires a lie "about the document itself; the lie must relate to the genuineness of the document." Conviction for financial representations when applying for indigent services reversed because "where the falsity lies in the representation of facts, not in the genuineness of execution, it is not forgery."

Montgomery v. Commonwealth, 62 Va. App. 656, 751 S.E.2d 692 (2013). This Petition for a Writ of Actual Innocence presents an "unusual" and "complex" issue. Governor issued a pardon conditioned on defendant obtaining a writ of innocence from the court. Held that this delegated the governor's clemency power to the judiciary in violation of the separation of powers doctrine. Court also held that although it is often difficult to determine whether a recantation or the original trial testimony is true, a perjury conviction for the original testimony establishes that that testimony was false.

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