Criminal Law NEWS
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CRIMINAL LAW SECTION CLE

74th Annual Meeting, Virginia State Bar
Friday, June 15, 2012
Cavalier Oceanfront – Coral Rooms D&E
11:00 a.m. (1.5 credits)

BIG BROTHER IS WATCHING: GPS AND CELL TOWER TECHNOLOGY AND TRACKING

The program will address the realities of cell phone forensics; the basics of how cell phones record and store data; and what and when you can recover information from cell phones. Attendees will learn about the processes and procedures used to collect cell phone evidence, about SMS text messaging and what you can and cannot retrieve from a cell phone. Attendees also will learn about cell tower tracking, and the different types of cell systems in use in the USA. In addition, a case law update will be given on the constitutional implications of tracking using GPS technology.

James G. (Jay) Connell III is Learned Counsel at the U.S. Department of Defense Office of the Chief Defense Counsel, where he leads the defense team of a man accused of conspiracy in the 9/11 attacks being prosecuted in the military commissions at Guantanamo Bay, Cuba. Prior to that position, Mr. Connell defended death penalty cases in private practice at Connell, Sheldon & Flood PLC in Fairfax (2000 – 2011). His prior clients have included alleged "Route 29 Stalker" Darrell Rice and "Washington Sniper" John Allen Muhammad. He served as public defender for the City and County of Fairfax from 1998-2000. He earlier served as a law clerk to The Hon. Rosemarie Annunziata, Court of Appeals of Virginia (1997 – 1998) and with the Federal Public Defender for the District of Nevada, Las Vegas, Nevada (1996 – 1997). He is a graduate of the College of William & Mary School of Law and Florida State University.

Lawrence (Larry) E. Daniel, EnCE, DFCP, BCE – Guardian Digital Forensics, Raleigh. With over 30 years of experience in software development, data recovery and computer and server diagnostics, Mr. Daniel began performing computer forensics in 2001, and founded his company in 2006. He has provided computer, cell phone and cell tower technology forensics in over 500 criminal and civil cases, and has qualified and testified as a computer forensic expert, a cell phone forensics expert and a cell tower technology expert. He also has provided training both in computer forensics and in continuing legal education, as well as presenting at such conferences as SANS What

Works in Forensics, the 2010 Department of Defense Cyber Crime Conference and the 2009 Techno Forensics and Digital Investigations Conference.

Brian Hood - Criminal Supervisor, U.S. Attorney's Office, Eastern District of Virginia, Richmond Division. During his 12 years as a federal prosecutor in Virginia, Mr. Hood has investigated and tried a wide variety of offenses, including violent crime, white collar fraud, domestic terrorism, civil rights, and a large number of cyber and computer crime cases. Two of his cases are included in COMPUTER CRIME LAW Casebook - ***United States v. John Ickes***, involving a First Amendment-based motion to suppress child pornography evidence that was discovered during a U.S. Customs border search, and ***United States v. William Jarrett***, involving questions of agency principles and the application of the Fourth Amendment where child pornography evidence was obtained by an anonymous "cyber vigilante" who hacked into the defendant's computer. Prior to becoming a federal prosecutor he was an Assistant District Attorney in Philadelphia, Pennsylvania, for five years. He is a graduate of the United States Naval Academy and the Georgetown University Law Center.

Annual Section Business Meeting: 12:30 p.m.

74th Annual Meeting - Virginia State Bar

June 14-17, 2012

BIG BROTHER IS WATCHING

CLE on GPS and Cell Tower Technology

Friday, June 15 – 11:00 am

Cavalier Oceanfront Hotel – Virginia Beach

Annual Meeting Registration

Now Available

Register prior to May 14 for discounted fee

Chair's Column

Casey R. Stevens

The 42nd Annual VSB Criminal Law Seminar was a great success as expected. Our Seminar Chair, Lisa Caruso, and our Newsletter Editor, Professor Ronald Bacigal, did a wonderful job bringing together both the Charlottesville and Williamsburg presentations. Our Luncheon Speakers, The Honorable Martin F. Clark, Jr. and DeMaurice "De" Smith, were both very well received and much appreciated for their contributions.

The Carrico Professionalism Award was presented at the Williamsburg Seminar to Melinda Douglas, Public Defender for the City of Alexandria and the Alexandria office's founder. We were privileged to have The Honorable Lucretia A. Carrico, daughter of Former Chief Justice Harry L. Carrico, for whom the award is named, make the presentation to Ms. Douglas. Among many other accomplishments it is notable that Ms. Douglas is the first female to have received this distinguished award.

A special thank you is due to each of our Seminar presenters without whom the success of the Annual Criminal Law Seminar would have been unattainable. Professor Ronald J. Bacigal, Sara N. Poole, Esq., B. Leigh Drewry, Jr., Esq., The Honorable Jane Marum Roush, David B. Hargett, Esq., The Honorable Charles S. Sharp, The Honorable Michael N. Herring, Rodney G. Leffler, Esq., Dr. Daniel Shenaman, M.D., The Honorable Michael E. McGinty, The Honorable Philip Trompeter, Annette Miller, Esq., Leslie J. Weisman, LCSW, Elizabeth P. Murtagh, Esq., Evan S. Nelson, PhD, and Erin D. Whealton, Esq.

The VSB 74th Annual Meeting is fast approaching and will be held Thursday, June 14 through Sunday June 17, 2012 in beautiful Virginia Beach. The Section's CLE program will be presented on Friday June 15th at 11:00 a.m. This year's presentation is entitled *Big Brother is Watching: GPS and Cell Tower Technology and Tracking.* Given the proliferation of cell phones and the many varied devices utilizing GPS technology, this presentation promises to be full of high-tech tips and information useful to all of our practices.

The Section, through the leadership of Judge Ashley Tunner, has been actively working on identifying authors and reviewing their proposals for scholarly submissions to the December 2012 edition of the Virginia State Bar's

magazine *Virginia Lawyer*. The Section was honored to be asked to coordinate this effort in obtaining submissions for this December's issue which will be focused on criminal law.

The Board met on April 26th in Williamsburg, with the assistance of former members and former chairs, to plan for the 43rd Annual Criminal Law Seminar. The Seminar will be held on Friday, February 1, 2013, in Charlottesville and Friday, February 8, 2013, in Williamsburg. I encourage each of you to calendar these dates now so as not to miss out on what are annually the two largest gatherings of criminal lawyers in the Commonwealth. The presenters and luncheon speakers at the Criminal Law Seminar have always been first rate and 2013 will be no exception.

Your Board of Governors is composed of some of the most talented and dedicated criminal practitioners, prosecutors and judges from across the state. Each member contributes a great many hours throughout the year to the continued success of the Criminal Law Section. I am humbled to be associated with each of them and extend my sincere appreciation for all of their efforts. Likewise, without the constant assistance of the VSB staff our mission would not be realized.

Lastly, as has become custom, I would like to focus the members of our Section on a quotation which I find most inspiring in directing my thinking while engaged in the necessary clash between the Government, the Accused, and sometimes the Court: *"You can only protect your liberties in this world by protecting the other man's freedom. You can only be free if I am free."* – Clarence Darrow. Let us commit ourselves to achieving justice.

U.S. SUPREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Florence v. Board of Chosen Freeholders of Country of Burlington, S.Ct. (4/2). Strip searches of arrestees to be placed in the general population of a detention facility are constitutional even in the absence of reasonable suspicion that the arrestees possess either weapons or contraband. The court noted that it was not ruling on the types of permissible searches when "a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."

Gonzalez v. Thaler, S.Ct. (1/10/12). In cases in which a prisoner did not seek a discretionary appeal in the state's highest court, the statute of limitations under the Antiterrorism and Effective Death Penalty Act begins to run on the date that the time for seeking such review expires.

U. S. v. Jones, 132 S.Ct, 945 (2012). "The trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property [by attaching a GPS device to defendant's auto] to gather information, a search occurs." Five concurring Justices suggest that the *Katz* test for a reasonable expectation of privacy is more important than a focus on trespass.

Smith v. Cain, 132 S.Ct, 627 (2012). The eyewitness's testimony was the *only* evidence linking defendant to the crime. The eyewitness's undisclosed statements contradicted his testimony. Thus the eyewitness's statements were plainly material, and the State's failure to disclose those statements to the defense violated *Brady*.

Perry v. New Hampshire, 132 S.Ct, 716 (2012) The Due Process Clause does not require a trial judge "to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police." When an eyewitness "spontaneously" identifies a suspect "without any inducement from the police" the reliability of that identification is to be tested by traditional methods for testing the reliability of all evidence.

Missouri v. Fyre, 566 U.S. (2012). To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would

have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the pleas would have been entered without the prosecution's canceling it or the trial court's refusing to accept it. See also *Lafler v. Cooper*, S.Ct. (2012) (the question is the fairness not of the trial but of the processes that preceded it, which caused respondent to lose benefits he would have received but for counsel's ineffective assistance).

Howes v. Fields,132 S.Ct 1181 (2012). Prior "decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison." Instead, when determining "custody' for purposes of *Miranda*, "the initial step is to ascertain whether, in light of 'the objective circumstances of the interrogation,' a 'reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.'" The relevant circumstances include the location of the questioning, statements made during the interview, the presence of absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.

Maples v. Thomas, U.S., (1/18/12). A death-row prisoner who missed a filing deadline in state post-conviction proceedings after his lawyers abandoned him without notice demonstrated the "cause" needed to excuse the procedural default and give him a chance to pursue federal habeas corpus relief.

Reynolds v. United States, U.S., (1/23/12) For offenders convicted of sex crimes before the federal Sex Offender Registration and Notification Act went into effect, the act's registration and reporting requirements are not applicable until the attorney general validly specifies that they apply to such offenders.

FOURTH CIRCUIT COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

U.S. v. Edwards, 666 F.3d 877 (4th Cir. 12/29). "All searches, including searches incident to an arrest, must be reasonable to withstand Fourth Amendment scrutiny." Reasonableness is determined by the totality of the circumstances, which include the location of the search [public or private], the intrusiveness of the search, and the safety, health, and fear of the defendant. Here "the drugs were removed from Edwards' person in an unnecessarily dangerous, and thus unreasonable, manner" when, on a dark public street "without the aid of the flashlight, [police] took the knife and cut the sandwich baggie off Edwards' penis."

U.S. v. Ortiz, F.3d (4th Cir. 2012). Probable cause requires a "reasonable belief" which "is less demanding than a standard requiring a preponderance of the evidence for the belief." The Court also reaffirmed that "once voluntary consent is given, it remains valid until it is withdrawn *by the defendant*."

U.S. v.Gaines, 668 F.3d 170 (4th Cir. 2012). During an unconstitutional pat-down, police detected a gun. When the defendant then assaulted the police, they arrested him and seized the weapon. The weapon was suppressed as the fruit of the poisonous tree because the criminal assault was "not an intervening event for the purpose of determining whether the 'taint' of the unlawful police action is purged."

U.S. v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2012). Under appropriate circumstances, it is not a violation of the confrontation clause to allow the use of anonymous witnesses. [There is a lengthy concurrence arguing that this is a violation of the confrontation clause].

In Re Bragg, F.Supp, (W.D.Va. 2/21/12). The Court sanctioned a criminal defense lawyer who violated a discovery order by letting a jailed client keep a copy of confidential prosecution materials, including grand jury testimony. The discovery order had restricted the lawyer's handling of sensitive materials that the government turned over pursuant to its open-file policy.

VIRGINIA SUREME COURT CRIMINAL LAW AND PROCEDURE DECISIONS

Demille v. Commonwealth, 283Va. 316, 720 S.E.2d 69 (2012). "The factual determination of whether a respondent is a sexually violent predator likely to engage in sexually violent acts is to be based on the totality of the record, including but not limited to expert testimony."

Branham v. Commonwealth, 283 Va. 273, 720 S.E.2d 74 (2012). "Code §46.2-104, requiring the owner or operator of a motor vehicle to exhibit his driver's license to an officer for identification, applies only when such a driver has received a signal to stop from a law-enforcement officer. Thus, [the officer's] request to see [defendant's] driver's license was no more than a request, and defendant's compliance was voluntary and not coerced."

Stevens v. Commonwealth, 283 Va. 296, 720 S.E.2d 80 (2012). Defendant's request for a lawyer "could be understood by a reasonable police officer to refer to either a lawyer for purposes of the custodial interrogation or a lawyer to represent defendant in court." Thus it was not an unambiguous request for counsel during interrogation.

Prieto v. Commonwealth, 283 Va. 149, 721 S.E.2d 484 (2012). (1) In capital cases when proving future dangerousness, the Commonwealth is not required to present expert witnesses to draw a nexus between past and future behavior. (2) The prosecutor's closing argument that it had "waited in vain to hear an ounce or remorse leak out anywhere, but there was none," was not an improper comment on the defendant's failure to testify. (3) Prison conditions [and a requested jury view of the prison] were "irrelevant and would not have been an aid to the jury in their evaluation of defendant's future dangerousness."

Lacava v. Commonwealth, Va. 3/2. Rule 5a:8(a) "clearly provides parties 90 days within which to file a motion" to extend the period for filing transcripts.

Commonwealth v. Blaxton, Va. 3/2. "Supervision of sexually violent predators cannot be transferred outside the Commonwealth. Therefore, even if a defendant qualified for transfer under the Interstate Compact for some other criminal conviction, the specific restriction on a person adjudicated a sexually violent predator … cannot be disregarded because the person may qualify for transfer for other reasons under the Interstate Compact."

Enriquez v. Commonwealth, Va. 3/2. "We establish the rule that when an intoxicated person is seated behind the steering wheel of a motor vehicle on a public highway and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore, is guilty of operating the vehicle while under the influence of alcohol within the meaning of Code §18.2-266." See also, *Nelson v. Commonwealth*, 281 Va. 212, 707 S.E.2d 815 (2011).

Burrell v. Commonwealth, Va. 3/2. "The circuit court did not have the power to render a judgment reducing defendant's conviction from a felony to a misdemeanor more than five years after its entry of the sentencing order. … We therefore hold that the ultra vires provision in the sentencing order results in the entire sentencing order being void ab initio."

Porter v. Warden, Va. 3/2. "Pursuant to Brady, there is no obligation to produce information available to the defendant from other sources, including diligent investigation by the defense."

Haas v. Commonwealth, 283 Va. 284, 721 S.E.2d 479 (2012). When addressing a petition for a writ of actual innocence "the Court of Appeals is vested with authority to refer a case … back to the circuit court for an evidentiary hearing if, in its discretion, it deems that the facts require further development, it is not required to do so. The court of appeals is vested with broad discretion in determining whether the facts require further development."

VIRGINIA COURT OF APPEALS CRIMINAL LAW AND PROCEDURE DECISIONS

Doss v. Commonwealth, 59 Va. App. 435, 719 S.E.2d 358 (2012). Defendant was not entitled to sever two drug charges because "evidence of one offense was necessary to prove a second or subsequent offense." The Court also held that evidence of other uncharged drug transactions was admissible because it was highly relevant in that it established defendant's relationship and participation in the cocaine trade.

Thomas v. Commonwealth, 59 Va. App. 496, 720 S.E.2d 157 (2012). The court order adjudicating him

a habitual offender barred him from operating a motor vehicle and ordered him to surrender his driver's license, but did not use the "revoke or revocation." Nonetheless "it is simply a distinction without a difference to suggest that his privilege to drive was not revoked for purposes of Code §46.2-357(A)."

Carrington v. Commonwealth, 59 Va. App. 614, S.E.2d (2/14). Code §18.2-371.1(A) makes it a class 4 felony for any person responsible for the care of a child to cause or permit serious injury to the child. "Nothing in this language conveys that an individual cannot have joint responsibility with another individual for the child, or that an individual cannot be responsible if a parent or guardian is also present at the time of the child's injury." [Defendant was living with the child's mother].

Hines v. Commonwealth, 59 Va. App. 567, S.E.2d (2/14). Code §18.2-53.1 [use of firearm in commission of robbery] provides for a mandatory minimum term of imprisonment of three years for a first conviction. Because the statute does not contain a maximum punishment or a specification of the class of the offense, the three year minimum is also the maximum sentence that may be imposed. Thus the trial court erred in sentencing defendant to a ten-year term of incarceration.

Dunham v. Commonwealth, 59 Va. App. 634, S.E.2d (2/21). "Proceedings for revocation of suspended sentences are within the subject matter jurisdiction of the circuit courts. Because the trial court had subject matter jurisdiction over appellant's 1998 revocation hearing when it decided to extend the period of suspension, the 1998 sentencing order is not void [nor did appellant directly appeal that sentencing order]. As a result, appellant cannot collaterally attack the 1998 sentencing order in this case."

Henderson v. Commonwealth, Va. App. , S.E.2d (2012). En banc Case of first impression addressing the "good cause" exception to the right to confrontation applicable at probation revocation hearings. The majority saw no need to choose between a reliability test and a balancing test. The dissent argued for adoption of the balancing test.

Smith v. Commonwealth, Va. App. , S.E.2d (3/6). "The presumption that a statement of facts is binding upon this Court as an accurate recitation of the incidents at trial is a rebuttable presumption. Where the evidence in the balance of the record indicates that the statement of facts does not accurately reflect the evidence and incidents of trial we are not bound by the statement of facts to the exclusion of the other evidence in the record."

Smith v. Commonwealth, 59 Va. App. 710, S.E.2d (3/6). The phones stolen had no market value because they were "demos" not intended for sale. However, "since it is reasonable to infer that these phone were new models in good working condition, it naturally follows that evidence of their replacement value closely approximates their actual value."

Price v. Commonwealth, Va. App. , S.E.2d (3/13). Robbery requires a taking from a person's "personal protection and presence." Here, "the items taken from victim's purse located in another room of the trailer were close enough to her and sufficiently under her control that, had she not been subject to violence and intimidation by the intruders, she could have attempted to prevent the taking of her personal items."

Landeck v. Commonwealth, Va. App. , S.E.2d (3/13). Evidence of a "particular racial epithet was relevant to prove the required element of malice, was not more prejudicial than probative, and therefore, was properly admissible."

Sierra v. Commonwealth, Va. App. , S.E.2d (3/20). "The plain language of Code §18.2-250 requires a defendant to know that the substance he possesses is in fact a controlled substance, but it does not require him to know precisely what controlled substance it is. … A defendant who intentionally possesses a controlled substance, aware of its nature and character as such, bears the risk of incurring whatever punishment the General Assembly has prescribed for the possession of the specific substance he has."

Duggins v. Commonwealth, Va. App. , S.E.2d (3/20). Under Code §19.2-265.3 "a trial court has the discretion to refuse a *nolle prosequi* if the prosecutor fails to show 'good cause.' … Virginia trial courts properly refuse a *nolle prosequi* when the circumstances 'manifest a vindictive intent, resulting in 'oppressive and unfair trial tactics' or other prosecutorial misconduct. Absent such mischief, however, courts defer to the public prosecutor given his constitutionally recognized prerogatives…." In addition, "the presence or absence of good cause in the earlier proceeding cannot be collaterally reviewed by the trial court in a subsequent proceeding."

Moore v. Commonwealth, Va. App. , S.E.2d (3/20). "Due to separation of powers consideration, the power to require 'good cause' is generally exercised with great caution by courts." However, our analysis and holding should not be "construed by prosecutors as carte blanche to request a *nolle prosequi* without providing a trial court with a rationale amounting to 'good cause' for doing so."

Mayfield v. Commonwealth, Va. App. , S.E.2d (3/27). "In Virginia, there is no per se rule disqualifying a prospective juror who is related to a prosecution witness on the grounds that he is presumed to be biased, or not indifferent in the cause." ["The juror confirmed that she could put aside her relationship with the witnesses and impartially evaluate their testimony, that she had no pre-conceived notions regarding the witnesses' truthfulness, and that she could be fair to both the defendant and the Commonwealth."

Tizon v. Commonwealth, Va. App. , S.E.2d (4/3). When the officer arrived on the scene of a reported shooting "he found what appeared to be a dead body with gunshot wounds, discovered the handgun dropped by Tizon, and learned from Tizon's neighbor that Tizon had moments before admitted shooting her boyfriend. Tizon claims the officer lacked any 'information regarding any malicious intent, motive, or pre-meditation' sufficient to justify an arrest for murder. The facts known to the arresting officer established probable cause for voluntary or involuntary manslaughter, discharging a firearm in a dwelling, malicious or unlawful wounding, or any number of other arrestable offenses."

Austin v. Commonwealth, Va. App. , S.E.2d (4/10). Conviction for false pretenses upheld because "a reasonable fact-finder could conclude that Austin had the intent to stop payment on the checks and thus defraud [the merchants] at the time she issued the checks and obtained the merchandise. Austin's subsequent evasive conduct, her failure to communicate with the victims or explain her actions, her failure to return the merchandise, and the fact that she repeated this pattern of behavior within a short time frame are circumstances that support a reasonable conclusion that Austin had a fraudulent intent at the time the transactions occurred."

Hylton v. Commonwealth, Va. App. , S.E.2d (4/10). A child's "drinking of the methadone plainly was 'closely related … in time, place and causal connection' to appellant's possession of the drug. Thus, the evidence sufficiently proved beyond a reasonable doubt that the child's death, caused by ingestion of the methadone, was within the *res gestae* of appellant's felonious possession of the drug and that appellant was guilty of felony murder [Code §18.2-33]"

Booker v. Commonwealth, Va. App. , S.E.2d (4/10). At a resentencing hearing, Virginia law "permits the introduction of evidence from the first trial 'as may be necessary to show the nature of the offense charged and the circumstances under which it was committed,' [but] such evidence must be the *same evidence* as was presented at trial. … A judge's own interpretation of that evidence – in the form of a statement of facts newly created for a resentencing jury – is not admissible at resentencing (absent agreement of the parties)."

MEMBER RESOURCES AREA

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Criminal Law NEWS

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