The General District Court's Felony Reduction Clause

by Bryan M. Cave

For even the most experienced defense attorney, preliminary hearings represent a complex area of criminal procedure to navigate. The process is difficult to explain to the defendant, the outcome lacks finality, and the lowered threshold of evidence creates a most unique criminal trial.

Depending on the tactical need or the strategic advantage, preliminary hearings can prove to be needless, or an "unofficial" vehicle to discovery, or a means to demonstrate to the defendant a preview of the impending trial. Many criminal attorneys, in spite of numerous instances of case law, use the preliminary hearings for de facto discovery due to the lack of a codified set of discovery rules in the Commonwealth. Attorneys use the preliminary hearing as a way to test potential witnesses and defenses without a real cost to the defendant.

The preliminary hearing has a seldom used, and often overlooked possibility that provides to General District Court judges an ability to summarily dispose of a felony immediately. This power is seldom invoked, and because General District Court is not a "Court of Record," a plethora of case law is not readily available to direct such practitioners. However, there are a few practice tips that can allow a defense attorney to utilize a preliminary hearing to effectuate a permanent and finite disposition of a felony case.

Court's Possible Findings in a Preliminary Hearing

"The preliminary hearing is essentially a screening process. Its primary purpose is to determine whether there is 'sufficient cause' for charging the accused with the crime alleged, that is, whether there is reasonable ground to believe that the crime has been committed and whether the accused is the person who committed it."[1] A preliminary hearing in the Commonwealth of Virginia is codified in Va. Code § 19.2-186 and specifically holds:

> The judge shall discharge the accused if he considers that there is not sufficient cause for charging him with the offense.
>
> If a judge considers that there is sufficient cause only to charge the accused with an offense which the judge has jurisdiction to try, then he shall try the accused for such offense and convict him if he deems him guilty and pass judgment upon

> him in accordance with law just as if the accused had first been brought before him on a warrant charging him with such offense.
>
> If a judge considers that there is sufficient cause to charge the accused with an offense that he does not have jurisdiction to try then he shall certify the case to the appropriate court having jurisdiction and shall commit the accused to jail or let him to bail pursuant to the provisions of Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title.[2]

There are three potential outcomes for a preliminary hearing in the Commonwealth of Virginia: 1) a finding that there is sufficient evidence presented to the court which then certifies the felony to the grand jury; 2) a finding that there is not sufficient cause for the felony and discharge the defendant; or 3) a finding "that there is not sufficient cause to charge the defendant with the charged felony, but reduce the charge to a lesser included misdemeanor."[3] Of these three outcomes, this article shall focus on the mechanics of the seldom used third option.

The code section is silent as to the actual use of what I will call "the Reduction Clause." The only guidance available is the General District Court Judges' Benchbook regarding what occurs after the court has decided to reduce the charge.[4] At the point of reduction, the court has the authority to immediately arraign the defendant on the misdemeanor, grant a continuance requested by either party, or entertain a motion for nolle prosse by the commonwealth.[5] The instructions are absent any direction on how the court may reduce the felony charge initially. However, statutory analysis and case law present several factors that must be present for the reduction.

Requirements to Trigger the Reduction Clause

1. Lesser Included Misdemeanor Offense

The first requirement is there must be an appropriate, lesser included misdemeanor to be arraigned on in place of the felony charge.[6] The court may not enforce any form of legal fiction and convict the defendant of a misdemeanor unrelated to the original felony. The Supreme Court of Virginia, in *Rouzie*, discussed the importance and necessity that lesser included misdemeanors play in this issue.[7] Evidence presented must justify such a conviction and supplant the felony as the proper charge. Therefore, if there is no appropriate, lesser included misdemeanor, the Reduction Clause cannot be triggered.

This position is further expanded upon in *Moore,* where the defendant argued that a subsequent indictment on charges that were dismissed at the preliminary hearing should be barred.[8] The defense argued that no further prosecutions were constitutional as there was a lesser included offense for the felony charged, and after a full presentation of the evidence to the court the felony was "dismissed."[9] The defendant's position in *Moore* was specifically rejected by the court.[10]

The issue of the lesser included misdemeanor becomes crucial in an attempt by the commonwealth for any subsequent prosecutions related to the issues put before the tribunal at the General District Court level. Both courts in *Rouzie*[11] and *Freeman*[12] saw appellants that had initial felony charges reduced to misdemeanors at their respective preliminary hearings. Both defendants then saw new felonies charged in circuit court. *Rouzie* faced a new charge of malicious wounding after being found guilty of misdemeanor assault and battery.[13] *Freeman* was subsequently tried for burglary after a lower court reduction to petit larceny.[14] While the *Rouzie* court held that the subsequent felony charge was barred as a result of double jeopardy,[15] the court in *Freeman* found that, based upon both the *Blockberger* and *Grady* tests, a misdemeanor conviction for petit larceny did not bar a subsequent burglary conviction.[16] While the initial need for a suitable, lesser included misdemeanor is needed to invoke the General District Court's use of the Reduction Clause, it also plays a crucial role in determining the constitutional validity of any subsequent charges by the commonwealth.

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2. Full Presentation of the Evidence

The second requirement for a reduction is more vague due to the lack of specific codified language. In *Moore*, the court spent considerable time discussing the "full presentation of the evidence" regarding felony charges brought and dismissed against a defendant who was subsequently indicted directly.[17] *Moore* had her felony charges "dismissed" at the preliminary hearing.[18] She was subsequently directly indicted and found guilty in a bench trial.[19] While the *Moore* decision goes more toward the elective decision of the court in using the Reduction Clause, a topic covered later in this article, the court's reliance on the necessity of the trial court to hear "a full presentation of the evidence" lends itself to a belief in its requirement.

The commonwealth is under no obligation to put on their entire case in chief and are only required to present evidence to establish probable cause of the crime and the defendant's culpability. Therefore one can logically assume that not all of the evidence will be guaranteed to be presented by the commonwealth. A defendant looking to request usage of the Reduction Clause may be forced to not only subpoena every potential commonwealth's witness but, in an effort to ensure that all potential testimony is considered by the court, elicit testimony from those witnesses that goes to support the commonwealth's case-in-chief as related to the felony charge.

This stills begs the question: what evidence, if any, beyond the normal preliminary presentment, will a General District Court judge need to hear before unilaterally deciding to permanently remove the onus of a felony? Unfortunately, based on a lack of case law, one can only assume that this bar would have to be established on a "judge by judge" basis.

The Commonwealth's Nolle Prosse Option

Once a felony has been reduced under this code section, the commonwealth is prevented from resurrecting this charge under a direct indictment.[20] This is in stark contrast to the commonwealth's broad authority to nolle prosse a charge at any time.[21] This power would seem to give the commonwealth the authority to drop a questionable charge before the General District Court judge might invoke its Reduction Clause.

As articulated by *Duggins*, courts "[reserve] the power to overrule a nolle prosequi when wielded as a weapon of 'mischief or oppression' against an accused."[22] Mischief and oppression can have multiple meanings depending on which side of the aisle is making the argument. "Such deference remains due even in cases where the prosecution seeks a nolle prosequi because of an 'oversight' in its pretrial preparations."[23] This again speaks to the potential need of the defense to call or subpoena witnesses usually brought by the commonwealth. If the defense is seeking the Reduction, and the commonwealth only opts to put on evidence to meet the probable cause standard, the defendant could be faced with a situation where the case may not be fully presented — thereby removing the Reduction option.

Moreover, "a lack of adequate foresight and preparation on the part of the Commonwealth's Attorney" may not rise to that mentioned level of mischief or oppression.[24] Any analysis of this power, and the court's prerogative in allowing the use of this power, must conclude that in order to avoid a nolle prosse, the defendant must show that the commonwealth's choice is strictly oppressive or connected to a desire to bring the charge again where this jeopardy will not apply.

The Discretion of the Court

A practicing defense attorney must always bear in mind that the Reduction Clause power of the General District Court is completely voluntary. While the pertinent paragraphs of Virginia Code §19.2-186 state: "If a judge considers that there is sufficient cause only to charge the accused with an offense which the judge has jurisdiction to try, then he *shall* try the accused for such offense and convict him,"[25] the Virginia Supreme Court held that the usually mandatory use of the word "shall" has a softer meaning in this context. The Moore court states:

> The word 'shall' in this context means the court has the responsibility to proceed to try the accused on the misdemeanor, either at the time of the hearing (but subsequent to the finding of no probable cause on the felony) or at some later time. To construe the language otherwise would mean that at every preliminary hearing on a felony which encompassed a lesser included misdemeanor offense,

> the Commonwealth must have all its evidence marshaled and be fully prepared to try the misdemeanor as part of such hearing. This could not have been the legislative intent, given the nature and purpose of the preliminary hearing.[26]

In this instance the court held that the use of the word 'shall' is "directory and not mandatory."[27] This means that even if you have a lesser included misdemeanor, a full presentation of the evidence, and an obvious instance of the commonwealth's inability to prove the felony in the Circuit Court, the trial court judge may still elect not to reduce the felony to the appropriate misdemeanor.

Appealing the Decision

As discussed in the *Moore* decision above, appealing the court's decision to use its Reduction Clause comes with its own set of issues. *Moore* found herself in the position of appealing the Circuit Court's finding of guilt on the lesser included misdemeanor.[28] Once the matter was appealed, the commonwealth was then allowed to nolle prosse the charge and direct indict on the original felony.[29] With the reduction appealed, the decision no longer had the element of finality that would have rendered the indictment unconstitutional on double jeopardy grounds. A conviction and finality of such a case on a lesser included offense would have prohibited a subsequent prosecution; once the matter was appealed, the jeopardy was no longer an issue. As a result, the Supreme Court of Virginia upheld *Moore's* eventual conviction on the felony.[30] If the Reduction Clause is used, be very careful of your decision to appeal the matter to Circuit Court.

Summary

The use of the Reduction Clause by the General District Court is rare because it effectively takes a perfect storm of circumstances. There must exist a felony with a suitable lesser included offense. A full presentation of the evidence must be given. That evidence must show the judge that not only is a conviction upon the felony unlikely, but it must show that a conviction upon the misdemeanor is proper. The commonwealth must either elect not to nolle prosse or be prevented from nolle prossing the charge. Finally the General District Court judge must be convinced to use this authority. While these circumstances may be rare, the potential exists to turn a preliminary hearing from an unofficial discovery hearing into a full dispositive trial that permanently eliminates a felony charge.

Endnotes:

1 *Moore v. Commn.*, 218 Va. 388, 391, 237 S.E.2d 187, 190 (1977) (citing *Williams v. Commn.*, 208 Va. 724, 725, 160 S.E.2d 781, 782 (1968)).
2 Va. Code § 19.2-186.
3 District Court Judges' Benchbook, Association of District Court Judges of Virginia Benchbook Committee, Section II(c), Chapter 5, Section D, p. 220, (2016).
4 *Id.*
5 *Id.*
6 *Rouzie v. Comm.,* 215 Va. 174, 207 S.E.2d 854 (1974).
7 *Id.*
8 *Moore v. Comm.*, 218 Va. 388, 237 S.E.2d 187 (1977).
9 *Id.* at 190.
10 *Id.*
11 *Id. at Rouzie.*
12 *Freeman v. Comm.,* 14 Va. App. 126, 414 S.E.2d 871 (1992).
13 *Rouzie v. Comm.*, 215 Va. 174, 207 S.E.2d 854 (1974).
14 *Freeman v. Comm.*, 14 Va. App. 126, 414 S.E.2d 871 (1992).
15 *Rouzie* at 176.
16 *Freeman* at 128 (citing Blockberger v. US, 284 U.S. 299, 52 S.Ct. 180 (1932) and Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084 (1990)).
17 *Moore v. Comm.*, 218 Va. 388, 237 S.E.2d 187 (1977).
18 *Id.* at 389.
19 *Id.*
20 *Rouzie* at 856.
21 *Duggins v. Commn.*, 59 Va. App. 785, 790, 722 S.E.2d 663, 666 (2012).
22 Id. (citing 2 William Hawkins, Treatise of the Please of the Crown, 355 n. 1 (1824).
23 Id. (citing *Battle*, 12 Va. App. 630, 406 S.E.2d at 198).
24 *Harris v. Comm.*, 258 Va. 576, 584, S.E.2d 825, 829 (1999).
25 Virginia Code § 19.2-186 (emphasis added).
26 *Moore* at 190-91.
27 *Id.*
28 *Moore* at 389.
29 *Id.*
30 *Id.*

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