University of Richmond Law Review

Volume 23 | Issue 4 Article 12

1989

Annual Survey of Virginia Law: Evidence

Charles E. Friend

EVIDENCE*

*Charles E. Friend***

I. INTRODUCTION

The past year has brought a number of cases which have supplemented and clarified existing Virginia law. The Court of Appeals of Virginia has produced many of these decisions in the exercise of its initial appellate jurisdiction, but the docket of the Supreme Court of Virginia has also generated some important holdings in the evidence area.

One supreme court case in particular, *O'Dell v. Commonwealth*,[1] involved an unusual number of points of evidentiary interest. These are reported in detail below. Other decisions dealt with such diverse issues as the exclusion of witnesses, impeachment, competence, expert opinion, and, as always, the hearsay rule. These matters will be found under the appropriate headings, *infra*.

II. O'DELL V. COMMONWEALTH

Occasionally a single case will present an astonishing number of evidentiary issues, thereby becoming in itself a sort of "minicourse" in evidence law. Such a case is *O'Dell*, decided by the Supreme Court of Virginia in January 1988.

A. *Appointment of Defense Experts*

Defendant in *O'Dell* contended that he was entitled to have a number of forensic scientists appointed to assist him in his defense. He argued that the prosecution was "overloaded" with experts, and cited *Ake v. Oklahoma*[2] in support of his contention

---

** Adjunct Professor of Law, George Mason University; B.A., 1957, George Washington University; J.D., 1969, College of William and Mary.

Professor Friend is a noted authority on Virginia evidence law. His detailed analysis of Virginia evidence cases appears regularly in supplements to his treatise, *The Law of Evidence in Virginia*.

1. 234 Va. 672, 364 S.E.2d 491 (1988).
2. 470 U.S. 68 (1985).

that a similar number of experts should be appointed for the defense. The supreme court said:

> O'Dell admits none of the proposed experts would address the question of his sanity, as in *Ake v. Oklahoma* . . . ; they were all forensic scientists. O'Dell had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance . . . . The trial court had the discretion to decide whether O'Dell needed an expert or experts, and the burden is on O'Dell to show that this discretion was abused . . . . O'Dell has not carried this burden.[3]

B. *Scientific Evidence*

1. *Frye* Test

Defendant contended that the electrophoresis technique, used to test dried blood stains in the case, was not shown by the Commonwealth to be generally accepted by the scientific community, or to be sufficiently reliable for the results to be admitted into evidence, in accordance with the so-called "*Frye* Test" used in some jurisdictions to determine the admissibility of scientific evidence.[4]

The court stated that "[w]e see no reason to adopt the *Frye* test. Even if it were the law in Virginia, the evidence was sufficient to meet it."[5]

2. "Independent" Expert Testimony as to Reliability

Defendant further argued that evidence of a test's reliability and acceptance must come from an "independent" expert. However, the court found that the Commonwealth's witness, a professor at the University of California, was an "independent" expert and that his testimony therefore met this condition.[6]

---

3. 234 Va. at 686-87, 364 S.E.2d at 499.

4. The name is derived from the case which announced it, Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The "*Frye* test" of admissibility has been accepted by some courts and criticized by others. *See* Moenssens, *Admissibility of Scientific Evidence—An Alternative to the* Frye *Rule*, 25 WM. & MARY L. REV. 545 (1984).

5. 234 Va. at 696, 364 S.E.2d at 504.

6. *Id.* at 696, 364 S.E.2d at 504.

3. Weight of Scientific Evidence

Defendant attacked the reliability of the method used to test the dried blood samples, the experience and competence of the examiner who performed the tests, and the manner in which the tests were conducted. The court rejected these arguments, saying "[e]ach side introduced evidence supporting its respective positions on these issues. All three of these questions were factual issues involving the weight of the evidence rather than its admissibility, and were properly resolved by the jury."[7]

C. *Offer of Proof*

The opinion re-states the time-honored rule that if an alleged error in the exclusion of evidence is to be considered on appeal, an offer of proof must be made so that the record will show what the evidence would have been. The court stated that "[w]e will not speculate what the answer might have been to these questions. The answers were not proffered for the record . . . . We will not consider testimony which the trial court has excluded without a proper showing of what the testimony might have been."[8]

D. *Burden of Proof*

1. Instruction on "Guilt Beyond a Reasonable Doubt"

The trial judge instructed the jury that a finding of guilt beyond a reasonable doubt "does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence."[9] The court found that this language "properly balanced the instruction" and was therefore proper.[10]

2. "Heightened" Burden of Proof in Capital Cases

Defendant contended that the eighth amendment creates what he termed a "heightened reliability" standard of proof in capital cases. The court rejected this argument, saying "The standard of proof is beyond a reasonable doubt. There is no heightened relia-

7. *Id.* at 696-97, 364 S.E.2d at 505 (footnote omitted).
8. *Id.* at 697, 364 S.E.2d at 505.
9. *Id.* at 698-99, 364 S.E.2d at 506.
10. *Id.* at 699, 364 S.E.2d at 506.

bility standard in a capital murder case. Nor do the cases relied upon by O'Dell support the existence of such a standard."[11]

E. *Impeachment—Prior Convictions*

In Virginia, a witness may be impeached by showing that the witness has been convicted of "felony or perjury,"[12] or of a crime of moral turpitude.[13] Under the common law, such convictions may be shown regardless of when they occurred.

In *O'Dell*, the defense contended that this rule is unconstitutional. Defendant argued that because Rule 609(b) of the Federal Rules of Evidence place a 10-year restriction upon the use of prior convictions, this same restriction also applies in Virginia. The supreme court rejected this contention, noting that "We have no such rule . . . . O'Dell cites no authority indicating the admission of such prior convictions presents constitutional issues . . . . There is no merit in this argument."[14]

F. *Hearsay*

The defendant objected to the admission of the postsentence report as being hearsay. The court rejected this contention also.[15]

G. *Prior Crimes*

O'Dell argued that evidence of unadjudicated crimes and juvenile findings of not innocent should not have been admitted during the penalty phase of the trial. The court said "[w]e adhere to our consistent position that 'a trier of fact called upon to decide whether or not to impose the death sentence is entitled to know as much relevant information about the defendant as possible . . . .' Accordingly, we reject O'Dell's contentions."[16]

---

11. *Id.* at 704, 364 S.E.2d at 509.

12. VA. CODE ANN. § 19.2-269 (Repl. Vol. 1983 & Cum. Supp. 1989).

13. *See, e.g.*, Hackman v. Commonwealth, 220 Va. 710, 261 S.E.2d 555 (1980).

14. 234 Va. at 700, 364 S.E.2d at 507.

15. *Id.* at 701-02, 364 S.E.2d at 507-08.

16. *Id.* at 700, 364 S.E.2d at 507 (citing Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342, *cert. denied*, 107 S.Ct. 3277 (1987) (juvenile offenses and unadjudicated criminal activity held admissible in penalty phase of capital murder case)).

H. *Privilege*

1. Self-Incrimination

O'Dell had arranged for the presence of a witness, Pruett, but later asked that Pruett be excused. The defendant attempted to justify this action by claiming that Pruett had a fifth amendment privilege against self-incrimination, and therefore could not have been compelled to testify. The court rejected this contention, noting that section 19-2-270 of the Code of Virginia (the "Code") would have compelled Pruett to testify.[17]

Although it was not mentioned by the court, the defendant's contention might well have been rejected for another reason as well. It has been held in Virginia (although in another context) that it may not be *assumed* that a witness will refuse to testify if called. It appears that the witness would have to be actually called to the stand, and would have to actually assert the privilege, before such an argument could have any force.[18]

2. Priest-Penitent

O'Dell alleged that a third person (Pruett) had confessed to a certain minister that he (Pruett) had committed the murder with which O'Dell was charged. O'Dell claimed he had been precluded from calling the minister by the priest-penitent privilege set forth in section 19.2-271.3 of the Code. This section provides that no member of the clergy "shall be required in giving testimony as a witness in any criminal action to disclose any information communicated to him by the accused in a confidential manner."[19]

The supreme court opinion points out that the section limits the privilege to information communicated to the minister *by the accused*. Since the accused was O'Dell, not Pruett, the alleged confession of Pruett to the minister would not be privileged in Virginia.[20]

---

17. 234 Va. at 704, 364 S.E.2d at 704. VA. CODE ANN. § 19.2-270 states:
> In a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, unless such statement was made when examined as a witness in his own behalf.

VA. CODE ANN. § 19.2-270 (Cum. Supp. 1989).

18. *See* Scaggs v. Commonwealth, 5 Va. App. 1, 359 S.E.2d 830 (1987).

19. VA. CODE ANN. § 19.2-271.3 (Repl. Vol. 1983 & Cum. Supp. 1989).

20. 234 Va. at 704-05, 364 S.E.2d at 509. VA. CODE ANN. § 8.01-400, which makes *any*

I. *Other Evidentiary Issues*

The decision touches upon other evidentiary and procedural issues raised by the defense on appeal, many of them related to the penalty phase of the trial. Those who wish to complete the mini-course on evidence may refer to the opinion in the case.[21]

III. Exclusion of Witnesses—Violation of Exclusion Order

For anyone who has ever wondered what happens when a witness violates the court's order excluding all witnesses from the courtroom, the recent case of *Bennett v. Commonwealth*[22] will be of interest. In that case the Supreme Court of Virginia ruled that the witness exclusion statute[23] does not automatically disqualify a witness from testifying merely because the witness has remained in the courtroom in violation of an exclusion order. The court noted that "the purpose of excluding the witnesses from the courtroom is, of course, to deprive a later witness of the opportunity of shaping his testimony to correspond to that of an earlier one,"[24] and that the trial judge has discretion to decide whether such a witness who violates an exclusion order should nevertheless be permitted to testify.[25]

The factors to be considered by this trial judge in determining whether the witness should be allowed to testify despite the violation include (1) whether there was intentional impropriety by a party and (2) whether prejudice resulted.[26] Taking these factors into consideration, the court held that it was not an abuse of discretion in this case to allow the witness in question to testify.

---

communication of this type privileged, applies only in civil cases. There is no *rule of evidence* which makes such conversations privileged in criminal cases, except as provided in § 19.2-271.3. Whether the rules of the religious denomination of which the minister was a member would have permitted the revelation of the alleged confession, and whether the minister in question, or any other clergyman, would be willing to violate the laws of the clergyman's church, is another matter.

21. Notwithstanding all of the assignments of error, O'Dell's conviction and death sentence were affirmed by the supreme court.

22. 236 Va. 448, 374 S.E.2d 303 (1988).

23. *See* Va. Code Ann. § 19.2-265.1 (Repl. Vol. 1983 & Cum. Supp. 1989).

24. 236 Va. at 465, 374 S.E.2d at 314 (citing Huddleston v. Commonwealth, 191 Va. 400, 61 S.E.2d 276 (1950)).

25. This principle has been stated in other cases, *e.g.*, Brickhouse v. Commonwealth, 208 Va. 533, 159 S.E.2d 611 (1968).

26. 236 Va. at 465, 374 S.E.2d at 314.

IV. IMPEACHMENT

A. *Bias*

Several 1988 Virginia cases dealt with the issue of showing bias to impeach a witness. First, the Supreme Court of Virginia twice during 1988 reiterated the well-established rule that bias is never "collateral," meaning that if the bias is denied, extrinsic evidence to show the bias is always admissible.[27] Therefore, *anything* which tends to show bias may be drawn out on cross-examination.[28]

The past year also brought a reminder that it is irrelevant that the basis of the bias is legal or illegal, moral or immoral, laudable or reprehensible. What matters is that the fact, whatever it may be, may cause the witness to be biased for or against a party. Thus, it was held in *Henning v. Thomas*[29] that it could be shown that a medical witness was part of a nationwide network of doctors who offer themselves as witnesses for medical malpractice plaintiffs.[30] The point of such a showing, of course, is not that it is somehow illegal or immoral to act exclusively as a witness for the plaintiff, but that constantly testifying exclusively on behalf of plaintiffs indicates a possible bias toward the plaintiff's side of a given litigation, including the present one.

B. *Juvenile Convictions*

The use or attempted use of juvenile convictions, usually referred to as "juvenile adjudications," to impeach a witness has resulted in some uncertainty in the Virginia law. The issue arose during 1988 in the case of *Scott v. Commonwealth.*[31] Although the references to this problem in *Scott* are dictum because the court of appeals found that the issue was "not properly presented" to it on appeal,[32] the matter needs clarification, and the comments in *Scott* make it appropriate to include the subject in this review.

---

27. Norfolk & W. Ry. Co. v. Sonney, 236 Va. 482, 374 S.E.2d 71 (1988); Henning v. Thomas, 235 Va. 181, 366 S.E.2d 109 (1988). By comparison, extrinsic evidence of prior inconsistent statements is not admissible to impeach if the subject matter of the statement was "collateral"—i.e., not important to the issues of the case.

28. 235 Va. at 188, 366 S.E.2d at 113 (citing Henson v. Commonwealth, 165 Va. 821, 183 S.E. 435 (1936); Norfolk & W. Ry. Co. v. Birchfield, 105 Va. 809, 54 S.E. 879 (1906)).

29. 235 Va. 181, 366 S.E.2d 109 (1988).

30. *Id.* at 187-89, 366 S.E.2d at 112-13.

31. 7 Va. App. 252, 372 S.E.2d 771 (1988).

32. *Id.* at 261, 372 S.E.2d at 776.

Much of the confusion over the propriety of the use of juvenile adjudications to impeach arises because of a failure to identify the *specific purpose* for which the juvenile adjudication is being offered. In order to reach the proper result, it must be determined whether the witness's juvenile record is being offered (1) as a prior conviction to impeach the witness's *character for veracity*, or (2) to show that the witness is *biased.*

If the juvenile adjudication is being offered as a "general attack on credibility," i.e., as a prior conviction to impeach the witness's character for veracity, it is inadmissible.[33] However, if the juvenile record is being offered to show that the witness is biased, it may be shown.[34]

This rule is the result of the very strong policy of the law which regards it as the inalienable right of a party to show that an opponent's witness is biased. So absolute is this right to show bias that it takes precedence over other rules of evidence and even over statutory enactments. This rule reaches its zenith in criminal cases, where it has been held by the United States Supreme Court that the right of the defendant to show that the prosecution's witnesses are biased has a constitutional foundation, and that it is therefore reversible error to limit cross-examination as to juvenile offenses to show bias, even though a statute protects such matters from disclosure.[35]

C. *Prior Accusations—Sex Crime Cases*

American courts have struggled with the question of the admissibility in sex crime cases of evidence that the complaining witness has made false accusations of such crimes in the past. The Supreme Court of Virginia recently addressed this question in the case of *Clinebell v. Commonwealth.*[36]

Section 18.2-67.7 of the Code prohibits the introduction in sex crime cases of "general reputation or opinion evidence of the complaining witness's unchaste character or prior sexual conduct."[37] In

33. *See* Kiracofe v. Commonwealth, 198 Va. 833, 97 S.E.2d 14 (1957); *see also* 7 Va. App. at 261, 372 S.E.2d at 776 (dictum).

34. *See, e.g.*, Townes v. Commonwealth, 234 Va. 307, 325 n.6, 362 S.E.2d 650 n.6 (1987).

35. Davis v. Alaska, 415 U.S. 308 (1974).

36. 235 Va. 319, 368 S.E.2d 263 (1988), *rev'g in part*, 3 Va. App. 362, 349 S.E.2d 676 (1986).

37. VA. CODE ANN. § 18.2-67.7(A) (Repl. Vol. 1988).

Clinebell, the supreme court ruled that while the statute prohibits introduction of general reputation or opinion evidence as to character, it does *not* prohibit the introduction of evidence of *prior false accusations* by the complaining witness, because this is not "conduct" within the prohibition of section 18.2-67.7 of the Code.

> [A] majority of jurisdictions that have considered the issue hold that evidence of prior false accusations is admissible to impeach the complaining witness' credibility or as substantive evidence tending to prove that the instant offense did not occur . . . . Consequently, in a sex crime case, the complaining witness may be cross-examined about prior false accusations, and if the witness denies making the statement, the defense may submit proof of such charges.[38]

The court noted that such prior accusations are admissible, not as an attack on character per se, but to impeach the witness's credibility by showing the probability that the current allegations are also fabrications.[39] Having heard evidence of these prior false accusations, the jury may properly infer that the present allegations are also false.[40] The court observed, however, that the prior accusations are admissible only if the trial judge makes a "threshold determination that a reasonable probability of falsity exists."[41]

V. COMPETENCE—CHILDREN

In Virginia, there is no minimum age which must be attained before a child is competent to testify. "A child is competent to testify if it possesses the capacity to observe events, to recollect and communicate them, and has the ability to understand questions and to frame and make intelligent answers, with a consciousness of the duty to speak the truth."[42] Within these parameters, the determination of the competency of a child to testify is left to the discretion of the trial judge, who will not be reversed in the absence of "manifest error."[43]

There is a considerable amount of language in the Virginia cases to the effect that before a child may testify, it must be shown that

38. 235 Va. at 324-25, 368 S.E.2d at 265-66.
39. *Id.* at 325, 368 S.E.2d at 266.
40. *Id.*
41. *Id.*
42. Cross v. Commonwealth, 195 Va. 62, 64, 77 S.E.2d 447, 449 (1953).
43. Carpenter v. Commonwealth, 186 Va. 851, 864, 44 S.E.2d 419, 425 (1947).

the child has an understanding and appreciation of the sanctity of an oath.[44] This view, which has been criticized as "manifestly inappropriate,"[45] may not be an accurate statement of current Virginia evidence law. In the 1988 case of *Durant v. Commonwealth*,[46] the trial judge declined to permit the defendant's seven-year-old son to testify, in part because the judge found that the child did not understand the meaning of the oath. The court of appeals, reversing, said "[t]he fact that a child cannot define oath or state the nature and purpose of an oath does not necessarily disqualify him as a witness; many intelligent adults cannot give such a definition or statement but are competent as witnesses."[47]

The court of appeals ruled that the trial court's voir dire of the child demonstrated that, although the child did not understand the oath as such, he did understand what it meant to tell the truth. Consequently, the court of appeals held that the trial judge abused his discretion by refusing to permit the witness to testify.[48]

This same position has been taken in other courts. For example, in *Oliver v. United States*,[49] the Fourth Circuit found that a thirteen-year-old witness was competent to testify, even though the witness stated that he did not understand the nature of the oath.[50] The Fourth Circuit reached this result because it appeared that the witness understood that he was expected to tell the truth when sworn to do so. The Court of Appeals of Virginia, citing *Oliver*, took the same position in *Durant*.[51]

It therefore appears that, when the competency of a child is to be determined, the focus of the trial judge's inquiry should be upon whether the child in fact understands the nature of the truth, and the necessity of telling it, rather than upon the child's ability or inability to "give a definition of an oath in . . . technical terms."[52]

---

44. *See, e.g.*, Mullins v. Commonwealth, 174 Va. 472, 5 S.E.2d 499 (1939).

45. *See, e.g.*, McCormick, Evidence § 62 (3d ed. 1984).

46. 7 Va. App. 454, 375 S.E.2d 396 (1988).

47. *Id.* at 467, 375 S.E.2d at 402 (quoting 81 Am. Jur. 2D *Witnesses* § 89 (1976)).

48. *Id.* at 467, 375 S.E.2d at 402.

49. 267 F. 544 (4th Cir. 1920).

50. *Id.*

51. Va. App. at 467, 375 S.E.2d at 402.

52. 267 F. at 547.

VI. Expert Witness

A. *Foundation of Expert Opinion*

1. Proper Foundation

There is a common misapprehension that once an expert witness is qualified as such, the expert is then permitted to render opinions at will. Nothing could be farther from the truth. In order for the opinion to be admissible, the opinion must be based upon a proper foundation. In recent years, much appellate attention has been devoted to the question of what constitutes a proper foundation for the rendition of expert opinion.

Although at common law an expert witness could base an opinion only upon personal knowledge or a hypothetical question, in Virginia today there are several other bases of opinion which may be proper in a given case. For example, the passage of section 8.01-401.1 of the Code has made it possible for expert witnesses in civil cases to base an opinion upon sources which are themselves inadmissible in evidence.[53] The Supreme Court of Virginia has ruled that, even in criminal cases, an expert who lacks personal knowledge of the case at bar may base an opinion upon the witness's prior experience in similar matters.[54]

The Court of Appeals of Virginia has also said that an expert witness, even in a criminal case, may base an opinion upon sources of information, such as trade publications, consulted before the trial, if such sources are normally relied upon by others in the field. This principle, first announced by the court of appeals, in *Kern v. Commonwealth*[55] in 1986, was reiterated in 1988 by the same court in *Funderburk v. Commonwealth.*[56] The Supreme Court of Virginia does not appear to have passed upon the point, and in view of the supreme court's refusal in *Simpson v. Commonwealth*[57] to extend the effect of section 8.01-401.1 of the Code to criminal cases,[58] it will be interesting to see what the result will be if and when the higher court is squarely presented with point at

53. For a full discussion, with case citations, of this subject see C. Friend, The Law of Evidence in Virginia § 217 (3d ed. 1988).

54. *See, e.g.*, Cantrell v. Commonwealth, 229 Va. 387, 394-95, 329 S.E.2d 22, 27-28 (1985); Simpson v. Commonwealth, 227 Va. 557, 565-66, 318 S.E.2d 386, 391 (1984).

55. 2 Va. App. 84, 341 S.E.2d 397 (1986).

56. 6 Va. App. 334, 368 S.E.2d 290 (1988).

57. 227 Va. 557, 318 S.E.2d 386 (1984).

58. *Id.* at 565-66, 318 S.E.2d at 391.

issue in the court of appeal's ruling in *Kern* and *Funderburk.*

2. Proper Foundation—Trial Judge's Determination

Whether the opinion has indeed been based upon a proper foundation is a matter for the trial judge. The Supreme Court of Virginia in early 1989 reminded us that, although under section 8.01-401.1 of the Code an expert witness in a civil case may express an opinion without initially disclosing the basis therefore, and may base such opinion on otherwise inadmissible information, nevertheless upon proper objection, the trial court must determine whether the factors required to be included in formulating the opinion were actually used.[59] If all such factors were not utilized, the court should exclude the opinion. Therefore, where there is, as the supreme court put it, a "missing variable" in the foundation of the expert's opinion, the opinion is inadmissible.[60]

3. Personal Knowledge—Examination—Similarity of Conditions

Although an expert witness is permitted to base an opinion upon an examination of the person, place, or item at issue, that examination must be conducted under the proper conditions if its results are to be the basis for an opinion. A recent case notes that if an expert's opinion is to be based upon a personal examination or inspection of the location of the incident, it must be shown that the condition of the location at the time of the inspection was the same as, or substantially similar to, its condition at the time of the incident.[61]

---

59. Swiney v. Overby, 237 Va. 231, 233, 377 S.E.2d 372, 374 (1989).

60. *Id.* (citing Gaalaas v. Morrison, 233 Va. 148, 353 S.E.2d 898 (1987); Mary Washington Hosp. v. Gibson, 228 Va. 95, 319 S.E.2d 741 (1984)).

61. Runyon v. Geldner, 237 Va. 460, 464, 377 S.E.2d 456, 458-59 (1989) (expert's statement that conditions shown in a photograph taken several months after the incident were the same as conditions at time of expert's inspection a year later was not proper foundation); *see* Mary Washington Hosp. v. Gibson, 228 Va. 95, 319 S.E.2d 741 (1984) (because conditions could have changed following accident and before inspection, expert's testimony too speculative); *see also* Wise Terminal Co. v. McCormick, 104 Va. 400, 51 S.E. 731 (1905); Richmond Passenger & Power Co. v. Racks, 101 Va. 487, 44 S.E. 709 (1903) (absent proof of similarity of conditions, opinion of expert as to speed and stopping distances or railway cars inadmissible).

4. Experiments—Similarity of Conditions

The same principle has generally been applied to testimony about experiments conducted by witnesses, expert or otherwise; conditions at the time of the experiment must be shown to be similar to those at the time of the incident, or the evidence is inadmissible.[62] However, in *Pope v. Commonwealth*,[63] the Supreme Court of Virginia upheld the admission of evidence of an experiment to test the time required to run a particular route. The accused had assigned error on the grounds that the evidence should have been excluded because of physical differences between the police officer who conducted the experimental run and the person who supposedly ran the route in the actual incident, but the supreme court stated that the differences affected the *weight* of the evidence, not its *admissibility*.[64]

VII. HEARSAY

As might be expected, the hearsay rule occupied a considerable amount of space in the cases of the past year. In particular, the Virginia appellate courts dealt with such diverse matters as computer printouts, official written statements, identification testimony, and the co-conspirator rule.

A. *Computer Printouts as Evidence*

1. Generally

Computer printouts have been held to be hearsay, at least when they repeat recorded human observations.[65] However, printouts have previously been held admissible in Virginia under the business records exception to the hearsay rule.[66]

However, there are many types of computer printouts, and the differences can be important. For example, a printout of state-

62. *See, e.g.*, Featherall v. Firestone Tire & Rubber Co., 219 Va. 949, 252 S.E.2d 358 (1979); Bunn v. Norfolk, F&P, Ry. 217 Va. 45, 225 S.E.2d 375 (1976); Habers v. Madigan, 213 Va. 485, 193 S.E.2d 653 (1973).

63. 234 Va. 114, 360 S.E.2d 352 (1987).

64. *Id.* at 126, 360 S.E.2d at 359; *cf.* Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984) (photograph admissible when showing condition different from that described by witnesses, if differences sufficiently explained to avoid jury confusion).

65. *See* Penny v. Commonwealth, 6 Va. App. 494, 370 S.E.2d 314 (1988).

66. *See* Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986).

ments in a medical record would be subject to the strictures of the hearsay rule if offered to prove the truth of the statements; a printout of this type would be admissible only if found so under the business records rule or some other recognized hearsay exception.

2. Special Types of Printouts—"Call Trap" Equipment

Last year, the court of appeals was called upon to decide the applicability of the hearsay rule to so-called "call trap" printouts. These printouts are produced by "call trap" equipment which, when attached to a given telephone line, will reveal the point of origin of incoming telephone calls. In *Penny v. Commonwealth*,[67] the court of appeals ruled that such printouts, produced as they are by sophisticated electronic equipment for a specific purpose, should be treated more like scientific test results, admissible without reference to the hearsay rule. The admissibility of this type of printout is, however, subject to a showing that the specific equipment in use was reliable.[68] The same result would, presumably, apply to readouts from similar types of equipment, such as pen registers and other "black boxes" designed to provide information to the trained user.[69]

B. *Official Written Statements*

The hearsay exception for official written statements reared its head again in the 1988 case of *Smith v. Woodlawn Construction Co.*[70] This rule, although codified in part in Virginia,[71] is still subject to several common law requirements which, although not included in the statutory language, are nevertheless applied by the courts. One of these is the requirement that the rule permits the admission of only those portions of the official record which are statements of fact; another is the provision that such records are admissible only if the recording public official has first-hand

67. 6 Va. App. 494, 370 S.E.2d 314.

68. *Id.* at 494, 370 S.E.2d at 314.

69. As to pen registers (devices which reveal the number being dialed from the target telephone), see Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969), *cited in* 6 Va. App. 494, 370 S.E.2d 314.

70. 235 Va. 424, 368 S.E.2d 699 (1988).

71. *See, e.g.*, VA. CODE ANN. §§ 8.01-389, -390 (Repl. Vol. 1984). There are many Virginia statutes which make public records of various types admissible in Virginia. For a more complete listing, *see* Friend, *Documentary Evidence* (Professional Programs Associates, 1989).

knowledge of the transaction being entered in the records.[72] Both of these requirements were applied by the supreme court in *Smith*, where the supreme court ruled that evidence of the value of a parcel of land contained in a tax assessor's file was not admissible in evidence.[73]

The application in *Smith* of the requirement that the public official making the record entry have first-hand knowledge of the matters being recorded is particularly interesting. This requirement is not often enforced, which is perhaps just as well in view of the fact that in today's complex society very few public officials are actually going to have personal knowledge of matters described in the records. Nevertheless, it is a part of the common-law hearsay exception for public records, and obviously continues to be applied in Virginia, notwithstanding the omission of any such language from the statues.

C. *Identification Testimony*

Although evidence of pretrial identifications necessarily involves hearsay questions, the general principles regarding the admissibility of out-of-court and in-court identifications go beyond the hearsay problem. Nevertheless, it is convenient to treat the subject under the heading of the hearsay rule, since hearsay issues are almost always present when such testimony is offered.[74]

---

72. *See, e.g.*, Taylor v. Maritime Overseas Corp., 224 Va. 562, 299 S.E.2d 340 (1983); Edwards v. Jackson, 210 Va. 450, 171 S.E.2d 854 (1970).

73. 235 Va. at 431, 368 S.E.2d at 703-04.

74. The applicable principles have been articulated in Virginia in a number of cases, including several decided within the past year. These principles may be stated as follows:

1. Evidence of out-of-court identifications may be admitted if:
   a. The identification was not unduly suggestive or
   b. The procedure was unduly suggestive, but the identification is so reliable that there is no substantial likelihood of misidentification.

Hill v. Commonwealth, 2 Va. App. 683, 693, 347 S.E.2d 913, 918 (1986), *cited in* Miller v. Commonwealth, 7 Va. App. 367, 373, 373 S.E.2d 721, 724 (1988).

2. The reliability of an unduly suggestive out-of-court identification must be considered in light of the "totality of the circumstances."

Miller v. Commonwealth, 7 Va. App. 367, 373 S.E.2d 721 (1988) (citing Neil v. Biggers, 409 U.S. 188 (1972)).

3. Factors to be considered in evaluating the likelihood of misidentification as the result of an unduly suggestive procedure included:
   a. The opportunity of the witness to view the criminal at the time of the crime;
   b. The witness' degree of attention;
   c. The accuracy of the witness's prior description of the criminal;
   d. The level of certainty demonstrated by the witness at the confrontation, and
   e. The length of time between the crime and the confrontation.

Defense claims that an identification procedure has been "unduly suggestive" frequently arise when only a single photograph of the defendant has been shown to the identifying witness. Such single-photo identifications have frequently been found by the courts to be unduly suggestive.[75] Nevertheless, the courts have sometimes used the principles discussed above to admit this type of identification evidence.[76]

D. *The Co-Conspirator Rule*

Still another hearsay exception which received judicial attention in 1988 was the so-called "co-conspirator rule," which makes statements of one conspirator, when made during and in furtherance of the conspiracy, admissible against all other conspirators, including those who were not present when the statement was made.[77]

One of the more troublesome aspects of this rule has been the question of how the existence of the conspiracy itself can be established, so that the hearsay exception can be applied. Not less than three court of appeals cases dealt with this problem in 1988. In these opinions, the court of appeals held that the conspiracy must be established by evidence other than the hearsay statements of the co-conspirators themselves.[78] Otherwise, said the court, the hearsay would "lift itself by its own bootstraps to the level of competent evidence."[79]

Thus, a party seeking to introduce the statements of conspirators under the co-conspirator exception to the hearsay rule must first produce some evidence to establish that a conspiracy existed; only then will the statements become admissible.

---

7 Va. App. at 373, 373 S.E.2d at 724; Wise v. Commonwealth, 6 Va. App. 178, 367 S.E.2d 197 (1988) (both quoting Neil v. Biggers, 409 U.S. 188 (1972)).

75. *See, e.g.*, Wise v. Commonwealth, 6 Va. App. 178, 367 S.E.2d 197 (1988).

76. *E.g.*, Miller, 7 Va. App. 367, 373, S.E.2d 721 (1988).

NOTE: Even if the out-of-court identification itself is inadmissible, an *in-court* identification may still be made if the origin of the in-court identification is independent of the improper out-of-court identification procedure. Hill v. Commonwealth, 2 Va. App. 683, 347 S.E.2d 913 (1986), *cited in* Miller v. Commonwealth, 7 Va. App. 367, 373 S.E.2d 721 (1988).

77. For a more complete discussion and case citations, see C. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 259 (3d ed. 1988).

78. Poole v. Commonwealth, 7 Va. App. 510, 375 S.E.2d 371 (1988); Stultz v. Commonwealth, 6 Va. App. 439, 369 S.E.2d 215 (1988); *see* Cirios v. Commonwealth, 7 Va. App. 292, 373 S.E.2d 164 (1988).

79. Pool v. Commonwealth, 7 Va. App. 510, 375 S.E.2d 371 (1988) (citing United States v. Gresko, 632 F.2d 1113, 1131 (4th Cir. 1980) (quoting Glasser v. United States, 315 U.S. 60, 74-75 (1942)).