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Annual Survey of Virginia Law: Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

*Steven D. Benjamin**

I. INTRODUCTION

During the past year, the Virginia Court of Appeals continued to be the primary contributor to the development of substantive and procedural criminal law in Virginia. As it has in years past, the court ruled on numerous Fourth Amendment questions, particularly with respect to investigatory detention. Other significant rulings dealt with double jeopardy, discovery, due process, and trial procedure.

II. FOURTH AMENDMENT

A. *Detention*

The court was particularly active in its review of challenges to the lawfulness of police/citizen encounters. In a number of cases, the court found the circumstances sufficient to create the reasonable suspicion necessary to justify the investigatory detention of the defendant.¹

In an equal number of cases, however, the court ruled that the officers' actions were not justified.² In *Moore v. Commonwealth*,³

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1. See *Quigley v. Commonwealth*, 14 Va. App. 28, 414 S.E.2d 851 (1992) (reasonable suspicion existed where defendant fled after receiving telephone call warning her of investigation); *Commonwealth v. Eaves*, 13 Va. App. 162, 408 S.E.2d 925 (1991) (pertinent circumstances created a reasonable suspicion justifying the defendant's detention); *Hall v. Commonwealth*, 12 Va. App. 559, 389 S.E.2d 921 (1991) (campus police officers exceeded their powers of arrest, but properly made a warrantless citizen's arrest); *Jacques v. Commonwealth*, 12 Va. App. 591, 405 S.E.2d 630 (1991) (the stop of the defendant's automobile and his detention were lawful); *Troncoso v. Commonwealth*, 12 Va. App. 942, 407 S.E.2d 349 (1991) (investigatory detention and subsequent arrest were proper); *Dixon v. Commonwealth*, 11 Va. App. 554, 399 S.E.2d 831 (1991) (investigatory detention and frisk were lawful); see also *Baldwin v. Commonwealth*, 243 Va. 191, 413 S.E.2d 645 (1992) (initial encounter not a seizure).

2. *Riley v. Commonwealth*, 13 Va. App. 494, 412 S.E.2d 724 (1992); *Adams v. Commonwealth*, 12 Va. App. 37, 402 S.E.2d 496 (1991); *Moore v. Commonwealth*, 12 Va. App. 404, 404 S.E.2d 77 (1991); *Waugh v. Commonwealth*, 12 Va. App. 620, 405 S.E.2d 429 (1991); *Hall v. Commonwealth*, 12 Va. App. 972, 406 S.E.2d 674 (1991); *Smith v. Commonwealth*, 12

the police officer made a lawful traffic stop (for speeding) of a man he knew to be under surveillance by other officers. The defendant appeared nervous; he stammered, and his hands shook. Fearing for his safety, the officer frisked the defendant, and removed a hard object which was heroin. The court held that the officer's own assessment of the severity of the defendant's nervousness did not justify the frisk.⁴

In *Smith v. Commonwealth*⁵ an officer saw the defendant standing in a playground where drugs were prevalent. When the defendant saw the officer, he jammed something into the front of his sweat pants. Suspicious, the officer detained and frisked the defendant, and subsequently found cocaine when he looked inside the man's pants. Citing similar cases in which detentions were based on officers' hunches, a panel of the Virginia Court of Appeals reversed the trial court's conviction.⁶

In *Adams v. Commonwealth*,⁷ an informant told a narcotics detective that he had seen "Mousey," whom he described, distribute drugs from a particular hotel room. The detective obtained a search warrant for the room, but by the time he arrived to conduct the search, the occupants had checked out. The hotel clerk told him that two males, one of whom matched the general description of "Mousey," had just left the hotel, and were walking on Midlothian Turnpike. Twenty minutes later, the detective located two black males a quarter of a mile from the hotel. The detective frisked the man he believed to be "Mousey," found a gun, and charged him with possession of a concealed weapon.

The court of appeals reversed, ruling that the detective merely had a hunch that the man he stopped and frisked was the man about whom he had information. No evidence existed to elevate his hunch into the reasonable suspicion required for an investigative detention. The detective had discovered nothing to corroborate the informant's tip, had acquired no evidence that the defendant had

Va. App. 1100, 407 S.E.2d 49 (1991). In view of the en banc decision in *Bethea v. Commonwealth*, 14 Va. App. ___, 419 S.E.2d 249 (1992), it is important to bear in mind that these cases were decided by panels on which at least two of the judges were dissenting members of the *Bethea* decision. See *infra* notes 9-12 and accompanying text.

3. 12 Va. App. 404, 404 S.E.2d 77 (1991).

4. *Id.* at 406-07, 404 S.E.2d at 78; cf. *Servis v. Commonwealth*, 6 Va. App. 507, 371 S.E.2d 156 (1988).

5. 12 Va. App. 1100, 407 S.E.2d 49 (1991).

6. *Id.* at 1104, 407 S.E.2d at 52.

7. 12 Va. App. 37, 402 S.E.2d 496 (1991).

ever been in the hotel room, and had offered no articulable reason to believe that the man he stopped was committing a crime.⁸

Perhaps one of the more unexpected decisions this past year was the en banc reversal⁹ of the Court of Appeals' panel decision in *Bethea v. Commonwealth*.¹⁰ In this case, two police officers were taking pictures while riding in an unmarked automobile. As they photographed several young men riding in a car near them, the passenger of that car, Bethea, noticed the picture-taking and began to mug, waving and making faces. He was not shaking his fist, pointing his finger, or making obscene gestures. Alarmed, the officers dropped back a bit and noticed that the vehicle did not have a city decal. Since the failure to have a city decal on the car violated a city ordinance, the policemen stopped the car and began to question the driver. Bethea, a passenger, was calm and did not cause a disturbance. However, as a safety precaution, one of the officers asked Bethea to step out of the car. When another officer observed Bethea adjusting his pants, he pulled Bethea away from the car. A bag of cocaine then dropped from Bethea's shorts, and he was arrested. The panel held that the officer's order to Bethea to step away from the car was an unlawful detention, one not justified by the circumstances and the public interest.¹¹ The en banc court differed, however, reaching its decision by more specific balancing. Instead of the broader balancing of the individual's interest in personal privacy and security against the public interest in law enforcement, the en banc court balanced the degree of the intrusion, which was found to be minimal, against the need of the police officer to take protective measures.¹² The balance, viewed in this light, was struck in the officer's favor.

8. *Id.*; accord *Hardy v. Commonwealth*, 11 Va. App. 433, 399 S.E.2d 27 (1990). Compare *Harris v. Commonwealth*, 241 Va. 146, 400 S.E.2d 191 (1991), in which the detention and frisk of the defendant were lawful. What was not lawful, however, was the officer's search of the film canister retrieved from the defendant's pocket and believed to contain drugs. In *Harris*, the tip and the officer's observation justified the detention. The tip and the officer's hunch as to the contents of the canister did not, however, supply the necessary probable cause. *Id.* at 151-52, 400 S.E.2d at 194.

9. *Bethea v. Commonwealth*, 14 Va. App. ___, 419 S.E.2d 249 (1992).

10. 12 Va. App. 303, 404 S.E.2d 65 (1991).

11. *Id.* at 310, 404 S.E.2d at 67.

12. *Bethea*, 14 Va. App. at ___, 419 S.E.2d at 251-52. In the context of an arrest, an officer's needs to ensure his own safety and the integrity of the arrest are compelling. *Washington v. Chrisman*, 455 U.S. 1, 7 (1982); see also *Servis v. Commonwealth*, 6 Va. App. 507, 517-18, 371 S.E.2d 156, 161 (1988) (discussing investigative detention); cf. *Payne v. Commonwealth*, 14 Va. App. 86, 414 S.E.2d 869 (1992).

B. Search Warrants

In order to demonstrate probable cause based upon an informant's tip, an affidavit for a search warrant must "provide the magistrate with the quality of information from which one reasonably and objectively could conclude that the informer was worthy of belief."¹³ This showing can be accomplished by reciting facts about the informer, or, to preserve anonymity, by presenting facts provided by the informer which evince personal knowledge of the information relayed.¹⁴

In *Boyd v. Commonwealth*,¹⁵ the affiant police officer described information received from an anonymous informant. The defendant argued that the affidavit was insufficient to establish probable cause, because the only corroboration of the informant's reliability was the officer's confirmation of innocent, non-predictive information (such as the target's address, a description of his car, and the fact that his girlfriend lived with him).¹⁶

The Virginia Court of Appeals ruled that the character and nature of the information supported the magistrate's finding of probable cause. The court's ruling was based on several factors: 1) the informant had personally observed the contraband; 2) he was more than eighteen years old, a resident of the metropolitan area for one year, had no criminal record, was responsibly employed, had used cocaine, and wished to preserve his anonymity out of fear; 3) the police officer had the informant's phone number, and could have ascertained his identity; and 4) the details supplied by the informant, although relating only innocent conduct, were confirmed.¹⁷

The Virginia Court of Appeals continued to rule on questions relating to the execution of search warrants.¹⁸ In *Meyers v. Com-*

13. *Boyd v. Commonwealth*, 12 Va. App. 179, 185, 402 S.E.2d 914, 918 (1991).

14. *Id.* at 187-88, 402 S.E.2d at 921-22.

15. 12 Va. App. 179, 402 S.E.2d 914 (1991).

16. *Id.* at 187-88, 402 S.E.2d at 921-22. Appellate courts have drawn a distinction between predictive behavior and "past activity" or "easily obtained facts and conditions existing at the time of the tip." See *Adams v. Commonwealth*, 12 Va. App. 37, 41, 402 S.E.2d 496, 498 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 245 (1983)); see also *Hardy v. Commonwealth*, 11 Va. App. 433, 399 S.E.2d 27 (1990) (informant's tip was insufficient to establish probable cause for a warrantless arrest).

17. *Boyd*, 12 Va. App. at 191, 402 S.E.2d at 921-22; see also *Williams v. Commonwealth*, 4 Va. App. 53, 69, 354 S.E. 279, 288 (1987).

18. The previous year's decisions included *Gladden v. Commonwealth*, 11 Va. App. 595, 400 S.E.2d 791 (1991); *Delacruz v. Commonwealth*, 11 Va. App. 335, 398 S.E.2d 103 (1990); and *Grover v. Commonwealth*, 11 Va. App. 143, 396 S.E.2d 863 (1990).

monwealth,¹⁹ the officer's entry pursuant to a search warrant was not unlawful, even though he used a ruse to persuade an occupant to open the door. Once the door was open, the officer announced his true identity and purpose. One important aspect of the court's holding was that the occupant did not try to close the door, and no force was necessary to complete the entry.

The "good faith" exception of *United States v. Leon*²⁰ does not apply where the affiant knowingly or recklessly includes a false statement in his affidavit.²¹ Once the defendant makes a "substantial preliminary showing" that such a statement was included, and where the disputed statement is necessary for a finding of probable cause, the defendant is entitled to a hearing in order to prove his contention.²² In two published Virginia cases raising a *Franks* challenge, the Court of Appeals affirmed the trial court's findings that a deliberate or reckless falsehood had not been proven.²³

A defendant is not necessarily entitled to a *Franks* hearing. He must first make a showing that the affidavit would not establish probable cause without the allegedly false statements. The failure to make this foundational showing was the basis for the court's affirmance in *Neustadter v. Commonwealth*.²⁴

In determining probable cause for the issuance of a search warrant, a magistrate may consider several affidavits containing facts relevant to the same offense when presented simultaneously by the same officer.²⁵

19. 12 Va. App. 398, 404 S.E.2d 83 (1991).

20. 468 U.S. 897 (1984); see also *Miles v. Commonwealth*, 13 Va. App. 64, 408 S.E.2d 602 (1991) (good faith exception permitted admission of evidence seized pursuant to defective search warrant).

21. *Franks v. Delaware*, 438 U.S. 154 (1978); *Lanier v. Commonwealth*, 10 Va. App. 541, 548-49, 394 S.E.2d 495, 500 (1990) (defendant failed to establish by a preponderance of the evidence that false information was provided to the magistrate).

22. *Franks*, 438 U.S. at 155-56.

23. See *Moats v. Commonwealth*, 12 Va. App. 349, 404 S.E.2d 244 (1991); *Lanier*, 10 Va. App. 541, 394 S.E.2d 495. In *Moats*, the defendant also argued that the affiant had failed to include information in the affidavit which would have frustrated a determination of probable cause. The Virginia Court of Appeals held that probable cause would have been established by the affidavit even if the missing information had been supplied. In any event, the court reasoned, the Commonwealth was not required to include all of its information in an affidavit. *Moats*, 12 Va. App. at 356, 404 S.E.2d at 247.

24. 12 Va. App. 273, 403 S.E.2d 391 (1991); see also *Moats*, 12 Va. App. 349, 404 S.E.2d 244.

25. *Derr v. Commonwealth*, 242 Va. 413, 420, 410 S.E.2d 662, 666 (1991). The court also discussed the requirements of § 19.2-54, its finding that the magistrate had a substantial basis for his conclusion, and the good faith exception. *Id.* at 419-20, 410 S.E.2d at 665-66.

C. Search Warrant Exceptions

The "plain view" exception was the subject of some discussion by the court of appeals.²⁶ An important prerequisite to the exception is that the seizable nature of the item must be immediately apparent prior to the challenged activity. In *Grimstead v. Commonwealth*,²⁷ the police officer saw a hemostat in a car ashtray, but could not tell if any marijuana was present. He was not entitled to pick up the hemostat and examine it more closely on the strength of his suspicion. Probable cause was necessary²⁸ and did not exist in this case.

A consensual search is deemed reasonable for purposes of the Fourth Amendment. The consent upon which an officer relies, however, must be voluntary. In *Commonwealth v. Ealy*,²⁹ the Virginia Court of Appeals held that a non-resident had an expectation of privacy in a garage which he used and kept locked. Further, the court affirmed the trial court's finding that the third-party consent to search was not voluntary and that the defendant's consent was the product of an initial, unlawful search.

The court noted, but did not decide, an issue undecided in Virginia: whether consent to search is voluntary where police falsely represent their ability to obtain a search warrant.³⁰

The Virginia courts have evinced a willingness to condone actions justified as necessary to protect the safety of officers and others.³¹ Searches exceeding the bounds of a traditional frisk of the person, which traditionally were permitted only as incidental to lawful arrests, have been approved in the rubric of protective sweeps,³² or as the product of a balancing of the degree of intrusion against the need to ensure safety.³³ The sweep search of the home

26. See *Ruffin v. Commonwealth*, 13 Va. App. 206, 409 S.E.2d 177 (1991); *Grimstead v. Commonwealth*, 12 Va. App. 1066, 407 S.E.2d 47 (1991); *Conway v. Commonwealth*, 12 Va. App. 711, 407 S.E.2d 310 (1991); *Carson v. Commonwealth*, 12 Va. App. 497, 404 S.E.2d 919 (1991).

27. 12 Va. App. 1066, 407 S.E.2d 47 (1991).

28. See *Arizona v. Hicks*, 480 U.S. 321, 323, 326-27 (1987).

29. 12 Va. App. 744, 407 S.E.2d 681 (1991).

30. *Id.* at 754 n.1, 407 S.E.2d at 687 n.1; see also *Crosby v. Commonwealth*, 6 Va. App. 193, 198, 367 S.E.2d 730, 733 (1988) (defendant's acquiescence to a detective's statement that he intended to get a search warrant did not constitute a consent to search).

31. See, e.g., *Servis v. Commonwealth*, 6 Va. App. 507, 517-18, 371 S.E.2d 156, 161 (1988).

32. *Maryland v. Buie*, 494 U.S. 325, 337 (1990).

33. *Conway v. Commonwealth*, 12 Va. App. 711, 407 S.E.2d 310 (1991).

of the defendant in *Conway v. Commonwealth*³⁴ was proper. In view of the court's decision in *Bethea*, case law discussing the right to make a protective sweep following the dissipation of the grounds for the detention should follow.³⁵

III. CONFESSIONS AND INTERROGATION

The Court of Appeals' consideration of the admissibility of defendants' incriminating statements has continued to focus primarily on the issue of voluntariness.³⁶

In making the legal determination of whether a statement is voluntary, the trial court must consider all circumstances, including the details of the interrogation and the individual traits of the defendant.³⁷ Generally, the question will be whether the circumstances were such as to undermine the free will of the accused, or to cause an innocent person to falsely confess.³⁸

On the question of voluntariness, Virginia appellate courts have accorded extraordinary deference to trial court findings.³⁹ In *Venable v. Commonwealth*,⁴⁰ the defendant challenged the voluntariness of statements he made while receiving treatment in a hospital for several unsutured lacerations, one of which had exposed a tendon. He had lost one-third of his total blood volume, had ingested cocaine, and had a blood alcohol concentration of 0.147.⁴¹ The trial court found that the Commonwealth had proved the voluntariness of the defendant's statements by a preponderance of the evidence. Because this finding was supported by the evidence, the conviction was affirmed.

34. *Id.*

35. *See supra* notes 9-12 and accompanying text.

36. *See, e.g.*, *Cheng v. Commonwealth*, 240 Va. 26, 35-36, 393 S.E.2d 599, 604 (1991); *Wilson v. Commonwealth*, 13 Va. App. 549, 413 S.E.2d 655 (1992); *Johnson v. Commonwealth*, 12 Va. App. 391, 404 S.E.2d 384 (1991); *Mundy v. Commonwealth*, 11 Va. App. 461, 390 S.E.2d 525 (1990).

37. *Terrell v. Commonwealth*, 12 Va. App. 285, 403 S.E.2d 387 (1991). The circumstances relating to the interrogation include the presence of trickery and deceit, psychological pressure, threats or promises of leniency, and the duration of the questioning. Individual traits include intelligence, education, prior experience with the police, the use of drugs or alcohol, emotional or mental instability, and the deprivation of physical comfort. *Id.*

38. *Id.* at 292, 403 S.E.2d at 390; *see, e.g.*, *Tipton v. Commonwealth*, 224 Va. 256, 262, 295 S.E.2d 880, 883 (1982).

39. *See, e.g.*, *Mundy v. Commonwealth*, 11 Va. App. 461, 390 S.E.2d 525 (1990).

40. 12 Va. App. 348, 404 S.E.2d 374 (1991).

41. *Id.* at 360, 404 S.E.2d at 75.

Several holdings discussed *Miranda*⁴² issues. *Mier v. Commonwealth*,⁴³ not surprisingly, held that the requirements of *Miranda* do not apply to private security personnel. The value of the decision was a question which was acknowledged but left open: whether "private security agents cooperating with the police or working in conjunction with law enforcement agencies might be required to give the *Miranda* warnings prior to questioning."⁴⁴ In this case, the cooperation of the private security agents "was merely coincident to the performance of their private duties,"⁴⁵ and the court distinguished those cases which involved "coordinated private-public law enforcement" or subterfuge.

A recurring question in *Miranda* litigation is whether there has been an invocation of the right to counsel. In *Terrell v. Commonwealth*,⁴⁶ the defendant's four references to his intention to "get a lawyer" during interrogation did not constitute an invocation of his right to counsel. Because the obligation to warn a suspect of his rights arises only upon initiation of custodial interrogation, the issue is often posed as to whether a particular encounter or exchange constitutes custodial interrogation.⁴⁷ In *Nash v. Commonwealth*,⁴⁸ the court of appeals held that a traffic stop defendant was not in custody for *Miranda* purposes.⁴⁹ Finally, a delay in bringing the defendant before a magistrate as required by Virginia Code section 19.2-80⁵⁰ did not require the suppression of his statements.⁵¹

IV. DOUBLE JEOPARDY

As practitioners continued to confront different interpretations and applications of *Grady v. Corbin*,⁵² the court of appeals' willingness to consider these double jeopardy issues has resulted in some

42. *Miranda v. Arizona*, 384 U.S. 436 (1966).

43. 12 Va. App. 827, 407 S.E.2d 342 (1991).

44. *Id.* at 833 n.1, 407 S.E.2d at 346 n.1.

45. *Id.* at 833, 407 S.E.2d at 346.

46. 12 Va. App. 285, 403 S.E.2d 387 (1991).

47. *See, e.g., Lanier v. Commonwealth*, 10 Va. App. 541, 544-55, 394 S.E.2d 495, 503-04 (1990); *Wass v. Commonwealth*, 5 Va. App. 27, 31-32, 359 S.E.2d 836, 838-39 (1987).

48. 12 Va. App. 550, 404 S.E.2d 743 (1991).

49. *Id.* at 552, 404 S.E.2d at 744; *see also Cherry v. Commonwealth*, 14 Va. App. 135, 415 S.E.2d 242 (1992); *Commonwealth v. Milner*, 13 Va. App. 556, 413 S.E.2d 352 (1992).

50. VA. CODE ANN. § 19.2-80 (Repl. Vol. 1990).

51. *Alatishe v. Commonwealth*, 12 Va. App. 376, 377, 404 S.E.2d 81, 82-83 (1991).

52. 495 U.S. 508 (1990).

degree of clarity.⁵³ In *Darnell v. Commonwealth*,⁵⁴ the court reversed the defendant's conviction for credit card theft where he had been convicted previously of petit larceny for stealing the wallet which contained the cards. In *Curtis v. Commonwealth*,⁵⁵ a prosecution for attempted capital murder was not barred where one of the two predicate rapes proven by the prosecution was a crime for which the defendant had already been convicted in another jurisdiction.⁵⁶ In another case, separate convictions of hit and run and evading police were not barred.⁵⁷

The United States Supreme Court decision in *United States v. Halper*⁵⁸ is significant to the attorney whose client faces both civil and criminal sanctions for the same conduct. For purposes of invoking the Fifth Amendment prohibition of double jeopardy, the determinative question is not whether the sanction is labelled criminal or civil, but whether the sanction may only fairly be characterized as serving purposes of retribution or deterrence. If so, a subsequent sanction of a like penal character for the same conduct is barred.⁵⁹ This holding was applied in *Small v. Commonwealth*,⁶⁰ where the defendant had been found in civil contempt for violating the terms of an earlier order of the trial court. He was ordered to pay, in addition to other sums, \$3,000 "in civil penalties for . . . [his] willful and flagrant violations of the court's final order."⁶¹ Prior to trial on a parallel criminal contempt charge, the defendant moved to dismiss on double jeopardy grounds. The court of appeals (en banc) agreed with the defendant; citing *Halper*, they reversed the trial court.⁶²

53. See, e.g., *Freeman v. Commonwealth*, 14 Va. App. 126, 414 S.E.2d 871 (1992); *Stevens v. Commonwealth*, 14 Va. App. 238, 415 S.E.2d 881 (1992).

54. 12 Va. App. 948, 408 S.E.2d 540 (1991) (applying *Grady* retroactively).

55. 13 Va. App. 622, 414 S.E.2d 421 (1992) (en banc).

56. The court invoked a "jurisdictional exception" to the double jeopardy rule.

57. *Treu v. Commonwealth*, 12 Va. App. 996, 406 S.E.2d 676 (1991); see also *Martin v. Commonwealth*, 242 Va. 1, 406 S.E.2d 15 (1991) (discussing double jeopardy and the "same conduct" rule); *Fitzgerald v. Commonwealth*, 11 Va. App. 625, 401 S.E.2d 208 (1991) (convictions for both destruction of private property (VA. CODE ANN. § 18.2-137 (Cum. Supp. 1992)) and burglary (VA. CODE ANN. § 18.2-91 (Cum. Supp. 1992)) did not violate prohibition against double jeopardy).

58. 492 U.S. 930 (1989).

59. *Id.*

60. 12 Va. App. 314, 398 S.E.2d 98 (1991) (en banc).

61. *Id.* at 317, 398 S.E.2d at 101.

62. *Id.*

Several double jeopardy questions were presented during 1991. In *Nelson v. Commonwealth*,⁶³ reconvening of court within fifteen minutes of pronouncement of sentence to correct the intended sentence did not violate double jeopardy.⁶⁴ *Ginanni v. Commonwealth*⁶⁵ held that a drug conspiracy conviction violated the double jeopardy prohibition, and *Lash v. Commonwealth*⁶⁶ provided the analysis to be followed in resolving Code of Virginia section 19.2-294 issues.⁶⁷

V. DUE PROCESS

The past year brought several due process decisions with important practical application to the dilemma confronted by trial courts and prosecutors in determining the extent of a defendant's entitlement to discovery.⁶⁸ In *White v. Commonwealth*,⁶⁹ the trial court erred in not requiring the Commonwealth to divulge completely⁷⁰ the confession of a confederate whose admission had been summarized by the Commonwealth's attorney.⁷¹ Because the withheld statement was material⁷² to White's preparation and defense,

63. 12 Va. App. 835, 407 S.E.2d 326 (1991).

64. *Id.* at 838-39, 407 S.E.2d at 328-29.

65. 13 Va. App. 1, 408 S.E.2d 767 (1991).

66. 13 Va. App. 251, 410 S.E.2d 689 (1991) (This case has been reargued en banc).

67. VA. CODE ANN. § 19.2-294 (Repl. Vol. 1990).

68. What does not exist cannot be disclosed. The failure to preserve potentially exculpatory evidence is not a violation of due process absent bad faith. *Tickell v. Commonwealth*, 11 Va. App. 558, 400 S.E.2d 534 (1991).

69. 12 Va. App. 99, 402 S.E.2d 692 (1991).

70. The summary by the Commonwealth of the portions of the statement deemed exculpatory was "conclusory and did not satisfy the obligation to produce the exculpatory material." *Id.* at 102, 402 S.E.2d 694; *accord*, *Lemons v. Commonwealth*, 13 Va. App. 668, 673 n.2, 414 S.E.2d 842, 845 n.2 (1992).

71. The third party had stated that he had shot the victim, that the defendant was present, and that "they did the killing together." Although the full statement was not made a part of the record, its exculpatory nature was evident in two respects. First, it tended to show that someone else committed the crime. This proof rebutted the prosecutor's theory that the defendant was the actual murderer. Second, even though the statement implicated the defendant as a principal in the second degree, it mitigated his role in the offense, and favored him on the issue of punishment. *Id.*

72. The court was realistic about making a determination of materiality from the record, stating that the determination was to be made with an awareness of the difficulty of divining what the defendant would have done but for the prosecutor's failure to divulge. The Court agreed that the defendant might have done nothing differently had the entire statement been made available, yet spoke of the likelihood of additional advantage and success otherwise. *Id.* at 104-05, 402 S.E.2d at 695-96. For a clearer example of materiality, see *Cherricks v. Commonwealth*, 11 Va. App. 96, 396 S.E.2d 397 (1990). *But cf.* *Taitano v. Commonwealth*, 4 Va. App. 342, 358 S.E.2d 590 (1987).

the conviction was reversed.⁷³ *Conway v. Commonwealth*⁷⁴ held that the defendant was prejudiced by the Commonwealth's failure to provide him with the tape recorded statement he had made to the case investigator. Although the defendant was told of the substance of his remarks, he did not know of the tape's existence until it was played in rebuttal to his testimony. The prejudice arose in his inability to review the tape and refresh his recollection of the conversation.⁷⁵

In *Crump v. Commonwealth*,⁷⁶ the reference to an investigation of two counts of burglary on a "warning and consent" form signed by the defendant did not constitute evidence of other crimes or offend considerations for exclusion of other-crime evidence.⁷⁷

VI. SIXTH AMENDMENT

Relatively few decisions dealt with the Sixth Amendment. *Hall v. Commonwealth*⁷⁸ held that the Sixth Amendment does not require a per se ban on post-hypnotic testimony.⁷⁹ A delay in appointing counsel in contravention of Code section 19.2-158⁸⁰ does not, in itself, violate the Sixth Amendment, absent prejudice. However, as explained in *Graves v. Commonwealth*,⁸¹ sufficient time is required for counsel to become familiar with the case, confer with the client, and prepare for trial.

73. 12 Va. App. at 105, 402 S.E.2d at 696. Whether the confederate's admission would have been admissible at trial was not the determinative question as to its materiality. The appellate court found significant that an extra-judicial statement (which is a broader category than extra-judicial confession) might affect trial preparation, observing that it may assist in the defendant's investigation, may be used to refresh a witnesses recollection or serve as a past recollection recorded, and may be used otherwise in cross-examination. See also *Humes v. Commonwealth*, 12 Va. App. 1140, 408 S.E.2d 553 (1991) (discussing the consequences of a failure to disclose exculpatory evidence).

74. 12 Va. App. 711, 407 S.E.2d 310 (1991) (en banc).

75. *Id.* at 716, 407 S.E.2d at 313.

76. 13 Va. App. 286, 411 S.E.2d 238 (1991).

77. *Id.* at 289, 411 S.E.2d at 240.

78. 12 Va. App. 198, 403 S.E.2d 362 (1991).

79. *Id.* at 207, 403 S.E.2d at 367-68.

80. VA. CODE ANN. § 19.2-158 (Repl. Vol. 1990).

81. 12 Va. App. 53, 402 S.E.2d 500 (1991).

VII. TRIALS

As it has for the past several years, the Virginia Court of Appeals continued to accept a large number of cases presenting questions dealing with trial procedure.

A. *Venue*

In larceny cases, Code section 19.2-245⁸² provides venue in any jurisdiction into which the defendant takes the stolen property. Although larceny is a continuing offense, venue will not lie absent proof that the defendant participated in the taking of the property into the other jurisdiction.⁸³

In a *LaRouche* prosecution, the trial court did not err in refusing the defense motion for a change of venue.⁸⁴

B. *Speedy Trial*

Pretrial delay, which did not violate the nine month provision of Code section 19.2-243,⁸⁵ likewise did not violate the defendant's constitutional right to a speedy trial where there was no prejudice to the defendant.⁸⁶ In *Taylor v. Commonwealth*,⁸⁷ the conviction was reversed for failure to try the case within five months.⁸⁸

C. *Jurors*

The decision of the United States Supreme Court in *Batson v. Kentucky*⁸⁹ and its practical application continue to present questions on appeal. In view of the United States Supreme Court's recent application of the doctrine to defendants in criminal trials,⁹⁰ the lessons of the appellate courts on both sides of the *Batson* application are important to the parties in a criminal case.

82. VA. CODE ANN. § 19.2-245 (Repl. Vol. 1990).

83. *Nelson v. Commonwealth*, 12 Va. App. 268, 403 S.E.2d 384 (1991) (dicta).

84. *Ascher v. Commonwealth*, 12 Va. App. 1105, 408 S.E.2d 906 (1991).

85. VA. CODE ANN. § 19.2-243 (Repl. Vol. 1990).

86. *Sheard v. Commonwealth*, 12 Va. App. 227, 403 S.E.2d 178 (1991).

87. 12 Va. App. 425, 404 S.E.2d 86 (1991).

88. *Id.* at 429-30, 404 S.E.2d at 88-89; *see also* *Adkins v. Commonwealth*, 13 Va. App. 519, 414 S.E.2d 188 (1992); *cf.* *Jones v. Commonwealth*, 13 Va. App. 566, 414 S.E.2d 193 (1992).

89. 476 U.S. 79 (1986).

90. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

One aspect of the *prima facie* showing necessary for a *Batson* motion is a showing of facts from which an inference of racial motivation may be drawn. In *Winfield v. Commonwealth*,⁹¹ the showing was adequately made by the prosecutor's striking of four of nine blacks.⁹²

Once the defense makes the requisite *prima facie* showing under *Batson*, the mere articulation by the prosecutor of a racially neutral explanation for his strikes may not be sufficient to rebut an inference of racial motivation in jury selection.⁹³ Once the *Batson* showing is made and the explanation is given, the trial court must determine if the defendant has established purposeful discrimination. It is the duty of the trial court to scrutinize the sometimes nebulous explanations offered by prosecutors to guard against the use of subterfuge to confound the achievement of a racially balanced cross-section of the community.⁹⁴

In *Moats v. Commonwealth*,⁹⁵ the court of appeals rejected the defendant's challenge to the venire and the disparity between the proportion of eligible blacks and the proportion of blacks on local juries.⁹⁶ In *Harris v. Commonwealth*⁹⁷ the trial court abused its discretion by denying the defendant's motion to inquire into effect of extraneous information received by jury.

D. Evidence

Many of the year's cases from the Virginia Court of Appeals concerned evidentiary questions, particularly questions related to hearsay.⁹⁸ In *West v. Commonwealth*,⁹⁹ the murder victim's state

91. 12 Va. App. 446, 404 S.E.2d 398 (1991).

92. *Id.* at 450-51, 404 S.E.2d at 400-01.

93. *See, e.g.*, *Buck v. Commonwealth*, 14 Va. App. 10, 415 S.E.2d 229, *reh'g granted* Apr. 27, 1992; *Jackson v. Commonwealth*, 8 Va. App. 176, 380 S.E.2d 1 (1989).

94. *Langhorne v. Commonwealth*, 13 Va. App. 97, 107-08, 409 S.E.2d 476, 482-83 (1991).

95. 12 Va. App. 349, 404 S.E.2d 244 (1991).

96. *Id.* at 354, 404 S.E.2d at 246.

97. 13 Va. App. 47, 408 S.E.2d 599 (1991).

98. *See Myrick v. Commonwealth*, 13 Va. App. 333, 412 S.E.2d 176 (1991)(certificate of analysis properly admitted); *Royal v. Commonwealth*, 12 Va. App. 928, 407 S.E.2d 346 (1991)(excited utterances); *Alatishe v. Commonwealth*, 12 Va. App. 376, 404 S.E.2d 81 (1991) (a defendant's out-of-court statements need not be incriminating to be admissible as a party admission); *Mullins v. Commonwealth*, 12 Va. App. 372, 404 S.E.2d 237 (1991) (admissibility of certificate of analysis conditioned upon requirements of VA. CODE ANN. § 19.2-187 (Cum. Supp. 1992)); *Bowling v. Commonwealth*, 12 Va. App. 166, 174-77, 403 S.E.2d 375 (1991) (case involving dying declarations and excited utterances); *Davis v. Commonwealth*, 12 Va. App. 81, 402 S.E.2d 684 (1991) (hearsay is admissible, in the court's discretion, at a

of mind was not relevant to any material issue, hence, the "state of mind" hearsay exception was not applicable.¹⁰⁰ The murder conviction was reversed in *West*, as well as in *Royal v. Commonwealth*.¹⁰¹ The reason for the latter reversal was the trial court's refusal to admit an "excited utterance" as substantive evidence.¹⁰²

The test for determining whether a statement qualifies as an adoptive admission for hearsay exception purposes is whether, under the circumstances, the statement was one which, if untrue, called for a denial.¹⁰³

Several cases dealt with evidentiary questions which arise during the examination and impeachment of witnesses. A "conviction" does not occur until a final order is entered.¹⁰⁴ A defendant may not be impeached by evidence of a jury verdict on which final judgment has not been entered,¹⁰⁵ nor may his felony conviction be named.¹⁰⁶

A witness may rely upon notes to refresh his memory if he has some independent recollection of the circumstances about which he is testifying.¹⁰⁷ A prior consistent statement is relevant only to a witness's credibility, and may not be offered as evidence of facts in issue.¹⁰⁸

Other cases presented a myriad of evidentiary questions. In *White v. Commonwealth*,¹⁰⁹ the Virginia Court of Appeals indicated that the refusal of the defendant's mother to talk to the

revocation hearing); *Tickle v. Commonwealth*, 11 Va. App. 558, 400 S.E.2d 534 (1991) (evidence improperly admitted under official records exception); *Stokes v. Commonwealth*, 11 Va. App. 550, 399 S.E.2d 453 (1991) (certificate of analysis properly admitted).

99. 12 Va. App. 906, 407 S.E.2d 22 (1991).

100. *Id.* at 910, 407 S.E.2d at 23. The opinion also discusses double hearsay, declarations of a party opponent, and the rule that the burden is on the party offering hearsay to show that the declaration falls within an exception.

101. 12 Va. App. 928, 407 S.E.2d 346 (1991).

102. *Id.* at 931, 407 S.E.2d at 348.

103. *Weinbender v. Commonwealth*, 12 Va. App. 323, 327, 398 S.E.2d 106, 108 (1991) (en banc) (the test was applied to a statement made by one of two drivers involved in an automobile accident).

104. *Dowell v. Commonwealth*, 12 Va. App. 1145, 408 S.E.2d 263 (1991).

105. *Id.* at 1149, 408 S.E.2d at 265.

106. *Powell v. Commonwealth*, 13 Va. App. 17, 409 S.E.2d 622 (1991). As to the use of a juvenile conviction to impeach a witness, see *Moats v. Commonwealth*, 12 Va. App. 349, 404 S.E.2d 244 (1991) (permitted in connection with a specific allegation of bias).

107. *Potts v. Commonwealth*, 12 Va. App. 1093, 408 S.E.2d 256 (1991).

108. *Beverly v. Commonwealth*, 12 Va. App. 160, 164 n.1, 403 S.E.2d 175, 177 n.1 (1991).

109. 12 Va. App. 99, 402 S.E.2d 692 (1991).

prosecutor was inadmissible.¹¹⁰ In *Creech v. Commonwealth*,¹¹¹ the Virginia Supreme Court reversed a conviction permitting the defendant's estranged wife to testify over the defendant's Code section 19.2-271.2¹¹² objection, even though her property was destroyed by the defendant's arson.¹¹³ And, in *Wymer v. Commonwealth*,¹¹⁴ the trial court was correct, under the circumstances, in not permitting the defendant to introduce his brother-in-law's criminal record.¹¹⁵

A defendant's failure to appear for trial constitutes evidence of flight which is admissible to show guilt or consciousness of guilt.¹¹⁶ Reputation evidence may be offered as negative testimony, e.g., that the witness has never heard that the defendant had a reputation for a particular trait.¹¹⁷ Whether a defendant has a reputation for selling drugs does not establish a reputation for a character trait, and is inadmissible.¹¹⁸

Expert testimony and the results of experimentation were properly admitted with regard to the speed of the defendant's automobile prior to a fatal accident in *Hubbard v. Commonwealth*.¹¹⁹ The trial court erred in admitting irrelevant and prejudicial photographs in a drug case, resulting in reversal,¹²⁰ and other-crime evidence was properly admitted in *Crump v. Commonwealth*¹²¹ and *Cullen v. Commonwealth*.¹²²

110. See *id.* at 106, 402 S.E.2d at 696-97 (dicta).

111. 242 Va. 385, 410 S.E.2d 650 (1991).

112. VA. CODE ANN. § 19.2-271.2 (Repl. Vol. 1992).

113. The Court reasoned that while the spousal privilege does not prohibit testimony in cases involving offenses to the property and person of the testifying spouse, the defendant was charged with arson, *not* an offense against his wife's property. *Id.* at 386-87, 410 S.E.2d at 651.

114. 12 Va. App. 294, 403 S.E.2d 702 (1991).

115. *Id.* at 299, 403 S.E.2d at 706. The brother-in-law had stated that he would have the defendant's house raided, and the defense inferred that the brother-in-law set the defendant up. This statement, however, did not constitute the necessary direct evidence of a defense, i.e., his intent to plant the contraband. *Id.*

116. Langhorne v. Commonwealth, 13 Va. App. 97, 105-06, 409 S.E.2d 476, 479 (1991).

117. Chiles v. Commonwealth, 12 Va. App. 698, 700, 406 S.E.2d 413, 415 (1991).

118. See *id.* at 700, 406 S.E.2d at 414; see also Robinson v. Commonwealth, 13 Va. App. 574, 413 S.E.2d 885 (1992).

119. 12 Va. App. 250, 403 S.E.2d 708 (1991), *aff'd*, 243 Va. 1, 413 S.E.2d 875 (1992).

120. Morris v. Commonwealth, 13 Va. App. 134, 409 S.E.2d 629 (1991).

121. 13 Va. App. 286, 411 S.E.2d 238 (1991) (vague references to other crimes or investigation were harmlessly irrelevant).

122. 13 Va. App. 17, 409 S.E.2d 487 (1991) (where evidence that proves a murder charge also relates to grand larceny charges, the evidence of the murder charge would properly be admitted in the grand larceny trial).

E. *Instructions*

The purpose of jury instructions and the duty of the trial court in this respect were the subject of several decisions.¹²³ The duty to instruct on a lesser-included offense received an interesting application in *Moats v. Commonwealth*.¹²⁴ The defendant robbed the victim at gunpoint and then shot him three times. Over the defendant's challenge, the Virginia Court of Appeals approved the giving of instructions for first and second degree murder rather than instructions for capital murder.¹²⁵

Two other decisions dealt with the responsibility of the trial court to instruct. Where the defense presents an incorrectly-stated instruction on a principal of law materially vital to the defense, the trial judge must correct and give the instruction.¹²⁶

F. *Sentencing*

Most decisions of the court of appeals regarding sentencing dealt with the law surrounding the imposition and revocation of suspended sentences of incarceration.¹²⁷ Incarceration is a proper condition of a suspended sentence.¹²⁸ A suspended sentence may be revoked upon evidence of a subsequent conviction,¹²⁹ irrespective of the facts underlying the conviction, or whether the new crime

123. See *Martin v. Commonwealth*, 13 Va. App. 524, 414 S.E.2d 401 (1992) (en banc) (duty of trial court to instruct on lesser-included offense); *Taylor v. Commonwealth*, 12 Va. App. 419, 404 S.E.2d 78 (1991) (purpose of jury instructions is to provide guidance to the jury and it must support the case evidence); *Harrison v. Commonwealth*, 12 Va. App. 581, 405 S.E.2d 854 (1991) (duty of trial court to instruct on lesser-included offense).

124. 12 Va. App. 349, 404 S.E.2d 244 (1991).

125. The court's reasoning was not what the defense bar expects when a defendant seeks an instruction for capital murder: "The jury could have found that the shots were fired by appellant in a fearful response to the victim reaching under the counter. From this the jury could have found that the killing was not willful, deliberate and premeditated." *Id.* at 357, 404 S.E.2d at 248.

126. *Mery v. Commonwealth*, 12 Va. App. 821, 826, 407 S.E.2d 18, 21 (1991); *Kil v. Commonwealth*, 12 Va. App. 802, 811-12, 407 S.E.2d 674, 679 (1991).

127. See, e.g., *Bryce v. Commonwealth*, 13 Va. App. 589, 414 S.E.2d 417 (1992) (fraudulent concealment of identity and probationary status sufficient to reduce suspended sentence); *Cottrell v. Commonwealth*, 12 Va. App. 570, 405 S.E.2d 438 (1991) (finding no error in revocation of suspended sentence).

128. *Nuckoles v. Commonwealth*, 12 Va. App. 1083, 407 S.E.2d 355 (1991). VA. CODE ANN. § 19.2-203 (Cum. Supp. 1992) "places wide discretion in the trial court to determine what conditions are to be imposed in each particular case." *Id.* at 1085, 407 S.E.2d at 356.

129. *Patterson v. Commonwealth*, 12 Va. App. 1046, 407 S.E.2d 43 (1991). This decision also held that the execution of a revoked suspended sentence may be postponed during the pendency of an appeal, and the defendant may be eligible for bail. Where the conviction

was committed while the execution of the sentence was suspended pending an appeal to the Virginia Supreme Court.¹³⁰ A court may not revoke previously suspended, concurrent sentences and impose them consecutively.¹³¹ A court loses jurisdiction to revoke suspended sentences where it fails to issue a bench warrant and detainee in a timely fashion.¹³²

G. *Argument*

The prosecutor's closing argument in *Jackson v. Commonwealth*,¹³³ which addressed the general effects of cocaine on society and urged a sentence which would deter drug distribution by the defendant, was not improper.¹³⁴

H. *Severance*

In *Spence v. Commonwealth*,¹³⁵ the trial court erred in not severing the trial of four drug distribution charges. The four sales did not meet the requirement of "the same act or transaction";¹³⁶ the defendant's statements to the person who made each of the four purchases were "merely the assurances of a salesman" and did not evidence connected transactions.¹³⁷

I. *Miscellaneous*

Certain motions must be filed within a particular time prior to trial, or the challenge is waived. Where, however, the trial court considers and rules upon an untimely motion, the necessary leave of court is provided implicitly.¹³⁸

underlying a revocation is affirmed, the appeal of the revocation will be dismissed. If the conviction is reversed, the revocation must be reversed. *Id.* at 1049, 407 S.E.2d at 45.

130. *Singleton v. Commonwealth*, 11 Va. App. 575, 400 S.E.2d 205 (1991).

131. *Wood v. Commonwealth*, 12 Va. App. 1257, 408 S.E.2d 568 (1991).

132. *Vaughan v. Commonwealth*, 12 Va. App. 924, 406 S.E.2d 419 (1991).

133. 12 Va. App. 798, 406 S.E.2d 415 (1991).

134. *Id.* As prosecutors have become more aggressive in making this type of argument, the difference between making an argument for sentencing (which is proper) and on conviction (which is improper) has sometimes become lost or confused. *Jackson* contains language which might well be adapted into a cautionary instruction.

135. 12 Va. App. 1040, 407 S.E.2d 916 (1991).

136. *Id.* at 1042, 407 S.E.2d at 917.

137. *Id.* at 1043, 407 S.E.2d at 918.

138. *Winfield v. Commonwealth*, 12 Va. App. 446, 448 n.1, 404 S.E.2d 398, 399 n.1 (1991) (*Batson* challenge was not made until after the jury had been sworn).

A witness other than the accused is incompetent to testify about matters recalled for the first time after hypnosis.¹³⁹ A witness who has been hypnotized is not incompetent as to all matters, however, and may testify to facts which are adequately documented as having been recalled pre-hypnosis. The court of appeals recommended, but did not require, adherence to specified guidelines.¹⁴⁰

A defendant may be tried in his absence under certain circumstances, but must be shown to have made a knowing and intelligent waiver of the right to be present. The trial court may not assume that a defendant's absence is voluntary; moreover, voluntary absence, without more, does not constitute a knowing and intelligent waiver. The defendant's knowledge of the consequences must be proven.¹⁴¹

In *Carter v. Commonwealth*,¹⁴² the trial court should have considered counsel's allegations of conflict of interest. Under the circumstances of another case, the trial court did not err in denying a mid-trial request by the defendant for a continuance.¹⁴³

The defendant in *Day v. Commonwealth*¹⁴⁴ waived his challenge to the Commonwealth's proof of venue by failing to renew it at the conclusion of the evidence.¹⁴⁵ His motion to set aside the jury's verdict as being contrary to the law and the evidence "to save the point" was not sufficiently particular.¹⁴⁶

VIII. APPEALS

The creation of the Virginia Court of Appeals, and its willingness to consider many unsettled questions previously resolved in a piecemeal fashion by trial courts, has brought an increased reliance on appellate litigation. With the court of appeals' numerous rulings, however, a body of appellate law has arisen which has at times seemed more exclusionary than accommodating.

Many practitioners have learned, through the published cases, that common practices adopted and traditionally relied upon to es-

139. *Hall v. Commonwealth*, 12 Va. App. 198, 210, 403 S.E.2d 362, 370 (1991).

140. *Id.* at 212, 403 S.E.2d at 371.

141. *Hunter v. Commonwealth*, 13 Va. App. 18, 409 S.E.2d 483 (1991).

142. 11 Va. App. 569, 400 S.E.2d 540 (1991).

143. *Kil v. Commonwealth*, 12 Va. App. 802, 813-14, 407 S.E.2d 674, 680-81 (1991).

144. 12 Va. App. 1078, 407 S.E.2d 52 (1991).

145. *Id.* at 1079, 407 S.E.2d at 53.

146. *Id.*

tablish an appellate record are inadequate. In *Day v. Commonwealth*,¹⁴⁷ the defendant unsuccessfully challenged the Commonwealth's proof of venue. Upon return of the jury's guilty verdict, defense counsel moved to set aside the verdict as being contrary to the law and the evidence "to save the point." The court of appeals held that the defendant waived his challenge by failing to renew it at the conclusion of the evidence.¹⁴⁸ The motion to set aside the verdict was not sufficiently particular.¹⁴⁹

One general rule that has emerged is that "error is presumed to be prejudicial unless it plainly appears that it could not have affected the result."¹⁵⁰ Once error is established, the burden shifts to the opposing party to prove otherwise.¹⁵¹ While the prosecution's burden has seemed, to defense lawyers, increasingly easy to sustain in recent years,¹⁵² this past year, the court of appeals declined to make the characterization. In *Beverly v. Commonwealth*,¹⁵³ a witness's improperly-admitted prior consistent statement was clearly inculpatory, could have caused the defendant's conviction, and was not harmless.¹⁵⁴ In *Lavinder v. Commonwealth*,¹⁵⁵ the improper impeachment of the defendant's credibility was not harmless.¹⁵⁶

A mixed question was presented in *White v. Commonwealth*.¹⁵⁷ Prior to the trial, the prosecutor summarized the admissions of a third party who confessed to the crime for which the defendant had been charged. The description of the confederate's confession was sufficient to establish its exculpatory nature, and so it was error for the trial court not to have ordered the disclosure of the entire text of the statement.¹⁵⁸ Without the entire text, however, the Virginia Court of Appeals was unable to determine its materiality, and hence, was unable to determine whether the case should

147. 12 Va. App. 1078, 407 S.E.2d 52 (1991).

148. *Id.* at 1079, 407 S.E.2d at 53.

149. *Cf.* *Campbell v. Commonwealth*, 12 Va. App. 476, 405 S.E.2d 1 (1991).

150. *Royal v. Commonwealth*, 12 Va. App. 928, 932, 407 S.E.2d 346, 348 (1991).

151. *Beverly v. Commonwealth*, 12 Va. App. 160, 164, 403 S.E.2d 175, 177 (1991).

152. *See, e.g., Winston v. Commonwealth*, 12 Va. App. 363, 404 S.E.2d 239 (1991). In this case, the prosecutor's argument and the trial court's refusal to instruct the jury to disregard the improper comment constituted error, but it was harmless. *Id.* at 371, 404 S.E.2d at 242.

153. 12 Va. App. 160, 403 S.E.2d 175.

154. *Id.* at 164, 403 S.E.2d at 177.

155. 12 Va. App. 1003, 407 S.E.2d 910 (1991).

156. *Id.* at 1010, 407 S.E.2d at 914. The court of appeals also discussed the test for the determination of whether constitutional and non-constitutional error is harmless. *See id.* at 1005-06, 407 S.E.2d at 911.

157. 12 Va. App. 99, 402 S.E.2d 692 (1991).

158. *Id.* at 105, 402 S.E.2d at 694.

be remanded for retrial.¹⁵⁹ The court's solution was to remand the case to the trial court to determine the materiality issue.¹⁶⁰

Somewhat more subtle lessons in appellate litigation are found in the language and holdings of recent decisions. The court of appeals has seemed more sensitive to the reality of criminal trial practice. In *White v. Commonwealth*,¹⁶¹ for example, the court accepted and described the likelihood of success of a defendant's proffered strategy had he been provided with the full text of the confession of a confederate.¹⁶² The prejudicial effect of challenged photographs outweighed their probative value in a drug case,¹⁶³ and in several cases, the trial court was held to have abused its discretion.¹⁶⁴

The court of appeals seemed ambivalent during the past year about certain police practices. Discussing the validity of a third-party consent to search, the court found significant an individual's ignorance of whether a search warrant was required and whether grounds even existed to obtain one.¹⁶⁵ Where a police officer falsely told the defendant that he had obtained incriminating fingerprints, the court expressed its mild disapproval, stating, "[w]hile we do not condone conduct wherein fake representations are made, the statement made by the officer did not constitute reversible error."¹⁶⁶

159. *Id.*

160. *Id.* at 106, 402 S.E.2d at 696; see also *Darnell v. Commonwealth*, 12 Va. App. 948, 951 n.1, 408 S.E.2d 540, 541 n.1 (1991) (where a writ of certiorari was issued to include the arrest warrant as a part of the record).

161. 12 Va. App. 99, 402 S.E.2d 692 (1991).

162. *Id.* at 104-05, 402 S.E.2d at 695-96.

163. *Morris v. Commonwealth*, 13 Va. App. 134, 409 S.E.2d 629 (1991). The panel opinion was later vacated, however, and the trial court judgment affirmed in *Morris v. Commonwealth*, 14 Va. App. 283, 416 S.E.2d 462 (1992) (en banc).

164. See *Taylor v. Commonwealth*, 12 Va. App. 419, 404 S.E.2d 78 (1991) (trial court abused its discretion in not giving mature consideration to the defendant's request for the Alcohol Safety Action Program (ASAP), even though the defendant denied that he had a drinking problem); *Harris v. Commonwealth*, 13 Va. App. 47, 408 S.E.2d 599 (1991) (trial court abused its discretion by denying the defendant's motion to inquire into the effect of extraneous information received by the jury); *Conway v. Commonwealth*, 12 Va. App. 711, 407 S.E.2d 310 (1991) (trial court abused its discretion by admitting a tape of the defendant's statement to a detective that was made without defendant's knowledge and not provided to defendant before its admission on rebuttal).

165. *Commonwealth v. Ealy*, 12 Va. App. 744, 407 S.E.2d 681 (1991).

166. *Johnson v. Commonwealth*, 12 Va. App. 391, 393 n.1, 404 S.E.2d 384, 386 n.1 (1991); see also *Wilson v. Commonwealth*, 13 Va. App. 549, 554, 413 S.E.2d 655, 658 (1992).

Other decisions indicated the extent to which the appellate court is willing to defer to the findings of the trial court. A statement made by a wounded defendant, who was covered in excrement and had a blood alcohol content of 0.147, was supported by the evidence and found to be voluntary. The court stated: "Sergeant Schockley described the appellant as nervous and stated he detected the odor of alcohol *but felt that the appellant was not drunk.*"¹⁶⁷ Distinguishing the case before it from that of a twenty-three-year-old defendant's IQ of sixty-seven,¹⁶⁸ the court found it significant that here "[t]he defendant . . . had a ninth grade education."¹⁶⁹

Finally, in an upset to conventional wisdom and belief, the Virginia Court of Appeals twice cited, with approval, a California case for its analysis of an issue.¹⁷⁰ As surprising as this nod may have been, it was consistent with the court's reference to a number of diverse authorities.¹⁷¹

167. *Venable v. Commonwealth*, 12 Va. App. 358, 361, 404 S.E.2d 74, 76 (1991) (emphasis added).

168. *Terrell v. Commonwealth*, 12 Va. App. 285, 403 S.E.2d 387 (1991) (discussing *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984)).

169. *Terrell*, 12 Va. App. at 291, 403 S.E.2d at 390.

170. See *Hall v. Commonwealth*, 12 Va. App. 198, 207 n.2, 403 S.E.2d 362, 368 n.2 (1991); *White v. Commonwealth*, 12 Va. App. 99, 102, 402 S.E.2d 692, 695 (1991); see also *Neustadter v. Commonwealth*, 12 Va. App. 273, 279, 403 S.E.2d 391, 394 (1991) (Benton, J., dissenting).

171. The Virginia Court of Appeals cited the following authorities in the cases indicated: RONALD J. BACIGAL, *VIRGINIA CRIMINAL PROCEDURE* (2d ed. 1989), cited in *Terrell v. Commonwealth*, 12 Va. App. 285, 291, 403 S.E.2d 387, 390 (1991) and *Walker v. Commonwealth*, 12 Va. App. 438, 443, 404 S.E.2d 394, 396 (1991); CHARLES E. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* (3d ed. 1988), cited in *Wymer v. Commonwealth*, 12 Va. App. 294, 299, 403 S.E.2d 702, 706 (1991), *Alatishe v. Commonwealth*, 12 Va. App. 376, 378, 404 S.E.2d 81, 82 (1991) and *Royal v. Commonwealth*, 12 Va. App. 928, 931, 407 S.E.2d 346, 348 (1991); CHARLES T. McCORMICK, *McCORMICK ON EVIDENCE* (Edward W. Cleary ed., 3d ed. 1984), cited in *Weinbender v. Commonwealth*, 12 Va. App. 323, 326, 398 S.E.2d 106, 108 (1991) and *Alatishe v. Commonwealth*, 12 Va. App. 376, 378, 404 S.E.2d 81, 82 (1991); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* (1986), cited in *Fortune v. Commonwealth*, 12 Va. App. 643, 647, 406 S.E.2d 47, 49 (1991); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 1986), cited in *Kil v. Commonwealth*, 12 Va. App. 802, 809, 407 S.E.2d 674, 678 (1991); MICHIE'S JURISPRUDENCE (1984), cited in *Walker v. Commonwealth*, 12 Va. App. 438, 443, 404 S.E.2d 394, 396 (1991); VA. L. REV., cited in *Lavinder v. Commonwealth*, 12 Va. App. 1003, 1006, 407 S.E.2d 910, 912 (1991) and *Fortune v. Commonwealth*, 12 Va. App. 643, 648, 406 S.E.2d 47, 49 (1991); MODEL PENAL CODE, cited in *Fortune v. Commonwealth*, 12 Va. App. 643, 648-49, 406 S.E.2d 47, 49 (1991); FED. R. EVID., cited in *Alatishe v. Commonwealth*, 12 Va. App. 376, 378, 404 S.E.2d 81, 82 (1991); Federal circuit courts, cited in *Winston v. Commonwealth*, 12 Va. App. 363, 367, 404 S.E.2d 239, 241 (1991); and cases representing the majority and minority views of an issue, cited in *Hall v. Commonwealth*, 12 Va. App. 198, 403 S.E.2d 362 (1991).

IX. CRIMES

A. *Homicide*

The Virginia Supreme Court continued to affirm capital murder convictions in 1991,¹⁷² with one exception. The conviction in *Rogers v. Commonwealth*¹⁷³ was reversed on the grounds that the evidence was insufficient to prove that the defendant had acted as the "triggerman."

The Virginia Court of Appeals found the evidence to be sufficient in each of its murder cases.¹⁷⁴

Evidence of voluntary intoxication is admissible in defense of capital and first degree murder cases to prove an inability to premeditate. However, the court of appeals held in *Bowling v. Commonwealth*¹⁷⁵ that evidence of diminished mental capacity is not admissible for the same purpose, or as a defense to the element of specific intent.¹⁷⁶

*Davis v. Commonwealth*¹⁷⁷ presented the question of whether a defendant who committed the felony of driving in violation of his habitual offender status could be convicted of murder under the felony-murder doctrine. Affirming the conviction, the court held that a "mere nexus" between the felony and the death would not be sufficient; the accidental death would have to be causally related to the commission of the felony.¹⁷⁸ A homicide would be considered to have been committed in the perpetration of the felony if it could be considered as being within the *res gestae* of the underlying felony and emanating therefrom.¹⁷⁹ In *Davis*, the defendant was driving recklessly so as to avoid being caught committing the

172. See *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1991); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991); *Saunders v. Commonwealth*, 242 Va. 107, 406 S.E.2d 39 (1991).

173. 242 Va. 307, 410 S.E.2d 621 (1991).

174. See *Fordham v. Commonwealth*, 13 Va. App. 235, 409 S.E.2d 829 (1991), *aff'd*, 243 Va. 236, 415 S.E.2d 218 (1992) (evidence was sufficient to sustain the conviction of first degree murder); *Cable v. Commonwealth*, 12 Va. App. 565, 405 S.E.2d 444 (1991), *aff'd*, 243 Va. 236, 415 S.E.2d 218 (1992) (evidence was sufficient to sustain the conviction of involuntary manslaughter in a hunting accident case); *Bell v. Commonwealth*, 11 Va. App. 530, 399 S.E.2d 450 (1991) (evidence was sufficient to establish a specific intent to kill).

175. 12 Va. App. 166, 403 S.E.2d 375 (1991).

176. See *Smith v. Commonwealth*, 239 Va. 243, 389 S.E.2d 871, *cert. denied*, 111 S. Ct. 221 (1990); *Stamper v. Commonwealth*, 228 Va. 707, 324 S.E.2d 682 (1985).

177. 12 Va. App. 408, 404 S.E.2d 377 (1991).

178. *Id.* at 411, 404 S.E.2d at 379.

179. *Id.*

felony of driving after having been declared an habitual offender.¹⁸⁰ The doctrine was properly invoked.

The trial court in *Moats v. Commonwealth*¹⁸¹ had given an instruction on second degree murder as a lesser-included offense over the objection of the defendant. The Virginia Court of Appeals approved the giving of the instruction with surprising reasoning, given that the defendant had robbed the victim at gunpoint and then shot him three times:

The jury could have found that the shots were fired by appellant in a fearful response to the victim reaching under the counter. From this the jury could have found that the killing was not willful, deliberate and premeditated.¹⁸²

B. *Drugs*

A common issue in drug cases is the sufficiency of the evidence to establish possession¹⁸³ or intent to distribute.¹⁸⁴ The sufficiency question as it relates to the intent to distribute was grounds for reversal in *Stanley v. Commonwealth*¹⁸⁵ because the Commonwealth failed to prove that the defendant's possession of the drugs and his intent to distribute them were contemporaneous.

The Commonwealth's proof of intent to distribute often includes testimony from a narcotics detective that the amount of drug possessed is inconsistent with personal use. In *Davis v. Common-*

180. *Id.* at 413, 404 S.E.2d at 380.

181. 12 Va. App. 349, 404 S.E.2d 244 (1991).

182. *Id.* at 356-57, 404 S.E.2d at 248. As attenuated as this theory might seem, the Virginia Court of Appeals in several instances declined to reject creative proffers.

183. *See, e.g., Wymer v. Commonwealth*, 12 Va. App. 294, 403 S.E.2d 702 (1991). The issue concerning sufficiency of evidence arose in two cases involving a drug "throwdown." In *Johnson v. Commonwealth*, 12 Va. App. 150, 402 S.E.2d 502 (1991), the facts surrounding the unobserved throwdown were sufficiently distinguishable from *Gordon v. Commonwealth*, 212 Va. 298, 183 S.E.2d 735 (1971), to sustain the verdict. The evidence was likewise sufficient in *Beverly v. Commonwealth*, 12 Va. App. 160, 403 S.E.2d 175 (1991), *rev'd on other grounds*, although *Gordon* was not discussed.

184. *See Morton v. Commonwealth*, 13 Va. App. 6, 408 S.E.2d 583 (1991) (evidence found insufficient); *Collins v. Commonwealth*, 13 Va. App. 177, 409 S.E.2d 175 (1991) (evidence found sufficient); *Hambury v. Commonwealth*, 3 Va. App. 435, 350 S.E.2d 524 (1986) (evidence found sufficient).

185. 12 Va. App. 867, 407 S.E.2d 13 (1991) (en banc).

wealth,¹⁸⁶ the Virginia Court of Appeals held that similar testimony did not constitute an opinion on the ultimate issue.¹⁸⁷

In *Satterfield v. Commonwealth*,¹⁸⁸ the defendant was arrested while in possession of 0.78 grams of cocaine in three packages which he admittedly intended to sell. The trial court allowed into evidence portions of his confession in which he described generally his prior purchases from the same source, and subsequent sales. The court of appeals ruled that the trial court did not err, because "proof of the prior distribution was included in an admission, was explanatory of the offense charged and was relevant to prove an essential element of the charged crime."¹⁸⁹

The *Palafox* doctrine provides that one who distributes a sample of drugs and retains the remainder for the purpose of making an immediate distribution to the same recipient, at the same place and at the same time, may only be punished for one offense.¹⁹⁰ While the Virginia Court of Appeals did not hold that this case accurately described Virginia law, its consideration of the *Palafox* doctrine in *Meyers v. Commonwealth*¹⁹¹ hinted at acceptance.

C. Conspiracy

An often-encountered question in conspiracy cases is whether the circumstances establish one or several separate conspiracies. An en banc Virginia Court of Appeals decision provided guidance in the resolution of this question.¹⁹² Ruling on another familiar issue which arises with the involvement of an informant or undercover agent in the investigation of a conspiracy, the court held that the crime of conspiracy requires a bilateral meeting of the minds, not a unilateral belief of agreement.¹⁹³

186. 12 Va. App. 728, 406 S.E.2d 922 (1991).

187. *Id.* at 731-32, 406 S.E.2d at 924. *But see* *Llamera v. Commonwealth*, 243 Va. 262, 414 S.E.2d 597 (1992).

188. 14 Va. App. ___, 420 S.E.2d 228 (June 9, 1992) (en banc).

189. *Id.* at 231.

190. *United States v. Palafox*, 764 F.2d 558, 560 (9th Cir. 1985).

191. 12 Va. App. 398, 404 S.E.2d 83 (1991).

192. *Williams v. Commonwealth*, 12 Va. App. 912, 407 S.E.2d 319 (1991) (en banc). The evidence was sufficient to support two separate convictions of conspiracy to distribute marijuana to an inmate. The evidence was insufficient to prove that five other convictions were for separate agreements.

193. *Fortune v. Commonwealth*, 12 Va. App. 643, 406 S.E.2d 47 (1991). The court discussed these two theories of conspiracy and the rules of statutory interpretation in reversing the conviction for conspiracy alleged between the defendant, a police officer, and an informant. *Id.*

D. *Sex Offenses*

The past year's cases involving sex offenses dealt largely with the sufficiency of the evidence to prove specific elements of the crime.¹⁹⁴ In *Myers v. Commonwealth*,¹⁹⁵ the victim's subjective fear of the defendant, and of having to walk back through the woods, was sufficient to establish the elements of force, threat, or intimidation, even though the defendant had no weapon, and had made no threat of physical harm. In another case, the appellate court affirmed the trial court's decision not to strike the evidence as to the victim's physical helplessness under Code section 18.2-67.10(4)¹⁹⁶ where the rape was accomplished while she was not fully awake.¹⁹⁷ The defendant's status as the victim's teacher in *Clark v. Commonwealth*¹⁹⁸ did not satisfy the requirement of a sexual assault achieved through force, threat or intimidation.

E. *Burglary and Larceny*

Neither common law trespass¹⁹⁹ nor the statutory crime of unlawful entry²⁰⁰ is a lesser-included offense of burglary. The crime of uttering a bad check is not a "like" offense for purposes of enhanced punishment under Code section 18.2-103²⁰¹ which deals with willful concealment of merchandise.²⁰²

The recent, unexplained, exclusive possession of stolen property by the defendant permits the inference that he committed the theft. In *Nelson v. Commonwealth*,²⁰³ the admittedly unexplained presence of a defendant's fingerprints inside a stolen truck proved only that he had been inside the truck after it had been stolen. Because the presence of the prints did not prove the defendant's dominion and control of the truck, the Commonwealth was not entitled to the inference.²⁰⁴

194. See, e.g., *Lawson v. Commonwealth*, 13 Va. App. 109, 409 S.E.2d 466 (1991)(evidence insufficient to sustain conviction of sodomy).

195. 11 Va. App. 634, 400 S.E.2d 803 (1991).

196. VA. CODE ANN. § 18.2-67.10(4) (Repl. Vol. 1992).

197. *Woodward v. Commonwealth*, 12 Va. App. 118, 402 S.E.2d 244 (1991).

198. 12 Va. App. 1163, 408 S.E.2d 564 (1991).

199. See *Taylor v. Commonwealth*, 11 Va. App. 649, 400 S.E.2d 794 (1991).

200. See *Crump v. Commonwealth*, 13 Va. App. 286, 441 S.E.2d 238 (1991).

201. VA. CODE ANN. § 18.2-103 (Repl. Vol. 1990).

202. *Snead v. Commonwealth*, 11 Va. App. 643, 400 S.E.2d 806 (1991).

203. 12 Va. App. 268, 403 S.E.2d 384 (1991).

204. *Id.* at 271, 403 S.E.2d at 386.

While fraud may be alleged by an indictment charging grand larceny, the defendant may require the Commonwealth to elect the statute under which it intends to proceed.²⁰⁵ This election often involves an academic resolution of the distinction between larceny, larceny by trick, larceny by false pretenses, and, as suggested by *Zoretic v. Commonwealth*,²⁰⁶ embezzlement. In *Zoretic*, the evidence was insufficient to sustain the conviction of embezzlement, because the Commonwealth was unable to prove that the defendant had converted funds to his own use.²⁰⁷

Rulings of the Virginia Court of Appeals were significant in two cases involving fraud. In *Klink v. Commonwealth*²⁰⁸ the court ruled that evidence of failure to perform and failure to return an advance, despite request by certified mail, was insufficient, standing alone, to establish the requisite fraudulent intent. The case of *Ascher v. Commonwealth*²⁰⁹ is the first published decision in Virginia pertaining to criminal securities fraud.

Other decisions concerned the elements of the offenses and the sufficiency of the evidence in forgery and worthless check cases.²¹⁰

F. Motor Vehicle Offenses

Several appellate court decisions concerned issues peculiar to DUI prosecutions. The breath test proscribed by Code section 18.2-267²¹¹ measures blood alcohol concentration at the time of the test itself, and not necessarily at the time of the offense. Hence, an instruction that breath test evidence was of the blood alcohol content at the time of the offense was incorrect.²¹² Where the defendant was charged with driving while having a blood alcohol concen-

205. VA. CODE ANN. § 18.2-111 (Repl. Vol. 1988).

206. 13 Va. App. 241, 409 S.E.2d 832 (1991).

207. Although the court expressly did not reach the issue of whether a trust relationship had been established, such a relationship might not be required, depending upon the rules of statutory interpretation, in view of the language of VA. CODE ANN. § 18.2-111 (Repl. Vol. 1988).

208. 12 Va. App. 815, 407 S.E.2d 5 (1991).

209. 12 Va. App. 1105, 408 S.E.2d 906 (1991).

210. *Beiler v. Commonwealth*, 243 Va. 291, 415 S.E.2d 849 (1992) (evidence of check alterations sufficient for jury to find forgery and uttering); *Muhammad v. Commonwealth*, 13 Va. App. 194, 409 S.E.2d 818 (1991) (evidence sufficient in forgery case); *Campbell v. Commonwealth*, 13 Va. App. 33, 409 S.E.2d 21 (1991) (requirement of prejudice to another in prosecution for forgery of public record); *Bagheri v. Commonwealth*, 12 Va. App. 1071, 408 S.E.2d 259 (1991) (evidence sufficient to sustain conviction for worthless checks).

211. VA. CODE ANN. § 18.2-267 (Cum. Supp. 1992).

212. *Taylor v. Commonwealth*, 12 Va. App. 419, 404 S.E.2d 78 (1991).

tration of 0.10 pursuant to Code section 18.2-266(i),²¹³ it was error to instruct the jury on the presumption that the defendant was under the influence.²¹⁴

In a prosecution for DUI, evidence of the defendant's refusal to take a field sobriety test was not barred by the Fifth Amendment or Article I, Section 8, of the Virginia Constitution.²¹⁵

The circumstantial evidence was insufficient in *Potts v. Commonwealth*²¹⁶ to prove DUI. The appellate court distinguished *Potts* from *Lyons v. City of Petersburg*,²¹⁷ a case where the DUI was sufficiently established by circumstantial evidence.

The habitual offender order in *Davis v. Commonwealth*²¹⁸ did not contain the language required by Code section 46.2-358²¹⁹ stating that the revocation would remain in effect until the driving privileges were restored. It only revoked the defendant's privilege to drive for ten years "from the date of this order."²²⁰ The defendant was arrested fourteen years later and charged with driving after having been declared an habitual offender and while the order of the court was still in effect. Because ten years had elapsed, the defendant should not have been convicted of the felony.²²¹

Virginia Code section 46.2-357 prohibits an habitual offender from driving a motor vehicle. The defendant's actions in touching wires together on a broken-down motorcycle, creating sparks, were held to be "driving" in violation of the statute.²²² This result was obtained by extending cases decided under Code section 18.2-266,²²³ which prohibits the driving *or operation* of a motor vehicle while under the influence of alcohol.²²⁴

In a hit and run case, the Commonwealth must prove that the defendant had "actual knowledge of the occurrence of the acci-

213. VA. CODE ANN. § 18.2-266(i) (Cum. Supp. 1992).

214. *Taylor*, 12 Va. App. at 422-23, 404 S.E.2d at 80.

215. *Farmer v. Commonwealth*, 12 Va. App. 337, 404 S.E.2d 371 (1991)(en banc).

216. 12 Va. App. 1093, 408 S.E.2d 256 (1991).

217. 221 Va. 10, 266 S.E.2d 880 (1980).

218. 12 Va. App. 246, 402 S.E.2d 711 (1991).

219. VA. CODE ANN. § 46.2-358 (Repl. Vol. 1989).

220. *Davis*, 12 Va. App. at 247 n.2, 402 S.E.2d at 712 n.2 (1991).

221. *Id.*

222. *Rosenbaum v. Commonwealth*, 12 Va. App. 61, 402 S.E.2d 498 (1991).

223. VA. CODE ANN. § 18.2-266 (Cum. Supp. 1992).

224. *Id.* (emphasis added). See also *Kil v. Commonwealth*, 12 Va. App. 802, 809, 407 S.E.2d 674, 678 (1991) (discussing the definition of "driver").

dent, and such knowledge of injury which would be attributed to a reasonable person under the circumstances of the case."²²⁵

X. CONCLUSION

Because of the willingness of the Virginia Court of Appeals to accept a diverse and heavy caseload, participants in the Virginia criminal justice system must no longer resort to a case-by-case resolution of the issues in the trial court. Instead, the idea of criminal appellate litigation has become a reality, displacing the tradition of reliance on the trial court as the final arbiter of the law. Criminal trial practice has benefitted, not only from the resolution of the numerous issues presented over the past several years, but also from the emergence of a need for a well-preserved and complete record.

Still, the criminal law practitioner must heed the tremendous deference that appellate courts accord to findings by trial courts on factual predicates and conclusions of law. The lesson remains a simple one — zealous and effective representation must be geared toward success at the trial court level.

225. *Id.* at 811, 407 S.E.2d at 679.