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Virginia Practice Series: Criminal Procedure

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Professor of Law
University of Richmond

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Birchfield v. North Dakota, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016) held that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving, but not warrantless blood tests. Breath tests do not implicate significant privacy concerns, yield only a BAC [blood alcohol concentration] reading, and leave no biological sample in the government’s possession. Blood tests are more intrusive and give law enforcement a sample from which to extract information beyond a simple BAC reading. Absent consent, blood samples must be obtained pursuant to a warrant, or the traditional exigent circumstances exception if it applies.

Mason v. Com., 291 Va. 362, 786 S.E.2d 148 (2016) found it irrelevant whether the arresting officer misunderstood the law on dangling objects interfering with a driver’s view. The proper standard is whether the totality of the facts “were such as to create in the mind of a reasonable officer in the same position a suspicion that a violation of the law was occurring.” The dissent maintained that “an officer’s mistake of law must be considered, especially where it serves as the basis for initiating an investigatory stop.”

U.S. v. Robinson, 814 F.3d 201 (4th Cir. 2016) stressed that: “Armed and dangerous are separate and independent conditions of a lawful Terry frisk.” “Because the carrying of a concealed firearm is not itself illegal in West Virginia, and because the circumstances did not otherwise provide an objective basis for inferring danger, [the officer] lacked reasonable suspicion that Robinson was not only armed but also dangerous.”

United States v. Foster, 824 F.3d 84 (4th Cir. 2016). Distinguished Robinson because Foster was stopped “not merely because he might be armed, but because he might have been the source of the reported gunshot.” Unlike Robinson, the circumstances here established that police were investigating a report of a gunshot and the one person they encountered at the scene reached for his pocket when asked if he was carrying a weapon. It was not unreasonable under these circumstances for the officers to have concluded that Foster might have a weapon.

U.S. v. Graham, 846 F. Supp. 2d 384 (D. Md. 2012), aff’d but criticized, 796 F.3d 332, 98 Fed. R. Evid. Serv. 98 (4th Cir. 2015), adhered to in part on reh’g en banc, 824 F.3d 421 (4th Cir. 2016) and aff’d, 824 F.3d 421 (4th Cir. 2016) (en banc). The case involved cell phone tracking through inspection of cell site location information obtained from defendant’s cell phone provider. Previous U.S. Supreme Court cases, Karo, Kyllo, and Jones, all involved
direct government surveillance activity and are not relevant. There is no Fourth Amendment search when the government obtains information voluntarily surrendered to a third party, i.e., the cell phone provider.

Utah v. Strieff, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). The “attenuation doctrine” is an exception to the exclusionary rule and applies when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by intervening circumstances. In denying suppression, the Court considered three factors: (1) “temporal proximity” between an illegal stop and a search; (2) “the presence of intervening circumstances,” [there was an existing arrest warrant]; (3) the officer was at most negligent, and did not engage in a purposeful or flagrant violation of the Fourth Amendment.

Walker v. Com., 289 Va. 410, 770 S.E.2d 197 (2015) found improper joinder of four separate sales of a controlled substance because such sales are insufficient to constitute a common scheme or plan. “Common plan connotes a series of acts done with a relatively specific goal or outcome in mind.” The four individual drug transactions here are not related to one another for the purpose of accomplishing a particular goal. The key factor is that the goal furthered by the offenses must be extrinsic to at least one of them. Profiting from the sale of drugs, including cultivating return customers, is intrinsic to the offense of selling drugs.

U.S. v. Ductan, 800 F.3d 642 (4th Cir. 2015). Waiver of the right to counsel must be “knowingly and intelligently” made. The Fourth Circuit has never held that the right to counsel can be forfeited by the defendant’s misconduct, and “at least four Justices of the Supreme Court” have identified the right to counsel as a right that can only be relinquished intentionally.

Williams v. Pennsylvania, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016) held that recusal is constitutionally required when there is an impermissible risk of actual bias, such as when a judge had significant personal involvement as a prosecutor in a critical decision regarding the defendant’s case. Failure to recuse is structural error “not amenable” to harmless-error review.

Payne v. Com., 65 Va. App. 194, 776 S.E.2d 442 (2015). While finding no error in this case, the Court noted that while there is no Virginia Model Jury Instruction addressing eyewitness testimony, a number of other jurisdictions use such instructions, particularly in dealing with cross-racial identifications. The opinion extensively discusses various aspects of eyewitness identifications, including expert scientific testimony on the issue, and recognizes that a trial court retains the “discretion to permit or forbid such testimony.” The Court also noted that “recognizing that there could be circumstances where eyewitness expert testimony would be appropriate does not mean that denial of funding for such expert testimony automatically renders a trial
fundamentally unfair."

There were three cases applying the often overlooked doctrine of collateral estoppel.

Com. v. Davis, 290 Va. 362, 777 S.E.2d 555 (2015). When the district court acquitted defendant of the misdemeanor of reckless handling of a firearm, collateral estoppel precluded the Commonwealth from relitigating that fact in the prosecution of murder arising out of the same event.

Leonard v. Com., 66 Va. App. 270, 784 S.E.2d 315 (2016). As a general rule, proceedings in the general district court are rendered nullities when a party files an appeal to the circuit court. But the district court's factual findings are not nullified by the appeal, and the defendant is entitled to rely on that ruling for the purposes of collateral estoppel.

Currier v. Com., 65 Va. App. 605, 779 S.E.2d 834 (2015). "A single grand jury indicted appellant on the same date for burglary, grand larceny, and possession of a firearm as a convicted felon." The firearm charge was severed, and appellant was acquitted of the larceny and burglary charge. At the subsequent firearm trial, appellant contended that double jeopardy and collateral estoppel barred any reference to the burglary and larceny. The Court denied defendant's claim because "the specific abuse the Double Jeopardy Clause aims to prevent—including its collateral estoppel facet—is the practice of 'unfair and abusive reprosecutions.' That concern is not present when a trial proceeds on a charge that was severed from a combined original group of charges and the charge was severed with the defendant's consent and for his benefit."
DEDICATION

To my parents who made it all possible. And to my children and grandchildren who make it all worthwhile.
PREFACE

In this volume, statutory law is covered through the 2014 Session of the General Assembly. Decisions of the United States Supreme Court are included from the 2014–2015 term, as well as decisions from the U.S. Court of Appeals and District Courts in Virginia issued through at least July 15, 2014.

RONALD J. BACIGAL

December 2016
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Chapter 1

Introduction

§ 1:1 Scope and purpose

The importance of procedure in criminal cases has increased dramatically over the years and many cases are won or lost on procedural grounds. This book is designed to aid Virginia practitioners in the handling of a criminal case. Through the sequential examination of the various stages of the criminal process from arrest to appeal, the reader should be able to find the relevant point of law applicable to a particular case.

Although this book focuses on Virginia law, attention also has been given to federal constitutional law. Since the days of the "Warren Court," the U.S. Supreme Court's concern with the constitutional aspects of procedure and its desire to safeguard the liberty of individuals have taken on increasing importance.

§ 1:2 Sources of law—Constitutional and statutory

Research References

West’s Key Number Digest, Constitutional Law ⇒18; Courts ⇒85(1);
Federal Courts ⇒502
C.J.S., Constitutional Law §§ 16 to 17, 27 to 30, 39; Courts §§ 179 to 181; Federal Courts §§ 329 to 333, 341 to 346, 348 to 349

It is axiomatic that the United States Constitution is "the supreme law of the land." The primary sources of federal law governing state criminal proceedings are those provisions of the

[Section 1:2] Clause).

1U.S. Const. Art. VI (Supremacy
Bill of Rights made applicable to the states through the Due Process Clause of the Fourteenth Amendment. While due process of law "precludes defining," it does incorporate major provisions of the Fourth, Fifth, Sixth, and Eighth Amendments. Accordingly, this subject matter is the major focus of this book.

Article I of the Virginia Constitution sets forth the Virginia Bill of Rights, with sections 8, 9, and 10 constituting the important provisions with respect to criminal procedure. Article I, section 8, guarantees an accused the right (1) to demand the cause and nature of the accusation; (2) to be confronted with the accusers and witnesses; (3) to call for evidence in the defendant's favor; (4) to have a public and speedy trial; (5) to have an impartial jury of the vicinage, without whose unanimous consent the defendant cannot be found guilty; (6) to not be put twice in jeopardy for the same offense; and (7) to not be compelled to give evidence. Article I, section 9, prohibits excessive bail, cruel and unusual punishment, and ex post facto laws. Article I, section 10, prohibits general warrants of search and seizure.

While most of the provisions of the Virginia Bill of Rights closely parallel the Bill of Rights in the United States Constitution, the Virginia courts have the authority to interpret the state constitution to confer additional rights beyond those guaranteed by the United States Constitution. For example, in *Henshaw v. 2*

2. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.


The initial decision in *Farmer v. Com.*, 10 Va. App. 175, 390 S.E.2d 775 (1990), on reh'g, 12 Va. App. 337, 404 S.E.2d 371 (1991), held that evidence of a refusal to submit to a field sobriety test did not violate the Fifth Amendment to the U.S. Constitution, but did violate the right against self-incrimination guaranteed by Article I, § 8, of the Virginia Constitution. The panel decision was reversed by the full court in *Farmer v. Com.*, 12 Va. App. 337, 404 S.E.2d 371 (1991) (en banc).

Commonwealth,\textsuperscript{6} the court held that Article I, section 8, of the Virginia Constitution gives a criminal defendant “a right to view, photograph, and take measurements of the crime scene, provided that the defendant makes a showing that a substantial basis exists for claiming that the proposed inspection and observation will enable the defendant to obtain evidence relevant and material to his defense or to be able to meaningfully defend himself.” At trial, “the rights to compulsory process, confrontation and due process give the defendant a constitutional right to present relevant evidence.”\textsuperscript{7}

Although the federal courts have the final word on interpretation of the United States Constitution, a state court’s recognition of broader protection for criminal defendants precludes federal review if the state court decision indicates “clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent” state grounds.\textsuperscript{8}

The primary source of statutory provisions governing criminal procedure is Title 19.2 of the Code of Virginia. Part Three A, Criminal Practice and Procedure, Rules of the Virginia Supreme Court, contains additional provisions governing criminal procedure. Statutory material in conflict with the Rules takes precedence.\textsuperscript{9}

“While violations of state procedural statutes are viewed with disfavor . . . , neither the Virginia Supreme Court nor the legislature has adopted an exclusionary rule for such violations . . . where no deprivation of the defendant’s constitutional rights occurred.”\textsuperscript{10}


Clark v. Com., 262 Va. 517, 551 S.E.2d 642 (2001) held that “[i]f an accused in Virginia has no right to interview a rape case victim, and no right to discover statements made by Commonwealth’s witnesses to agents of the Commonwealth, and no right to discover certain internal Commonwealth documents, surely the accused should have no right to a physical examination of the victim in a statutory rape case.”


\textsuperscript{9}Va. Const. Art. VI, § 5.

§ 1:3 Court system in Virginia

Research References
West's Key Number Digest, Courts ☞ 157, 191, 250

The Supreme Court of Virginia consists of seven justices, each elected for a term of 12 years. The court may render decisions en banc or in divisions as prescribed by law.¹

On January 1, 1985, the Court of Appeals of Virginia was established and given jurisdiction over appeals from any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed.²

Courts of record (circuit courts) are established in every county and city of the first class. These courts have original jurisdiction over all felonies and indictments for misdemeanors, original writs of habeas corpus,³ and appellate jurisdiction in the form of de novo review over misdemeanors tried in courts not of record (district courts).⁴

Courts not of record (district courts) are of three types: general district courts, juvenile and domestic relations district courts, and drug treatment courts. General district courts have original jurisdiction over misdemeanors⁵ and conduct preliminary hearings in felony cases.⁶ Juvenile and domestic relations courts have exclusive jurisdiction over (1) defendants under the age of 18, (2) all misdemeanor offenses committed by one member of the family against another, and (3) all misdemeanor offenses committed against the person of a juvenile.⁷ Juvenile and domestic relations courts conduct the preliminary hearings in felony cases involving offenses committed by one member of the family against another, or felonies committed against the person of a child.⁸ Drug treatment courts have specialized dockets offering judicial monitoring of intensive treatment and supervision of addicts in drug and drug-related cases.⁹

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Chapter 2

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§ 2:1 Arrest—General considerations

Research References
West's Key Number Digest, Arrest ©=63.5(3), 68(3), 68(4), 71.1
C.J.S., Arrest §§ 2, 37, 42 to 43, 46 to 47, 52 to 53, 62 to 70

An arrest of a suspect is a seizure of the person within the meaning of the Fourth Amendment.¹ Prior to the decision in Terry v. Ohio,² the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed wholly in terms of whether an arrest had taken place.³ Terry put an end to the "relatively simple and straightforward"⁴ principle that the term arrest is synonymous with those seizures governed by the Fourth Amendment. Terry recognized that limited seizures such as a

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²Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).