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Criminal Law and Procedure

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CRIMINAL LAW AND PROCEDURE

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INTRODUCTION

It has been another busy year in the General Assembly and in the appellate courts of Virginia, especially with the recently expanded Court of Appeals. Areas in which the General Assembly made significant changes are now filtering to the appellate courts for interpretation. There have been a number of significant opinions in retroactivity of statutes, probation violations, and mental health.

I. LEGISLATIVE UPDATE

A. *Criminal Procedure*

1. Notifying the Opposing Party of an Appeal from Juvenile & Domestic Relations Court ("JDR")

The Code of Virginia section 16.1-296 now requires a party who appeals a JDR decision to serve a copy of the notice of appeal on the opposing party or each counsel of record.[1] Service may be accomplished in accordance with Rule 1:12.[2] Failure to serve the notice of appeal does not impact the validity of the appeal; however, a circuit court may continue the hearing or dismiss in the absence of good cause.[3]

2. Victim's Rights

Section 19.2-11.01 requires that the Commonwealth's Attorney notify the victim of a felony regarding any proposed plea agreement and give the victim an opportunity to express their views about disposition and sentencing.[4] A trial court "shall not accept" a plea agreement unless the Commonwealth has complied or shows good faith for their failure to do so.[5] This amendment does away

1. VA. CODE ANN. § 16.1-296(A) (Cum. Supp. 2023).
2. *Id.*
3. *Id.*
4. § 19.2-11.01(A)(4)(d) (Cum. Supp. 2023).
5. *Id.*

with the previous requirement that the victim notify the prosecution in writing of their desire to be consulted.[6]

3. Court-Ordered Testing for Sexually Transmitted Infections

Section 18.2-61.1 authorizes a trial court to order a criminal defendant to be tested for sexually transmitted infections upon the request of the complaining witness if the crime alleged includes sexual assault, certain sexual offenses against children, or assault and battery involving an alleged exposure to bodily fluids, and the defendant does not agree.[7] The trial court shall hold an evidentiary hearing to determine whether there is probable cause to believe that the defendant committed the crime, and that the complaining witness was exposed.[8] Any specimen obtained pursuant to this process may not be used for any other testing, and the results of the testing are not admissible as evidence at trial.[9]

4. Post-Release Violations

Section 53.1-161 moves jurisdiction for revocation of post-release supervision from a hearing before the parole board to the circuit court in the sentencing jurisdiction.[10] In cases of new criminal charges, the statute specifically authorizes release pending adjudication of the new charges.[11]

5. Prohibition on Solitary Lockdown in Maximum Security

"Restorative housing" is defined as "special purpose bed assignments operated under maximum security regulations and procedures and utilized for the personal protection or custodial management of an incarcerated person."[12] Section 53.1-39.2 prohibits restorative housing, except in cases where the inmate has requested it, isolation is needed for the inmate's own safety, there is reason to believe the inmate or another inmate will be harmed, or it is

6. 2023 Va. Acts chs. 746 & 784 (codified as amended at VA. CODE ANN. § 19.2-11.01 (Cum. Supp. 2023)).
7. § 18.2-61.1 (Cum. Supp. 2023).
8. *Id.*
9. § 18.2-61.1(E).
10. § 53.1-161(B) (Cum. Supp. 2023).
11. *Id.*
12. § 53.1-39.2(A) (Cum. Supp. 2023).

necessary for the "orderly operation" of the facility.[13] An inmate in "restorative housing shall be offered" at least four hours daily out of the cell, including recreation and activities designed to resolve any "problematic behavior."[14] The out-of-cell time may only be suspended in the case of a lockdown.[15]

A restorative housing placement must be reviewed weekly.[16] The review must describe in writing why less restrictive housing is unavailable, include an action plan to transition away from restorative housing, and document the date, duration, and statutory basis for placement.[17] Mental and physical health evaluations are required within one day of placement, unless such were performed in the week before the restorative designation.[18]

6. Payment for Jurors

Since 1993, Virginia has paid jurors thirty dollars for each day they serve.[19] That changed on July 1, 2023 when the compensation increased to fifty dollars.[20]

7. Alcohol Safety Action Program ("ASAP") Boards

Section 18.2-271.1(G) allows courts to refer a person to the Virginia ASAP when they are convicted of reckless driving if the original charge is DUI.[21] Subsection (I) calls for ASAP community boards to include a member who is an attorney with experience defending people charged with DUI, in addition to a prosecuting attorney.[22]

13. § 53.1-39.2(B).
14. § 53.1-39.2(B)(5).
15. § 53.1-39.2(D).
16. § 53.1-39.2(C).
17. *Id.*
18. § 53.1-39.2(E).
19. § 17.1-618 (2020); 2023 Va. Acts chs. 232 & 233 (codified as amended at VA. CODE ANN. § 17.1-618 (Cum. Supp. 2023)).
20. § 17.1-618 (Cum. Supp. 2023).
21. § 18.2-271.1(G) (Cum. Supp. 2023).
22. § 18.2-271.1(I).

8. Expungement

The General Assembly amended multiple sections of the Code of Virginia addressing expungement of criminal records.[23] Orders may be sent to the Central Criminal Records Exchange ("CCRE") by electronic means, and the response is electronic.[24] Records may be sealed rather than expunged in cases involving misdemeanors, underage alcohol, or misdemeanor marijuana convictions.[25] In other cases, expungement is no longer automatic, but requires a petition and a court order.[26] A person may petition for access to their own sealed record.[27]

B. *Criminal Offenses*

1. Concealed Weapons

The Code of Virginia section 18.2-308 is amended to remove switchblades from the list of prohibited concealed weapons and add stiletto knives.[28]

2. Free Range Parenting

The definition of "abused or neglected child"—provided by section 16.1-228—was amended to exclude a child who is allowed to engage in independent, age-appropriate activities.[29] These "independent activities" include travelling to and from school, outdoor play, and/or staying home alone for a "reasonable period of time."[30]

3. Drones

Section 18.2-130.1 adds unmanned aircraft systems to the list of prohibited electronic devices used for peeping or spying.[31]

23. *See* 2023 Va. Acts chs. 554 & 555 (codified as amended in scattered sections of VA. CODE ANN. tit. 19.2 (Cum. Supp. 2023)).
24. § 19.2-392.2(C) (Cum. Supp. 2023).
25. § 19.2-392.6(A) (Cum. Supp. 2023).
26. § 19.2-392.2 (Cum. Supp. 2023).
27. § 19.2-392.13 (Cum. Supp. 2023).
28. § 18.2-308(A) (Cum. Supp. 2023).
29. § 16.1-228 (Cum. Supp. 2023).
30. § 16.1-228(2).
31. § 18.2-130.1(B) (Cum. Supp. 2023).

Relatedly, section 18.2-121.3 redefined the definition of trespassing to include the use of an unmanned aircraft system to drop items to, photograph, or video inmates at a correctional facility.[32]

4. Fentanyl as a Weapon of Terrorism

The definition of "[w]eapon of terrorism" was expanded to include "any mixture or substance containing a detectable amount of fentanyl" or its component chemicals.[33] An individual who knowingly and intentionally manufactures or distributes a weapon of terrorism containing a "detectable amount of fentanyl" is guilty of a Class 4 felony.[34]

5. Purchasing of Minors

Section 18.2-356.1 now creates a Class 5 felony when one offers money "or other valuable thing" in exchange for custody or control of a minor, with exceptions for surrogacy, adoption, and other family exchanges.[35]

6. Organized Retail Theft

Revised section 18.2-103.1 creates a Class 3 felony—organized retail theft—for anyone who acts with another person to commit retail larceny, with a value exceeding $5,000 in value over a ninety-day period.[36] A person who places such property in a retail property fence is also liable under the statute.[37] Section 2.2-511.2 creates a fund from which grants may be awarded to investigate and prosecute violations of organized retail theft.[38]

32. § 18.2-121.3(A) (Cum. Supp. 2023).
33. § 18.2-46.4 (Cum. Supp. 2023).
34. § 18.2-46.6(D) (Cum. Supp. 2023).
35. § 18.2-356.1 (Cum. Supp. 2023).
36. § 18.2-103.1(B)–(C) (Cum. Supp. 2023).
37. § 18.2-103.1(B); *see also* § 18.2-103.1(A) ("'Retail property fence' means a person or business that buys retail property knowing or believing that such retail property has been unlawfully obtained.").
38. § 2.2-511.2 (Cum. Supp. 2023).

7. GPS for Sexually Violent Predators ("SVPs")

A new provision was added to section 37.2-912, which states that if an SVP placed on conditional release tampers with or "attempts to circumvent" their GPS equipment, they are guilty of a Class 6 felony.[39]

8. Catalytic Converter Transactions

The General Assembly amended two sections of the Code of Virginia relating to catalytic converter transactions.[40] Under revised section 18.2-146.1, any person who sells or purchases a used catalytic converter is guilty of a Class 6 felony, unless the transaction involves a scrap metal purchaser.[41] Furthermore, section 18.2-146 states that a judge or jury may infer that a person possessing a catalytic converter removed from a motor vehicle obtained it in violation of the section, barring a few exceptions.[42]

9. Sexual Extortion

Revised section 18.2-59.1 makes sexual extortion a Class 5 felony; a person is guilty of this crime when they "maliciously threatens in writing" to distribute—or refuse to withdraw—a photograph or video that "expose[s] the genitals, pubic area, buttocks, or female breast" of a person, with intent to cause the person photographed to engage in sexual activity.[43] If the victim is under eighteen years of age, punishment is one to twenty years of incarceration and a fine.[44]

39. § 37.2-912(C) (Cum. Supp. 2023).

40. 2023 Va. Acts chs. 90 & 91 (codified as amended at VA. CODE ANN. § 18.2-146 & codified at VA. CODE ANN. § 18.2-146.1 (Cum. Supp. 2023)).

41. § 18.2-146.1 (Cum. Supp. 2023).

42. § 18.2-146 (Cum. Supp. 2023).

43. § 18.2-59.1(A) (Cum. Supp. 2023).

44. *Id.*

C. *Mental Health*

1. Providing Assistance Information to Defendants Presenting Mental Health Information

The Code of Virginia section 19.2-271.6 allows a defendant to introduce evidence of their mental health condition history under certain circumstances.[45] In response to this, the General Assembly amended various sections of the Code relating to certain information that must be made to certain defendants found not guilty.[46] When a defendant's mental condition at the time of the offense is introduced, the trial court—general district, JDR, and circuit courts—must provide the defendant with information regarding services available through the local community services board.[47] Community services boards are required to provide this information to the courts, including information on how to access the services.[48]

2. Opioid Reduction and Jail-Based Substance Use Disorder Treatment and Transition Fund

Section 9.1-116.8 creates the Virginia Opioid Use Reduction and Jail-Based Substance Use Disorder Treatment and Transition Fund. The fund offers grants to local and regional jails for the creation of substance use and transition programs for inmates during incarceration.[49] This provision will not become effective until July 1, 2024.[50]

D. *Court-Appointed Counsel*

The Code of Virginia section 19.2-163 allows localities to supplement the compensation of Public Defenders and their employees.[51] The General Assembly amended the section to state that the funds

45. § 19.2-271.6(B) (2022).

46. 2023 Va. Acts chs. 217 & 218 (codified at VA. CODE ANN. §§ 16.1-69.29:1, -290.2, 17.1-525, 37.2-513 (Cum. Supp. 2023)).

47. § 16.1-69.29:1, -290.2 (Cum. Supp. 2023); § 17.1-525 (Cum. Supp. 2023).

48. § 37.2-513 (Cum. Supp. 2023).

49. § 9.1-116.8 (Cum. Supp. 2023).

50. *Id.*

51. § 19.2-163.01:1 (Cum. Supp. 2023).

may be paid to the Indigent Defense Commission.[52] Numerous jurisdictions already provide this type of supplement for the offices of Commonwealth's Attorneys.[53]

Amended section 19.2-160.1 authorizes courts to appoint two attorneys to represent a defendant charged with a Class 1 felony.[54] If the jurisdiction has a public defender, then the circuit court judge appoints the second attorney from the list of approved attorneys maintained by the Indigent Defense Commission.[55] Should the public defender have a conflict, the court may appoint two private attorneys.[56]

Section 19.2-163 now requires the presiding judge to provide a written explanation if they deny additional waiver funds, in whole or in part, to private attorneys who accept court-appointed cases.[57] The chief judge of the circuit shall review the explanation.[58] If the chief judge finds that the waiver is not justified, they shall provide a written explanation of their findings to the requesting attorney.[59]

II. CASE SUMMARIES

A. *Criminal Procedure*

1. Bail

When the Commonwealth moves to revoke bond, it is error for the trial court to only consider new information that arose after the initial grant of bail.[60] The trial court should also consider the

52. 2023 Va. Acts ch. 467 (codified as amended at VA. CODE ANN. § 19.2-163.01:1 (Cum. Supp. 2023)).

53. *See, e.g.*, OFF. OF THE COMMONWEALTH'S ATT'Y, FY 2023 FAIRFAX COUNTY ADOPTED BUDGET PLAN 146 (2023), https://www.fairfaxcounty.gov/budget/sites/budget/files/assets/documents/fy2023/adopted/volume1/82.pdf [https://perma.cc/A76B-S29J]; CITY OF RICHMOND, VA., ADOPTED FISCAL PLAN § 1-1 (2022), https://www.rva.gov/sites/default/files/2021-06/FY22%20Adopted%20Annual%20Fiscal%20Plan%20-%20Web%20Version.pdf [https://perma.cc/Z3ND-JCJ2].

54. § 19.2-160.1 (Cum. Supp. 2023).

55. § 19.2-160.1(A).

56. § 19.2-160.1(B).

57. § 19.2-163(2) (Cum. Supp. 2023).

58. *Id.*

59. *Id.*

60. Commonwealth v. Denny, 75 Va. App. 100, 106 n.2, 107 n.3, 108, 873 S.E.2d 112, 115 nn.2–3, 116 (2022).

circumstances of the case de novo.[61] In *Commonwealth v. Denny*, the Commonwealth moved to revoke bail—using the procedure set out in Code of Virginia section 19.2-132—based upon the defendant's alleged contact with the complaining witness in violation of his bail terms.[62] Section 19.2-132 does not set out a standard for the trial court to use in evaluating evidence to amend bail.[63] The Court of Appeals of Virginia, sitting en banc, held that the trial court was to consider the factors described in section 19.2-120, which applies to the initial admission to bail.[64]

2. Admissibility of Evidence

a. Prior Bad Acts

The defendant in *Carolino v. Commonwealth* was charged with strangulation of his girlfriend.[65] On cross-examination, the Commonwealth asked if the defendant had ever "been physical" with his girlfriend.[66] The prosecutor then asked whether he had ever "whipped" his girlfriend, and the defendant replied that he had done it once with her consent.[67] The Commonwealth then called the girlfriend on rebuttal to contradict the defendant's version of the events.[68] The defendant appealed the Virginia Beach City Circuit Court's decision to admit this testimony, arguing that the Commonwealth elicited testimony about the prior act to impugn his integrity rather than for an accepted bases for admitting prior bad acts evidence.[69] The court of appeals found that the cross-examination was impeachment on a collateral issue, and the trial court erred in allowing the Commonwealth to introduce extrinsic evidence.[70]

61. *Id.* at 108, 873 S.E.2d at 116.
62. *Id.* at 103, 873 S.E.2d at 113.
63. *See* VA. CODE ANN. § 19.2-132 (2022).
64. *Denny*, 75 Va. App. at 108, 873 S.E.2d at 116.
65. Carolino v. Commonwealth, No. 1270-21-1, 2022 Va. App. LEXIS 672, at *1 (Dec. 29, 2022).
66. *Id.* at *6.
67. *Id.*
68. *Id.* at *6–7.
69. *Id.* at *8–9.
70. *Id.* at *14–15.

b. Authentication

The court of appeals held that when the video of a crime was the only evidence presented and the authenticating witness testified to the wrong date, the trial court may not go outside the evidence to supplement the authentication.[71] The defendant in *Goldman v. Commonwealth* was employed on a construction site and had permission to access tools that were stored there.[72] On October 31, 2019, a number of tools were stolen from the site.[73] The only evidence of the theft was a video of the defendant removing tools from a storage box.[74] The Commonwealth asked a witness from the construction company whether the video was dated January 31, 2019, and the witness answered affirmatively.[75] The defendant moved to strike the Commonwealth's evidence, arguing that a video of him accessing tools nine months earlier was not proof he stole the tools on October 31.[76] The Commonwealth responded that the name of the electronic file was "EMVS [sic] — Inside — IT Rack Office Entrance_20191031_070000.mp4," which showed that the video was really recorded on October 31.[77]

The court of appeals reversed the conviction, finding that the name of the file was not in evidence and there was no testimony to show that the numbers "20191031"—contained in the file name—were an accurate date.[78] The court pointed out that the only evidence offered by the Commonwealth to authenticate the file was a witness who agreed to the prosecutor's leading question as to whether it was recorded on January 31.[79]

c. In-Court Identification

A witness who has not previously identified a culprit may do so for the first time when a pro se defendant is seated alone at the

71. Goldman v. Commonwealth, 74 Va. App. 556, 567–68, 871 S.E.2d 243, 248–49 (2022).
72. *Id.* at 558 n.2, 563, 871 S.E.2d at 244 n.2, 246.
73. *Id.* at 559, 871 S.E.2d at 244.
74. *Id.* at 559–60, 871 S.E.2d at 244–45.
75. *Id.* at 560, 871 S.E.2d at 245.
76. *Id.* at 561, 871 S.E.2d at 245.
77. *Id.* at 566, 871 S.E.2d at 248 (emphasis added).
78. *Id.* at 566–67, 871 S.E.2d at 248.
79. *Id.* at 565–67, 871 S.E.2d at 247–48.

counsel table.[80] The Supreme Court of Virginia based this ruling on five factors: (1) the jury is able to observe the witness during the initial identification and evaluate their reliability; (2) a trial is the appropriate mechanism to determine reliability of evidence, as opposed to a pretrial screening; (3) in-court identifications are part of the history of jurisprudence, and the court should avoid policy making in that regard; (4) the procedure by which eyewitness testimony is evaluated for reliability is based on judicial rulings and not scientific research; and (5) this approach has been adopted by a majority of courts.[81]

3. Motion to Strike

When a trial court grants a motion to strike the evidence, that ruling is not final until it is recorden in a written order—or "judgment of acquittal."[82] Rule 3A:15 authorizes a trial court to grant the accused's motion to strike the evidence "if the evidence is insufficient as a matter of law to sustain the conviction."[83] However, the authority to grant the motion also implicitly includes the authority to reconsider that decision as long as the parties and the subject matter remain under the trial court's jurisdiction.[84]

In the Fairfax County Circuit Court, the Commonwealth filed a motion in limine to obtain a ruling on the admissibility of sentencing orders from Maryland necessary to establish prior offenses in a jury trial.[85] The trial court ruled the orders were admissible.[86] The defendant moved to strike the evidence at the close of the Commonwealth's case based on insufficient evidence he was the defendant in the prior convictions.[87] After the court granted the motion, the Commonwealth objected, arguing that the trial court ruled—in the pretrial motion—that the convictions were attributable to the defendant, taking the issue away from the jury.[88] The trial court sympathized with the prosecutor's "misunderstanding" of its

80. *See* Walker v. Commonwealth, __ Va. __, __, 887 S.E.2d 544, 545, 547, 549 (2023).
81. *Id.* at __, 887 S.E.2d at 549–51.
82. Commonwealth v. McBride, No. 220715, 2023 Va. LEXIS 43, at *8–9 (Oct. 19, 2023).
83. VA. SUP. CT. R. 3A:15.
84. *McBride*, 2023 Va. LEXIS 43 at *9.
85. *Id.* at *1–2.
86. *Id.* at *2.
87. *Id.* at *2–3.
88. *Id.* at *3–4.

ruling and reopened the evidence, resulting in the ultimate conviction of possession with intent to distribute, third offense.[89]

Reversing the ruling of the court of appeals, the supreme court upheld the trial court's authority to reconsider its decision and allow the Commonwealth to reopen its case in chief.[90] Finding that "[a] verbal pronouncement from the bench granting a motion to strike is not a final judgment," the supreme court that Rule 3A:15 did not "preclude a trial court from timely reconsidering a motion to strike."[91]

Additionally, the supreme court found that the protections of the Double Jeopardy Clause, found in both the United States Constitution and the Constitution of Virginia, similarly did not prohibit the trial court's actions.[92] The court acknowledged that under the United States Supreme Court's holding in *Smith v. Massachusetts*, "the Double Jeopardy Clause forecloses reconsideration of a motion for acquittal when the defendant has suffered the possibility of prejudice."[93] In the present case, however, the defendant suffered no prejudice because the Commonwealth immediately objected to the trial court's grant of the motion to strike, and trial court reversed its decision prior to the defendant presenting any evidence or altering his strategy based on the ruling.[94]

4. Sentencing

a. Preparation of a Presentence Report

The court of appeals reaffirmed a defendant's absolute right to a presentence report upon request.[95] In *Gant v. Commonwealth*—a somewhat procedurally confusing case—the defendant pleaded guilty.[96] The parties announced they had an agreement; however, it was not reduced to writing.[97] The Amelia County Circuit Court asked if the Commonwealth had recommended a sentence, and the

89. *Id.* at *4–5.
90. *Id.* at *9–10.
91. *Id.* at *9.
92. *Id.* at *10, *12–13.
93. *Id.* at *12 (citing Smith v. Massachusetts, 543 U.S. 462, 471–72 (2005))
94. *Id.* at *13–14.
95. *Gant v. Commonwealth*, No. 0480-21-2, 2022 Va. App. LEXIS 110, at *8–9 (Apr. 19, 2022).
96. *Id.* at *1–2.
97. *Id.*

prosecutor responded that it recommended one year of probation.[98] The trial court imposed the agreed upon sentence[99] and requested that the parties provide a copy of the sentencing guidelines for the case so it could place them in the file, should it be audited by the supreme court.[100] The "sentencing order was entered the next day."[101] The order stated that the court had reviewed the sentencing guidelines and the defendant waived preparation of a presentence report.[102]

Sometime later, a probation officer prepared the sentencing guidelines.[103] Contrary to the expectations of counsel, the guidelines called for an active sentence range of seven months to one year, with a midpoint of ten months.[104] The trial court rescinded the sentencing order, stating that the prior order was "based on erroneous information."[105] The court ordered that the case be scheduled for a new sentencing hearing.[106]

A different trial judge presided over the new hearing.[107] At the start, defense counsel explained the history of the case and requested a presentence report.[108] The trial court denied the motion and sentenced the defendant to an active sentence of ten months.[109] Neither party mentioned the prior agreement, and the prosecutor recommended a one-year active sentence.[110]

The court of appeals panel majority characterized the case as an unwritten plea agreement that was rejected by the trial court.[111] It found that once the plea agreement was rejected, the defendant was entitled to request a presentence report because his plea was in the absence of an agreement.[112] He did not have an absolute right to the presentence report until the trial court rejected the

98. *Id.* at *2.
99. *Id.*
100. *Id.*
101. *Id.* at *3.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at *3–4.
106. *Id.*
107. *Id.*
108. *Id.* at *4.
109. *Id.* at *4–5.
110. *Id.* at *5.
111. *Id.* at *11.
112. *Id.* at *11–12.

agreement.[113] The dissent opined that requesting a presentence report "for the purpose of just doing a background investigation and putting [appellant] in a better light before the Court" was not sufficient to preserve the issue for appeal.[114]

b. Subsequent Offenses

A sentence may not be enhanced as a subsequent offense in the absence of proof of prior offenses during trial.[115] The court of appeals declined to rule on whether a subsequent offense was a sentencing enhancement or an element of the offense.[116]

Nonetheless, evidence of both the first and the subsequent offense may be distilled from the course of a single event.[117] For example, in *Walker v. Commonwealth*, the defendant was convicted of a bank robbery in which several people were present.[118] He was charged with four counts of robbery and four counts of use of a firearm in the commission of a robbery.[119] He argued the single event could not result in conviction for both first and subsequent offenses.[120]

The supreme court found that the "conviction" part of "subsequent conviction" applies when the finder of fact finds the defendant guilty in a single trial, even though sentencing did not formally finalize the conviction.[121] The court distinguished the situation from cases where the trials are held separately because, in a separate trial, there is a possibility that the court could set aside the verdict.[122] The court specifically noted that "a person who robs more than one person is more blameworthy."[123]

113. *Id.* at *13–14.
114. *Id.* at *15–16 (Huff, J., dissenting).
115. Artis v. Commonwealth, 76 Va. App. 393, 404, 882 S.E.2d 478, 483 (2023).
116. *Id.* at 406, 882 S.E.2d at 484.
117. Walker v. Commonwealth, __ Va. __, __, 887 S.E.2d 544, 545–46 (2023).
118. *Id.* at __, 887 S.E.2d at 548.
119. *Id.* at __, 887 S.E.2d at 548.
120. *Id.* at __, 887 S.E.2d at 548, 553.
121. *Id.* at __, 887 S.E.2d at 553–54.
122. *Id.* at __, 887 S.E.2d at 554.
123. *Id.* at __, 887 S.E.2d at 554.

c. Abuse of Discretion

In *May v. Commonwealth*, the court of appeals found that a trial court abuses its discretion when it states it does not agree with the sentencing statute.[124]

d. Safety Valve in Code of Virginia Section 18.2-248(H)(5)

Code of Virginia section 18.2-248(H)(5) contains an exception to the twenty-year mandatory minimum that is required when a defendant is convicted of the manufacture, sale, distribution, or gifting of large quantities of methamphetamine.[125] The exception is applicable only if (1) the defendant has not been convicted of one of the felonies enumerated as violent felonies under the sentencing guidelines; (2) there was no violence, threat of violence, or firearm involved in the current offense; (3) there was no death or serious bodily injury; (4) the defendant was not a manager or organizer, and the offense was not a continuing criminal enterprise; and (5) the defendant made a truthful statement for the Commonwealth regarding their knowledge of the offense and any associated offenses.[126] This "safety valve" provision was interpreted for the first time in *Cannaday v. Commonwealth*.[127]

The Henry County Circuit Court found that the safety valve provision did not apply.[128] The court made no specific findings, although it did state that "the main question is the gun."[129] On appeal, the defendant argued that specific findings are required for each factor enumerated.[130] The court of appeals found that the trial court was not required to articulate findings for each factor.[131] In this case, the trial court evaluated the factors and concluded that the defendant did not satisfy the requirement of no firearm being connected to the offense.[132]

124. May v. Commonwealth, No. 0083-22-3, 2023 Va. App. LEXIS 49, at *6 (Jan. 24, 2023).
125. VA. CODE ANN. § 18.2-248(H)(5) (2021).
126. *Id.*
127. Cannaday v. Commonwealth, 75 Va. App. 707, 711, 879 S.E.2d 604, 606 (2022).
128. *Id.*
129. *Id.* at 715, 879 S.E.2d at 608.
130. *Id.* at 716, 879 S.E.2d at 608.
131. *Id.* at 719, 879 S.E.2d at 610.
132. *Id.* at 721, 879 S.E.2d at 611.

e. Restitution

The court of appeals split in a recent decision involving embezzlement by the bookkeeper of a law firm.[133] In *Tyler v. Commonwealth*, the Charlottesville City Circuit Court ordered restitution for (1) office expenses such as ordering new checks after the firm had to open new accounts; (2) insurance costs resulting from suit by an insurer against the firm; (3) legal fees incurred in suing the embezzler, defending a suit by a client, and other matters; (4) forensic accounting fees; (5) fees from a complaint with the Virginia State Bar ("VSB"); and (6) anticipated future costs to comply with the future requirements of the VSB.[134] The defendant appealed, contending that some of the costs were too attenuated to be ordered as restitution.[135]

The court of appeals first found guidance in aspects of proximate cause analysis, which it used to limit the historically used "but for" analysis.[136] The court was concerned about the breadth of "but for" analysis and found the proximate cause limitation of superseding or intervening events to be helpful—but not binding—because it gives "trial courts freedom to draw on experience, common sense, and other legal principles."[137] The court found that the restitution for office expenses and insurance fees was directly related to the embezzlement.[138] In addition to being forced to open new bank accounts and order new checks, the firm changed the locks because the defendant failed to return her office key.[139] The insurance expenses were directly related to money shortages caused by the defendant removing funds from firm accounts.[140] Similarly, the court found a proven link between forensic accounting fees—including fees for testimony—and the offense.[141] However, the Commonwealth's evidence only explained the basis for some of the legal fees requested.[142] The court of appeals found that the trial court abused

133. Tyler v. Commonwealth, 75 Va. App. 218, 226, 243, 875 S.E.2d 119, 123, 132 (2022).
134. *Id.* at 227–28, 875 S.E.2d at 123–24.
135. *Id.* at 226, 875 S.E.2d at 123.
136. *Id.* at 230–32, 875 S.E.2d at 125–26.
137. *Id.* at 233, 875 S.E.2d at 126–27.
138. *Id.* at 234, 875 S.E.2d at 127.
139. *Id.* at 235, 875 S.E.2d at 128.
140. *Id.* at 236–37, 875 S.E.2d at 128.
141. *Id.* at 238–39, 875 S.E.2d at 129–31.
142. *Id.* at 238, 875 S.E.2d at 129.

its discretion in awarding restitution for fees which were listed but not linked to the crime.[143]

With regard to the VSB expenses and the anticipated future costs, the court of appeals pointed out that the law firm was obligated to review its bank statements and conduct expenditure reconciliations outside of the embezzlement—as is every attorney.[144] The court noted that, had the firm complied with the VSB's mandate on these matters, the embezzlement would have been caught long before eight years passed.[145] The VSB ordered future audits because of the firm's shortcomings in that regard.[146] The court found all of these expenses could have been avoided had the firm been in compliance in the first place.[147]

The concurring opinion based a restitution award on the principles of intentional tort law—a broader interpretation than the majority's.[148] The concurrence agreed with the result set out by the majority but differed in their reasoning.[149]

5. Withdrawal of a Guilty Plea

Incompetency to stand trial is not a basis to withdraw a guilty plea.[150] In *Cecil v. Commonwealth*, the parties entered into a plea agreement which called for the Commonwealth to request an order of nolle prosequi of some charges while the defendant pled guilty to others.[151] There were several continuances and the defendant obtained new counsel.[152] The new defense counsel requested a competency evaluation, and the client was found incompetent to stand trial.[153] The opinion does not state how much time passed between that finding and the guilty plea, but the defendant was restored to competency nineteen months after the plea.[154] He moved to

143. *Id.* at 237–38, 875 S.E.2d at 129.
144. *Id.* at 239–42, 875 S.E.2d at 130–31.
145. *Id.* at 241, 875 S.E.2d at 131.
146. *Id.* at 242, 875 S.E.2d at 131.
147. *Id.* at 241–42, 875 S.E.2d at 131.
148. *Id.* at 243, 875 S.E.2d at 132 (Raphael, J., concurring).
149. *Id.*
150. Cecil v. Commonwealth, No. 0448-21-3, 2022 Va. App. LEXIS 91, at *8–9 (Apr. 5, 2022).
151. *Id.* at *3.
152. *Id.*
153. *Id.* at *4.
154. *Id.* at *1, *4.

withdraw his plea, asserting that "with the finding of incompetency so close in proximity to his pleas coupled with his history of mental health problems, he presented a possible substantive defense of insanity at the time of the offense."[155]

The Giles County Circuit Court denied the motion, and the court of appeals affirmed the denial.[156] The court noted that "[t]he problem with [the defendant's] argument is that competency to stand trial and insanity at the time of the offense are not synonymous legal or factual concepts."[157] It pointed out that the defendant's inability to assist with his defense was not a basis to support a finding that the defendant did not appreciate the nature and quality of his actions at the time of the offense.[158]

B. *Fourth Amendment*

1. Exigent Circumstances

In a published opinion, *Bakersville v. Commonwealth*, the Court of Appeals of Virginia reversed the trial court's denial of a motion to suppress.[159] Police responded to a call for disorderly conduct where the female caller reported that her boyfriend was drunk and might become violent.[160] Police did not see nor hear a disturbance at the apartment when they arrived, and when they knocked on the apartment door the female caller answered but did not seem to be injured or in distress.[161] When the officers asked to enter the home, the female agreed, but the defendant—who was also in the apartment and identified himself as a resident—immediately told the officers they could not enter the apartment and attempted to block the door with his body.[162] The defendant spoke to the officers through the partially opened door, but tried to close the door when the conversation escalated into a shouting match between himself and an officer.[163] The officer, however, blocked the door with his hand and leg before entering the apartment with two other officers,

155. *Id.* at *8–9.
156. *Id.* at *11–12.
157. *Id.* at *9.
158. *Id.* at *9–10.
159. Baskerville v. Commonwealth, 76 Va. App. 673, 680–81, 883 S.E.2d 279, 282 (2023).
160. *Id.* at 681, 883 S.E.2d at 282.
161. *Id.* at 681–82, 883 S.E.2d at 283.
162. *Id.* at 682, 883 S.E.2d at 283.
163. *Id.* at 682–83, 883 S.E.2d at 283.

who pinned the defendant to the ground.[164] The police arrested the defendant for domestic assault and battery, and uncovered narcotics on his person during a search incident to arrest.[165]

The court of appeals analyzed the factors outlined in *Verez v. Commonwealth* to determine whether exigent circumstances authorized this warrantless entry into the defendant's home.[166] Finding there was no urgency and no genuine possibility of danger, the court held that the officers lacked probable cause to believe that any exigency existed when they entered the apartment against the defendant's express and repeated wishes.[167]

Commonwealth v. Mihokovich reaffirmed the sanctity of privacy within one's home, regardless of whether it is a stand-alone home or a motel room.[168] The court of appeals held that exigent circumstances did not authorize a warrantless entry into a motel room, even when it was to render aid in a suspected overdose.[169]

After coming into contact with an "impaired, intoxicated" man exiting a motel room, officers looked through the motel window and observed two people who appeared to be sleeping in the bed.[170] When the man told the officers he had recently used fentanyl, the officers became concerned about the people in the room and entered, making no attempt to wake the occupants and despite no visible narcotics or drug paraphernalia in the room.[171]

The Commonwealth appealed the Frederick County Circuit Court's grant of the defendant's motion to suppress.[172] Affirming the trial court's decision, the court of appeals held that warrantless entry into one's home, including a motel room, is "presumptively unreasonable" absent exigent circumstances.[173] Even if the officers thought it was necessary to enter the room to provide emergency aid, the exception did not apply because a reasonable officer would

164. *Id.* at 683, 883 S.E.2d at 283.

165. *Id.*

166. *Id.* at 686–87, 883 S.E.2d at 285 (citing Verez v. Commonwealth, 230 Va. 405, 410–11, 337 S.E.2d 749, 753 (1985)).

167. *Id.* at 686–87, 883 S.E.2d at 285–86.

168. Commonwealth v. Mihokovich, No. 1076-22-4, 2022 Va. App. LEXIS 582, at *15–17 (Nov. 15, 2022)

169. *Id.*

170. *Id.* at *2.

171. *Id.* at *2–4.

172. *Id.* at *1.

173. *Id.* at *8.

have attempted to wake up the people in the room before entering the room.[174]

2. Scope of Government Intrusion

a. Scope of Terry Stop

In *Camann v. Commonwealth*, Frederick County officers responded to a call for service at a 7-Eleven store and saw a man standing outside the store.[175] As the officers spoke to the man, one noticed that he appeared to be hiding something under his shoe that looked like aluminum foil.[176] When ordered to move his foot, the defendant revealed what appeared to be drug paraphernalia.[177] An officer placed him in handcuffs, and a search incident to his arrest yielded a cellophane wrapper in his wallet and a pill bottle in his pocket, both containing mixtures of controlled substances.[178] The contents of the wrapper later tested positive for fentanyl (Schedule II substance) and etizolam (Schedule I substance).[179]

The court of appeals affirmed the Frederick County Circuit Court's denial of the defendant's motion to suppress, holding that the officer's statement to the defendant—"move your foot"—was a minimal incursion into the defendant's liberty that was supported by reasonable articulable suspicion (akin to a Terry stop).[180]

b. Scope of Seizure

The court of appeals addressed questions of lawfulness of a seizure and application of the exclusionary rule in *Commonwealth v.*

174. *Id.* at *21–22.

175. Camann v. Commonwealth, No. 0243-22-4, 2023 Va. App. LEXIS 134, at *1, *3 (Feb. 28, 2023).

176. *Id.*

177. *Id.*

178. *Id.* at *4.

179. *Id.*

180. *Id.* at *2, *9. The court of appeals, however, reversed Mr. Camann's conviction for possession of etizolam, holding that "when a defendant possesses two *different* controlled substances so mixed or fused together as to make them indivisible," the Commonwealth must prove that the defendant knew that the mixture in his possession contained two controlled substances. *Id.* at *20–21. This holding was granted a rehearing before the entire court and should be heard sometime later in 2023. *See* Upon a Petition for Rehearing En Banc, Camann v. Commonwealth, No. 0243-22-4, 2023 Va. App. LEXIS 134 (Mar. 28, 2023), https://law.justia.com/cases/virginia/court-of-appeals-unpublished/2023/0243-22-4-0.html [https://perma.cc/3L7T-KJFM].

Martinez.[181] Police responded to a call for a medical emergency from a ride-share driver about his passenger being passed out.[182] Upon arrival, police found that the passenger was alert and communicating.[183] The passenger and three officers walked under a nearby awning to get out of the rain as they spoke.[184] The passenger first provided the officers a Colorado driver's license and later gave his Virginia license.[185] While one officer crossed the road with the defendant's ID to speak to the driver, the other two asked for consent to search the defendant, suspecting that narcotics were present.[186] The search continued when emergency medical personnel were on scene; the officers found marijuana and Xanax in the defendant's jacket pocket.[187] The defendant refused medical care, and the police continued to question him after the EMTs left.[188] After being told by an officer to "make some smart decisions," the defendant admitted he had a baggie of cocaine in his sock.[189]

The Virginia Beach City Circuit Court granted the defendant's motion to suppress, and the court of appeals affirmed, holding that the officers had unlawfully seized him in violation of his Fourth Amendment rights.[190] The court held that a reasonable person would not have felt free to leave when (1) he was surrounded by three uniformed officers, one of whom took and kept his driver's license until they arrived at the jail; (2) no one told him he was free to go; and (3) one officer asked to search him prior to the EMTs' arrival because the officer thought there might be drugs or a weapon.[191] This demonstrated "that the officers converted the situation from a medical emergency to a drug search" without reasonable, articulable suspicion.[192]

181. Commonwealth v. Martinez, No. 0061-22-1, 2022 Va. App. LEXIS 185, at *1, *7 (May 24, 2022).
182. *Id.* at *1–2.
183. *Id.* at *2.
184. *Id.*
185. *Id.* at *2–3.
186. *Id.* at *3.
187. *Id.* at *3–4.
188. *Id.* at *4.
189. *Id.*
190. *Id.* at *1.
191. *Id.* at *12–13.
192. *Id.* at *13.

c. Scope of a Search Warrant

In *Jones v. Commonwealth*, a case originating in the Lynchburg City Circuit Court, officers obtained a search warrant specifically authorizing the search of all persons in the home and naming the defendant as a party to be searched.[193] The defendant was not present when the police served the warrant on the home; however, the defendant drove down his street while the police were at the home and he turned around when he saw them.[194] The defendant was subsequently stopped by officers in a nearby gas station parking lot.[195] Police searched his person and his vehicle, finding drugs and a handgun.[196]

The court of appeals reversed the trial court's denial of the motion to suppress.[197] "The Fourth Amendment requires warrants to 'particularly describ[e] the place to be searched, and the persons or things to be seized,'" and these details provide the officers with the boundaries of the authorized search and/or seizure.[198] While the warrant authorized the search of any person in the home and specifically named the defendant, the search of his person and vehicle—neither of which were at the residence—was beyond the scope of the warrant.[199] Since the search was outside the boundaries of the warrant and there was no other evidence that an exception to the warrant requirement existed, the search was in violation of the defendant's Fourth Amendment rights against unreasonable searches and seizures.[200]

3. Vehicle Searches

In *Commonwealth v. Hendrick*, the court of appeals affirmed the Richmond City Circuit Court's grant of a motion to suppress.[201] Just before midnight, officers stopped a car for not fully stopping

193. Jones v. Commonwealth, No. 0431-22-3, 2023 Va. App. LEXIS 165, at *1–2 (Mar. 14, 2023).
194. *Id.* at *2–3.
195. *Id.* at *3.
196. *Id.*
197. *Id.* at *1.
198. *See id.* at *6 (quoting U.S. CONST. amend. IV).
199. *Id.* at *5–6.
200. *Id.* at *7–8.
201. Commonwealth v. Hendrick, No. 1054-22-2, 2022 Va. App. LEXIS 684, at *1–2. (Dec. 29, 2022).

at a stop sign in what the police deemed to be a "high-crime area."[202] One officer told the trial court that the driver's movements in the vehicle—reaching down toward the floorboard, reaching under the seat, and looking back at the officers in his mirror—were indicative of "somebody . . . trying to conceal something."[203] Concerned it was a weapon, one officer told the driver to exit the vehicle and placed him in handcuffs, while another began a "protective sweep of the vehicle."[204] During this search, officers discovered a small plastic baggie in a gap under the steering wheel; the contents later tested positive for a mixture of heroin and fentanyl.[205]

The court of appeals held that the officers lacked reasonable, articulable suspicion to conduct a protective sweep of the vehicle because the officers did not possess anything more than a "mere hunch" that the driver was armed and a threat to their safety.[206] The fact that the traffic stop was in a high-crime area and that the driver made a "furtive movement" toward the floorboard prior to the officer approaching his vehicle was insufficient to create reasonable, articulable suspicion for a search of the vehicle.[207] Additionally, the attenuation doctrine did not apply because the officers exceeded the scope of a protective sweep for weapons when they continued to search the car after ensuring the driver was secured and unarmed.[208] Their comments and actions during the search made it clear they were searching for drugs, not weapons.[209]

In *Commonwealth v. Branch*, the court of appeals affirmed the Virginia Beach City Circuit Court's grant of a motion to suppress because the officers lacked probable cause for a vehicle search.[210] The driver of the vehicle was stopped by police for observed traffic violations.[211] While one officer spoke to the driver, another spoke with the passenger.[212] The officer asked the passenger for identification, and when the passenger opened her wallet the officer saw

202. *Id.* at *2.
203. *Id.* at *3.
204. *Id.* at *3–4.
205. *Id.* at *6.
206. *Id.* at *15.
207. *Id.* at *13–14.
208. *Id.* at *20–21.
209. *Id.* at *19–20.
210. Commonwealth v. Branch, No. 0132-22-1, 2022 Va. App. LEXIS 245, at *1 (June 21, 2022).
211. *Id.* at *1–2.
212. *Id.* at *2.

"a green, leafy substance," which the officer described as a "little bit of weed."[213] Despite telling the passenger that the marijuana was "no big deal," the officer proceeded to search the vehicle based on both the marijuana and an open container of alcohol in the passenger seat.[214]

The court of appeals held that neither the open container nor the passenger's possession of a small amount of marijuana rose to the level of probable cause sufficient to justify the search.[215] The Commonwealth elicited no evidence that the driver's appearance or conduct demonstrated that he had consumed the alcohol, as required to satisfy the rebuttable presumption outlined in Code of Virginia section 18.2-323.1.[216]

The court avoided the question of whether a small amount of decriminalized marijuana constituted "contraband" under section 19.2-53(A).[217] Instead, assuming the marijuana was contraband, the presence of a small amount of marijuana in the sole possession of the passenger in a car does not establish probable cause that the vehicle contains contraband or evidence of a crime.[218] Additionally, section 18.2-250.1(F)—which has since been repealed and replaced by section 4.01-1302—prohibited searches based only on the smell of marijuana.[219]

4. Retroactivity of Statutory Changes Regarding Searches Based on the Odor of Marijuana

Recent changes to the law regarding marijuana have continued to make their way through the appellate courts. This year, the court of appeals addressed the retroactivity of these changes in two published opinions.

Retroactivity of a statutory change is "not favored" in statutory construction, but the court of appeals noted two ways to overcome this presumption: (1) the General Assembly can use explicit terms to outline whether and how a statute is to be applied retroactively; or (2) "where a law affects procedure only, instead of vested or

213. *Id.*
214. *Id.* at *2–3.
215. *Id.* at *4–12.
216. *Id.* at *6–7; VA. CODE ANN. § 18.2-323.1(B) (Cum. Supp. 2023).
217. *Branch*, 2022 Va. App. LEXIS 245, at *9; § 19.2-53(A) (2022).
218. *Branch*, 2022 Va. App. LEXIS 245, at *9–10.
219. *Id.* at *11; § 18.2-250.1(F) (2020), *repealed by* 2021 Va. Acts chs. 550 & 551.

substantive rights, the statute may 'be given retroactive effect.'"[220] Therefore, the question is whether the changes in the law regarding marijuana represent substantive or procedural changes.

Effective April 7, 2021, section 18.2-250.1(F) became section 4.1-1302; it prohibits law enforcement searches based solely on the odor of marijuana and renders any evidence found as a result of such a search inadmissible.[221] In *Montgomery v. Commonwealth*, the court of appeals addressed whether this change would apply retroactively to searches performed prior to March 2021.[222]

In November 2018, a Hampton Police Department detective stopped a car for not dimming its headlights.[223] Upon approaching the vehicle, the detective said he smelled the odor of marijuana and searched the vehicle, finding a bookbag of what appeared to be marijuana.[224] The defendant was indicted for possession with intent to distribute marijuana.[225] The court of appeals ultimately held that the search prohibition in repealed section 18.2-250.1(F) is substantive, and that even if the court characterized it as procedural, it cannot be applied retroactively in this case.[226]

In *Street v. Commonwealth*, the court of appeals addressed the retroactivity of the newly enacted section 4.1-1302(A).[227] Section 4.1-1302(A) prohibits searches or seizures based on the odor of marijuana, provides exclusion as a remedy for any violation,[228] and went into effect on July 1, 2021.[229]

In November 2019, the defendant was stopped for an expired registration.[230] When the officer approached the vehicle, he noted the odor of marijuana coming from inside.[231] Based on the odor alone, the officer searched the vehicle and recovered a handgun.[232] The defendant admitted the gun was his and, based on that

220. *See* Montgomery v. Commonwealth, 75 Va. App. 182, 189–90, 875 S.E.2d 101, 105 (2022) (quoting Sargent Elec. Co. v. Woodall, 228 Va. 419, 424, 323 S.E.2d 102, 105 (1984)).
221. 2021 Va. Acts chs. 550 & 551; § 4.1-1302 (2021).
222. *Montgomery*, 75 Va. App. at 189, 875 S.E.2d at 105.
223. *Id.* at 188, 875 S.E.2d at 104.
224. *Id.*
225. *Id.*
226. *Id.* at 197–199, 875 S.E.2d at 109–110.
227. Street v. Commonwealth, 75 Va. App. 298, 302, 876 S.E.2d 202, 204–05 (2022).
228. VA. CODE ANN. § 4.1-1302(A) (2021).
229. *Id.*; 2021 Va. Acts chs. 550 & 551.
230. *Street*, 75 Va. App. at 303, 876 S.E.2d at 205.
231. *Id.*
232. *Id.*

admission and his criminal record, was charged with possession of a firearm by a convicted felon.[233]

In analyzing the language of each statute, the court of appeals found two distinct prongs (or parts) to each statute; the "right" prong assures people would be safe from searches and seizures based solely on the odor of marijuana, and the "remedy" prong authorizes exclusion of any evidence "discovered or obtained pursuant to a violation of this subsection."[234] The limiting language in the remedy prong governs which searches are subject to exclusion.[235] "The ability to invoke the exclusionary 'remedy' prong of the statute is expressly contingent upon 'discover[y of the evidence] pursuant to a violation of [the 'right' prong of] this subsection.'"[236] Since neither statute existed when the appellant was initially subjected to the search, the exclusionary prong did not apply to either case.[237] Both searches predated the change to the law; therefore, neither search could have violated a subsection that did not yet exist.[238]

C. Miranda

In two unpublished opinions, the Court of Appeals of Virginia addressed what is required for a suspect to clearly invoke his right to an attorney and/or his right to remain silent. Generally, when analyzing whether the suspect's statement was sufficient to be considered an invocation, the court uses an objective reasonable man test, asking "whether the suspect 'articulated his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'"[239]

In *Rodriguez v. Commonwealth*, a police officer stopped a man on the street, read him his *Miranda* rights in Spanish, and began to question him about allegations of sexual conduct with his minor

233. *Id.*

234. *Id.* at 307, 876 S.E.2d at 207.

235. *Id.* at 309, 876 S.E.2d at 208.

236. *Id.* at 307, 876 S.E.2d at 207 (citing Montgomery v. Commonwealth, 75 Va. App. 182, 195, 875 S.E.2d 101, 108 (2022)).

237. *Id.* at 307–08, 876 S.E.2d at 207.

238. *Id.* at 309, 876 S.E.2d at 208.

239. Bermudez v. Commonwealth, No. 0769-21-4, 2022 Va. App. LEXIS 261, at *11 (June 28, 2022) (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

stepdaughter.[240] When the officer offered to continue the conversation in the courthouse, the man agreed.[241] Once at the courthouse, the defendant was presented with a typed form outlining his *Miranda* rights; even though it was in English, the defendant said he understood and signed the form.[242] Multiple times during the interrogation, the defendant mentioned having a lawyer present when answering questions and asked if he had to answer the questions without a lawyer; he also stated that he should have a lawyer because "everything I've been talking to you [sic] is going to be used against me," and declared "I would need a lawyer to answer that question for you."[243]

The court of appeals looked at both the statements made and the circumstances surrounding the statements.[244] The court specifically noted that "pre-request circumstances are relevant to determining the clarity of the request," meaning the circumstances of the interrogation prior to the statements at issue are relevant to provide important context to the demand.[245]

Finding that the defendant made an unequivocal and unambiguous request for a lawyer, the court concluded that the defendant's repeated mentions of needing or wanting a lawyer before answering questions provided the appropriate context with which to view his eventual invocation: "I would need a lawyer to answer that question for you."[246] After finding that the Arlington County Circuit Court's denial of the defendant's motion to suppress was not harmless error, the court reversed the decision and remanded the case.[247]

In another unpublished opinion, the appellant—a Spanish speaker—was questioned by police relating to allegations of sexual abuse of a minor.[248] Two police officers reviewed a form that outlined his *Miranda* rights, and one was acting as a translator.[249]

240. Rodriguez v. Commonwealth, No. 1394-21-4, 2022 Va. App. LEXIS 509, at *2 (Oct. 11, 2022).
241. *Id.* at *2–3.
242. *Id.* at *3.
243. *Id.* at *4–5.
244. *Id.* at *10–11.
245. *Id.* at *11.
246. *Id.* at *13.
247. *Id.* at *17–18.
248. Bermudez v. Commonwealth, No. 0769-21-4, 2022 Va. App. LEXIS 261, at *1–2 (June 28, 2022).
249. *Id.* at *2.

After reading the form to the defendant and instructing him to initial where necessary, the officers instructed the defendant to sign the "Consent to Speak" portion of the form, which stated that he was waiving his right to have a lawyer present during questioning.[250]

The defendant asked the officer if he had to sign the form if he did not want to answer the officers' questions.[251] The officer evaded the defendent's question and told him that this was his only opportunity to tell the police "his side of the story," and that signing the form was only necessary to make sure the defendant understood his rights.[252] The defendant responded, stating that he understood, "but, no, I have to explain to a lawyer because I can't be answering things."[253] The police continued to question him, and he made incriminating statements that were subsequently used against him at trial.[254]

Based on the record, the court of appeals found the defendant's statement was "clear, unambiguous, and unequivocal" and that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[255] The court also found the defendant's statement consistent with those of other cases where the invocation was found to be sufficient.[256]

D. *Confrontation*

In *Tyler v. Commonwealth*, the defendant was charged with strangulation, abduction, and attempted malicious wounding against his former girlfriend.[257] The girlfriend failed to show up for trial after being served with a valid subpoena (by posting) for two different trial dates so, prior to the third trial date, the Commonwealth sent police to her home, called her phone number, and asked its investigators for updated contact information.[258] In anticipation of the girlfriend failing to appear, the Commonwealth

250. *Id.* at *3.
251. *Id.*
252. *Id.* at *3–4.
253. *Id.* at *3.
254. *Id.* at *4.
255. *Id.* at *12–13.
256. *See id.* at *13.
257. Tyler v. Commonwealth, No. 0888-21-1, 2022 Va. App. LEXIS 340, at *1–2 (Aug. 2, 2022).
258. *Id.* at *2–3.

filed a motion to admit her preliminary testimony into evidence at trial.[259] The defense objected, citing the Confrontation Clause, and the Norfolk City Circuit Court took the matter under advisement while the bench trial proceeded.[260] The court eventually ruled that the preliminary hearing transcript was admissible, holding that the Commonwealth had exercised its due diligence to get the girlfriend to trial and overruling the defendant's constitutional objection.[261]

The Court of Appeals of Virginia first found that the Commonwealth had satisfied its burden of "due diligence" to allow the preliminary hearing transcript into evidence under Rule of Evidence 2:804 (allowing for prior sworn testimony in lieu of the witness if the witness is deemed unavailable).[262] In accordance with prior holdings, the court of appeals affirmed that "[d]ue diligence requires only a good faith, reasonable effort; it does not require that every possibility, no matter how remote, be exhausted."[263]

Turning to the Confrontation Clause objection, the court of appeals ruled that the prior testimony was admissible despite using the higher de novo standard for alleged violations of constitutional rights.[264] Since the Sixth Amendment's protections only require "that the defendant have an adequate opportunity to cross-examine the witness," it does not mean the defendant is entitled to "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[265] The defense had the opportunity to cross examine the girlfriend at the preliminary hearing, and this is all that was required.[266]

259. *Id.* at *3.
260. *Id.* at *4.
261. *Id.* at *7.
262. *Id.* at *9–10; VA. SUP. CT. R. 2:804 (2023).
263. *Tyler*, 2022 Va. App. LEXIS 340, at *15 (quoting McDonnough v. Commonwealth, 25 Va. App. 120, 129, 486 S.E.2d 570, 574 (1997)).
264. *Id.* at *15–16.
265. *Id.* at *16 (emphasis added) (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)).
266. *Id.* at *16–17.

E. *Jury Trials*

1. Jury Instruction: Accomplice Testimony

In *Holmes v. Commonwealth*, the Court of Appeals of Virginia affirmed the long-standing principle that in cases of testimony from more than one accomplice, the accomplices may not be found to corroborate each other.[267] In the absence of some other form of corroborating evidence, the trial court must instruct the jury on the danger of convicting based on the uncorroborated testimony of accomplices, as it would in the case of a single accomplice.[268] Although evidence produced from other sources may have predicted some of the defendant's actions, those actions were unrelated to any fact that might establish guilt.[269]

2. Instructing the Jury on Sentencing Range

Among recent criminal justice reforms was the end of mandatory jury sentencing.[270] As of July 1, 2021, a defendant can request a jury for the guilt phase of a trial and be sentenced by a judge if they are convicted.[271] The court of appeals addressed the application of Code of Virginia section 19.2-262.01 in *Rock v. Commonwealth*.[272] The statute allows the court or counsel to inform the jury of the potential sentencing range during voir dire to determine whether the juror could sit impartially in the sentencing phase of a trial.[273] The defendant in this case requested trial by jury for the guilt phase but not for sentencing.[274] The trial court prohibited the defense from informing the jury he faced a mandatory life sentence if convicted.[275] The court of appeals affirmed, finding that section 19.2-262.01 only applies in cases where jury sentencing was requested.[276]

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267. Holmes v. Commonwealth, 76 Va. App. 34, 55, 880 S.E.2d 17, 27 (2022).
268. *Id.* at 55–56, 880 S.E.2d at 27.
269. *Id.* at 56–57, 880 S.E.2d at 27–28.
270. 2020 Va. Acts ch. 43 (codified as amended at VA. CODE ANN. §§ 19.2-264.3, -288, -295, -295.1, -295.3 (2022)).
271. Rock v. Commonwealth, 76 Va. App. 419, 430, 882 S.E.2d 490, 496 (2023).
272. *Id.* at 430–35, 882 S.E.2d at 496–99.
273. *Id.* at 431, 882 S.E.2d at 496.
274. *Id.* at 424, 882 S.E.2d at 493.
275. *Id.*
276. *Id.* at 423, 431, 882 S.E.2d at 492, 496.

F. *Probation*

The 2021 General Assembly made a number of changes to probation and probation revocation proceedings. This past year has seen several cases which interpret those statutory amendments.

1. Retroactivity of the Statutes

In a split opinion, the Court of Appeals of Virginia held that the amendments are not retroactive for revocations that were initiated before the effective date of July 1, 2021.[277] The probation officer issued a major violation report in April 2021, before the effective date of the amendments.[278] The hearing was scheduled for June 21, 2021, and trial counsel requested a continuance until after July 1.[279] When the case reconvened, counsel asked the court to apply the amended version of that statute.[280] The trial court held, and the panel majority affirmed, that Code of Virginia section 1-239 prohibits application of the amendment to cases pending on the effective date of the statute.[281] In a footnote, the majority specifically declined to rule on how its holding would apply to a case in which the violations occurred before the statutory reenactment, yet the major violation report was issued after that date.[282]

Judge Chaney dissented.[283] She opined that the clear intent of the General Assembly was to modify the procedures used in probation revocations, and accordingly section 1-239 would not apply.[284] Judge Chaney noted that section 19.2-306.1 makes reference to "a first technical violation" and "any second technical violation."[285] The dissent found that the use of the indefinite article "a" and the adjective "any" meant the General Assembly intended the

277. Green v. Commonwealth, 75 Va. App. 69, 86–87, 873 S.E.2d 96, 105 (2022). *See* VA. CODE ANN. §§ 19.2-306, -306.1 (2022).

278. *Id.* at 73, 873 S.E.2d at 98–99.

279. *Id.* at 74, 873 S.E.2d at 99.

280. *Id.* at 75, 873 S.E.2d at 99.

281. *Id.* at 75–76, 873 S.E.2d at 100.

282. *Id.* at 84 n.4, 873 S.E.2d at 104 n.4.

283. *Id.* at 87, 873 S.E.2d at 105 (Chaney, J., dissenting).

284. *Id.* at 94–95, 873 S.E.2d at 109 (Chaney, J., dissenting).

285. *Id.* at 92, 873 S.E.2d at 108 (Chaney, J., dissenting) (citing VA. CODE ANN. § 19.2-306.1 (2022)).

amendments to apply to "any" revocation hearing, without regard to when it was initiated.[286]

2. Technical Violations Distinguished From Special Conditions

There were also a number of cases which discussed the special conditions of probation and the technical violations described in section 19.2-306.1. The statute limits the range of sentencing for ten specifically listed technical violations of probation, with the range increasing according to the number of previous technical violations.[287] The limited range for technical violations applies to misdemeanors and felonies.[288] Furthermore, the court of appeals held that in order to find someone guilty of a subsequent technical violation, the Commonwealth must first prove that the earlier violation fell within the enumerated technical violations.[289] Violations that occurred prior to the statutory amendment may be considered in the analysis.[290]

The court of appeals also addressed the distinction between the violation of a special condition and a technical violation in *Delaune v. Commonwealth*.[291] The Virginia Beach City Circuit Court placed the defendant on probation and imposed the usual terms of probation, but the order also stated that the probationer "shall be drug free."[292] When the probationer stipulated to using drugs, the trial court found that its explicit prohibition on drug use rendered the violation one of a special condition.[293] The court of appeals reversed[294] and held that a violation of the condition to be drug free is "a violation based on" the failure to "refrain from the use, possession, or distribution of controlled substances or related paraphernalia" set out in section 19.2-306.1(A)(vii).[295] As such, the "label a trial court may have used in imposing a condition of probation" was not relevant under the statute.[296]

286. *Id.* at 92, 873 S.E.2d at 108 (Chaney, J., dissenting).
287. VA. CODE ANN. § 19.2-306.1 (2022).
288. Henthorne v. Commonwealth, 76 Va. App. 60, 68 n.2, 879 S.E.2d 913, 917 n.2 (2022).
289. Heart v. Commonwealth, 75 Va. App. 453, 474, 877 S.E.2d 522, 532–33 (2022).
290. Nottingham v. Commonwealth, 77 Va. App. 60, 69, 884 S.E.2d 254, 258 (2023).
291. Delaune v. Commonwealth, 76 Va. App. 372, 382, 882 S.E.2d 27, 32 (2023).
292. *Id.* at 376, 882 S.E.2d at 29.
293. *Id.* at 376–77, 882 S.E.2d at 29.
294. *Id.* at 383, 882 S.E.2d at 33.
295. *Id.* at 381, 882 S.E.2d at 32 (quoting VA. CODE ANN. § 19.2-306.1(A) (2022)).
296. *Id.* at 383, 882 S.E.2d at 32.

The Supreme Court of Virginia granted part of the Commonwealth's petition for appeal on this subject. The assigned errors before the court are "[t]he Court of Appeals erred when it concluded that the Commonwealth was bound on appeal by the prosecutor's statements in the trial court and when it concluded that Code § 19.2-306.1 applied retroactively to Delaune's probation violation," and "[t]he Court of Appeals erred when it concluded that the trial court abused its discretion in sentencing Delaune to [sixty] days in jail upon revoking a portion of her previously suspended sentence."[297] In the wake of this ruling, appellate attorneys are left wondering whether they will no longer be bound by representations and agreements made in the trial court.

The court of appeals distinguished the *Delaune* holding in *Thomas v. Commonwealth*, where a sentencing order forbade the probationer to "purchase, consume, or possess alcohol, marijuana, and/or illegal substances."[298] Later, he tested positive for marijuana and alcohol.[299] The Henrico County Circuit Court found that both prohibitions were special conditions of probation.[300] The probationer argued the violations were technical conditions because, in addition to the statutory prohibition on controlled substances discussed in *Delaune*, section 19.2-306.1(A)(vi) prohibits the use of alcohol in excess; specifically, the statute references a violation based on the failure to "refrain from the use of alcoholic beverages to the extent [that it] disrupts or interferes with his employment or orderly conduct."[301] The court of appeals found that the use of marijuana was a technical violation in accordance with *Delaune*.[302] However, the court distinguished between the statutory prohibition on the use of alcohol to the extent it disrupts or interferes and the admonition of the trial court to utterly abstain from the use of alcohol.[303] Since one may consume alcohol without it interfering with their employment or orderly conduct, the court found that the total prohibition on alcohol use was a special condition.[304]

297. Commonwealth v. Delaune, No. 230127, 2023 Va. LEXIS 27, at *1 (May 31, 2023).

298. Thomas v. Commonwealth, 77 Va. App. 613, 617, 886 S.E.2d 772, 775 (2023); *see Delaune*, 76 Va. App. at 383, 882 S.E.2d at 32.

299. *Id.* at 618, 886 S.E.2d at 775.

300. *Id.*

301. *Id.* at 625–26, 886 S.E.2d at 778–79.

302. *Id.* at 626–27, 886 S.E.2d at 779.

303. *Id.* at 625–26, 886 S.E.2d at 779.

304. *Id.* at 626, 886 S.E.2d at 779.

In *Henthorne v. Commonwealth*, the court of appeals found a probationer—who never reported to probation—in violation of section 19.2-306.1(A)(iii) for failure to "report within three days of release from incarceration."[305] The court specifically noted the Commonwealth had not asked it to consider whether the failure to report was in violation of section 19.2-306.1(A)(x) for failure to "maintain contact with the probation officer whereby [the probationer's] whereabouts are no longer known to the probation officer."[306] Although absconding from supervision is a technical violation, the statute calls for it to be treated immediately as a second or subsequent technical violation.[307]

3. Good Conduct Violations

Section 19.2-306.1(B) authorizes a trial court to revoke a suspension and impose or resuspend a sentence if a probationer has been convicted of another offense, or has violated a condition that is not a technical violation or a "good conduct violation that did not result in a criminal conviction."[308] The statute does not define a "good conduct violation."[309] The court of appeals addressed this issue in *Diaz-Urrutia v. Commonwealth*, where the defendant contacted the victim of his offense despite a prohibition on that action in his sentencing order.[310] On appeal, he argued that contact constituted a good conduct violation and not a special condition.[311]

The court of appeals set out a four-step process for the trial courts to use in classifying violations.[312] First, the court must determine whether the conduct is a technical violation.[313] If so, the court is constrained by the statute in sentencing.[314] Second, the court looks to whether any condition of the sentencing order other than "good behavior" covers the violation.[315] If so, the court is not

305. Henthorne v. Commonwealth, 76 Va. App. 60, 66–67, 879 S.E.2d 913, 916–17 (2022).
306. *Id.* at 68 n.1, 879 S.E.2d at 917 n.1.
307. *Id.* (citing VA. CODE ANN. § 19.2-306.1 (2022)).
308. Diaz-Urrutia v. Commonwealth, 77 Va. App. 182, 189, 884 S.E.2d 839, 842 (2023) (quoting § 19.2-306.1(B) (2022)).
309. *Id.* at 191–92, 884 S.E.2d at 843.
310. *Id.* at 194, 884 S.E.2d at 845.
311. *Id.* at 188, 884 S.E.2d at 842.
312. *Id.* at 193–94, 884 S.E.2d at 844–45.
313. *Id.* at 193–94, 884 S.E.2d at 844.
314. *Id.* at 194, 884 S.E.2d at 844.
315. *Id.*

constrained by the statute.[316] Third, if no other condition in the sentencing order matches the conduct, the trial court then determines whether the conduct resulted in a criminal conviction.[317] If so, the court is not constrained.[318] If none of the first three categories applies, the trial court may consider whether the behavior is "substantial misconduct" that amounts to a good conduct violation.[319] The court of appeals implied that section 19.2-306.1 does not set out the range of punishments that may be considered for a good conduct violation.[320]

4. Other Probation Issues

The supreme court held that an extension of a probation period was an implicit extension of the period of suspended sentence.[321] Previous decisions of the court of appeals yielded inconsistent results.[322] The court of appeals also held that a sentence which exceeds the maximum permitted by section 19.2-306.1 is void ab initio and violates the authority given the court by the legislature.[323]

G. *Appeals and Postconviction Issues*

1. Expungement

The Supreme Court of Virginia affirmed the dismissal of the appellant's petition for expungement in *Forness v. Commonwealth*, a case in which the petitioner was arrested and charged with felony driving while intoxicated.[324] The felony indictment required a prior conviction for a felony driving offense.[325] The charge was amended to a misdemeanor because the petitioner lacked the required prior conviction.[326] When the petitioner attempted to expunge the felony

316. *Id.*
317. *Id.* at 194, 884 S.E.2d at 844–45.
318. *Id.* at 194, 884 S.E.2d at 845.
319. *Id.*
320. *Id.* at 193–94, 884 S.E.2d at 844.
321. Hill v. Commonwealth, 301 Va. 222, 226–27, 876 S.E.2d 173, 175–76 (2022).
322. *Id.* at 226, 876 S.E.2d at 175.
323. Browne v. Commonwealth, No. 1373-21-4, 2023 Va. App. LEXIS 228, at *23 (Apr. 11, 2023).
324. Forness v. Commonwealth, __ Va. __, __, 882 S.E.2d 201, 203 (2023).
325. *Id.* at __, 882 S.E.2d at 203.
326. *Id.* at __, 882 S.E.2d at 201–02.

charge, the Arlington County Circuit Court denied the petition.[327] On appeal, the Court of Appeals of Virginia held that "a charge is 'otherwise dismissed' when the original charge is amended to a 'completely separate and unrelated charge.'"[328] In this case, the amendment related to the possible sentencing enhancement, not the elements of the underlying offense.[329]

2. Assignments of Error ("AOEs")

In *Arrington v. Commonwealth*, a volunteer firefighter was charged with unauthorized use of a vehicle for driving a firetruck without the department's permission, and the court of appeals considered AOEs.[330] The firefighter admitted to driving the truck without permission, but argued that he lacked the requisite intent to temporarily deprive the owner of possession because he was using the truck for the principal's benefit.[331]

The court refused to consider that argument, however, because it was not encompassed in the AOE.[332] The AOE only challenged whether there was sufficient evidence to show a deprivation, not the intent to deprive.[333]

3. Ends of Justice

Holman v. Commonwealth provides an example of how narrowly the "ends of justice" exception to the Supreme Court of Virginia Rule 5A:18 is applied; the appellant in the case was charged with aggravated malicious wounding and several firearm related charges.[334] The King William County Circuit Court granted the appellant's renewed motion to strike the aggravated malicious wounding, finding the Commonwealth had only proven the

327. *Id.* at __, 882 S.E.2d at 202.

328. *Id.* at __, 882 S.E.2d at 202 (quoting Dressner v. Commonwealth, 285 Va. 1, 6, 736 S.E.2d 735, 737 (2013)).

329. *Id.* at __, 882 S.E.2d at 203.

330. Arrington v. Commonwealth, No. 0124-21-3, 2022 Va. App. LEXIS 98, at *1–2 (Apr. 12, 2022).

331. *Id.* at *2.

332. *Id.* at *7.

333. *Id.* at *7–8.

334. Holman v. Commonwealth, 77 Va. App. 283, 290–91, 296, 885 S.E.2d 493, 496, 499 (2023).

elements for unlawful wounding.[335] Appellant entered a guilty plea to unlawful wounding and the three firearms charges.[336]

On appeal, however, the appellant challenged his conviction for use of a firearm in the commission of a felony because unlawful wounding is not a listed predicate offense under the Code of Virginia section 18.2-53.1.[337] Since he pled guilty to the offense, he invoked the "ends of justice" exception, asserting that a miscarriage of justice had occurred because the record did not show that all the elements of the offense had been proven.[338]

"To fall under the 'ends of justice' exception, [the court] must therefore determine 'whether the record contains affirmative evidence of innocence or lack of a criminal offense.'"[339] The court held that because section 18.2-53.1 requires the use of a firearm while committing or attempting to commit a malicious or aggravated malicious wounding, a finding of malice is a required element of the charge.[340] Since the trial court granted the motion to strike as to the element of malice, "the record affirmatively shows that a malicious wounding—a necessary element of Code § 18.2-53.1—did not exist."[341]

H. *Mental Health Related Opinions*

1. Evidence of Mental Condition to Rebut Intent

The Court of Appeals of Virginia addressed the application of Code of Virginia section 19.2-271.6 in two cases. Though the cases involved very different facts, the analysis for each was the same. The court, in *Temple v. Commonwealth*, started by asking what kind of defense the statute allowed.[342] "In interpreting a statute which contains some exception or qualification on criminal liability, we must determine whether the language creates an

335. *Id.* at 291, 885 S.E.2d at 496.
336. *Id.* at 294, 885 S.E.2d at 498.
337. *Id.*
338. *Id.* at 299–300, 885 S.E.2d at 500–01.
339. *Id.* at 299, 885 S.E.2d at 500 (quoting Holt v. Commonwealth, 66 Va. App. 199, 214, 783 S.E.2d 546, 553 (2016)).
340. *Id.* at 299–300, 885 S.E.2d at 500–01.
341. *Id.* at 300, 885 S.E.2d at 501.
342. Temple v. Commonwealth, No. 1172-21-1, 2022 Va. App. LEXIS 484, at *2–3 (Oct. 4, 2022).

affirmative statutory defense or merely relates to a defendant's ability to dispute whether an essential element has been proved."[343]

The difference relates to burdens of production and persuasion. For example, where a statute creates an affirmative defense, a defendant typically shoulders a burden of production "'to present more than a scintilla of evidence' supporting the defense before the Commonwealth must 'shoulder its burden of persuasion—requiring proof sufficient under the reasonable-doubt standard to permit a rational factfinder to reject the defense and to find the defendant guilty.'"[344] More plainly, affirmative defenses, like self-defense, excuse or justify what would otherwise be criminal conduct.

"Case-in-chief defense[s]," on the other hand, occur when "a statute merely permits the defendant to dispute whether the prosecution has proved an essential element."[345] "[B]oth the burden of production and persuasion remain on the prosecution to prove the [required element]."[346] An alibi defense is an example of a case-in-chief defense; evidence is offered to rebut an element of the offense (presence at the scene).

Finding that section 19.2-271.6 "is an evidentiary rule that abrogates the common law," the court of appeals held that the statute creates a "case-in-chief" defense that makes certain types of evidence admissible and relevant to rebut an element.[347] It allows the defendant to argue that they lacked the intent required to commit the offense charged.[348] "Presenting evidence of a qualifying mental condition is not an excuse or justification, but rather 'a denial of an essential element of the offense.'"[349]

In *Calokoh v. Commonwealth*, the court of appeals evaluated whether the evidence presented was sufficient to disprove the intent required for rape.[350] The defendant proffered a jury instruction saying that the Commonwealth was required to prove that the

343. *Id.* at *13.

344. *Id.* at *13–14 (quoting Myers v. Commonwealth, 299 Va. 671, 679, 857 S.E.2d 805, 809–10 (2021)).

345. *Id.* at *13–14.

346. *Id.* at *14.

347. Calokoh v. Commonwealth, 76 Va. App. 717, 731, 883 S.E.2d 674, 681 (2023).

348. *Id.* at 731, 883 S.E.2d at 682.

349. *Id.* at 731, 883 S.E.2d at 681 (quoting RONALD J. BACIGAL & CORINNA BARRETT LAIN, VIRGINIA PRACTICE CRIMINAL PROCEDURE § 17:32 (2022–2023 ed.)).

350. *Id.* at 732–33, 883 S.E.2d at 682–83.

defendant knew the victim did not consent.[351] The court affirmed the Fairfax County Circuit Court's denial of the instruction, finding that the intent for rape is the general intent evidenced by the act of committing the offense itself.[352] The question is not whether the defendant intended to have sex with the victim against her will—just whether he had sex with her and it was against her will.[353] The Commonwealth is not required to prove that the defendant knew it was against the victim's will or without her consent.[354]

Temple v. Commonwealth addressed the intent needed to obstruct justice pursuant to the Code of Virginia section 18.2-460(A) and to commit an assault and battery on a law enforcement officer in violation of section 18.2-57(C).[355] The court of appeals affirmed Temple's convictions, finding that the condition of being under an emergency custody order did not negate the required intent for either charge.[356]

2. The Code of Virginia Section 19.2-303.6 – Deferral for Those with Autism Spectrum Disorders or Intellectual Disabilities

The defendant in *Suhay v. Commonwealth* pleaded guilty to three counts of electronic solicitation of a minor and requested a deferred disposition pursuant to section 19.2-303.6, which authorizes the court to defer disposition if (1) the defendant has been diagnosed with an autism spectrum disorder or intellectual disability, and (2) the defendant's conduct is shown by clear and convincing evidence to have been caused by or had a substantial and direct relationship to his diagnosis.[357] The Rockingham County Circuit Court found that the defendant failed to show that his autism spectrum diagnosis caused or was related to his conduct, denied his request for the deferral, and imposed ten years of active time.[358]

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351. *Id.* at 726, 883 S.E.2d at 679.

352. *Id.* at 733, 883 S.E.2d at 682.

353. *Id.*

354. *Id.* at 733, 883 S.E.2d at 682–83.

355. Temple v. Commonwealth, No. 1172-21-1, 2022 Va. App. LEXIS 484, at *25 (Oct. 24, 2022).

356. *Id.* at *2–*3.

357. Suhay v. Commonwealth, 75 Va. App. 143, 150, 875 S.E.2d 82, 85 (2022); VA. CODE ANN. § 19.2-303.6 (2022).

358. *Id.* at 154, 875 S.E.2d at 87.

On appeal, the court of appeals first looked at the plain language of this relatively new statute.[359] The use of "may" indicates that the decision whether to grant the deferral is left to the discretion of the trial court, but that discretion is dependent on two predicate factual findings: that the defendant has a qualifying diagnosis, and that "the court finds by clear and convincing evidence that the criminal conduct was caused by or had a direct and substantial relationship to the person's disorder or disability."[360]

The statute also requires the trial court to consider the position of the Commonwealth and the victim before deciding to defer disposition in a given case.[361] The court held that these opinions could be considered only after the trial court has found the predicate facts by clear and convincing evidence.[362] "[I]f either of the two factual elements of Code § 19.2-303.6(A) have not been satisfied, then the necessary implication is that the trial court must deny a defendant's request for a deferred disposition . . . regardless of the position of the Commonwealth's attorney and the views of the victim."[363] The court of appeals held the trial court did not err in failing to find a connection between the defendant's diagnosis and his conduct and affirmed the denial of a deferred disposition.[364]

3. Standard of Review for the Not Guilty by Reason of Insanity Defense

In *Khine v. Commonwealth*, the defendant appealed after a bench trial resulted in his conviction for murder; he argued that the Chesapeake City Circuit Court erred when it granted the Commonwealth's motion to strike his insanity defense at the close of all evidence, "finding as a matter of law that [the defendant] failed to show that he was 'totally deprived of the mental power to control or restrain' his actions."[365]

The court of appeals reversed the conviction.[366] It found that while the trial court applied the correct legal standard for an

359. *Id.* at 155, 875 S.E.2d at 88.
360. *Id.*
361. *Id.* at 156, 875 S.E.2d at 88.
362. *Id.* at 156–57, 875 S.E.2d at 89.
363. *Id.* at 157–58, 875 S.E.2d at 89.
364. *Id.* at 159, 162, 875 S.E.2d at 90–91.
365. Khine v. Commonwealth, 75 Va. App. 435, 443–44, 877 S.E.2d 514, 518 (2022).
366. *Id.* at 441–42, 877 S.E.2d at 517.

insanity defense ("that his mind has become so impaired by [a mental] disease that he is totally deprived of the mental power to control or restrain his act"), it erred by failing to consider the Commonwealth's motion "in the 'light most favorable' to [the defendant], the non-moving party."[367] The case was remanded for the trial court to reassess the Commonwealth's motion to strike under the correct standard.[368]

I. *Sufficiency of the Evidence*

This year, as every year, the appellate courts have offered some guidance in cases on whether the evidence was sufficient to support a conviction. These cases are generally fact specific, so it can be difficult to use them to generalize. For this reason, the following summaries are brief.

1. Assault and Battery: Parental Discipline

Corporal punishment is within parental rights in Virginia, "within the bounds of moderation and reason."[369] If corporal punishment does not result in "significant physical harm," the trial court should consider other factors, including, but not limited to the age, size, and conduct of the child; the nature of the behavior at issue; the nature of any instrument used in discipline; the marks or wounds inflicted; and the emotional state of the parent in implementing discipline.[370]

2. Assault and Battery: Words Alone

Words alone are not sufficient to support a conviction for assault and battery, even when the words may be perceived as threatening, in the absence of an overt act toward the complainant.[371]

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367. *Id.* at 449–50, 877 S.E.2d at 521 (quoting Herbin v. Commonwealth, 28 Va. App. 173, 181, 503 S.E.2d 226, 230 (1998)).

368. *Id.* at 453, 877 S.E.2d at 522.

369. Woodson v. Commonwealth, 74 Va. App. 685, 694, 871 S.E.2d 653, 658 (2022) (quoting Carpenter v. Commonwealth, 186 Va. 851, 861, 44 S.E.2d 419, 423 (1947)).

370. *Id.* at 696–97, 871 S.E.2d at 659.

371. Harvey v. Commonwealth, No. 1116-21-1, 2022 Va. App. LEXIS 165, at *10 (May 17, 2022).

3. Contributing to the Delinquency of a Minor

In *Unger v. Commonwealth*, a four-year-old child left the house while the mother was either sleeping or getting dressed.[372] It was possible that the mother failed to lock all of the doors to the residence.[373] This evidence was not sufficient to prove the "willful" requirement of contributing to the delinquency of a minor.[374]

4. Circumstantial Evidence

a. Larceny: Shoplifting

The defendant in *Locke v. Commonwealth* was seen removing "clearance" tags from items, but was not seen placing the tags on other items.[375] On a different date, the defendant purchased a number of items with "clearance" labels that were not clearance items.[376] The court of appeals reversed the conviction, finding the evidence did not preclude the possibility of innocence because there was no evidence to explain how the tags got on the items the defendant purchased.[377]

b. Possession with Intent to Distribute: Constructive Possession

The court of appeals affirmed that there must be acts, statements, or conduct of the accused to demonstrate knowledge of the presence and character of a controlled substance in a constructive possession case, especially when the defendant is not home when a search is executed.[378] The opinion, written by Judge Friedman, contains an excellent survey of constructive possession cases.[379]

372. Unger v. Commonwealth, No. 0003-22-2, 2023 Va. App. LEXIS 7, at *2–4 (Jan. 10, 2023).

373. *Id.* at *11–12.

374. *Id.* at *10–12; *see also* VA. CODE ANN. § 18.2-371 (Cum. Supp. 2023).

375. Locke v. Commonwealth, No. 0540-21-3, 2022 Va. App. LEXIS 93, at *2 (Apr. 5, 2022); *see* § 18.2-103 (2021).

376. *Locke*, 2022 Va. App. LEXIS 93 at *3–4, *11.

377. *Id.* at *11–12, *14.

378. Carter v. Commonwealth, No. 0315-21-3, 2022 Va. App. LEXIS 72, at *10, *19–20 (Mar. 15, 2022).

379. *Id.* at *10–20.

5. Concealed Carry While Intoxicated

Transporting a firearm in a bag not on one's person is not the same as carrying said firearm under Code of Virginia section 18.2-308.012.[380] The statute prohibits carrying a concealed weapon while intoxicated.[381] Section 18.2-308 prohibits the concealed carry "about [one's] person."[382] The Supreme Court of Virginia focused on the difference in language between the two otherwise similar statutes.[383] It considered that the word "carry" could mean "to hold," and could also mean to "transport."[384] The court applied the rule of lenity in combination with the difference in language between the two statutes, finding the concealed weapon in a zipped bag on the passenger's seat of the vehicle was not "carr[ied]" under the statute.[385]

6. Financial Exploitation of Mental Incapacity

Proof of a person's general mental incapacity does not justify the conclusion that the mental incapacity extends to an unrelated subject.[386] In *Tomlin v. Commonwealth*, there was evidence that the victim lacked capacity to make her own health care decisions, but there was no evidence regarding her capacity to make her own financial decisions.[387] The court of appeals found that the most proven was a general or partial incapacity, and the evidence was insufficient to find the victim lacked capacity to make financial decisions.[388] There was a second issue in this case involving the definition of "serious bodily injury," which distinguishes misdemeanor abuse and neglect of an incapacitated adult from the felony offense.[389] On appeal, the supreme court affirmed the conviction, finding, among other things, that the phrase "serious bodily injury" could have different meanings in different statutes.[390]

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380. Morgan v. Commonwealth, 301 Va. 476, 485, 881 S.E.2d 795, 801 (2022).
381. VA. CODE ANN. § 18.2-308.012 (2021).
382. § 18.2-308 (Cum. Supp. 2023).
383. *Morgan*, 301 Va. at 482, 881 S.E.2d at 799.
384. *Id.* at 482–83, 881 S.E.2d at 799.
385. *Id.* at 482–85, 881 S.E.2d at 799–801.
386. *See* Tomlin v. Commonwealth, 74 Va. App. 392, 404, 869 S.E.2d 898, 904 (2022); § 18.2-178.1 (Cum. Supp. 2023); § 54.1-2983.2 (Cum. Supp. 2023).
387. *Tomlin*, 74 Va. App. at 402, 869 S.E.2d at 903 (2022).
388. *Id.* at 404–05, 869 S.E.2d at 904.
389. *Id.* at 405, 869 S.E.2d at 904.
390. Tomlin v. Commonwealth, __ Va. __, __, 888 S.E.2d 748, 755–56, 758 (2023).

7. Obscene Exposure

An inmate housed in a single cell with a solid door containing only a small, barred window is in a "public place."[391] The Code of Virginia section 18.2-387.1 prohibits an obscene display "in any public place where others are present." [392] Section 18.2-387 prohibits an obscene display in a public place or where others are present.[393] The court of appeals found it was bound by a previous panel decision, *Barnes v. Commonwealth*.[394]

Although the relevant event in *Barnes* was clearly in a public place, the court of appeals held there was no distinction between the way the two statutes used the term.[395] Accordingly, the court found the defendant's isolation cell was a public place.[396]

8. Possession of an Unlawful Chemical Compound by a Prisoner

Section 53.1-203(5) is a strict liability offense with no requirement the defendant be aware of the identity or the nature of the substance possessed.[397] The court of appeals found it was bound by a prior published opinion which relied on a supreme court opinion, *Esteban v. Commonwealth*, in which the court found possession of a firearm on school property to be a strict liability offense.[398] The concurring opinion pointed out that Virginia is an outlier in this sort of strict liability offense.[399] Judge Raphael wrote separately because he believed the supreme court should reconsider *Esteban* and bring Virginia in line with the majority of other states on this issue.[400] Subsequently, the supreme court refused the case.[401]

391. Johnson v. Commonwealth, 75 Va. App. 475, 478–80, 877 S.E.2d 533, 534–35 (2022).
392. VA. CODE ANN. § 18.2-387.1 (2021).
393. § 18.2-387 (2021).
394. *Johnson*, 75 Va. App. at 481, 877 S.E.2d at 536 (citing Barnes v. Commonwealth, 61 Va. App. 495, 499–500, 737 S.E.2d 919, 921–22 (2013)).
395. *Barnes*, 61 Va. App. at 500, 737 S.E.2d at 921–22.
396. *Johnson*, 75 Va. App. at 482, 877 S.E.2d at 537.
397. § 53.1-203(5) (2020); Clayton v. Commonwealth, 75 Va. App. 416, 418, 877 S.E.2d 504, 506 (2022).
398. *Clayton*, 75 Va. App. at 421, 877 S.E.2d at 507 (citing Esteban v. Commonwealth, 266 Va. 605, 610, 587 S.E.2d 523, 526 (2003)).
399. *Id.* at 423, 587 S.E.2d at 508 (Raphael, J., concurring).
400. *Id.* at 423–24, 587 S.E.2d at 508 (Raphael, J., concurring).
401. Clayton v. Commonwealth, 75 Va. App. 416, 877 S.E.2d 504, *cert. denied* (2022).

J. *Miscellaneous Opinions*

1. Fatal Variance in Indictment: Burglary

The defendant in *Milsap v. Commonwealth* was indicted by the grand jury in the City of Norfolk for burglary in violation of the section 18.2-91.[402] The indictment read: "On or about October 18, 2020, in the City of Norfolk, Dontay Milsap did feloniously enter in the daytime the dwelling house or an adjoining occupied outhouse of Tamara Foster, with intent to commit larceny a [sic] or [a] felony [arson offense] in violation of § 18.2-77, § 18.2-79 or § 18.2-80."[403]

At the close of all evidence, the defendant moved to strike, arguing that the evidence failed to prove he broke into the home to commit a larceny or an arson-related offense.[404] The Court of Appeals of Virginia held that the indictment narrowed the offense charged by both including the element of the intent to commit larceny or arson and specifically excluding the intent to commit an assault and battery.[405] Therefore, "the offense had to be proved as charged."[406] Since there was no evidence that Milsap broke into the home to steal or to commit arson, the variance between the indictment and the evidence was fatal, and the indictment was dismissed.[407]

2. Retroactivity of Recently Updated Statutes

In a trio of cases, the court of appeals took up the issue of retroactivity for repealed or amended statutes. Like its other retroactivity analysis from this past year, the court of appeals focused on when the repeal or amendment occurred in relation to the arrest and trial of the defendant. The court also considered whether the change was substantive or procedural. Statutes that were repealed after the defendant was charged remain in effect for that offense.

402. Milsap v. Commonwealth, No. 0794-21-1, 2022 Va. App. LEXIS 149, at *3–4, (May 10, 2022).

403. *Id.* at *3 (alteration in original).

404. *Id.* at *3–4.

405. *Id.* at *6.

406. *Id.*

407. *Id.* at *6–7.

a. Repeal of Petit Larceny Third or Subsequent Felony Status

In *Gionis v. Commonwealth*, a defendant was arrested and charged with felony petit larceny, but before his trial date, the General Assembly repealed the felony status for a third or subsequent petit larceny.[408] The defendant argued that because the repeal occurred before his trial, he should have been convicted of a misdemeanor.[409] The court of appeals disagreed, finding that "criminal proceedings" against him had already started before the statute was amended.[410] Also, the court found that the change affected "substantive rights," and without clear legislative intent in favor of retroactivity or the Commonwealth's consent to use the new statute, the trial court did not err in applying the previous version of the statute to this case.[411]

b. Repeal of Habitual Offender Offense

Similarly, in *Everette v. Commonwealth*, the court of appeals affirmed a conviction for operating a vehicle after being declared a habitual offender, despite the repeal of Code of Virginia section 46.2-357.[412] The court found that the defendant was arrested and charged more than a year before the statute was repealed.[413] Further, the defendant failed to raise his objection with the trial court; the "ends of justice" exception did not apply because the repeal was a substantive change in the law, and there was nothing to show the General Assembly meant for the repeal to apply retroactively.[414]

c. Changes Regarding Whether Something is a Primary Offense (Subject to Being Pulled Over)

Finally, the court of appeals analyzed the amendment to section 46.2-1003 that prevented law enforcement from stopping vehicles

408. Gionis v. Commonwealth, 76 Va. App. 1, 4–5, 880 S.E.2d 1, 2–3 (2022).
409. *Id.* at 6, 880 S.E.2d at 3.
410. *Id.* at 6, 11, 880 S.E.2d at 3, 6.
411. *Id.* at 12–15, 880 S.E.2d at 6–8.
412. Everette v. Commonwealth, No. 0032-22-1, 2022 Va. App. LEXIS 671, at *1 (Dec. 29, 2022).
413. *Id.* at *4.
414. *Id.* at *5–7.

for driving with defective or unsafe equipment.[415] In *Swinson v. Commonwealth*, the defendant was subjected to a traffic stop when an officer thought his front bumper was defective.[416] A drug dog alerted to the vehicle, and drugs were found.[417]

After the defendant's arrest but before his trial, subsection (C) was added to section 46.2-1003, prohibiting the exact type of search and seizure employed in the case.[418] Once again, the court of appeals denied the request to retroactively apply the amended statute, finding no legislative intent supporting retroactivity for this substantive change.[419]

415. Swinson v. Commonwealth, No. 0351-22-3, 2023 Va. App. LEXIS 61, at *4 (Jan. 31, 2023).

416. *Id.* at *2.

417. *Id.* at *3.

418. *Id.* at *2–4.

419. *Id.* at *10–14.