Selected Appellate Decisions
for
Law Enforcement Officers

June 1, 2019– June 1, 2020

- U. S. Supreme Court
- Fourth Circuit Court of Appeals
- Virginia Supreme Court
- Virginia Court of Appeals

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Please refer to

2020 Appellate Update
Master List

for a complete listing of new cases
of interest to law enforcement officers.

PART ONE:
Criminal Procedure

Constitutional Law and Virginia Procedure

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Fifth Amendment

Interviews & Interrogations

U.S. v. Oloyede
933 F. 3d 302 (2019)

- Executing a search warrant and an arrest warrant at the defendant's house, an FBI agent handed the defendant a locked cell phone & asked her, "Could you please unlock your iPhone?" without *Miranda* warning.
- Defendant unlocked the phone, but agent did not see the passcode.
- Court: Defendant's act was not a testimonial communication to the agent.
- Court: self-incrimination clause "is not implicated by the admission into evidence of the physical fruit of a voluntary statement."

Adkins v. Commonwealth: March 28, 2019
(Va. S.Ct. Unpublished)

- After learning of his *Miranda* rights, defendant stated: "I don't have no more to say to you."
- Court: statement, "I don't have no more to say to you," essentially meant: "I am invoking my right to remain silent" because the context did not reasonably support any other interpretation.
- Once the defendant invoked his right to remain silent, the Commonwealth was prohibited from interrogating him unless the defendant voluntarily reinitiated the interrogation or a significant period of time passed.

Note on *Adkins*: Context Matters

- In *Green* v. *Commonwealth*, 27 Va. App. 646 (1998) – during custodial interview, defendant said he "didn't have anything more to say" – Court said that was NOT an invocation.
- Under those circumstances, this same statement meant: "I've told you everything I know about this subject, and there's no more for me to say about it."
- Court: In such a situation, the suspect would not be invoking his right to remain silent, but instead would merely be implying that saying more would just be an exercise in repeating himself.

Jones v. Commonwealth: January 14, 2020 (Va. Ct. App. Unpublished)

- Defendant asked officers, "Hey, can you call my wife to tell her to call my lawyer for me?"
- Court: defendant's statement did not indicate a clear invocation of his right to counsel because a reasonable officer would not know with clarity that the defendant wanted to have an attorney present for his interrogation.
- It could have indicated that he wanted to notify a lawyer that he faced future legal issues, or it could have indicated that he wanted a lawyer to assist him at some future stage in the legal proceedings. (Again, context matters.)

Commonwealth v. Delcid, April 28, 2020 (Unpublished)

- Officer told defendant, while reading *Miranda* form, that the right to counsel was "more for court."
- Court: Officer misinformed the defendant about his rights, by stating that appointed counsel is "for court" and not for questioning.
- Court: the waiver was invalid, and that his statements to the officer had to be suppressed.

Fourth Amendment

Search and Seizure

Kansas v. Glover: U.S. Supreme Court
April 6, 2020

- Question: Does a police officer violate the Fourth Amendment by initiating an investigative traffic stop after running a vehicle's license plate and learning that the registered owner has a revoked driver's license?
- Court: When an officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable.
- However, if an officer is aware of exculpatory information, that information could eliminate reasonable suspicion.

Hupp v. Cook,
931 F. 3d 307 (2019)

- Court rejected a uniform exigent circumstances exception for all electronic video evidence.
- While video evidence contained in a cell phone can be easily deleted or concealed, it is not merely the ease with which evidence may be destroyed or concealed that dictates exigency.
- Instead, an officer must also have reason to believe that the evidence will be destroyed or concealed.

Inventory Search & Community Caretaker
Knight v. Commonwealth: April 7, 2020 (Pub.)

- Officers stopped the defendant's vehicle, which had no license plates, in the travel lane of a busy street.
- They learned that the defendant was wanted and arrested him.
- Officers searched the car and found the defendant's gun.
- Commonwealth argued Inventory Search and Community Caretaker exceptions justified the search.

Court: Search Improper, Conviction Reversed.

- Court rejected the "inventory exception," noting that the officer made no attempt to prepare a list of the contents of the car while he was searching, nor did he attempt to record the inventory.
- Court rejected the "community caretaker" exception to the warrant requirement, because regardless of whether it was lawfully impounded, the search was not "conducted pursuant to standard police procedures" and was a "pretextual surrogate for an improper investigatory motive."
- Court also noted that if the defendant had arranged his own towing, the firearm would not inevitably have been discovered.

Carrying a Firearm:
Williams v. Commonwealth

- Officer stopped defendant for a traffic violation at night and asked him whether he had any firearms in the vehicle.
- Although defendant admitted that he had a firearm, he was evasive about where the firearm was located.
- Officer asked at least four times about the location of the gun. Each time, the defendant responded only that it was concealed.
- When defendant exited car on officer's request, officer saw the gun inside defendant's jacket and seized it.

Court: Lawful to Seize Firearm

- Court: Under these circumstances, once the officer saw the firearm in plain view protruding from the defendant's jacket, the objective circumstances provided him a reason to believe that his safety or that of another officer on the scene was in danger.
- Court explicitly dodged the broader question of whether a police officer may constitutionally seize a firearm during a traffic stop regardless of whether other factors support the inference that a driver or passenger is dangerous.

Also: Proper to Read & Check Firearm Serial Number

- Court: Viewing and recording a serial number from a firearm lawfully seized by an officer does not violate the Fourth Amendment.
- Once officer had lawfully seized the firearm to ensure safety during the stop, defendant's expectation of privacy in its serial number was not objectively reasonable.
- Officer was permitted to read the visible serial number and search for it in the firearms database.
- 71 Va. App. 462, 837 S.E.2d 91 (2020).

Different Facts, Different result: *Commonwealth v. Johnson*: April 28, 2020 (unp.)

- Officers approached defendant to speak to him.
- Officer noticed that defendant had an "L-shaped" bulge in his waistband and suspected that the bulge was a concealed firearm.
- Officer lifted defendant's shirt, revealing the firearm.
- Officer seized the firearm, detained defendant, and learned that the defendant was a convicted felon.

Court: Search Unlawful

- "An individual's choice to exercise his fundamental right to bear arms cannot, standing alone, serve as the basis for reasonable suspicion or probable cause that in doing so, he is committing a crime. Thus, we do not presume that an individual carrying a concealed firearm must be in violation of the law in doing so."
- "officers may not seize and search an individual based solely on the presence of what appears to be a concealed firearm without establishing first that it is concealed in violation of the law. Accordingly, the mere presence of a bulge that is consistent with the concealed carry of a firearm, without more, does not create probable cause that a crime is being committed."

Commonwealth v. Stanley: November 13, 2019 Va. Ct. App. Unpublished

- Court: officers were not required to cease their search of the electronic devices when they discovered clear evidence of criminal activity that was non-drug related.
- Only limitation on the officers' warrant was that the search be no more "extensive as reasonably required to locate the items described in the warrant."
- Because the warrants authorized officers to search for photographs related to potential drug crimes, the officers necessarily were authorized to search all photographic files contained on the electronic devices.

Consent v. Detention: *Porter v. Commonwealth*: July 30, 2019 (Unp.)

- During consensual encounter, officer asked defendant for his name and social security number. Defendant provided a name and a partial number, but then started to walk away.
- Officer told him to "hang tight for a minute;" if defendant "ha[d] no warrants, you're on your way, awesome, no harm, no foul."
- Court: Reasonable person in defendant's position would have taken this to mean that he was expected to remain on the scene.
- Therefore, at that point, the interaction was no longer consensual and officer had seized defendant for Fourth Amendment purposes.

PART TWO: Crimes and Offenses

Substantive Criminal Law

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Animal Cruelty: *Blankenship v. Commonwealth:* March 10, 2020, Court of Appeals (Pub.)

- Defendant punched K9 unit in the side of the head, continued to swing and kicked the dog in the chest. Defendant repeatedly punched the dog in the ribs.
- The dog then backed off, which was "not typical for him to do" and was not what the dog was trained to do. At trial, a veterinarian testified that dogs can feel pain and opined that he would expect the dog felt pain from these repeated blows.
- Court: Affirmed Animal Cruelty conviction. A person may not resist a lawful arrest effectuated with reasonable force.

Assault on Law Enforcement: *Blankenship* continued

- While standing only a few feet from officers, defendant shook his fists at officers.
- Defendant repeatedly cursed at officers, told them to "F off," called them "motherfuckers," and progressively became more "angry," and "amped up."
- After officers told defendant he was under arrest, he told officers "you're not going to fucking touch me" and then moved toward officers while clenching his fists.
- Each time officers attempted to effectuate an arrest, defendant clenched his fists, took a step toward them, and took a fighting stance.
- At trial, officers testified that they felt threatened by defendant's behavior and that they were concerned it would lead to a physical altercation.

Court: Evidence Proved Assault

- In addition to an unlawful touching, assault can be an overt act intended to inflict bodily harm with the present ability to inflict such harm.
- Assault can also be "an overt act intended to place the victim in fear or apprehension of bodily harm," which in fact creates "such reasonable fear or apprehension in the victim."
- Officers' testimony and actions demonstrated that they reasonably feared a threat of bodily injury.

Malicious Wounding: *Ellis v. Commonwealth*

- 70 Va. App. 385, 827 S.E.2d 786 (2019)
- If it is established by the evidence and reasonable inferences therefrom that there was a temporal interval between the initial malicious wounding, with the victim remaining alive, and the subsequent death of the victim, then the defendant can be convicted of both Aggravated Malicious Wounding and Murder.
- Survival from the injury for some specific interval of time is NOT required

Burglary: Guest Guilty of Burglary *Pooler v. Commonwealth*

- 71 Va. App. 214, 834 S.E.2d 530 (2019): Defendant, who had property in house and visited often, kicked in door of boyfriend's house and attacked him.
- Court: Defendant did not have permission to be at the home the day the burglary occurred, nor did defendant have a right to occupy the residence.
- Defendant had no legally cognizable special relationship to victim and therefore had no possessory interest in the residence and no right to occupy
- Court "expresses no opinion on whether a breaking occurs if a person exceeds the scope of their permission to enter or be present in the dwelling—a matter of substantial ambiguity in the jurisprudence of this Commonwealth."

Child Abuse: *Astudillo v. Commonwealth,* April 21, 2020

- Defendant beat her eleven-year-old child with a belt in repeated beatings, lasting several hours, for failing to complete his homework.
- Defendant also used victim's shirt to strangle him until his nose bled.
- Victim suffered markings and bruises all over his body. Defendant's sister described the marks as "red raised welts on his body, long strips."
- Court: Defendant "exceed[ed] the bounds of moderation"
- Defendant's conduct showed a "reckless disregard for human life" and was "willful" as required by § 18.2-371.1(B)(1).

Credit Card Theft Venue: *Bryant v Commonwealth*

- 70 Va. App. 697, 832 S.E.2d 48 (2019).
- Defendant possessed four stolen credit cards and used three of them at an Arlington County CVS to purchase five $100 gift cards in separate transactions, one after the other.
- Court: Arlington was proper venue for all four stolen cards.
- Under § 18.2-198.1, defendant possessed the unused credit card with the requisite intent to use it without the victim's authorization as well as a strong presumption that he intended to do so in Arlington.

Destruction of Property: *Spratley v. Commonwealth,* 836 S.E.2d 385 (2019)

- Defendant deliberately destroyed a scale at a grocery.
- Scale was unrepairable, and victim store could not find an exact replacement.
- A different model, "virtually identical," cost over $4,000.
- Court: Felony conviction affirmed. For Destruction of Property, the "amount of loss" caused by the destruction of property "may be established by proof of the . . . fair market replacement value."

DUI: *Mitchell v. Wisconsin,* 588 U.S. ___ , 139 S. Ct. 2525 (2019)

- Exigency exists when (1) BAC evidence is dissipating & (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.
- Where driver is unconscious and therefore cannot be given a breath test, the exigent-circumstances rule almost always permits a warrantless blood test.
- In an unusual case, a defendant might be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

Embezzlement & Extortion: *Ware v. Commonwealth,* October 1, 2019 (Unp)

- Defendant, a subdivision manager, collected road maintenance fees, deposited them into an account he controlled, doing little maintenance.
- Court: Because road maintenance fees were not the "entrusted property of another," the court erred in finding defendant guilty.
- Whether defendant deposited the fees in his business or personal account or created a segregated account, his dominion and control over the money was not unauthorized or wrongful.

Extortion Dismissed as Well

- Defendant sent notice of lien and threatened to sue residents who didn't pay.
- Court: Defendant used the statutory judicial process when sent the notice, and thus he had a legal claim to the amount he sought until the point a court of competent jurisdiction ruled that he did not.
- Statements in defendant's notice were covered by absolute privilege and were not a wrongful threat in the context of an extortion charge.
- "To find otherwise would suggest that any creditor who says, "Pay me what you owe me, or I will sue you," is guilty of attempted extortion."

Computer Fraud: *Brewer v. Commonwealth*: March 10, 2020 (Pub.)

- Defendant used an iPhone to steal from a bank using unauthorized transactions.
- Court: Definition of "computer" in Code § 18.2-152.2 includes the defendant's telephone in this case.
- The way in which defendant used his iPhone, by accessing the Internet and using a mobile app to transfer money from one bank account to another, rendered it a "computer" for purposes of the Act.

Concealed Handguns – Secured in Container in Personal Private M/V

- A stolen vehicle is not one intended "exclusively" for defendant or one subject to his authorized use – therefore not a lawful place to conceal a handgun without a permit under § 18.2-308.
  - *Eley v. Commonwealth,* 70 Va. App. 158, 826 S.E.2d 321 (2019)
- A zipped backpack on the floorboard of the front passenger seat was not a "secured container or compartment" – therefore not a lawful place to conceal a handgun without a permit under § 18.2-308.
  - *Myers v. Commonwealth,* January 2, 2020 (Unpublished)

Use of Firearm: Proving "Firearm" *Trace v. Commonwealth*: October 2, 2019 (Unp.)

- During a robbery, the defendant produced a gun and, at close range, pointed it straight at the victim's chest and stomach. No gun was recovered.
- At trial, the victim testified that the firearm was a Glock handgun, based upon his observations and a comparison of those observations with a friend's Glock pistol.
- On cross-examination, the victim admitted that he did not know whether the object was a real gun or a BB gun.
- Victim's identification was corroborated by the defendant's conduct, which was "an implied assertion that the object he held was a firearm."

Hit & Run: Stopping Required

- Defendant who attacked and struck woman with his car, chasing her away, did not comply with statute by calling her father hours later and offering to pay. *Butcher v. Commonwealth,* Va. Sup. Ct., February 27, 2020.
- Defendant who struck victim, stopped briefly to check out her car, and then drove to another street about 100 yards away did not comply with statute, because it "was not the first safe place to park her car." *Cleaton v. Commonwealth*: Ct. App. (Unpub.), May 26, 2020.

Homicide: *Watson-Scott v. C/w,* 835 S.E.2d 902 (2019)

- Court: Affirmed 2nd Degree Murder conviction for defendant who fired a gun down a street and struck an innocent bystander.
- "It is patently obvious that firing multiple shots from a handgun in the middle of a populous city is the very definition of an action flowing from a 'wicked and corrupt motive, done with an evil mind and purpose and wrongful intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and deliberately bent on mischief.'"

Identity Theft: *Taylor v. Commonwealth,* 837 S.E.2d 674 (2020)

- Defendant entered a bank and signed the back of a stolen check with her own name and presented her own identification to the bank teller.
- Court: Identity theft under § 18.2-186.3 can include a defendant partially using her own identifying information to obtain money.
- Court agreed that defendant's unauthorized employment of victim's identifying information, as defined by subsection (C) of the statute (her name and bank account number), with the intent to defraud in an attempt to obtain money, clearly fell within the statute.

Interdiction: *Manning v. Caldwell,* 930 F. 3d 264 (2019)

- Court: Virginia's Interdiction statutory scheme is unconstitutionally vague.
- Even assuming that the scheme could be limited to those suffering from alcoholism, the plaintiffs stated an Eighth Amendment claim in their lawsuit against enforcing the statute.
- "Habitual drunkard" as used in Virginia law is so vague as to offer no meaningful standard of conduct and is unconstitutionally vague.

Manning Court's Reasoning

- Court: If one could show both "that resisting drunkenness [was] impossible and that avoiding public places when intoxicated [was] also impossible," a statute banning public drunkenness would be unconstitutional as applied to them.
- The Eighth Amendment "cannot tolerate the targeted criminalization of otherwise legal behavior that is an involuntary manifestation of an illness."

Guidance from Va. Association of Commonwealth's Attorneys

"On October 30, 2019, the United States District Court for the Western District of Virginia issued an order declaring Virginia Code Section 4.1-333, as that statute references the term "habitual drunkard," and Virginia Code Sections 4.1-305 and -322, as those statutes provide for the criminal prosecution of any person on the basis that such person has been interdicted as a "habitual drunkard pursuant to Virginia Code Section 4.1-333 (together, the "challenged statutory scheme"), unconstitutionally vague and thus facially void in violation of the Fifth and Fourteenth Amendments of the United States Constitution. The Court's Final Judgment and Order is consistent with the *en banc* Opinion and Judgment of the Fourth Circuit holding the challenged statutory scheme facially unconstitutional. "

Obstruction

Venue for Witness Threat
Tanner v. Commonwealth: May 5, 2020

- Defendant called victim and told her "not to show up" for Charles City County court.
- No evidence about where the victim or defendant were during call.
- Court: Venue was proper in Charles City County, the jurisdiction of the court toward which defendant directed his efforts to obstruct justice.
- Venue includes where the "direct and immediate result" occurred, that is, where the judicial process was affected.

Limits: *Maldonado v. Commonwealth*
70 Va. App. 554, 829 S.E.2d 570 (2019)

- Defendant's son drove defendant's truck while intoxicated, crashed the truck on the side of the road, and then fled, abandoning it. Defendant found out about crash soon after it happened.
- Officers investigated and traced the vehicle back to defendant, who claimed that someone had stolen it.
- Later, when officers located defendant at his house, defendant lied about his son's whereabouts, claiming that he was not at home when, in fact, son was inside the house.

Court: Obstruction Conviction Reversed

- "there is no statute or case law that stands for the proposition that lying to law enforcement officers during a consensual encounter, or failing to admit them to one's home on request, constitutes an obstruction of justice offense in the Commonwealth and as noted, to the extent similar actions have been criminalized, it has been done via other statutory offenses that have additional requirements and with which Maldonado was not charged."

False Report: *Gibson v. Commonwealth* July 23, 2019 (Unpub.)

- Defendant convinced her five-year-old child to report false allegations that the child's father had sexually abused her.
- Court rejected defendant's argument that she could not have committed the offense because her child was the one who reported the crime.
- Because defendant caused her child to commit the crime as an innocent agent of the defendant, Court agreed that she was guilty of giving a false report to law enforcement as a principal in the first degree.

False ID to Law Enforcement *Kronemer v. Commonwealth*: Nov. 26, 2019 (Unpub.)

- Defendant gave false ID when stopped in trespassing investigation.
- Court construed the term "detained" in § 19.2-82.1 as having the same meaning that "detained" has in the Fourth Amendment.
- Thus, Court explained that an individual is "detained" by a law enforcement officer under § 19.2-82.1 when he or she has been "either physically restrained or has submitted to a show of authority" under a brief investigative detention based upon an officer's reasonable suspicion that crime is afoot.

Child Pornography: *Ele v. Commonwealth,* 70 Va. App. 543, 829 S.E.2d 564 (2019)

- Defendant filmed himself masturbating in front of a child, who was clothed and asleep
- Court: § 18.2-374.1 criminalizes child exploitation resulting from the production of sexually explicit visual material "which utilizes or has as a subject" a child.
- Court refused to require child nudity for a conviction under § 18.2-374.1.

Also: Defendant Guilty of Indecent Liberties

- § 18.2-370 (Indecent Liberties with a Child) does not require that the offense occur in public, unlike § 18.2-387 (Indecent Exposure)
- If there is a "reasonable probability" that a child may see a defendant's penis, the child's "actual perception of such a display" is immaterial.

Limits: Indecent Exposure *Steggall v. Commonwealth*

- Court of Appeals, November 5, 2019 (Unpublished)
- Defendant pulled down his pants and exposed himself to a mother and child at a shoe store.
- Defendant did so while looking at the child's mother.
- Defendant did not say anything, did not gesture, did not have an erection, and maintained a blank expression

Court: Conviction Reversed

- "it is clear that something more is required than simple exposure in a public place, which is all that transpired here."
- Potential Evidence of lascivious intent could be:

1) that the defendant was sexually aroused;
2) that the defendant made gestures toward himself or to the child;
3) that the defendant made improper remarks to the child; or
4) that the defendant asked the child to do something wrong."

Unauthorized Use of a Motor Vehicle: *Otley v. Commonwealth*: April 7, 2020 (Ct. App., Pub.)

- Victim gave his vehicle to defendant to repair the brakes.
- Defendant used the victim's vehicle to tow defendant's personal vehicle dozens of miles away, out of state, and in the process severely damaged victim's vehicle.
- Court: Conviction affirmed. "Regardless of whether he did tow it or was simply on the way, permission to use a vehicle for one purpose is not implied consent to take the vehicle to an unknown destination for a purpose not beneficial to the owner and unrelated to the purpose for which possession of the vehicle was given."

PART THREE: Evidence

Rulings on Admissibility

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Drug Field Tests: *Williams v. Commonwealth*

- 71 Va. App. 462, 837 S.E.2d 91 (2020)
- DFS regulations have approved the "NARK II" "05 - Duquenois - Levine Reagent" test under § 19.2-188.1
- At trial for Possession of Marijuana, officer testified that he used the "NARK II #2005 Duquenois-Levine Reagent" field test, which his Department routinely used.
- Officer explained that he received training on the test "during basic school."

Court: Conviction Reversed

- Court: Record contained no evidence pertaining to the reliability or accuracy of the specific field test, nor did it demonstrate that the test used was the the test approved by the DFS required by § 19.2-188.1.
- Court explained that it was not persuaded that the "NARK II #2005 Duquenois-Levine Reagent" field test used by the officer was, as a matter of law, the same as the "NARK II" "05 - Duquenois - Levine Reagent" test approved by the DFS.
- "to concluded that they reference the same test requires technical knowledge."
- Full kit list is on page 2057: http://register.dls.virginia.gov/vol32/iss13/v32i13.pdf

PART FOUR: Police Use of Force

Rulings on Liability

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Deadly Force in Private Home: *Betton v. Belue,* 942 F.3d 184 (2019)

- Court: Shooting an individual is an unconstitutional use of excessive force when the officer, serving a search warrant:

1) Came onto a suspect's property;
2) Forcibly entered the suspect's home while failing to identify himself as a member of law enforcement;
3) Observed an individual holding a firearm at his side inside the home; and
4) Failed to give any verbal commands to that individual.

Court Does Not Foreclose Use of Deadly Force

- Court agreed that, if the officers had identified themselves as members of law enforcement, the officers reasonably may have believed that the plaintiff's presence while holding a firearm posed a deadly threat to the officers.
- Court also agreed that, had the plaintiff disobeyed a command given by the officers, such as to drop his weapon or to "come out" with his hands raised, the officers would have reasonably feared for their safety upon observing the plaintiff holding a gun at his side.

Deadly Force Against Wounded Suspect: *Harris v. Pittman*: 927 F. 3d 266 (2019)

- Court: Even a police officer who has just survived an encounter that necessitated the use of deadly force to extricate himself may not continue to use deadly force once he has reason to know that his would-be assailant is lying on the ground wounded and unarmed.
- Court: Even if the officer's shots were all part of a single series, with the initial shots concededly justified, it did not establish that the final shots were justified.
- Court found it "possible to parse the sequence of events as they occur."

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