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CRIMINAL LAW AND PROCEDURE

*Steven D. Benjamin**

I. FOURTH AMENDMENT

A police officer's detention of a citizen is a "seizure" of the person for purposes of the fourth amendment, and must be reasonable in light of the totality of the circumstances.¹ Significant police encounters fall into two categories—the brief investigatory detention and the more intrusive, full-blown arrest.²

The prerequisites for these two types of stops differ. Before a police officer makes an investigatory detention, he must have a reasonable suspicion that the person to be stopped "is, or is about to be, engaged in criminal activity."³ Before an officer may effect a warrantless arrest, he must have probable cause to believe that the person has committed a felony.⁴ When the legality of the seizure is challenged, courts characterize the detention and assess the underlying justification. If the court finds that the circumstances did not justify the detention, all information or evidence obtained as a result is subject to suppression.⁵

The characterization is sometimes difficult to make. The United States Supreme Court has consistently refused to establish a "bright line" rule to determine whether a stop is an investigatory

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1. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *Zimmerman v. Commonwealth*, 234 Va. 609, 611, 363 S.E.2d 708, 709 (1988); *Taylor v. Commonwealth*, 6 Va. App. 384, 369 S.E.2d 423 (1988).

2. A third category is the consensual encounter requiring no objective justification. *See Florida v. Royer*, 460 U.S. 491, 497 (1983).

3. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *see Terry v. Ohio*, 392 U.S. 1 (1968). "[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop and further investigation." *Id.* at 21; *see also Taylor*, 6 Va. App. at 388, 369 S.E.2d at 423.

4. "The test of constitutional validity is whether at the moment of arrest the arresting officer had knowledge of sufficient facts and circumstances to warrant a reasonable man in believing that an offense has been committed." *Bryson v. Commonwealth*, 211 Va. 85, 86-87, 175 S.E.2d 248, 250 (1970); *see also VA. CODE ANN. § 19.2-81* (Repl. Vol. 1983 & Cum. Supp. 1988).

5. *See, e.g., Zimmerman*, 234 Va. 609, 363 S.E.2d 708 (1988); *Taylor*, 6 Va. App. at 389, 369 S.E.2d at 423.

detention or an arrest.⁶ Courts consider the facts of each case, in the context of "common sense and ordinary human experience,"⁷ to determine whether the nature of the stop was so intrusive as to require a showing of probable cause.⁸

These issues arose in several cases decided by the Virginia Supreme Court and Virginia Court of Appeals this past year. In *DePriest v. Commonwealth*,⁹ the issue was whether the initial detention by the police was an arrest or an investigatory detention. A narcotics detective had observed a sequence of events over a three and one-half hour period, which, in conjunction with his experience and training as a narcotics officer, caused him to suspect that the defendant and his companion were engaged in drug transactions. Watching the individuals leave their location, the detective directed other officers by radio to detain and search both people. When the detective arrived at the place where the other officers had detained the defendant and his companion, he retrieved drugs from the pocket of the companion and then arrested the defendant. A search of the defendant conducted pursuant to his arrest revealed several bags of heroin.¹⁰

The defendant moved to suppress the heroin. He conceded that his initial detention was a lawful *Terry*¹¹ stop, at least until a pat-down by the officers revealed no weapons. He argued that the stop became an arrest, unsupported by probable cause, when the officers continued to detain him until the detective arrived. He argued further that because he was unlawfully detained at the time the discovery was made, the discovery could not establish probable cause for a subsequent arrest.¹²

The court ruled that the detective's initial observations and conclusions gave rise only to a suspicion of criminal activity, and were not sufficient to establish probable cause to arrest.¹³ But probable

6. See *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

7. *Id.*

8. See, e.g., *Wass v. Commonwealth*, 5 Va. App. 27, 359 S.E.2d 836 (1987).

9. 4 Va. App. 577, 359 S.E.2d 540 (1987).

10. *Id.* at 579-81, 359 S.E.2d at 541-42.

11. *Terry*, 392 U.S. at 21.

12. *DePriest*, 4 Va. App. at 582, 359 S.E.2d at 542.

13. *Id.* at 585, 359 S.E.2d at 544. Several factors were relevant. First, the detective did not observe an exchange of narcotics or an object which he believed to be narcotics. Second, there was no evidence that the area under surveillance was known for drug trafficking. *Id.*; see *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Third, there was no evidence that the transactions were furtive. *DePriest*, 4 Va. App. at 585, 359 S.E.2d at 544.

cause was not required, because the court characterized the detention as investigatory.¹⁴ Because the defendant was lawfully detained at the time the detective discovered drugs on the defendant's companion, and the discovery of the drugs provided sufficient probable cause to arrest, his subsequent warrantless arrest was valid.¹⁵ It followed, then, that the subsequent search incident to arrest was also valid.¹⁶

In contrast, the police officer's observations in *Zimmerman v. Commonwealth*¹⁷ were not sufficient to establish even reasonable suspicion. The officer had seen the defendant pull his car over and allow a passenger to exit. The passenger approached the police officer and asked for directions. The passenger returned to the car, getting in behind the wheel while the defendant slid over into the passenger seat. The passenger then drove the car in a different direction than had been given by the officer.¹⁸ His suspicions aroused, the police officer stopped the car, obtained the defendant's name and learned that he had been adjudicated a habitual offender. At trial, the defendant moved to suppress the evidence of his identity, arguing that the police officer had insufficient basis to justify the stop.¹⁹ The Virginia Supreme Court agreed, ruling that the conduct "viewed as a whole, demonstrates innocent, lawful conduct not a basis for a reasonable suspicion of illegal, criminal conduct."²⁰

14. *DePriest*, 4 Va. App. at 586, 359 S.E.2d at 544. Did the court finesse this conclusion? The court reasoned that the detective's observations "led him to request that other officers detain [the defendant and his companion] until he could arrive to investigate his reasonable suspicion that the two men were selling narcotics." *Id.* The detective, however, had testified as follows: "I directed the officers to detain them based on my observations and I would respond and I also directed the officers to search both individuals." *Id.* at 581, 359 S.E.2d at 541. Once the detective arrived at the scene, he searched the pockets of the companion and found drugs. *Id.* at 581, 359 S.E.2d at 541-42.

15. *Id.* at 588, 359 S.E.2d at 546.

16. *Id.*

17. 234 Va. 609, 363 S.E.2d 708 (1988).

18. *Id.* at 610-11, 363 S.E.2d at 709.

19. *Id.* at 611, 363 S.E.2d at 709.

20. *Id.* at 612, 363 S.E.2d at 709-10. The court distinguished *United States v. Arias*, 678 F.2d 1202 (4th Cir.), cert. denied, 459 U.S. 910 (1982) and *United States v. Crews*, 445 U.S. 463 (1980). In *Crews*, the United States Supreme Court affirmed a trial court's refusal to suppress an in-court identification which the defendant argued was the result of his illegal arrest. The distinguishing point is that in *Crews*, the police knew the defendant's identity and suspected his involvement in the crimes for which he was charged prior to his arrest. In *Zimmerman*, the defendant's identity and connection with unlawful activity (driving), were not known until the officer detained the defendant unlawfully. *Zimmerman*, 234 Va. at 609, 363 S.E.2d at 710; see also *Commonwealth v. Phillips*, 9 Va. Cir. 242 (Alexandria 1987).

Perhaps the most significant decision of the Virginia Court of Appeals, certainly with respect to the fourth amendment, was *Taylor v. Commonwealth*,²¹ the "drug courier profile" case. A Chesterfield County police officer observed a car northbound on Interstate 95 which had characteristics consistent with a drug courier profile taught by the Virginia State Police. The officer followed the vehicle for approximately five miles, noticing that the speed, though at or under the speed limit, varied, and that the occupants glanced at him in a nervous fashion. The car was stopped and the occupants consented to a search of the vehicle. The occupants were arrested when the officer found 173 pounds of marijuana in the trunk.²²

The only issue before the court was whether the police were authorized to stop the vehicle.²³ The court restated the applicable law from *Terry* to *Cortez*, requiring a particularized suspicion. The court acknowledged that "a trained law enforcement officer may identify criminal behavior which would appear innocent to an untrained observer."²⁴ The court followed this foundation with the reminder that "any such special meaning must be articulated to the courts and its reasonableness . . . assessed independently of the police officers' subjective assertions."²⁵ The court held that the necessary "particularized suspicion" was not objectively established by the "mere presence of drug courier profile characteristics."²⁶

The court discussed the adequacy of the particular factors upon which the officer relied in this case. As may have been foreshadowed in *Zimmerman*, the court's reasoning included the observation that the profile characteristics "have no apparent relationship to criminal activity."²⁷ Nor was there evidence of "an empirical relationship between these characteristics and criminal behavior."²⁸ At best, the observations warranted the officer's hunch that this

21. 6 Va. App. 384, 369 S.E.2d 423 (1988) (en banc).

22. *Id.* at 387, 369 S.E.2d at 424.

23. The court suggested two sets of circumstances which could justify a stop of an automobile: 1) where there are "specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual," or 2) where "the vehicle must be stopped pursuant to a plan embodying explicitly, neutral limitations on the conduct of individual officers." *Id.* (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

24. *Id.* at 388, 369 S.E.2d at 425.

25. *Id.* (quoting *United States v. Gooding*, 695 F.2d 78, 82 (4th Cir. 1982)).

26. *Id.* (citing *Reid v. Georgia*, 448 U.S. 438, 440-41 (1980)), *United States v. Haye*, 825 F.2d 32, 34 (4th Cir. 1987); *United States v. Aguiar*, 825 F.2d 39, 40-41 (4th Cir. 1987)).

27. *Id.* at 388, 369 S.E.2d at 425.

28. *Id.*

particular car should be closely watched. The court concluded that neither the drug courier profile nor the nervousness detected by the officer provided a sufficient basis for the stop.²⁹ Accordingly, the stop and the subsequent search were illegal, and the evidence should have been suppressed.³⁰

The automobile exception to the warrant requirement permits the warrantless search of a vehicle if the officer has probable cause to believe that the vehicle contains evidence of a crime.³¹ Similarly, if an officer is able to observe an item in plain view, and has probable cause to believe the item to be seizable, he may enter the car to seize the item.³² In *Delong v. Commonwealth*,³³ the Virginia Supreme Court held that a gun was property seized from a car that the police had stopped because it and its occupants matched the description given by a witness to a shooting of a police officer. The court also held that the officer's observations, made without intruding upon a constitutionally protected zone of privacy, were not subject to the inadvertence requirement of *Coolidge v. New Hampshire*.³⁴

During the past year, the Virginia courts continued to adhere to the rule that warrantless searches are *per se* unreasonable, subject only to a "few specifically established and well-delineated exceptions."³⁵ This adherence in some cases seems a guise wherein the rule's recitation is followed by a balancing of law enforcement and privacy interests to determine reasonableness.³⁶ Although the use of a balancing approach in fourth amendment analysis is regrettable, the Virginia Court of Appeals has included, commendably, in its analysis a consideration of whether a particular search and seizure is the lesser form of intrusion.³⁷

29. *Id.* at 389, 369 S.E.2d at 425.

30. *Id.* Judge Cole, joined by Judge Hodges, wrote a lengthy dissent, including principles and arguments fundamental to any thorough discussion of the issues posed by profile stops. Unfortunately, such a treatment is beyond the scope of this survey.

31. *See Derr v. Commonwealth*, 6 Va. App. 215, 368 S.E.2d 916 (1988).

32. *Arizona v. Hicks*, 480 U.S. 321 (1987).

33. 234 Va. 357, 362 S.E.2d 669 (1987).

34. 403 U.S. 443 (1971); *see also Derr v. Commonwealth*, 6 Va. App. at 222, 368 S.E.2d at 919-20 (shining a flashlight into an automobile triggers no fourth amendment concerns and does not render the plain view exception inapplicable).

35. *See Crosby v. Commonwealth*, 6 Va. App. 193, 367 S.E.2d 730 (1988) (defendant's acquiescence to a detective's statement that he intended to get a search warrant, did not constitute consent to the search).

36. *See Id.* at 200-01, 367 S.E.2d at 735 (certain factors may weigh in favor of a warrantless entry to secure the premise of a place to be searched).

37. *Id.*

The United States Supreme Court's fourth amendment decisions were not monumental. A person has no objectively reasonable expectation of privacy in trash.³⁸ Evidence discovered during an illegal search is admissible if rediscovered during a subsequent execution of a search warrant, so long as the information gained during the illegal search plays no part in the police officer's decision to obtain a warrant or the magistrate's decision to issue one.³⁹ An investigatory pursuit of a suspect is not a fourth amendment seizure unless, by objective standards, the circumstances effect s restraint on that individual's freedom to leave.⁴⁰

Two Supreme Court decisions contained significant interrogation holdings. *Arizona v. Roberson*,⁴¹ held that the invocation of the right to counsel bars subsequent uncounseled police questioning even as to unrelated crimes. *Patterson v. Illinois*⁴² held that the attachment of the sixth amendment right to counsel upon indictment does not impose a *per se* ban on police-initiated, uncounseled interrogation.

In *Wass v. Commonwealth*,⁴³ the defendant made incriminating statements to police officers during the execution of a search warrant on the defendant's residence. No *Miranda* warnings were given by the police prior to questioning. Therefore, the issue was whether the defendant "was in custody or otherwise deprived of his freedom in any significant way."⁴⁴

Because there was no dispute that the case involved an interrogation by the police, the Virginia Court of Appeals confined its analysis to whether the defendant was in custody. The court stated that this analysis must take into consideration the totality of the circumstances to determine whether there existed, on an objective basis, a "restraint of freedom of movement of the degree associated with a formal arrest."⁴⁵ The court considered ten factors: 1) whether the defendant was questioned in familiar or neutral surroundings; 2) the number of police present; 3) the degree of physical restraint; 4) the duration and character of interrogation; 5) the

38. *California v. Greenwood*, 108 S. Ct. 1625 (1988).

39. *Murray v. United States*, 108 S. Ct. 2529 (1988).

40. *Michigan v. Chesternut*, 108 S. Ct. 1975 (1988).

41. 108 S. Ct. 2093 (1988).

42. 108 S. Ct. 2389 (1988).

43. 5 Va. App. 27, 359 S.E.2d 836 (1987).

44. *Id.* at 31, 359 S.E.2d at 838.

45. *Id.* at 32, 359 S.E.2d at 839 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

probable cause; 6) the manner in which the police officers directed the defendant; 7) the extent to which the defendant was confronted with evidence of his guilt; 8) the physical surroundings of the interrogation; 9) the duration of the detention; and 10) the degree of pressure applied to effect the detention.⁴⁶

In *Wass*, the defendant admitted to the police that he understood that he was not under arrest and "was free to go at any time."⁴⁷ This fact was not dispositive of the issue. The court held that by informing a suspect that he is not in custody, an officer does not necessarily dispel the effect of other circumstances which might "dictate a finding that custody exists."⁴⁸

II. DOUBLE JEOPARDY

The double jeopardy protection provided by the fifth amendment means that a defendant may not be tried twice for the same offense. A lesser-included offense and the greater offense are the "same offense" for double jeopardy purposes.⁴⁹ These principles were invoked by the defendant in *Peterson v. Commonwealth*.⁵⁰ Pursuant to a plea agreement reached while the case was in the General District Court, the Commonwealth had reduced a felony charge of possession of marijuana with intent to distribute to a misdemeanor charge of possession. The defendant noted an appeal to the Circuit Court (after changing counsel), and the Commonwealth indicted her on the felony charge.⁵¹ The Virginia Court of Appeals sustained the trial court's dismissal of the double jeopardy argument, holding that the defendant was not implicitly acquitted of the felony charge.⁵²

In *Rogers v. Commonwealth*,⁵³ the defendant was acquitted by a jury of a charge of abduction. A related charge of rape was tried at

46. *Id.* at 32-33, 359 S.E.2d at 839.

47. *Id.* at 31, 359 S.E.2d at 838.

48. *Id.* at 34, 359 S.E.2d at 840 (the number of armed officers, their manner of arrival, and the methods used to secure Wass' house all contributed to his belief that he was not free to leave).

49. *Blackburger v. United States*, 284 U.S. 299 (1932).

50. 5 Va. App. 389, 363 S.E.2d 440 (1987).

51. *Id.* at 393, 363 S.E.2d at 443.

52. *Id.* at 398, 363 S.E.2d at 445. The court noted that special circumstances may permit retrial. *Id.* at 398, 363 S.E.2d at 444; *see, e.g., Ricketts v. Adamson*, 107 S. Ct. 2680 (1987) (plea agreement expressly stating that the government may reinstate more serious charges under certain conditions is tantamount to a waiver of double jeopardy).

53. 5 Va. App. 337, 362 S.E.2d 752 (1987).

the same time, but a mistrial was declared when the jury was unable to reach a verdict. The rape charge was tried again over the defendant's objection that the Commonwealth was collaterally estopped⁵⁴ from attempting to prove the necessary element of force by the jury's acquittal on the charge of abduction.⁵⁵ The court of appeals affirmed the resulting conviction on the rape charge, reasoning that the jury may have considered the force and detention accompanying the rape as incidental to the rape, and may have based its verdict on the question of whether the victim had been forced into the defendant's house.⁵⁶

Federal and state prosecutions for the same offense do not violate double jeopardy prohibitions. However, section 19.2-294 of the Code of Virginia operates to bar a state prosecution if a defendant can show that at the time the state prosecution is commenced, there has been a federal prosecution or proceeding for the same act.⁵⁷ The state prosecution in *Shilling* was not barred because the only federal action was the obtaining and execution of a federal search warrant. The court found that this action was not a "proceeding" within the meaning of the statute.⁵⁸

III. DISCOVERY

Three opinions this past year involved the obligation of the Commonwealth to divulge, upon request, evidence favorable to the defendant. One of those cases, *Walker v. Commonwealth*,⁵⁹ dealt with the failure of the Commonwealth to disclose plea agreements and prior inconsistent statements made by key Commonwealth witnesses. The court held that the failure created a reasonable probability that the outcome may have been different, and accordingly, reversed the conviction.⁶⁰ The significant aspect of this case is the fact that the defendant was able to elicit this information during trial.

54. See *Ashe v. Swenson*, 397 U.S. 436, 443 (1970) ("when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.").

55. *Rogers*, 5 Va. App. at 341, 362 S.E.2d at 754.

56. *Id.* at 343, 362 S.E.2d at 755.

57. See *Shilling v. Commonwealth*, 4 Va. App. 500, 359 S.E.2d 311 (1987).

58. *Id.* at 504, 359 S.E.2d at 313-14. Even if the execution of a federal search warrant was a proceeding, it was not procured for the same act but for possible subsequent violations. *Id.*

59. 4 Va. App. 286, 356 S.E.2d 853 (1987).

60. *Id.* at 300, 356 S.E.2d at 861; see also *Whittington v. Commonwealth*, 5 Va. App. 212, 361 S.E.2d 449 (1987).

As encouraging as *Walker* might be to advocates of meaningful remedies for *Brady* violations,⁶¹ the decision of the Virginia Supreme Court in *Townes v. Commonwealth*⁶² is an unfortunate illustration of what the court does not view as exculpatory. In that case, an eyewitness to a crime picked two "possibles," including the defendant, from a photo array which she viewed four weeks after her observations. Sometime later, she viewed a lineup which included, of the two "possibles," only the defendant.⁶³ She identified the defendant, who was tried and convicted.

The defendant did not learn of the witness' identification of two "possibles" until the first day of trial. He assigned the Commonwealth's reticence as error, arguing that the evidence was favorable and should have been disclosed to him well before the commencement of trial.⁶⁴ The court found no merit to his argument, questioning whether the information was in fact exculpatory. The court pointed out that the witness' identification was not a positive identification of the other person. Also, the jury might have believed that the witness' selection of the two suspects "displayed commendable caution on her part."⁶⁵ The court resolved the issue by holding that the defendant was not prejudiced because he was given the information substantially in advance of the witness' testimony.

61. 373 U.S. 83 (1963) (failure of the state to furnish the defendant with any exculpatory evidence it has in its possession).

62. 234 Va. 307, 362 S.E.2d 650 (1987).

63. *Id.* at 314, 362 S.E.2d at 653-54. The defendant subsequently moved to suppress the witness' in-court identification as the product of an unduly suggestive identification procedure. *Id.* at 329, 362 S.E.2d at 662. The court gave the issue short shrift. It distinguished *Foster v. California*, 394 U.S. 440 (1969) as "inapposite" with no explanation other than a recitation of the facts. *Id.* at 330, 362 S.E.2d at 663. It cited *United States v. Portillo*, 633 F.2d 1313, 1324 (9th Cir. 1980), as authority for the proposition that due process is not violated where an accused is "the only individual to appear in both [a] photospread and [a] lineup." *Id.* at 330-31, 362 S.E.2d at 663. The court concluded its analysis with the rule of *Neil v. Biggers*, 409 U.S. 188 (1972) (listing the factors to be considered in evaluating the likelihood of misidentification). *Id.*

Eyewitnesses testify without fail that their in-court identifications are based upon their initial observations and not upon any intervening events. This testimony is not talismanic, and defense counsel should pursue relevant inquiry on cross-examination. In *Wise v. Commonwealth*, 6 Va. App. 178, 376 S.E.2d 197 (1988), cross-examination revealed that the witness's cerainty was the result of the intervening, unconstitutionally suggestive, identification procedures.

64. *Townes*, 234 Va. at 324, 362 S.E.2d at 659.

65. *Id.* at 324, 362 S.E.2d at 663.

A similar ruling resulted in *Taitano v. Commonwealth*,⁶⁶ which involved the post-conviction discovery of a statement in the Commonwealth's possession of another witness to the crime. The defendant argued that this version, although inculpatory, would have contradicted the testimony of the Commonwealth's key eyewitness.⁶⁷ Not being convinced that the jury probably would have reached another result, the court concluded that the possible impeachment benefit of the information was "insignificant."⁶⁸

IV. UNCHARGED MISCONDUCT

The general rule that prior or subsequent misconduct of an accused is inadmissible to prove predisposition to commit the crime charged has a number of exceptions. However, a number of reversals from the Virginia Court of Appeals demonstrates that the Commonwealth pursues these exceptions with some peril. For instance, in *Henderson v. Commonwealth*,⁶⁹ the prosecutor offered evidence of misconduct ostensibly to show motive, intent or knowledge. The court of appeals viewed the real object of the evidence differently, concluding that the evidence went instead to the issue of identity or "commission of the act itself."⁷⁰

Generally, a cautionary instruction will suffice to ensure that evidence of misconduct is properly received and considered by the jury. The giving of such an instruction, in clear and specific terms, is not a matter of discretion for the trial court.⁷¹ However, where the evidence of misconduct is inadmissible, a cautionary instruction might not be sufficient to cure the prejudice. In *Terry v. Commonwealth*,⁷² the Commonwealth introduced sufficient circumstan-

66. 4 Va. App. 342, 358 S.E.2d 590 (1987).

67. *Id.* at 348, 358 S.E.2d at 593.

68. *Id.* at 351, 358 S.E.2d at 595. Undisclosed evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome [of the trial]." *United States v. Bagley*, 473 U.S. 667, 668 (1985).

69. 5 Va. App. 125, 360 S.E.2d 876 (1987).

70. *Id.* at 129, 360 S.E.2d at 876. The court added that where identity was the issue for which the misconduct was probative, the misconduct evidence must depict a distinctive *modus operandi* sufficient to place the defendant's "signature" on the crimes. *Id.* at 129-30, 360 S.E.2d at 879; see also *Godwin v. Commonwealth*, 6 Va. App. 118, 367 S.E.2d 520 (1988) (court erred in not severing trial of two factually similar robberies); *Foster v. Commonwealth*, 5 Va. App. 316, 362 S.E.2d 745 (1987).

71. *Marshall v. Commonwealth*, 5 Va. App. 248, 257, 361 S.E.2d 634, 640 (1987).

72. 5 Va. App. 167, 360 S.E.2d 880 (1987).

tial evidence to sustain a conviction of possession of marijuana with intent to distribute. The most probative evidence of intent was the inadmissible testimony of a detective that a search warrant was obtained following a controlled purchase by an informant.⁷³ Despite the trial court's cautionary instruction, the evidence may have influenced the jury, which might not have found the requisite intent otherwise.⁷⁴

One of the most helpful opinions of the Virginia Court of Appeals concerned the paradox familiar to defense counsel: deciding whether it is worthwhile to "open the door" by offering evidence of a defendant's good character. The upstanding citizens who invariably give this kind of testimony are tempting targets for the "have you heard" form of cross-examination. The court of appeals adopted invaluable criteria for trial courts to use in determining whether prospective cross examination of a character witness is proper.⁷⁵

A court would make four determinations before permitting a prosecutor to confront a reputation witness with a rumor or suggestion of past misconduct: 1) that there is no dispute as to the fact of the subject matter of the rumor; 2) that a reasonable likelihood exists that the misconduct would have been the subject of conversation; 3) that neither the event underlying the rumor nor the rumor itself was too remote; and 4) that the underlying event and the rumor concerning that event pertained to the character trait in issue. The court then must ensure that the prosecutor employs proper "have you heard" form in his cross-examination and further instruct the jury of the exact purpose of this kind of questioning.⁷⁶

73. *Id.* at 169, 360 S.E.2d at 881.

74. *Id.* In a similar vein, hearsay declarations of Barbara Evans-Smith, the murdered wife of the defendant in *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 193, 361 S.E.2d 436, 439 (1987), were admitted under the state-of-mind exception along with an instruction that the statements were offered only for the purpose of proving her fear of her husband. Aside from the fact that the statements were immaterial and irrelevant, they also did not reflect well on the defendant's character. Reasoning that it was "impossible to discern for what purpose the remarks were received by the jury," and "to what extent the jury was influenced by this prejudicial evidence," the court of appeals held that their admission constituted reversible error. *Id.* at 200, 361 S.E.2d at 444.

75. *Weimer v. Commonwealth*, 5 Va. App. 47, 54, 360 S.E.2d 381, 384-85 (1987).

76. *Id.* at 55, 360 S.E.2d at 384-85.

V. TRIALS

The Virginia Court of Appeals has been equally helpful in establishing case law on a variety of procedural issues. The court considered a *Batson*⁷⁷ challenge in *Taitano v. Commonwealth*.⁷⁸ In *Reynolds v. Commonwealth*,⁷⁹ the Court of Appeals acknowledged that the right to voir dire is disqualified, and explained the appellate analysis of this issue. In *McCormick v. City of Virginia Beach*,⁸⁰ the court reversed a conviction reached in a bench trial where the trial court failed to obtain the defendant's express waiver of trial by jury. The court ruled that this waiver and the trial court's and Commonwealth's concurrence must be entered on the record.⁸¹

An indictment may be amended at any time before the jury returns a verdict or a judge finds the defendant guilty, so long as the amendment does not change the nature and character of the charged offense.⁸² Venue must be proved by direct or circumstantial evidence.⁸³ A concern for the well-being of the defendant and the victim's peace of mind does not provide a sufficient foundation for a denial of bail.⁸⁴

Tentative, conditional, or provisional rulings, such as may be responsive to motions *in limine*, do not relieve parties of the requirement of contemporaneous objections.⁸⁵ Motions to strike the Com-

77. *Batson v. Kentucky*, 476 U.S. 79 (1986) (a challenge claiming peremptory strikes of jurors were racially motivated).

78. 4 Va. App. 342, 358 S.E.2d 590 (1987). In a matter involving a black defendant and a black victim, the Commonwealth's Attorney struck four blacks during jury selection. The reasons he articulated for the strikes were that each of the persons struck lived near the defendant, near the scene of the crime, or in a "high crime area." Additionally, he considered age, dress and demeanor. The court agreed that these factors were non-racial considerations. *Id.* at 347, 358 S.E.2d at 563.

79. 6 Va. App. 157, 367 S.E.2d 176 (1988).

80. 5 Va. App. 369, 373, 363 S.E.2d 124, 126 (1987).

81. *Id.*; accord *Wright v. Commonwealth*, 4 Va. App. 303, 357 S.E.2d 547 (1987).

82. *Chiang v. Commonwealth*, 6 Va. App. 13, 365 S.E.2d 778 (1988); cf. *Commonwealth v. Davis*, 10 Vir. Cir. 320 (1987).

83. *Traverso v. Commonwealth*, 6 Va. App. 172, 366 S.E.2d 719 (1988).

84. *Dowell v. Commonwealth*, 6 Va. App. 225, 367 S.E.2d 742 (1988). This decision also contains a discussion of the factors involved in bail determinations.

85. *Harward v. Commonwealth*, 5 Va. App. 468, 474, 364 S.E.2d 511, 513 (1988); see also *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987) (a capital murder appeal involving a defendant who represented himself at trial). In *Townes*, the trial court made sufficient inquiry into the defendant's decision and ability to waive his sixth amendment right to counsel. This inquiry included a determination that the defendant understood the requirement and importance of contemporaneous objections. *Id.* at 319, 362 S.E.2d at 656. In view of *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975), which held that self-representation does not excuse a defendant from complying "with the relevant rules of pro-

monwealth's evidence must be renewed at the conclusion of the defendant's evidence where he wishes to challenge the sufficiency of that evidence.⁸⁶ A motion to strike is not, however, the only means by which the sufficiency of evidence may be challenged and the issue preserved for appeal. A motion to set aside the verdict is equally appropriate, even where the record does not indicate whether the trial judge has ruled on that motion. The motion must contain specific objections pertaining to the issue of sufficiency.⁸⁷

The right of an accused to compulsory process is qualified. He must be able to show that the testimony would be material and favorable to his defense.⁸⁸

Ordinarily, a court may not hear testimony from a juror to impeach a verdict, even where the testimony concerns jury misconduct. An exception exists where it appears that a jury may have considered matters not in evidence, thus frustrating the defendant's constitutional right to confrontation.⁸⁹ Affidavits submitted in support of a motion for a new trial are not sufficient in themselves, but may create an affirmative duty on the trial court to investigate the alleged misconduct.⁹⁰ This duty may require hearing testimony from the jurors to determine if they might have been influenced by the extraneous material.⁹¹

Finally, the Virginia Supreme Court and Virginia Court of Appeals provided significant case law on evidentiary points common to criminal practice. Because evidentiary matters are discussed elsewhere,⁹² these cases are cited only for convenience.⁹³

cedural and substantive law," the Virginia Supreme Court refused to consider those assignments of error which were not properly preserved. *Tounes*, 234 Va. at 319, 362 S.E.2d at 657; accord *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988).

86. *Fields v. Commonwealth*, 5 Va. App. 229, 237, 361 S.E.2d 359, 363 (1987).

87. *McGee v. Commonwealth*, 4 Va. App. 317, 321, 357 S.E.2d 738, 740 (1987); see also *Mounce v. Commonwealth*, 4 Va. App. 433, 357 S.E.2d 742 (1987) (citing cases illustrative of the rule that a motion is necessary to preserve the issue unless a miscarriage of justice would otherwise result).

88. *Howard v. Commonwealth*, 6 Va. App. 132, 367 S.E.2d 527 (1988); see also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

89. *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 206, 361 S.E.2d 436, 446 (1987).

90. *Id.* at 207, 361 S.E.2d at 447.

91. *Id.* at 206, 361 S.E.2d at 446.

92. *Friend, Evidence: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 621 (1988).

93. See *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263 (1988) (Rape Shield law); *Royal v. Commonwealth*, 234 Va. 403, 362 S.E.2d 323 (1987) (prior inconsistent statements); *Whittington v. Commonwealth*, 5 Va. App. 212, 361 S.E.2d 449 (1987) (after-discovered evidence); *Fields v. Commonwealth*, 5 Va. App. 229, 361 S.E.2d 359 (1987) (impeachment); *Arnold v. Commonwealth*, 4 Va. App. 275, 356 S.E.2d 847 (1987) (use of transcript by

VI. CRIMES

A. *Driving Under the Influence (DUI)*

The United States Supreme Court, in *Baldasar v. Illinois*,⁹⁴ held that an uncounseled misdemeanor conviction could not be used to convert a subsequently committed misdemeanor into a felony with an enhanced punishment. In *Sargent v. Commonwealth*,⁹⁵ the Virginia Court of Appeals reached the same holding in a case involving an enhanced punishment for a third DUI conviction. Thus, where the record was silent as to whether the defendant had been represented on his earlier convictions or had waived counsel, those convictions could not form the predicate for a conviction of a third DUI offense.⁹⁶

A driver in this Commonwealth, if he is arrested for driving under the influence, is presumed to consent to a blood or breath test pursuant to section 18.2-268 of the Code of Virginia. Defendants seeking to suppress the results of blood and breath tests often challenge the validity of the underlying arrest, arguing, for example, that the arrest was without probable cause or that it occurred more than two hours after the offense. The case of *Durant v. City of Suffolk*⁹⁷ involved such a challenge. A police officer in Suffolk saw the defendant driving in a manner that suggested that he was under the influence of alcohol. Unable to stop the defendant in Suffolk, the officer radioed the information to an Isle of Wight officer. This officer saw the defendant driving in Isle of Wight and effected a warrantless arrest.⁹⁸ Because the arrest was for a misdemeanor not committed in the officer's presence, (driving under the

jury while listening to recorded conversation); *Martin v. Commonwealth*, 4 Va. App. 438, 358 S.E.2d 415 (1987) (excited utterance exception).

94. 446 U.S. 222, 225-26 (1980) (Marshall, J., concurring).

95. 5 Va. App. 143, 360 S.E.2d 895 (1987).

96. *Id.* at 149, 360 S.E.2d at 901. The court of appeals reversed the judgment of the trial court and remanded the case for further proceedings. Although the three month sentence was well within the permissible range of punishment for a first time offense, the court noted that the defendant was tried and convicted of a third offense and that evidence of the two prior offenses was presented. *Id.* The court concluded that the defendant was sentenced to three months *because* he had been convicted of a third offense. Thus, he received an enhanced sentence because of uncounseled convictions. This result, the court felt, was prohibited. *Id.* at 153, 360 S.E.2d at 902.

97. 4 Va. App. 445, 358 S.E.2d 732 (1987).

98. *Id.* at 447, 358 S.E.2d at 733.

influence in Suffolk), the arrest was invalid and the test results inadmissible.⁹⁹

B. Conspiracy

In *Barber v. Commonwealth*,¹⁰⁰ the Commonwealth introduced evidence of seemingly unrelated drug transactions in New Kent County to prove a conspiracy in Henrico County. The issue on appeal was whether the Commonwealth improperly joined two transactions in its proof of one charge of conspiracy.¹⁰¹ The Virginia Court of Appeals employed factors identified in *United States v. MacDougall*:¹⁰² 1) the time periods in which the activities occurred; 2) the offenses charged; 3) the location of the activities; 4) the identity of the coconspirators; and 5) the acts or descriptions which indicated the nature and scope of the activities. Applying these factors, the court concluded that the jury could infer from the totality of the circumstances that the Commonwealth had demonstrated a single conspiracy and that the acts or transactions in question were acts in furtherance of that single conspiracy.¹⁰³

A single agreement may constitute multiple violations of the law, where the defendant conspired to distribute marijuana, cocaine and preludein. Separate sentences for each offense were affirmed.¹⁰⁴

C. Drugs

Evidence that the defendant was holding a baby in whose diapers was found cocaine was insufficient to show that the defendant was aware of the presence of cocaine or that she intentionally and consciously possessed cocaine.¹⁰⁵

In *Graves v. Commonwealth*,¹⁰⁶ there was no evidence of the weight of the marijuana which was the subject of multiple transactions. As a result, the defendant could not be convicted of conspiring to distribute more than one-half ounce.

99. *Id.* at 449, 358 S.E.2d at 734.

100. 5 Va. App. 172, 176, 360 S.E.2d 888, 889-90 (1987).

101. *Id.* at 177, 360 S.E.2d at 890.

102. 790 F.2d 1135, 1144 (4th Cir. 1986).

103. *Barber*, 5 Va. App. at 179, 360 S.E.2d at 890-91. The court went further. The Commonwealth contended that activities in another county were evidence of a single conspiracy in Henrico, and it tried the defendant separately in New Kent for those same activities. The court found no significance to this inconsistency. *Id.* at 181 n.2, 360 S.E.2d at 893 n.2.

104. *Wooten v. Commonwealth*, 235 Va. 89, 93, 368 S.E.2d 693, 695 (1988).

105. *Hairston v. Commonwealth*, 5 Va. App. 183, 360 S.E.2d 893 (1987).

106. 234 Va. 578, 363 S.E.2d 705 (1988).

D. *Fraud and Embezzlement*

In *Watson v. Commonwealth*,¹⁰⁷ the defendant had been employed to care for his elderly victim. He obtained the victim's endorsement on a check in the amount of \$950, payable to a third-party, marked "for services rendered." At trial for larceny by false pretenses, the third-party testified that she performed no services. The defendant testified that the check was for him, but had been made payable to the third party so she would cash it because he had lost his operators license.¹⁰⁸ The court affirmed the defendant's conviction, noting that if the jury had believed the defendant, then no false pretenses had occurred.¹⁰⁹ Because the jury did not believe the defendant, his possession of the check could only be explained by his having obtained it through a misrepresentation to the victim that the third party had performed services for which she had to be compensated.

In *Waymack v. Commonwealth*,¹¹⁰ a defendant's conviction for embezzlement was reversed where the evidence failed to show that she converted the missing funds (which she had received) to her own use. It was also shown that other employees received funds in the office, made accounting entries, and had access to the cash drawer.¹¹¹

To sustain a conviction of constructive fraud, the evidence must show that the defendant had fraudulent intent at the time of the contract.¹¹²

*Gregory v. Commonwealth*¹¹³ involved the crime of fraudulent disposal of property on which a lien is given. In this type of case the "fraud" is the act of the debtor which is designed to deprive a secured creditor of his collateral. This fraudulent intent to dispose of the secured property need not exist in Virginia.¹¹⁴

107. 4 Va. App. 450, 358 S.E.2d 735 (1987).

108. *Id.* at 451, 358 S.E.2d at 735.

109. *Id.* at 453, 358 S.E.2d at 736.

110. 4 Va. App. 547, 358 S.E.2d 765 (1987).

111. *Id.* at 550-51, 358 S.E.2d at 767.

112. *Booth v. Commonwealth*, 4 Va. App. 484, 492, 358 S.E.2d 740, 744 (1987).

113. 5 Va. App. 89, 360 S.E.2d 858 (1987).

114. *Id.* at 93, 360 S.E.2d at 860.

E. *Murder*

Section 19.2-264.2 of the Code of Virginia provides the sole criteria by which a defendant convicted of capital murder may be sentenced to death. Where the defendant is convicted of capital murder pursuant to section 18.2-31(g) (multiple homicides), the Commonwealth relies upon the "vileness" predicate for the imposition of the death penalty. However, section 19.2-264.2 contains no requirement that both or all of the homicides be vile.¹¹⁵

"Aggravated battery" for purposes of section 19.2-264.2 of the Code of Virginia, means a battery "which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."¹¹⁶ This "more culpable than the minimum" standard does not require the Commonwealth to prove either the order of the multiple gunshot wounds, or that death might not otherwise have resulted. Factors to be considered are whether there is an appreciable lapse of time between the first wound and the last, and whether death results instantaneously from the first.¹¹⁷

The evidence in *Townes v. Commonwealth*,¹¹⁸ was that the defendant was the last person seen in a convenience store before the clerk was found dead and money was found to be missing. The defendant objected to the court's instruction defining the elements of robbery, stating that the instruction should require a finding that the money was taken by him or on his behalf. He argued that otherwise, the jury could have found him guilty of robbery, (and thus, capital murder), even if they felt that a stranger had come upon the scene after the killing and taken the money. The Virginia Supreme Court was unimpressed by this argument, stating that there was no evidence to support the defendant's speculative theory.¹¹⁹

In *Wright v. Commonwealth*,¹²⁰ the Virginia Supreme Court held that although the first sentence of an instruction on voluntary intoxication, offered by the defendant on trial for first degree mur-

115. *Barnes v. Commonwealth*, 234 Va. 130, 138, 360 S.E.2d 196, 202 (1987).

116. *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 44 U.S. 967 (1979).

117. *Barnes*, 234 Va. at 138, 360 S.E.2d at 203.

118. 234 Va. 307, 362 S.E.2d 650 (1987).

119. *Id.* at 334-35, 362 S.E.2d at 665.

120. 234 Va. 627, 363 S.E.2d 711 (1988).

der, was incomplete and misleading standing alone, the effect of the remainder of the instruction was to state the law clearly and accurately.¹²¹ The first portion of the instruction stated incorrectly that intoxication is a defense to first degree murder.¹²² The second portion, however, cured the inaccuracy by further explaining that intoxication may prevent the formulation of the specific intent necessary to deliberate and premeditate.¹²³ Thus, the trial court erred in refusing the instruction.¹²⁴ The instruction which was given and drafted *sua sponte* by the trial court was held "confusing, inaccurate, and misleading."¹²⁵ It did not cure the error of failing to give the defendant's instruction.¹²⁶

Evidence that the defendant was on parole at the time of the crime is properly admitted during the penalty phase of a capital murder trial as part of the "prior history" of the defendant.¹²⁷

121. *Id.* at 630, 363 S.E.2d at 712.

122. *Id.* at 629, 363 S.E.2d at 712.

123. *Id.*

124. *Id.* at 630, 363 S.E.2d at 712.

125. *Id.* The instruction stated that:

voluntary intoxication is not a defense to murder or malicious wounding. Even if you find that the defendant was so greatly intoxicated by the voluntary use of alcohol that he was incapable of having the specific intent which is an element of this crime, you must still find him guilty if you find that the Commonwealth has proven every element of the crime beyond a reasonable doubt. In the case of first degree murder proof of voluntary intoxication may negate deliberation and premeditation which is a necessary element of that offense.

Id. at 630, 363 S.E.2d at 712-13.

126. *Id.* at 630, 363 S.E.2d at 713.

127. *Pope v. Commonwealth*, 234 Va. 114, 126-27, 360 S.E.2d 352, 360 (1987).