

Monday, February 26. 2007

Caught in disbelief over an acquittal.

A drug possession conviction requires probable cause to seize the alleged drugs; proof that the seized item constitutes illegal drugs; and a proof beyond a reasonable doubt of knowledge, dominion and control over the alleged drugs. (Image from public domain.) When I started doing criminal defense over fifteen years ago, many lawyers with more criminal defense experience than I told me that most criminal defendants have committed one or more of the criminal counts against them, most will be found guilty (particularly in federal criminal cases), and most will lie to their lawyers. Nevertheless, the more I interacted with successful criminal defense persuaders -- and the more I won cases where the cards initially seemed stacked against my clients -- the more I felt that the acquittal ratio could be increased through a devotion by all criminal defense lawyers to keep learning, practicing, improving, and transcending local and national groupthink, rather than accepting any status quo. Sunwolf implores that "Reality is no obstacle," and that is not farfetched. John D. Delgado shows lawyers not to fear any reality of the case, to the point of being willing to ask the defendant right off the bat at trial, if s/he testifies, the question all the jurors want to know: "Did you do it?" Lisa Monet Wayne has shown lawyers how to overcome their fears of going to trial in difficult cases, and to turn the cases' facts into their own (including reducing a prosecution of possession with intent to distribute a few grams of cocaine to a reminder that a diner sugar packet weighs but one gram). It is important for the criminal defense lawyer -- at trial -- to erase a belief in the client's guilt and to have a compelling story showing why the client is innocent. Sometimes reaching that compelling story comes from remembering how the criminal defense lawyer first reacted to the criminal charges, and how the lawyer arrived at a conviction that the prosecution's evidence is shaky at best. Finally, the more a lawyer expects the client to lie to the lawyer and to the judge and jury, the more that will become a self-fulfilling prophecy. Asking a client to trust his or her lawyer enough to tell the lawyer the truth is a tall order, in part because the client usually does not know the lawyer from Adam when the representation begins. The lawyer must earn that trust, and convince the client that all confidential information from the client will be kept confidential unless the client authorizes the lawyer to reveal the information. When the resources are available, sometimes a skilled trial or psychological consultant's assistance will be needed to get to the root of any tendency by the client to lie, and to draw out honesty. Sometimes the client will be more truthful when the lawyer shares some relevant and even sensitive and painful personal information about the lawyer. Once the lawyer shows confidence in the client -- combined with giving the client confidence in the lawyer and in the lawyer's skills, experience, and fearlessness -- the client will be more willing to plead innocent when the lawyer so advises, despite the rampant fear of so many criminal defendants about entering innocent pleas. A few days ago, a client accepted my advice to plead innocent to a marijuana possession charge. A few colleagues who frequently appear in this particular Virginia District courthouse warned me about my supposedly low potential of winning this case, where the police officer stopped my client's car for a burned-out taillight, claimed to have seen my client reaching behind him as the officer approached the car, and claimed to have seen a green leafy substance in a bag on the rear floorboard in the direction where my client reached, containing "suspected marijuana". Our case theory was that possession was absent, due to a failure of the evidence to prove beyond a reasonable doubt that our client exercised knowledge, dominion and control over what turned out to be under two grams of marijuana, which is not enough to roll more than two regular-sized marijuana cigarettes/joints. My primary ground for suppressing the marijuana was that no cop has sufficient vision late at night in the rain to have any idea about the contents of the bag purportedly containing such a small quantity of marijuana. Our trial was held before a Virginia District Court judge, because in Virginia misdemeanors (offenses jailable for no more than one year) must be tried in District Court without a jury before a de novo jury trial is available. Va. Const. Art. I, § 8; McCormick v. Virginia Beach, 5 Va. App. 369 (1987) (confirming the jury trial right for all de novo criminal appeals to a Virginia Circuit Court, as opposed to the federal Constitution's limit of the jury trial right to petty offenses). The United States Supreme Court has upheld the Constitutionality of two-tiered state systems that require a bench trial before a de novo appeal may proceed by jury. Ludwig v. Massachusetts, 427 U.S. 618 (1976), as has the Virginia Supreme Court in Manns v. Commonwealth, 213 Va. 322 (1972). The judge initially denied my motion to suppress the marijuana, despite my arguments that included the cop's not even bringing the alleged marijuana and packaging with him to court, for the judge to reach his own conclusions about the officer's ability to have probable cause that he saw marijuana. Providing the judge the bag and the alleged marijuana would have let the judge see for himself that the officer actually seized the item first before having sufficient information to know the item was marijuana. The judge refused to keep out the drug analysis report (I subpoenaed and questioned the chemist) despite my arguments about the failure to establish chain of custody, the inadmissible hearsay in the chain of custody report, and failure to produce the alleged marijuana into evidence. During my closing argument, I reincorporated by reference all my previous arguments at trial. I then focused on the failure of the prosecutor to prove beyond a reasonable doubt that my client had possession -- i.e., knowledge, dominion and control -- over the marijuana. Drew v. Com., 230 Va. 471 (1986). However, I did not get far into my closing argument before the judge stopped me in my tracks. I recognized that something good probably was coming down the pike,

because judges are forbidden from finding guilt without providing sufficient opportunity for the defense to present a closing argument (although I once saw a Maryland judge violate this rule, only for him accidentally to have said "not guilty" rather than "guilty" and to have conceded that once those words "not guilty" passed his lips, he never could summon them back). The judge said that although he believed this was my client's marijuana, he did not believe that the police officer had sufficient grounds late at night to know this was marijuana (which I argued in the first place). As the judge was talking, I told my client he had won, and shook his hand. My client was in disbelief. Once the judge finished talking, my client was still caught in disbelief. Therefore, I said to my client: "We have won, and you have been found not guilty. Let's get out of here." The last thing we needed was to stick around for the judge to have said that he was changing his mind. Last month, I blogged about how I managed to continue practicing criminal defense in an unjust system. Such victories as this certainly make it easier to do so. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:15

I have often had a judge acquit when it became clear (during the bench trial to preserve the appeal) that the denial of suppression motion was a mistake. One time I saw the Judge reading my brief in support of suppression during the trial (he was bored). He saw the issue and acquitted. Maybe not the correct way, but the right result in the end
Anonymous on Feb 26 2007, 19:55

Most Virginia courts I've been in would have dismissed because the officer didn't bring the actual marijuana to court.

BTW: You could have had a jury trial for the marijuana charge. All it required is a guilty finding in GDC; then you could have appealed it to Circuit Court and demanded your 7 person jury. Even contempt findings (maxed at 10 days in Virginia GDC) can be appealed. It's an absolute right under Virginia law. I've represented people in Circuit Court for both.
Anonymous on Feb 27 2007, 16:06

Jon, I think a sugar packet is more like 4g of sugar (1 tsp). The pink and blue packets are a gram of artificial sweetener each, and they're much lighter than the sugar packets.
Anonymous on Mar 2 2007, 16:23