

Wednesday, April 25, 2007

**Recent Virginia Court of Appeals decisions.**

Image from Virginia Forestry Dept's website. The Court of Appeals is Virginia's intermediate appellate court (not to be confused with Maryland's Court of Appeals being that state's highest court). Here is an overview of some recent key criminal decisions from the Virginia Court of Appeals:

- **Whither Boykin in District Court?** This month, Virginia's Court of Appeals confirmed -- as required by the Supreme Court in *Boykin v. Alabama*, 395 U.S. 238 (1969) -- that "to withstand scrutiny on appeal, the record must contain an "affirmative showing" that the guilty plea was entered voluntarily and intelligently." *Hill v. Com.*, 47 Va. App. at 674, 626, S.E.2d at 463 [2006]. *Cross v. Com.*, \_\_\_ Va. \_\_ (April 3, 2007). How does this four-decade-old mandatory rule jibe with just about every Virginia District Court where I have appeared, where routinely judges (1) do not make any inquiry about whether the defendant is voluntarily and intelligently entering a guilty plea, and (2) ordinarily just ask the defense lawyer how the defendant will be proceeding?
- **Virginia's drunk driving Va. Code § 18.2-266** provides the basis for a permissive inference "that the blood alcohol concentration while driving was the same as indicated by the results of the subsequent test." *Davis*, 8 Va. App. at 300, 381 S.E.2d at 16." *Yap v. Com.*, \_\_\_ Va. App. \_\_ (April 24, 2007). *Yap* appears to clarify that the above-quoted language from *Davis*, 8 Va. App. at 300, refers to a permissive inference, and not a rebuttable presumption.
- **Factors in distinguishing between possession with intent to distribute drugs and simple possession of drugs** are discussed in *Harper v. Com.* \_\_\_ Va. App. \_\_ (April 10, 2007).
- **A nod, a search, and a robbery conviction.** (Or, the perversion of "A Coke and a smile.") A majority of a debating Court of Appeals upheld the search of Defendant's closed backpack that turned up the smoking gun -- or in this instance, the smoking cellphone -- that connected him to a robbery to which he entered a guilty plea on the condition that the plea would be withdrawn if he beat his suppression motion on appeal. *Glenn v. Com.* \_\_\_ Va. App. \_\_ (March 20, 2007). In *Glenn*, the defendant's grandfather -- who was unable to speak -- gave police consent to search his home with nothing more than a nod of the head together with a shake of the head to indicate the defendant did not pay rent to be there. (A vision comes to mind of the slow head-nodding and head-shaking coming from the headless ghost of Christmas Future in A Christmas Carol, and the outcome of *Glenn* is no less eerie and chilling). Based on this one nod, the Court of Appeals found that the police were permitted to search defendant's closed backpack, without even making further inquiry about its ownership. I hope this case will go to Virginia's Supreme Court and be reversed there. *Glenn* addresses a search of closed containers pursuant to the homeowner's consent, as opposed to such a case as *California v. Acevedo*, 500 U.S. 565 (1991), where the Supreme Court said: "The police may search an automobile and the containers within it [regardless of who may own the containers] where they have probable cause to believe contraband or evidence is contained." *Acevedo*, 500 U.S. at 580.
- **Drug chemist reports may be admissible in evidence where the chemist testifies, even when the chemist has no independent recollection of the particular drug test.** *Bell v. Com.*, \_\_\_ Va. App. \_\_ (April 17, 2007). In *Bell*, the drug certificate of analysis was inadmissible without the chemist's testimony, because the court and prosecutor sent the certificate of analysis to the defense lawyer beyond the deadline for admitting the certificate without live testimony from the chemist. Left undiscussed in *Bell* is the extent to which the certificate of analysis is admissible when offered into evidence by the prosecution, where (1) the certificate of analysis is requested by and timely delivered to the defendant, (2) the defendant issues a subpoena for the chemist to testify, or otherwise demands that the chemist testify, and (3) the chemist has not yet presented testimony. If Virginia followed the District of Columbia's recent ruling in *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (discussed here), which analyzes *Crawford v. Washington*, 541 U.S. 36 (2004) (which bars testimonial evidence from slipping through the hearsay rule), the foregoing circumstances would preclude the admission of the certificate of analysis into evidence without the chemist's testimony preceding the offer of the certificate into evidence.
- **A knife similar to a bowie knife may qualify as a concealed weapon.** *Gilliam v. Com.*, \_\_\_ Va. App. \_\_ (April 10, 2007). *Gilliam* not only provides detailed guidance for what qualifies as a concealed weapon, but even includes a picture of the knife and sheath involved in the instant case.
- **Unfortunate Brady/exculpatory evidence decision will encourage prosecutors to err on the side of disclosing too little pretrial discovery than too much.** *Garnett v. Com.* \_\_\_ Va. App. \_\_ (April 10, 2007), provides dueling en banc judicial views about the type of evidence that constitutes exculpatory material that must be provided to the defense pretrial. Unfortunately, in this instance, the crabbed view of the definition of exculpatory evidence prevails.
- **Search incident to misdemeanor generally is impermissible.** In Virginia, unlike in some other states, the police are generally prohibited from arresting for any misdemeanor (Va. Code § 19.2-74), which prevents a search incident to a non-arrestable misdemeanor. *Moore v. Commonwealth*, 272 Va. 717 (2006). Consequently, a search finding cocaine incident to an arrest for suspended driving was unlawful, because suspended driving is a non-arrestable misdemeanor, unless, as with all misdemeanors, the defendant refuses to give his or her name and address together with a promise to return to court. Consequently, it was necessary to suppress the cocaine seized incident to the decision to arrest the defendant for driving with a suspended license. *Cross v. Com.*, \_\_\_ Va. App. \_\_ (April 3, 2007).
- **Law governing variances between indictment and evidence presented.** Evidence at a forged signature trial need not prove a bank

account owner's identity, because the victim is the bank rather than the bank account holder. *Stokes v. Com. \_ Va. \_* (March 13, 2007).<sup>1</sup> *Stokes* addresses the difference between a fatal and non-fatal variance between the indictment and the evidence presented at trial: "As this Court held in *Traish v. Commonwealth*, 36 Va. App. 114, 549 S.E.2d 5 (2001): 'It is true that a variance between the allegations of an indictment and proof of the crime may be "fatal," and "the offense as charged must be proved." A variance is fatal, however, only when the proof is different from and irrelevant to the crime defined in the indictment and is, therefore, insufficient to prove the commission of the crime charged. 36 Va. App. at 134-35, 549 S.E.2d at 15 (quoting *Hawks v. Commonwealth*, 228 Va. 244, 247, 321 S.E.2d 650, 651-52 (1984)).'" *Stokes*, slip op. at 3.<sup>2</sup> - When<sup>3</sup> business records contain multiple levels of hearsay. In the foregoing *Stokes* case, *Stokes v. Com. \_ Va. \_* (March 13, 2007).<sup>4</sup> the defendant forged the signature of Mr. Tucker, who passed away before the trial date. Over defendant's objection, and under the business records exception to the hearsay rule, the trial court admitted into evidence Mr. Tucker's affidavits of forgery. The Court of Appeals affirmed, without at all discussing the prohibition<sup>5</sup> against the admission of testimonial hearsay at a criminal trial. *Crawford v. Washington*, 541 U.S. 36 (2004).<sup>6</sup> How on earth the affidavits of forgery are not inadmissible testimonial hearsay<sup>7</sup> is beyond me. Moreover, the business records exception to the hearsay rule requires examining each level of hearsay for admissibility into evidence. With the affidavits of forgery, any notation that Mr. Tucker's appearance at the bank represented the first level of hearsay, but his claim that the withdrawals from his account (which were attributed to the defendant) were fraudulent represented the second level of hearsay. *Stokes* is silent about the need to examine each level of hearsay when a document is offered into evidence under the business records exception to the hearsay rule.<sup>8</sup> Jon Katz.

Posted by Jon Katz in Criminal Defense at 04:58

Jon -

Your post says that a recent court decision means that Virginia will no longer permit warrantless searches "incident to citation," but that some other states still permit the practice.

Can you comment on how *Knowles v. Iowa*, 525 U.S. 113 (1998) affects the notion of whether or not there is a search "incident to citation" exception to the warrant rule? I'm not an attorney, so I may have unknowingly missed some critical detail as I read the decision, but I think *Knowles* ruled that a search "incident to citation" was not a valid exception to the 4th Amendment's warrant rule in traffic citation cases.

Can you elaborate on which jurisdictions, and under what circumstances, a warrantless search "incident to citation" might still jive with the 4th Amendment and local laws?

Thanks Jon! And keep up the good work - both in the courtroom and on the blog!  
Anonymous on Apr 26 2007, 02:49

Thanks, Steve, for your comment and for alerting me to the need to correct and clarify my summary of *Cross v. Com.* The summary has now been corrected above, and is reprinted below:

-In Virginia, unlike in some other states, the police are generally prohibited from arresting for any misdemeanor (Va. Code Â§ 18.2-388), which prevents a search incident to a non-arrestable misdemeanor. *Moore v. Commonwealth*, 272 Va. 717 (2006). Consequently, a search finding cocaine incident to an arrest for suspended driving was unlawful, because suspended driving is a non-arrestable misdemeanor, unless, as with all misdemeanors, the defendant refuses to give his or her name and address together with a promise to return to court. Consequently, it was necessary to suppress the cocaine seized incident to the decision to arrest the defendant for driving with a suspended license. *Cross v. Com., \_ Va. \_* (April 3, 2007).

As to *Knowles v. Iowa*, 525 U.S. 113 (1998) decision you mention -- to give Underdog readers a background -- a unanimous Supreme Court reversed the defendant's conviction where there was a search incident to citation. In *Knowles*, unlike in Virginia, the police had the option to arrest the defendant, in which case the Supreme Court would have permitted a search incident to arrest. However, the police decision to issue a citation precluded any search incident to the alleged law violation.

Thanks, again, for your excellent coment. Jon  
Anonymous on Apr 26 2007, 07:18