IN THE

Supreme Court of Virginia

RECORD NO. 080775

CHARLENE MARIE WHITEHEAD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Grand Jury for the City of Danville indicted Whitehead for twenty-seven counts of receiving stolen property in violation of Code §18.2-108 of the Virginia Code, and thirteen counts of receiving stolen property, fourteenth or subsequent offense in violation of Code §18.2-108 and 18.2-104 of the Virginia Code.

On May 24, 2006, prior to trial, the Commonwealth amended the indictments to reflect that the twenty-seven counts of receiving stolen property were being prosecuted as the fourteenth or subsequent offense. Whitehead pled not guilty to the charges and waived her right to a jury trial. She was tried before the Honorable Joseph W. Milam, Jr., judge of the Circuit Court for the City of Danville. Both sides presented evidence.

At the close of the Commonwealth's case, Whitehead, by counsel, moved to strike the Commonwealth's evidence. The motion was denied. At the conclusion of all of the evidence, Whitehead, by counsel, renewed her motion to strike the Commonwealth's evidence. The trial court merged eight of the charges into other charges and found Whitehead guilty of thirty-two counts of receiving stolen property, fourteenth or subsequent offense.

On June 26, 2006, upon consideration of a presentence report, evidence and argument by counsel, the trial court sentenced Whitehead to

serve thirty years in a state correctional facility, with twenty-four years suspended on indictments one through six. On indictments seven through thirty-two, the trial court withheld imposition of sentence, conditioned upon Whitehead's good behavior for twenty-five years.

Later, on June 26, 2006, Whitehead appeared before the Hon. David A. Melesco, judge of the Circuit Court for the City of Danville on a probation violation hearing predicated upon her convictions for the thirty-two counts of receiving stolen property. The trial court found Whitehead to be in violation of the terms and conditions of her probation. The trial court sentenced Whitehead to serve seventeen years, four months in a state correctional facility, with twelve years, four months suspended upon successful completion of probation.

On December 13, 2006, Whitehead timely petitioned the Court of Appeals for an appeal. By unpublished opinion, dated March 25, 2008, the Court of Appeals affirmed Whitehead's convictions.

On April 22, 2008, Whitehead petitioned this Court for an appeal. By order, dated January 6, 2009, this Court awarded Whitehead an appeal.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred in ruling the trial court was not clearly erroneous in finding the evidence sufficient to prove Whitehead received the stolen property.

II. The Court of Appeals erred in ruling the trial court was not clearly erroneous in finding the evidence sufficient to prove Whitehead aided in concealing stolen property.

III. The Court of Appeals erred in ruling the trial court did not abuse its discretion in finding reasonable cause to violate.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in ruling the trial court was not clearly erroneous in finding the evidence sufficient to prove Whitehead received stolen property. (Assignment of Error 1)

Preserved, Joint Appendix (App.) at 153-160, 180-184.

II. Whether the Court of Appeals erred in ruling the trial court was not clearly erroneous in finding the evidence sufficient to prove Whitehead aided in concealing the stolen property. (Assignment of Error 2)

Preserved, Joint Appendix (App.) at 153-160, 180-184.

III. Whether the Court of Appeals erred in ruling that the trial court did not abuse its discretion in finding reasonable cause that Whitehead violated her probation.

(Assignment of Error 3)

Preserved, Joint Appendix (App.) at 218-221.

STATEMENT OF FACTS

The Commonwealth's evidence proved the following facts[1]:

On December 22, 2005, Charlene Whitehead and Jamil Walden, the father of Whitehead's child, were wanted on outstanding fugitive warrants (App. 123,132). Officers from the Danville police department arrested Whitehead and Walden in the apartment where they lived after gaining

[1] References to "(App. __)" in this document are to the joint appendix filed in this case.

entry by force (App. 123,132, 133). There was another female inside of the apartment at the time (App. 124).

Upon entry into the apartment, officers observed several items of personal property in plain view, including a laptop computer, a case of compact discs and several cellular telephones (App. 133, 140-141,143). The items had nothing on or near them to indicate to the casual observer that the items were stolen (App. 143). Officers suspected that the property was stolen and photographed the items before removing them from the apartment (App. 134, 138; Commonwealth's exhibit 4, App. 242). Most of the suspected stolen property was concealed in closets, dressers and bags – hidden from common observation (App. 140-144). The property in plain view as well as the property hidden throughout the apartment was later identified as stolen from the motor vehicles of various people (App. 141-142).

The Commonwealth introduced a weekly rental agreement, which commenced on October 12, 2005 (App. 150; Commonwealth's exhibit 5, App. 258). The agreement is signed by Walden as "Tenant" and Whitehead's name is listed on the lease as a person permitted to stay in the apartment (App. 148-149; Commonwealth's 5, App. 258). The lease terms prohibit overnight guests (Commonwealth's 5, App. 258).

Mack Eatman, a maintenance worker at the apartment complex where Whitehead and Walden were staying testified that Whitehead was at the apartment most of the time (App. 146). Eatman would sometimes collect the weekly rent by going to an apartment, knocking on the door and saying rent was due (App. 146, 149, 150). On at least one occasion when he knocked on Walden's door to collect rent, Whitehead was the one who gave Eatman the rent money (App. 147, 150).

Walden pled guilty to stealing all of the personal property that was recovered from his apartment (App. 162). He testified that Whitehead did not participate in the break-ins, thefts or handling of any stolen property (App. 162). Walden stated that he never told Whitehead about his actions of breaking into cars or when he was heading out to steal (App. 163). Walden stated that he would either leave the stolen property outside of the apartment or hide it inside of closets or dresser drawers inside of the apartment (App. 164, 166). Walden stated that he never told Whitehead that the property he brought home was stolen and he never talked to Whitehead about the property he brought home (App. 163-165). Walden testified that he never gave the property to Whitehead and he was the person responsible for taking the property from the apartment and selling it (App. 163). Walden stated that sometimes he would sell the property

before he went home (App. 164). Walden stated that he was using illicit substances during this time; however, he denied using the proceeds from the thefts to purchase the illicit substances (App. 164-165).

Travis Whitehead, Whitehead's brother (herein referred to as "Travis), testified that on one occasion when he was visiting Whitehead, Walden left the apartment and returned with a backpack "full of stuff" (App. 171). Walden invited Travis to go back out with him and Travis declined the invitation (App. 171). No date or time frame was given for when this incident occurred. Travis recalled another occasion when he was visiting his sister and Whitehead and Walden got into an argument (App. 171). According to Travis, Whitehead told Walden that he did not need to do what he was doing (App. 173). Whitehead told Walden that she wanted nothing to do with what Walden was involved in (App. 173). Whitehead told Walden that should the police come to the apartment, Whitehead was going to tell the police that "It's not mine, it's yours" (App. 172). Again, no time-frame was given for when this argument took place.

Whitehead testified that she was not aware of when Walden first began the thefts, but she became aware of it sometime after Walden had already begun (App. 175, 176). She stated that Walden did not tell her that he was stealing (App. 177). Whitehead stated that she suspected that he

was stealing property, but she never knew exactly where he was stealing or whom he was stealing from (App. 175-177). Whitehead was not privy to what Walden was doing; and, she only knew that he would come to the apartment with lots of property (App. 175, 178). Whitehead stated that based upon her suspicions, she confronted Walden and told him that she did not agree with what he was doing and refused to be a part of it (App. 175). Whitehead stated that she had no knowledge that items were concealed throughout the apartment (App. 176). Whitehead stated that even though she suspected that Walden was stealing and she refused to assist or condone his actions, she was unable to leave his apartment because she had no family to turn to and nowhere else to live (App. 176).

Walden and Whitehead both testified that the items were not in plain view at the time that the officers entered the apartment (App. 166, 179).

On December 27, 2005, Whitehead gave a statement to police regarding the stolen property found (Commonwealth's exhibit 3, App. 234). In her statement, Whitehead stated that she suspected Walden and his friend Squeeky of using crack cocaine and stealing items to support their habits; however, she was not able to prove it (Commonwealth's exhibit 3, App. 234). In addition, Whitehead stated:

> ". . . Jamil [Walden] was stealing to try and support me and our daughter. Jamil may have used some money for

> drugs, but he was helping pay the rent and bills at the house. I knew that Jamil [Walden] stealing was wrong. I used to fuss and yell at Jamil [Walden] about stealing and bringing the stuff in the house, but it seemed like the only way we could get by. My only concern is taking care of and being with my daughter, and that's the only reason I allowed this to go on in my house. I was scared that social services would take my child if I could not keep a roof over her head. I really have no idea how much stuff Jamil [Walden] has actually stolen" (Commonwealth's exhibit 3, App. 234).

During her interview with police, Whitehead was shown a series of photos containing property taken from the apartment and attempted to assist the officer in determining which items were stolen (Commonwealth's exhibit 3, App. 234). On page one of the photos, Whitehead was only able to identify a police type radio in photograph #1, which she stated that Walden took sometime in late October 2005, when Walden was with Squeeky. Whitehead was not able to identify any of the other items in photo #1 as stolen property. Whitehead was not able to identify any of the property in photo #2 or in photo #3 as stolen property. Whitehead stated that the Jansport book bag in photo #4 was brought to the apartment full of cellular phones taken by Walden. However, it is unclear whether or not Whitehead was aware that the cellular phones were inside of the book bag when it was brought into the apartment or whether or not she learned of the contents of the book bag after the arrest.

On page two of the photos, Walden was unable to identify the property in photo #1, in photo #2, or in photo #4 as stolen property. Whitehead identified the flashlights in photo #3 as stolen. However, she was unaware of when the flashlights were brought into the apartment.

On page three of the photos, Whitehead was unable to identify any of the items in photo #1 as stolen, except for binoculars; however, she did not know where the item was taken from. In photo #2, Whitehead was unable to identify any of the items as stolen except for one of the bags in the photo; and, she did not know where it was taken from. Whitehead was unable to identify any of the items in photo #3 as stolen property. Regarding photo #4, Whitehead stated that the two pocketbooks and three wallets did not belong to her. She stated that Walden brought the items to the apartment. She was unable to identify the other pocketbook in the photo as stolen property.

On page four of the photos, Whitehead was able to identify the knives, sheathes and the silver item in photo #1 as stolen property. She stated the car stereo in the photo was not stolen property in this case. Whitehead identified the cellular phones in photo #2 as the same cellular phones previously identified in photo #4 of the photos on page one. She was unable to identify the cameras in photo #2 as stolen property. She

stated that the cameras did not belong to her and she had not seen them in Walden's possession.

Whitehead stated that if Squeeky and Walden were trading [stolen] items for drugs, they would go to one of several places (Commonwealth's exhibit #3, App. 234).

After viewing the photos of stolen property, Whitehead stated,

> "I am sorry for letting myself get involved in this situation with Jamil Walden. I care about Jamil [Walden] and I love my daughter. I only became involved in this and allowed this to happen to make sure my daughter was taken care of. I sincerely regret that my personal situation got to the point I had to allow these things to happen" (Commonwealth's #3, App. 234).

On June 26, 2006, following Whitehead's sentencing hearing in this case, the trial court conducted a probation violation hearing.[2] Whitehead was on probation for thirteen convictions of receiving stolen property when she was charged and convicted in this case. The Commonwealth introduced copies of Whitehead's prior convictions (App. 122). At the hearing, Whitehead did not contest the allegations that she was in violation of the terms of her probation (App. 213). The trial court found that Whitehead was in violation of the terms of her probation and sentenced her

[2] The hearing was held before the Hon. David A. Melesco, who sentenced Whitehead on the prior convictions. The probation violation hearing was held after Whitehead's trial and sentencing hearing in the instant case.

to serve an active sentence of five years in a state correctional facility (App. 224-225).

DISCUSSION OF LAW AND ARGUMENT

I. The Court of Appeals erred in ruling the trial court was not clearly erroneous in finding the evidence sufficient to prove Whitehead received the stolen property.

Standard of Review

When questions as to the sufficiency of the evidence are raised on appeal, this Court must examine the facts in the light most favorable to the Commonwealth, the prevailing party below, granting to it all reasonable inferences fairly deducible there from. The factual findings will not be disturbed on appeal unless they are plainly wrong or without evidence to support them. Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). However, the Commonwealth's evidence must exclude every reasonable hypothesis of innocence." Id. (emphasis added). "[W]here a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused, [the trier of fact] cannot arbitrarily adopt that interpretation which incriminates him." Corbett v. Commonwealth, 210 Va. 304, 307, 171 S.E.2d 251, 253 (1969) (quoting

Burton v. Commonwealth, 108 Va. 892, 62 S.E. 376 (1908)). A suspicion of guilt, however strong, or even a probability of guilt, is insufficient to support a criminal conviction. Stover v. Commonwealth, 222 Va. 618, 623, 283 S.E.2d 194, 199 (1981); Boothe v. Commonwealth, 4 Va. App. 484, 492, 358 S.E.2d 740, 745 (1987) (citing Bishop v. Commonwealth, 227 Va. 164, 170, 313 S.E.2d 390, 393 (1984)). Conviction cannot rest upon conjecture. Foster v. Commonwealth, 209 Va. 326, 329, 163 S.E.2d 601, 603 (1968).

Further, where a conviction is based upon circumstantial evidence, all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence. Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 569 (1976).

Analysis

Virginia Code §18.2-108 states in relevant part that "If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof . . ." The statute defines the offense of larceny in the disjunctive. Therefore, any person who buys *or* receives *or* aids in concealing property knowing that it was the fruit of a theft is guilty of

constructive larceny." Spitzer v. Commonwealth, 233 Va. 7, 9, 353 S.E.2d 711, 713 (1987).[3]

The Commonwealth argues that Whitehead received stolen property with knowledge that the property was stolen. In order to sustain a conviction under this code section, the Commonwealth was required to prove that property "was (1) previously stolen by another, and (2) received by defendant [Whitehead], (3) with knowledge of the theft, and (4) a dishonest intent." Shaver v. Commonwealth, 30 Va. App. 789, 800-801, 520 S.E.2d 393, 399 (1999). The evidence, viewed in the light most favorable to the Commonwealth failed to prove that Whitehead received stolen property with knowledge that the property was stolen.

Receipt of stolen property

The Commonwealth's evidence proved that Walden stole personal property from vehicles from April 2005 through December 2005. Whitehead was not involved in the thefts. From October 2005 through December 2005, Walden rented an apartment, where he stored the stolen property, recovered by police. During this time, Whitehead lived at the apartment with Walden and their child.

[3] The element of "aid in concealing" will be discussed in argument II below.

The Commonwealth's evidence failed to prove that Whitehead received the stolen property. No evidence was presented to show that Whitehead ever handled the stolen property. No evidence was presented of Whitehead's fingerprints having been found on the property. No evidence was presented that Whitehead took possession of the stolen property when Walden brought it to his apartment. The evidence shows that Walden brought the property to his apartment, hid it throughout the apartment, and then removed it for sale.

According to the terms of the lease, Whitehead was a guest in Walden's home. She had no ownership interest in the apartment. The lease prohibited overnight guests. Therefore, Whitehead's name was listed on the lease as a guest, permitted to stay at the apartment overnight. The lease is signed by Walden as the "Tenant." As a guest, Whitehead had no legal right to exclude Walden or his stolen property from the apartment. Whitehead merely lived at an apartment, where the tenant stored stolen property. As a result, the Commonwealth's evidence proved only that Whitehead lived at a place where stolen property was found. A person's mere presence at a place where a crime is committed is insufficient to establish guilt. Smith v. Commonwealth, 185 Va. 800, 40 S.E.2d 273 (1946).

More importantly, the Commonwealth's evidence shows that Whitehead affirmatively refused to receive Walden's stolen property. The evidence shows that at some point, Whitehead became suspicious that Walden was stealing personal property and bringing it to the apartment. Whitehead confronted Walden with her suspicions, and told him that she did not agree with what he was doing and refused to be a part of it. Travis testified regarding another occasion in which Whitehead confronted Walden with her suspicions regarding his illegal activities. According to Travis, Whitehead told Walden that she wanted nothing to do with what Walden was involved in. Whitehead told Walden that should the police come to the apartment, Whitehead was going to tell the police that "It's not mine, it's yours." And, in fact, Whitehead did just what she told Walden that she would do when the police found his stolen property.

Whitehead evidenced her refusal to receive Walden's stolen property as well as her lack of involvement in Walden's criminal enterprise on more than one occasion. There was nothing more she could have done other than to move out of the apartment. However, Whitehead was unable to move out because she had no where else for herself and the child to live. More importantly, she had no legal duty to move out. Whitehead's mere

presence at a place where a crime is committed is insufficient to establish her culpability for the crime.

Because the Commonwealth's evidence failed to prove that Whitehead received Walden's stolen property; and, because the Commonwealth's evidence shows that Whitehead, on more than one occasion, evidenced her refusal to receive Walden's stolen property, the evidence fails to prove that Whitehead received stolen property.

Knowledge that property is stolen

In order to sustain the convictions, the Commonwealth was required to prove that Whitehead received the property in this case with knowledge that it had been stolen.[4] The Commonwealth failed to prove that Whitehead knew the property was stolen for each and every offense of which she was convicted.

"Guilty knowledge . . . [a]bsent proof of an admission against interest, . . . necessarily must be shown by circumstantial evidence." Lewis v. Commonwealth, 225 Va. 497, 503, 303 S.E.2d 890, 893 (1983). Guilty knowledge "is sufficiently shown if the circumstances proven are such as

[4] Whitehead does not concede that she received the stolen property as previously stated.

must have made or caused the recipient of stolen goods to believe they were stolen." Reaves v. Commonwealth, 192 Va. 443, 451, 65 S.E. 2d 559, 564 (1951).

Whitehead did not know when Walden first began stealing the property found in this case.[5] According to the dates alleged in the indictments, there appears to be a slow progression of thefts committed by Walden. Whitehead was not stealing with Walden and he did not inform her when he began the thefts. It was only after Walden began coming home with more and more property that Whitehead began to suspect that Walden was obtaining the items illegally. Whitehead confronted Walden with her suspicions that Walden was obtaining items illegally on more than one occasion. However, Walden never specifically told Whitehead that Walden stole the items.

Moreover, the evidence shows that Walden sometimes left the stolen property outside of the apartment, sometimes he sold the property prior to returning home, and sometimes he brought the property inside of the apartment. However, even when Walden brought the stolen property into

[5] The indictments allege one incident as early as April 2005, one incident as early as June 2005, two incidents as early as July 2005, and three incidents as early as August 2005. Most of the incidents alleged in the indictments occurred between October 2005 and December 2005.

the apartment, it was concealed from common observation. Walden would enter the apartment with a bag or a book bag "full of stuff." The "stuff" inside of the bag was hidden from Whitehead's observation. As a result, the evidence fails to show that Whitehead observed each item of which she was convicted when Walden brought the item into the apartment, and that she knew that the item was stolen at the time she observed it.

Whitehead viewed a series of photos with police to aid them in identifying which items of property in the photos were stolen. Most of the property in the photos Whitehead stated was not stolen property. Even if the property is stolen property, Whitehead's statement shows her lack of knowledge that the property was stolen property. Of the forty items of property Whitehead is alleged to have received, she identified thirteen items from the photos as either stolen or not belonging to her. Whitehead identified five of the thirteen items as stolen based upon deductive reasoning – the items, two pocketbooks and three wallets, she stated simply did not belong to her. As a result, the items must be stolen property. She stated that she did not know when the flashlights began showing up. Therefore, the evidence fails to show that she knew the flashlights were stolen property at the time they came into the apartment. Whitehead identified the cellular phones as stolen property. However, the phones

were inside of the backpack – hidden from Whitehead's observation when they were discovered by police. As a result, it is unknown whether or not Whitehead observed the phones at the time they were brought into the apartment. And, if she did observe the phones when they were brought into the apartment, it is unclear whether or not she knew the phones were stolen property at the time she observed them. The same can be said of the remaining six items that Whitehead identified in the photos as stolen property – a pair of binoculars, knives, sheaths, a silver item, a police radio, and a backpack. It is unclear whether or not Whitehead identified the property as stolen property because she knew the property was stolen property when Walden brought it into his apartment; or, whether or not Whitehead identified the property as stolen property because upon viewing the photos she was able to determine that certain items depicted in the photos did not belong to Whitehead or Walden. Also, if Whitehead observed the property at the time that Walden brought it to his apartment, there is no evidence to show that Whitehead knew that the property was stolen property at the time she observed it.

In addition, most of the property found inside of Walden's apartment was concealed and hidden from common observation. The property was hidden inside of bags, which were inside of closets. Also, some of the

property was hidden inside of dresser drawers. No evidence was presented that the stolen property was commingled with Whitehead's personal effects, such that Whitehead's knowledge of the presence of the stolen items could be inferred. It is reasonable to believe that Walden hid the items well in an effort to conceal them from Whitehead as well as anyone else. Walden was aware that Whitehead was suspicious that Walden was stealing property. Whitehead confronted Walden on more than one occasion regarding her suspicions. Walden did not leave the stolen property in a place where Whitehead could see it and confirm her suspicions that Walden was stealing property.

The police officers stated that when they entered the apartment, a laptop computer, cellular phones, and a case of compact discs were in plain view. Both Whitehead and Walden denied that any items were in plain view at the time the officers entered Walden's apartment. Another female was inside of the apartment at the time. However, no evidence was presented regarding how long the items were in plain view; from where the items came; or whether or not Whitehead knew the items were stolen. Even if Whitehead being found in a room with stolen items in plain view could be said to infer Whitehead's guilty knowledge that the items were

stolen property, still, there is no evidence that she received the items that the officers stated were in plain view as stated above.

At best, the Commonwealth's evidence proved that at some point in time, Whitehead became suspicious that Walden was stealing the personal property of others. Even so, the evidence failed to prove at what point Whitehead's suspicions were aroused. The evidence fails to show Whitehead knew that Walden was stealing property after the first theft, the second theft, or the fifteenth theft. Moreover, the evidence failed to prove when Whitehead became aware that the property found in Walden's apartment was stolen property. The evidence does not prove that Whitehead saw all of the property at the time that Walden brought it into his apartment. And, the evidence fails to prove that Whitehead knew the property was stolen property at the time Walden brought the property into his apartment. As a result, the evidence fails to prove that Whitehead had guilty knowledge that each item of stolen property found inside of Walden's apartment was stolen property at the time she was convicted of having received it. As Whitehead stated to police, "I really have no idea how much stuff Jamil [Walden] has actually stolen."

Consequently, the Court of Appeals erred in finding that the trial court was not clearly erroneous in finding the evidence sufficient to prove beyond

a reasonable doubt that Whitehead received the property that Walden stole, brought back to his apartment and hid from Whitehead's observation. The conclusion reached by the Court of Appeals is clearly erroneous in view of the evidence of Whitehead's denouncement of Walden's thievery and affirmative assertion that she was not a participant, in any way, in Walden's criminal activities, including the receipt of stolen property.

II. The Court of Appeals erred in ruling the trial court was not clearly erroneous in finding the evidence sufficient to prove Whitehead aided in concealing the stolen property.

Standard of Review

The standard of review for this question presented is the same as that stated in Discussion of Law and Argument I, above.

Analysis

Aid in concealing stolen property

Receipt of stolen property alternatively may be established by proof that the defendant [Whitehead] aided in concealing the stolen property. Starks v. Commonwealth, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983).

Here, the Commonwealth's evidence failed to prove that Whitehead aided in concealing the property that Walden stole. No evidence was presented that Whitehead took possession of the stolen items when Walden returned with them and concealed them from observation or that she assisted Walden in so doing. No evidence was presented that Whitehead handled the items or took possession of them in order to conceal them. No evidence was presented that Whitehead hid the items in the closets and dresser drawers where the items were found. None of the stolen items were concealed inside of Whitehead's bags. No evidence was presented that Whitehead took the stolen items that Walden brought to his apartment and transferred them into other bags in an effort to conceal them. No evidence was presented at all to prove that Whitehead had any contact with the items that Walden stole, or that she aided Walden in concealing the items.

On the contrary, Whitehead confronted Walden about her suspicions that he was stealing property and refused to participate in Walden's criminal activities. Whitehead warned Walden that if the police asked about the stolen property she would tell them that it belonged to Walden; and, in fact, she did assist the police in determining which items in the photos were stolen and which items were not. Whitehead did not attempt to conceal the

stolen nature of the property even after it was discovered. She was cooperative with the police in uncovering the stolen nature of the property. Whitehead's actions are inconsistent with aiding in concealing stolen property.

Moreover, Walden had already concealed the stolen property when he brought it into his apartment. The property was concealed in book bags and other bags, hidden from Whitehead's observation. Thereafter, Walden hid the items inside of closets and dresser drawers, away from common observation. Whitehead could not aid in concealing property that was already concealed.

The only evidence that Whitehead aided in concealing stolen property is that she did not notify the police about the stolen property. Whitehead simply remaining silent, where she had no legal duty to speak, is not the concealment of stolen property as contemplated by the statute.

Knowledge that property is stolen

In order to sustain the convictions, the Commonwealth was required to prove that Whitehead aided in concealing the property in this case with knowledge that it had been stolen. For the reasons stated in Discussion of Law and Argument I above, regarding Whitehead's lack of knowledge that

the items in this case were stolen, the Commonwealth failed to prove that Whitehead concealed property with knowledge that the property was stolen. The contrary finding of the Court of Appeals is without evidence to support it.

III. The Court of Appeals erred in ruling the trial court did not abuse its discretion in finding reasonable cause to violate.

Standard of Review

"A revocation [of probation] . . . must be based on reasonable cause but a court has broad discretion in making such a determination." Patterson v. Commonwealth, 12 Va. App. 1046, 1048, 407 S.E.2d 43, 44 (1991). "To put the matter another way, the sufficiency of the evidence to sustain . . . revocation is a matter within the sound discretion of the trial court, . . . reversible only upon a clear showing of an abuse of such discretion." Slayton v. Commonwealth, 185 Va. 357, 367, 38 S.E.2d 479, 484 (1946); see Holden v. Commonwealth, 27 Va. App. 38, 41, 497 S.E.2d 492, 493 (1998). Although revocation must be based upon reasonable cause, an assessment of the sufficiency of the evidence to sustain an order

is vested in the trial court, and proof beyond a reasonable doubt is not required. Marshall v. Commonwealth, 202 Va. 217, 220-21, 116 S.E.2d 270, 273-74 (1960).

Analysis

A court has broad discretion to revoke a previously suspended sentence and probation when a defendant has not complied with the terms of probation and suspension. Davis v. Commonwealth, 12 Va. App. 81, 86, 402, S.E.2d 684, 687 (1991); Russnak v. Commonwealth, 10 Va. App. 317, 321, 392 S.E.2d 491, 493. The court may do so "for any cause deemed by it sufficient which occurred at any time within the probation period, or if none, within the period of suspension fixed by the court, or if neither, within the maximum period for which the defendant might originally have been sentenced to be imprisoned." Code § 19.2-306.

Here, the trial court's determination in finding that whitehead was in violation of her probation was based upon evidence presented that Whitehead suffered thirty-two *new* convictions of receiving stolen property, fourteenth offense. Whitehead was on probation for conviction of thirteen counts of receiving stolen property.

The probation violation hearing was conducted after Whitehead's trial, conviction and sentencing on the 32 new charges. The convictions, if

sustained, were clearly in violation of the terms and conditions of Whitehead's probation and suspended sentence. At the hearing, Whitehead did not contest the fact that she suffered 32 new convictions as a violation of the terms and conditions of her probation.

The Commonwealth argued to the trial court that Whitehead was essentially thumbing her nose at the court after the court bend over backwards to give her a lenient sentence on the thirteen prior convictions (App. 221, 222-224).

In revoking Whitehead's previously suspended sentence, the trial court stated, ". . . I mean I fell all over myself giving you a break a year and a-half ago or a year ago, and you just started up within two month. I mean I'm not personally offended. It doesn't surprise me that people do that, but you've done this to yourself and I'm sorry" (App. 225).

According to the Commonwealth's argument and the trial court's finding, clearly, the trial court took into consideration Whitehead's 32 *new* convictions in its decision to revoke Whitehead's previously suspended sentence. While Whitehead may have suffered other violations – failure to maintain contact or pay restitution – an overwhelming factor in the trial court's decision was the fact that Whitehead had suffered 32 new

convictions for the same offense for which the trial court had placed Whitehead on probation.

But for the evidence that Whitehead suffered 32 new convictions for the same offense for which she was on probation, it is unknown whether or not the trial court would have found reasonable cause to revoke Whitehead's previously suspended sentence. And, had the trial court found reasonable cause to revoke the suspended sentence, it is unknown whether or not the trial court would have sentence Whitehead to an active term or incarceration.

Because the discretion rests within the trial court to determine whether or not to revoke a previously suspended sentence for any cause shown, the case should be remanded to the trial court to make such a determination should this court reverse one or more of Whitehead's convictions in this case. Should one or more of Whitehead's convictions in this case be reversed, the revocation finding should be remanded to the trial court to determine what, if any, action should be taken in view of the fact that Whitehead did not suffer 32 new convictions that were the same as those for which she was on probation.

Whitehead maintains that the evidence was insufficient to support the 32 convictions. It would, in deed, be an abuse of discretion to allow

Whitehead's probation revocation decision stand were it to be based upon evidence found to be erroneous. The Court of Appeals did not reach this decision as it found the evidence sufficient to support the convictions. Should this Court determine that the evidence is insufficient to support one or more of Whitehead's convictions, the case would require remand to the trial court for reconsideration of its revocation decision.

CONCLUSION

For the foregoing reasons, the appellant, Charlene Marie Whitehead, prays that this Court reverse her convictions and dismiss the indictments against her. Further, the appellant prays that this Court remand this case to the trial court for reconsideration of its revocation decision in light of this Court's ruling on Whitehead's 32 convictions.

RESPECTFULLY SUBMITTED,
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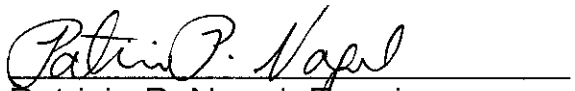
CERTIFICATE

I, Patricia P. Nagel, Esquire, Counsel for Appellant, do hereby certify that on this 17th day of February, 2009, I filed by hand the required number of copies of this Opening Brief and Appendix with the Clerk of the Supreme Court of Virginia, and filed an electronic copy as required, and on the same day mailed or delivered three copies of this Opening Brief and Appendix to Jennifer C. Williamson, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.



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