In The

Supreme Court of Virginia

RECORD NO. 081577

RICKY C. WILLIAMS,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

Anthony J. Nicolo (VSB No. 16723)
FERRELL, SAYER & NICOLO, P.C.
355 Crawford Street, Suite 704
Portsmouth, Virginia 23704
(757) 398-8300 (Telephone)
(757) 397-8233 (Facsimile)
ajnicolo@fsnlaw.com

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

INDEX

Page

TABLE OF CITATIONS ii

I. STATEMENT OF THE NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS IN THE TRIAL COURT 1

II. QUESTION PRESENTED 3

III. STATEMENT OF FACTS 3

IV. ASSIGNMENT OF ERROR 5

V. ARGUMENT 5

1. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DECISION THAT THE DEFENDANT POSSESSED METHADONE WITH THE INTENT TO DISTRIBUTE? 5

VI. CONCLUSION 9

VII. CERTIFICATE 10

TABLE OF CITATIONS

Page(s)

SUPREME COURT OF VIRGINIA CASES:

Cameron v. Commonwealth,
211 Va. 108, 175 S.E.2d 275 (1970) 8

Corbett v. Commonwealth,
210 Va. 304, 171 S.E.2d 251 (1969) 6

COURT OF APPEALS OF VIRGINIA CASES:

Askew v. Commonwealth,
40 Va. App. 104, 578 S.E.2d 58 (2003) 7

Davis v. Commonwealth,
37 Va. App. 421, 559 S.E.2d 374 (2002) 5

Shackleford v. Commonwealth,
32 Va. App. 307, 528 S.E.2d 123 (2000) 6

COURT OF APPEALS OF FLORIDA CASE:

Campbell v. Florida,
563 So. 2d 202, 1990 Fla. App. Lexis 4616 (1990) 9

COURT OF APPEALS OF ILLINOIS CASES:

Illinois v. Gaines,
94 Ill. App. 3d 130, 418 N.E.2d 520 (1981) 8

People v. Kline,
41 Ill. App. 3d 261 (1976) 8

IN THE VIRGINIA SUPREME COURT

AT RICHMOND

RICKY C. WILLIAMS,

Appellant,

v.

RECORD NO: 081577
COURT OF APPEALS NO: 0996-07-1

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF

The Appellant, Ricky C. Williams, respectfully represents that he is aggrieved by the final judgment by the Honorable Mark S. Davis, Judge of the Circuit Court of the City of Portsmouth, Virginia dated January 29, 2007, in a criminal proceeding wherein the Appellant was the Defendant. The Appellant, Ricky C. Williams, will be referred to herein as the "Defendant". The Appellee, the Commonwealth of Virginia, will be referred to herein as "the Commonwealth".

I. STATEMENT OF THE NATURE OF THE CASE AND THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

The Defendant appeared before the Circuit Court of the City of Portsmouth, Virginia, the Honorable Mark S. Davis, presiding on September 20, 2006. The Defendant was charged with possession

with the intent to distribute heroin, cocaine and methadone. The Defendant pled not guilty and waived trial by jury. The Commonwealth presented its evidence and the Defendant moved to strike the evidence as to possession with intent to distribute methadone, which was denied by the court (App. 59).

The Defendant testified on his own behalf. The court again denied the Defendant's motions to strike with regard to the cocaine and methadone counts (App. 65-74). The court found the Defendant guilty as charged on all counts and ordered a pre-sentence report.

On January 29, 2007, the Defendant came before the court for imposition of sentence. After receiving the pre-sentence report, the court sentenced the Defendant on each count to five years, with two years suspended upon successful completion of two years supervised probation upon release, a fine of $250.00 and a suspension of his operator's license for 6 months (App. 81-82).

The Defendant's Notice of Appeal was timely filed. The Defendant's Petition for Appeal was granted in part and denied in part by order dated November 30, 2007. On June 24, 2008, the Court of Appeals affirmed the Defendant's conviction (App. 87-98).

II. QUESTION PRESENTED

1. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DECISION THAT THE DEFENDANT POSSESSED METHADONE WITH THE INTENT TO DISTRIBUTE? (This question was preserved at App. 70-74) (References Assignment of Error 1)

III. STATEMENT OF FACTS

On August 17, 2005, Detective Tim McAndrew, accompanied by Detective Kevin Johankin, was operating an unmarked police car in the City of Portsmouth (App. 14). Both Detectives are narcotics detectives (App. 12). At approximately 6:45 p.m., Detective McAndrew observed a vehicle stopped directly in front of his police vehicle with its left brake light out (App. 14). Detective McAndrew effectuated a traffic stop, observing that two black males occupied the vehicle (App. 14). Detective McAndrew approached the driver's side of the stopped vehicle to speak with the driver (App. 15).

Within seconds of approaching the driver, a man named Clark, Detective McAndrew was alerted by Detective Johnakin that the Defendant, seated in the passenger seat, threw items into the rear seat of the vehicle (App. 14). Detective McAndrew went to the

passenger side of the vehicle, opened the rear door and recovered three plastic bags, one of which contained 38 capsules of heroin, another of which contained 1.2 grams of cocaine powder and a third bag containing 10 pills of methadone (App. 15).

Detective Johnakin, upon exiting Detective McAndrew's police vehicle, approached Clark's vehicle on the passenger side (App. 33). As Johnakin approached the vehicle, he saw the Defendant looking left over his shoulder in Detective McAndrew's direction (App. 33). He then saw the Defendant throw the three plastic bags, with his right hand, over his left shoulder (App. 34). Those three bags were later recovered by Detective McAndrew. The Defendant was then taken into custody.

The Certificate of Analysis introduced by the Commonwealth reflected that only one pill of the ten containing suspected methadone was analyzed and found to contain methadone (App. 44-45).

Detective Mike Holley testified as an expert that the evidence in his case was not consistent with personal use of heroin, cocaine and methadone based almost exclusively on his experience that users of narcotics do not simultaneously possess those three types of drugs (App. 49, 51-53). He opined that the quantity of cocaine is borderline

as to personal use, but the combination of drugs like this was not ever seen by him before (App. 52-54).

IV. ASSIGNMENT OF ERROR

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT RULING THAT THE DEFENDANT POSSESSED METHADONE WITH THE INTENT TO DISTRIBUTE. (This assignment of error was preserved at App. 56-59, 65-74).

V. ARGUMENT

1. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL OURT'S DECISION THAT THE DEFENDANT POSSESSED METHADONE WITH THE INTENT TO DISTRIBUTE?

The trial court's ruling regarding the Defendant's intent to distribute the methadone seized from the vehicle was plainly wrong. This court is not bound by a trial court's findings of historical fact if it is plainly wrong or without evidence to support them. Davis v. Commonwealth, 37 Va. App. 421, 429 559 S.E.2d 374, 378 (2002). Further where a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused the trial court

cannot arbitrarily adopt that interpretation which incriminates him. Corbett v. Commonwealth, 210 Va. 304, 307, 171 S.E.2d 251, 253 (1969).

Detective Holley's testimony was based almost exclusively on his experience that users of narcotics would not simultaneously possess cocaine, heroin and methadone. He conceded that the amount of cocaine was borderline or close to personal use (App. 52). Detective Holley's experience was not evidence in this trial. Further, Detective Holley's opinion did not consider that there were two occupants of the vehicle, each of whom could have possessed different types of narcotics. The hypothesis offered by the Commonwealth did not include the fact that the vehicle was occupied by two people (App. 47).

Expert testimony is but one factor or circumstance which the fact finder may consider in determining whether drugs were possessed with intent to distribute. Shackleford v. Commonwealth, 32 Va. App. 307, 327, 528 S.E.2d 123, 133 (2000). Because the facts and circumstances in each drug-related case vary, no uniform standard exists to differentiate an amount that is always for personal

use or distributing. Askew v. Commonwealth, 40 Va. App. 104, 578 S.E.2d 58 (2003).

In the case at bar, Detective Holley's opinion was based on an incomplete hypothesis, on his experience which was not evidence in the case, and upon a certificate of analysis which conclusively stated that only one tablet was found to contain methadone. Detective Holley was unequivocal that the amount of cocaine was boarderline to personal use, and that programs in Portsmouth distribute one methadone tablet at a time (App. 50-52).

Detective Holley's opinion is but one factor for the court to consider in determining whether the Defendant possessed each of the substances with the intent to distribute. Considering the incomplete hypothesis, the quantity of cocaine, the evidence that only one tablet was analyzed and found to contain methadone and the Defendant's testimony that he was gainfully employed, the trial court was plainly wrong in reaching the conclusion that the Defendant possessed all three substances with the intent to distribute. In order to justify conviction of a crime, it is not sufficient to create a probability of guilt, but the evidence must establish guilt beyond a reasonable doubt. It must exclude every reasonable hypothesis except that of

guilt. The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence. Cameron v. Commonwealth, 211 Va. 108, 110-11, 175 S.E.2d 275, 276 (1970).

Further, only one of the ten pills of alleged methadone were analyzed. One pill of methadone is certainly possessed for personal use under these facts and circumstances. The court had to go beyond the evidence in concluding the other nine pills contained methadone.

A chemist need not analyze every particle of a substance admitted into evidence to give an opinion as to the whole. People v. Kline, 41 Ill. App. 3d 261 (1976). However, the chemist did not express an opinion as to all ten tablets. Neither did Detective Holley, the expert witness called by the Commonwealth. What inference can be drawn as to the composition of the tablets not analyzed? The answer is none in the absence of expert opinion testimony. Mere speculation is not enough. The verdict must be based on evidence and not upon guess, speculation or conjecture. Illinois v. Gaines, 94 Ill. App. 3d 130, 418 N.E.2d 520 (1981). The charge of possession with the intent to distribute methadone should have been reduced

when only one of ten tablets was analyzed. Campbell v. Florida, 563 So. 2d 202, 1990 Fla. App. Lexis 4616 (1990).

VI. CONCLUSION

Considering that there were two occupants of the vehicle, the amount of narcotics seized, the fact that only one tablet of suspected methadone was analyzed, the incomplete and inaccurate hypothesis asked of the expert and the expert's opinion which was based on his experiences, and the certificate of analysis, it is clear that the Court of Appeals was plainly wrong in affirming the trial court's decision to deny the Defendant's motion with regard to possession with the intent to distribute methadone.

Based on the above argument, the Defendant prays that his conviction for possession with the intent to distribute methadone be reversed.

RICKY C. WILLIAMS

By: _____
Of counsel

Anthony J. Nicolo, Esquire
FERRELL, SAYER & NICOLO, P.C.
355 Crawford Street, Suite 704
Portsmouth, Virginia 23704
VSB#16723
(757) 398-8300 (Telephone)
(757) 397-8233 (Facsimile)
ajnicolo@fsnlaw.com

VII. CERTIFICATE

The name of the Appellant is Ricky C. Williams, #369068, Green Rock Correctional Center, 475 Green Rock Lane, Chatham, Virginia 24531, who is represented by Anthony J. Nicolo, 355 Crawford Street, Suite 704, Portsmouth, Virginia 23704, (757) 398-8300; the Appellee is Josephine F. Whalen, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071.

Counsel for the Appellant desires to state orally the reasons his relief should be granted.

Counsel for the Appellant was appointed.

Counsel does not request supersedeas.

Counsel for the Appellant certifies that pursuant to Rule 5:26(d), twelve copies and one electronic copy of the foregoing Brief of Appellant and Appendix were hand filed with the Clerk of the Supreme Court of Virginia, and three true copies of the foregoing brief and appendix were mailed via U.S. Mail, postage pre-paid, to counsel for Appellee on this 21st day of January, 2009.

_____
Anthony J. Nicolo