In The

Supreme Court of Virginia

RECORD NO. 081715

ERNEST BAKER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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COMMONWEALTH OF VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

ERNEST BAKER, APPELLANT,

Vs.

COMMONWEALTH OF VIRGINIA APPELLEE.

VIRGINIA SUPREME COURT Record Number 081715

COURT OF APPEALS Record No.: 0220-07-2

O P E N I N G B R I E F O F A P P E L L A N T

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

STATEMENT OF THE CASE

On November 9, 2006, Ernest Baker appeared in the Petersburg Circuit Court, for a bench trial on charges of possession of cocaine in violation of Virginia Code Section 18.2-250, and trespassing in violation of Virginia Code Section 18.2-119. The defendant was convicted of the charges. On January 4, 2007 the Court granted a renewed Motion to Suppress and dismissed the possession of cocaine indictment. The defendant was sentenced to serve twelve months upon his trespassing conviction.

A timely appeal was made to the Virginia Court of Appeals. After denial of the Petition for Appeal by one judge, a writ panel granted Baker's appeal and the case was argued. On August 5, 2008 a panel of the Virginia Court of Appeals issued an unpublished opinion upholding Baker's conviction in Baker v. Commonwealth, Record No. 0220-07-2, slip op. at n.3 (August 5, 2008) (Unpublished).

Mr. Baker filed a notice of appeal in the office of the Clerk of the Court of Appeals simultaneously with the filing of a petition in the Clerk's Office of this Court. This Court awarded Mr. Baker an appeal by Order entered March 12, 2009.

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred by upholding Baker's conviction for trespassing on posted property where the Commonwealth failed to prove that the property was posted by the true owner, which is an element of the offense.

2. The Court of Appeals erred by upholding Baker's conviction where the trial court violated Baker's Due Process rights by allowing an inference either that the true owner had posted the property, or that the property was posted, to shift an evidentiary burden to the defendant, and the Court of Appeals erred by ruling that the defendant failed to preserve his due process argument for appeal, and that Rule 5A:18 barred consideration of the question on appeal.

3. The Court of Appeals erred by upholding Baker's conviction where the evidence was insufficient to prove that he was legally excluded from the property notwithstanding the signs which were posted on the property.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by upholding Baker's conviction for trespassing on posted property where the Commonwealth failed to prove that the property was posted by the true owner, which is an element of the offense. (Assignment of Error 1).

2. Whether the Court of Appeals erred by upholding Baker's conviction where the trial court violated Baker's Due Process rights by allowing an inference either that the true owner had posted the property, or that the property was posted, to shift an evidentiary burden to the defendant, and the Court of Appeals erred by ruling that the defendant failed to preserve his due process argument for appeal, and that Rule 5A:18 barred consideration of the question on appeal. (Assignments of Error 1, 2).

3. Whether the Court of Appeals erred by upholding Baker's conviction where the evidence was insufficient to prove that he was legally excluded from the property notwithstanding the signs which were posted on the property. (Assignments of Error 1, 2, 3).

STATEMENT OF FACTS

On December 9, 2005 Petersburg Police Officer Vazquez was on duty with his field training officer Corporal Buffkin when they received a dispatch to the 700 Block of Mt. Airy Street regarding a report of shots fired. App[1] 30-31. They observed Ernest Baker walking northbound on Mt. Airy Street. App 31. As they exited the car to make contact, Baker began running eastbound and through a yard in the area. App 31. Baker was about one hundred feet from the police when he began to run. App 32. As Baker ran, Corporal Buffkin said stop. App 33.

Baker was followed to 717 Mt. Airy Street where he ran through a hole in a wooden fence and was caught on the other side of the fence by Corporal Buffkin. App 33. Officer Vasquez testified that there was a "No Trespassing" sign on 717 Mt. Airy Street. After refreshing his memory by looking at his notes, Vasquez stated he could not remember exactly where the no trespassing sign was, but he could remember that it was posted on the side of the residence where Baker had been running. App 34. Corporal Buffkin testified that the sign was posted on the front of the house. App 56.

Baker was handcuffed and taken into custody. App 35. A search of Baker revealed a baggie of suspected contraband. App 36-37. (This

[1] References to the Joint Appendix will be designated App ___.

contraband was the subject of an indictment which was dismissed at the time of sentencing on the currently pending trespass case). In response to questions from the police, Baker stated, among other things, that the residence at 717 Mt. Airy Street belonged to his cousin. App 41. Officer Vasquez said the initial reason for Baker's arrest was obstruction of justice. App 39. Corporal Buffkin, on the other hand, said Baker was arrested for possession of cocaine and trespassing. App 62. The Commonwealth did not present any testimony of an owner or agent of 717 Mt. Airy Street to testify that they had posted the property, or that Ernest Baker was not allowed to be on that property. In finding the evidence sufficient to convict Baker of trespassing, the trial court acknowledged that there was no evidence that he had been forbidden to be on the property in the past. App 76. Instead, the Court appeared to accept the argument advanced by the Commonwealth that Mr. Baker's presence on posted property was sufficient to convict him, stating: “I think the state has reached its burden, Mr. Hall, and shows that the property was in fact property posted. The person entered that property. I think the burden shifts”. App 8.

ARGUMENT

1. The Court of Appeals erred by upholding Baker's conviction for trespassing on posted property where the Commonwealth failed to prove that the property was posted by the true owner, which is an element of the offense.

On appeal, the evidence is viewed in the light most favorable to the Commonwealth. Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987), and the Commonwealth is granted all reasonable inferences flowing from the evidence. Archer v. Commonwealth, 26 Va. App. 1, 492 S.E.2d 826 (1997). A conviction will not be disturbed unless it is plainly wrong or without evidence to support it. Armstrong v. Commonwealth, 29 Va. App. 102, 510 S.E.2d 247 (1999). In order to prove a defendant guilty beyond a reasonable doubt, wholly circumstantial evidence must be consistent with guilt, inconsistent with innocence and exclude every reasonable hypothesis of innocence. Granger v. Commonwealth, 20 Va. App. 576, 459 S.E.2d 106 (1995).

The appellant concedes the evidence established he was on the property at 717 Mt. Airy Street, however, he argues the evidence was insufficient to prove he had been banned from the property in the manner prescribed by law.

Virginia Code § 18.2-119 proscribes and punishes criminal trespass and states in part:

> **If any person without authority of law goes on or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons or by the holder of any easement of other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or portion of area thereof at a place or places where it or they may be reasonably seen...**

Va. Code § 18.2-119 (1950). Following § 18.2-119 is § 18.2-119.1 which states:

> **If any person knowingly and intentionally posts No Trespassing signs on the land of another without the permission of a person authorized to post such signs on that land, he shall be guilty of a Class 3 misdemeanor.**

Va. Code § 18.2-119.1 (1950).

The construction of a statute is a question of law which an appellate court reviews de novo on appeal. Farrakhan v. Commonwealth, 273 Va. 177, 180, 639 S.E.2d 227, 229 (2007); Dowling v. Rowan, 270 Va. 510, 519, 621 S.E.2d 397, 401 (2005). It is well established that statutes are to be interpreted so as to give meaning to every word and to avoid rendering any word mere surplusage. See Bailey v. United States, 516 U.S. 137, 145, (1995) quoting Ratzlaf v. United States, 510 U.S. 135, 140-141 (1994); Hoover v. Hoover, 131 Va. 522, ___, 105 S.E.2d 91, 92 (1920). When construing penal statutes, a court must not add to the words or the statute,

nor ignore its actual words, and must strictly construe the statute and limit its application to cases falling clearly within its scope. Farrakhan, 273 Va. at 181, 639 S.E.2d at 230; Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

It is well settled that a prosecution for criminal trespass cannot be premised upon strict liability and requires proof of willful intent to trespass. Reed v. Commonwealth, 6 Va. App. 65, 366 S.E.2d 274 (1988). Addressing persons banned from property by a posted sign, § 18.2-119 explicitly includes the words "...after having been forbidden to do so by a sign or signs posted by such persons...", referring back to the words owner, lessee, custodian or other person lawfully in charge thereof. Any reasonable interpretation of this statute requires the Commonwealth to present evidence the property was posted by one of the enumerated parties in order to present a prima facie case, not to mention proof beyond a reasonable doubt. If the General Assembly had not intended that evidence to be an element of such a prosecution, such language would not have been included in the statute; rather, it would be rendered mere surplusage. "While, as a general rule, every word in a statute is to be given force and effect, yet, whenever a statute contains words to which no meaning at all can be attached, or at least no meaning in harmony with the legislative intent as collected from the entire

act, such words will be treated as surplusage, and will be wholly disregarded in the construction of the act." Looney v. Commonwealth, 145 Va. 825, 832 (1926).

Here, all the words in Virginia Code § 18.2-119 must be given force and effect as the legislative intent is clear. "[W]e must also assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." Barr v. Town & Country Properties, Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990). Virginia Code § 18.2-119.1, which punishes the unauthorized posting of no trespassing signs, supports Baker's argument the General Assembly intended the crime of trespass on posted property to be premised upon proof a person with legal authority posted the sign.

The record is devoid of any testimony or other evidence that 717 Mt. Airy Street was posted by one of the persons or entities specifically enumerated in the statute. The only testimony, other than that Baker was on posted property, was Baker's unchallenged statement that his cousin owned the property. App 41. The trial court acknowledged there was no evidence Baker had been forbidden to be on the property in the past. App 76. The lack of sufficient evidence to convict in this case is further illustrated by arguments 2 and 3 below.

2. The Court of Appeals erred by upholding Baker's conviction where the trial court violated Baker's Due Process rights by allowing an inference either that the true owner had posted the property, or that the property was posted, to shift an evidentiary burden to the defendant, and the Court of Appeals erred by ruling that the defendant failed to preserve his due process argument for appeal, and that Rule 5A:18 barred consideration of the question on appeal.

The Commonwealth bears the burden of proving every element of an offense beyond a reasonable doubt, and no presumption or inference may be used to shift the ultimate burden of proof to the accused. See Barnes v. United States, 412 U.S. 837 (1973); Hodge v. Commonwealth, 217 Va. 338, 228 S.E.2d 692 (1976) (citing Barnes). The prosecution's absolute burden was given constitutional status in In re Winship, 397 U.S. 358, 364 (1970), where the United States Supreme Court stated the Due Process Clause protects the accused against convictions unless every element of the crime has been proven beyond a reasonable doubt.

A law stating that possession of marijuana created a legal presumption the possessor knew the marijuana was imported to the United States was held to violate due process because the marijuana could have been grown domestically. See Leary v. United States, 395 U.S. 6 (1969). "Where an inference supporting guilt is no more likely to arise from a proven fact than one favoring innocence, the inference of guilty is impermissible." Morton v. Commonwealth, 13 Va. App. 6, 11, 408 S.E.2d 583, 586 (1991). If the

inference is permissive, and there is other evidence of guilt, the rational relationship is sufficient if "the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." Leary, 395 U.S. at 36 (emphasis added). However, even if the inference is permissive, if the only evidence of guilt is that which gives rise to the inference, a rational relationship must exist, *beyond a reasonable doubt*, between the inference and the proved fact. County Court of Ulster v. Allen, 442 U.S. 140, 166-67 (1979). Thus, it violates Due Process unless the presumed or inferred fact relates to the proved fact beyond a reasonable doubt. The required rational relationship does not exist in the case at bar to connect the proven fact that 717 Mt. Airy Street had a "No Trespassing" sign posted on the house with the presumed or inferred fact that Baker was trespassing by being on the property in the absence of any evidence that a person authorized to post the property intended the proscription to apply to Mr. Baker.

Virginia Code § 18.2-119 creates no prima facie case by the mere presence of the accused on posted property which must be rebutted by his showing permission to be on the property. "[I]t is a cardinal principle of law that penal statutes are to be construed strictly against the [Commonwealth]….Such a statute cannot be extended by implication, or be

made to include cases which are not within the letter and spirit of the statute." Wade v. Commonwealth, 202 Va. 117, 122, 116 S.E.2d 99, 103 (1960); Shreve v. Commonwealth, 44 Va. App. 541, 547, 605 S.E.2d 780, 783 (2004).

In overruling a motion to strike and ultimately convicting Baker, the trial court said "I think the state has reached its burden, Mr. Hall, and shows that the property was in fact property posted. The person entered that property. I think the burden shifts". App 81. The trial court made this global statement without distinguishing between the burden to challenge who posted the sign and the burden to explain one's presence on posted property. In so stating, the trial court ignored the actual plain words in the statute which establish that posting by an authorized person is a specific element of the crime. "We must also assume that the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." Barr, 240 Va. at 295, 396 S.E.2d at 674. "Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear." Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944).

Either way, the court allowed the fact of a posted sign, with no proof of who posted it, and no testimony that the defendant was excluded, to create an inference or presumption which required the defendant to offer an explanation or evidence in order to exonerate himself. This decision wrongly shifted the ultimate burden of proof to the defendant. Implying a presumption of exclusion by a mere showing that a sign was posted would violate due process because anyone, including friends, guests or customers could be on a property legally despite the fact that "No Trespassing" signs are on the property.

The Court of Appeals excluded Baker's Due Process argument under Rule 5A:18. Baker v. Commonwealth, Record No. 0220-07-2, slip op. at n.3 (August 5, 2008) (Unpublished). In doing so, the Court of Appeals effectively ruled that if the trial judge sitting without a jury shifted an evidentiary burden to the defendant were the defendant is not required to plead an affirmative defense, this action, which clearly runs afoul of the constitutional authority of In re Winship, becomes the law of the case notwithstanding the fact that the defendant argued on the record that the Commonwealth had failed to prove every element beyond a reasonable doubt. The defendant asserts that if the trial court did shift the burden, the defendant's specific argument at trial that the evidence was not sufficient to convict clearly preserved his right to argue

the due process implications which attend all sufficiency reviews on appeal. Beyond the authority of In re Winship, he notes the case of Young v. Commonwealth in which a sufficiency of the evidence appeal took up the constitutionality of a presumption that one who possesses narcotics knows the nature and character of the substance, even though Due Process was not argued at trial. Young v. Commonwealth, 275 Va. 587, 659 S.E.2d 308 (2008) (where the Virginia Supreme Court addressed the application of a presumption by the Court of Appeals in support of the trial court's decision to convict the defendant of possession of prescription drugs without a valid prescription).

Baker contends that the structural nature of the requirement of proof beyond a reasonable doubt, and the impropriety of shifting evidence burdens to the defendant on the question of the Commonwealth's case in chief calls for the application of the ends of justice exception to Rule 5A:18. This is particularly so where the defendant at all stages contested the proof of guilt, argued sufficiency of the evidence, and gave the trial court the opportunity to rule in his favor. For this reason, Baker further asserts that he stated his object with reasonable certainty at trial and has shown good cause for this Court to consider his Due Process argument for good cause shown and to

attain the ends of justice pursuant to Rule 5:25 of the Rules of the Supreme Court of Virginia.

3. The Court of Appeals erred by upholding Baker's conviction where the evidence was insufficient to prove that he was legally excluded from the property notwithstanding the signs which were posted on the property.

Even if the fact that signs were on the property relieved the Commonwealth of the burden to show that they were posted by the true owner, the only evidence other than Baker's presence on the property was his own unchallenged statement that the property belonged to his cousin. App 41. In upholding the conviction the Court of Appeals, while noting that the trial court could infer that the true owner had posed the property, said:

> **It is undisputed that Baker went upon property owned by another person, and it is undisputed that the property was posted with a "No Trespassing" sign.**

Baker v. Commonwealth, Record No. 0220-07-2.

Common observation reveals that "No Trespassing" signs are posted on businesses such as convenience stores and residential property such as apartment complexes or single family homes. These signs often make no distinction between invited customers (an invitee), residents, or other persons such as a licensee. The swimming pool of a condominium might say "No Trespassing, violators will be prosecuted" without designating hours of operation or any objective method for a third party, such as a police officer, to

determine if someone in the pool area is a trespasser. These signs say, in effect, “you are not allowed to be here unless you are.”

It would be absurd, not to mention a violation of due process, to say that a police officer could take it upon himself or herself to arrest a person for trespassing on such posted property. The absurdity and due process violation would be compounded to allow a trespass conviction merely because the Commonwealth proved the property was posted, that the defendant was on the property, and that the defendant did not come forward with enough evidence of his authority to be there.

Yet, this is precisely how the case against Baker was pursued. He was arrested for trespass, he told the police the house belonged to his cousin, but the police, the Commonwealth, and the trial court refused to believe him despite no evidence to the contrary. Thus, because the Commonwealth proved the property was posted “No Trespassing,” and Baker was on the property, he was convicted and sentenced to twelve months on a class one misdemeanor.

As discussed *supra*, the statute makes obvious the need for a witness with authority to exclude to establish that the defendant was a trespasser. Granted, in some cases the circumstances could rise above a suspicion or a probability of guilt such as where an admission, corroborated by presence on

posted property, established the crime. This reality dovetails well with the logic of requiring the Commonwealth to establish that the sign was posted by the true owner or a person with authority to exclude. To say otherwise would be to declare that posted property prosecutions, across the board, shift a burden of production of evidence to any accused so prosecuted whenever the accused failed to convince investigating officers not to charge him.

The weakness of such a proposition is already illustrated by prior Virginia cases on sufficiency of probable cause to arrest for trespass, where it has been recognized that the mere existence of a "No Trespassing" sign will not provide probable cause to arrest where the officer does not know if the arrestee otherwise has authority to be on the property. See Johnson v. Commonwealth, 18 Va. App. 229, 443 S.E.2d 189 (1994). (Police lacked probable cause to arrest a fleeing man for trespass at an apartment complex which was posted, but allowed guests and visitors notwithstanding the posting).

In Baker's case, the property was a residence, not a business or office building. Thus, as the appellant argued at trial, no inferences could be drawn from the fact that the property was closed for business, or that Baker was present on the property in a manner which no reasonable person could conclude a person in his position at the time could have had permission to be

on the property for. App 80. According to the police testimony, Baker seemed to know exactly where he was going on the property at 717 Mt. Airy Street. Baker's presence on the property, gained by entering a hole in the fence, may have provided probable cause to arrest him or reasonable suspicion to detain and investigate him. But, in light of the clear statutory language of Virginia Code § 18.2-119, his presence was not sufficient to prove him guilty beyond a reasonable doubt.

Even an inference that an authorized person posted the property does not prove Baker was a person meant to be excluded by the sign. Under these facts, allowing an inference or presumption to require the defendant to offer an explanation to avoid conviction would violate Due Process by shifting the burden to Baker to show his innocence when the inferred fact was not rationally related beyond a reasonable doubt to the proven fact. "The law never imposes upon a defendant in a criminal case the burden or duty of producing any evidence." Walker v. Commonwealth, 212 Va. 289, 291,183 S.E.2d 739, 740 (1971). "The general instructions given in virtually every criminal jury trial … reflect general principles of criminal law and procedure including that the defendant is not required to produce any evidence" and that "the [trier of fact] must weigh the credibility of witnesses but may not arbitrarily disregard believable testimony." Elliot v. Commonwealth, 267

Va. 464, 470, 593 S.E.2d 263, 267 (2004). The decision of the trial court and the Court of Appeals stand *contra* to these principles and are in error. Baker asks that this Court reverse the decision of the Court of Appeals and dismiss his criminal conviction.

CONCLUSION

The evidence was not sufficient to convict Baker of trespass because the Commonwealth did not prove that the property was posted as required by the elements of Virginia Code § 18.2-119, and because the evidence failed to prove that Baker was legally excluded just because the property was posted. Therefore, the petitioner's conviction should be reversed and dismissed.

Respectfully submitted,
ERNEST BAKER

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Court Appointed Counsel for Appellant

CERTIFICATE OF SERVICE

I, Daniel W. Hall, Esquire, Counsel for Appellant, do hereby certify that on April 21, 2009, I caused fifteen bound copies and one electronic copy of Appellant's Opening Brief and Appendix to be hand-filed with the Clerk, Supreme Court of Virginia, and on the same day served three copies of said brief and appendix, via U.S. Mail, postage prepaid, to Counsel for the Appellee, Susan M. Harris, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 pursuant to Rule 5:26(d).

Counsel for Appellant is appointed and requests oral argument pursuant to Rule 5:35.

Daniel W. Hall