In The

Supreme Court of Virginia

RECORD NO. 081920

JAMES LESTER WALLER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE DOCUMENTS NOT SHOWN TO BE VALID CONVICTION ORDERS AND WHICH WERE NOT PROPERLY AUTHENTICATED.

II. THE TRIAL COURT ERRED IN FINDING THAT THE DOCUMENTS WERE SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT WALLER WAS CONVICTED OF A VIOLENT FELONY.

STATEMENT OF CASE

James Lester Waller was indicted for possessing a firearm after having been previously convicted of a violent felony in violation of Virginia Code § 18.2-308.2. He was tried and convicted by the Court without a jury on March 22, 2007, and was sentenced on April 26, 2007. His petition for appeal was granted by the Court of Appeals on January 24, 2008, and the conviction was affirmed on September 2, 2008. On March 12, 2009, the Supreme Court of Virginia granted James Lester Waller an appeal on two assignments of error.

QUESTIONS PRESENTED

I. **WAS THE UNSIGNED DOCUMENT PURPORTING TO BE A CONVICTION ORDER PROPERLY AUTHENTICATED AND CERTIFIED AS REQUIRED BY VA. CODE § 17.1-123 AND VA. CODE § 8.01-389 TO BE ADMITTED INTO EVIDENCE? (objection preserved in App. at pp. 18, 20, 21-22, 25-28, 31). ASSIGNMENT OF ERROR 1.**

I. **WAS THE EVIDENCE SUFFICIENT TO PROVE THAT WALLER WAS PREVIOUSLY CONVICTED OF A VIOLENT FELONY? (objection preserved in App. at pp. 18, 20, 21-22, 25-28, 31). ASSIGNMENT OF ERROR 2.**

STATEMENT OF FACTS

James Lester Waller was a 69 year old man, who resided alone out in the country next door to his 25 year old nephew. On August 5, 2006, in his own front yard, James Lester Waller accused his nephew, who stayed "high all the time," of stealing from him and of selling drugs. The nephew then threatened, "I will put you out there beside your brother" (his brother was deceased and in the graveyard). James Lester Waller knew the nephew to have recently purchased a gun. The nephew stated, "I'm going

to get my gun and I'll be back." "I'm coming back to kill you." (App. at pp. 35-37). Waller does not drive a vehicle due to his glaucoma.

James Lester Waller went into the woods and retrieved four guns. He testified he did not know whether his nephew "was going to step back through the woods or what." (App. at p. 38). "He was going to kill me." (App. at p. 46).

Deputy Jones arrived approximately 35 - 45 minutes later and observed Waller crouched behind his van in his front yard in possession of four weapons. (App. at p. 7). Over objection, the Commonwealth entered into evidence documents attempting to prove a prior violent felony conviction against the defendant, however, the documents were not signed by a Judge, there was no evidence that a Judge had signed the Order book and the documents were neither authenticated nor certified.

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT ADMITTED INTO EVIDENCE AND RELIED ON DOCUMENTS THAT WERE NOT SHOWN TO BE VALID CONVICTION ORDERS AND WHICH WERE NOT PROPERLY AUTHENTICATED. ASSIGNMENT OF ERROR 1.

> The Commonwealth has the burden of proving all elements of the crime, including prior convictions, beyond a reasonable doubt. Palmer v. Commonwealth, 269 Va. 203, 207, 609 S.E.2d 308, 310(2005).

Mwangi v. Commonwealth, Record No. 081065 (Va. 2/27/2009)(Va. 2009).

In reversing a conviction, this Court recently stated:

> When the fact of a prior conviction is an element of a charged offense, the burden is on the Commonwealth to prove that prior conviction beyond a reasonable doubt. See Moore v. Commonwealth, 254 Va. 184, 186, 491 S.E.2d 739, 740(1997); Dowdy v. Commonwealth, 220 Va. 114, 116, 255 S.E.2d 506, 508(1979); McBride v. Commonwealth, 24 Va. App. 30, 33, 480 S.E.2d 126, 127(1997); Essex v. Commonwealth, 18 Va. App. 168, 171-72, 442 S.E.2d 707, 709-10(1994).

McMillan v. Commonwealth, Record No. 080622 (Va. 1/16/2009)(Va. 2009).

The Code of Virginia § 17.1-123 provides:

> All orders that make up each day's proceedings of every circuit court shall be recorded by the clerk in a book known as the order book. Orders that make up each day's proceedings that have been recorded in the order book shall be deemed authenticated when (i) the judge's signature is shown in the order, (ii) the judge's signature is shown in the order book, or (iii) an order is recorded in the order book on the last day of each term showing the signature of each judge presiding during the term.

Without proof of a signature of the Judge in one of the three methods allowed, a document is not an authenticated order. This statute defines authentication. The documents introduced into evidence were neither authenticated nor certified and were inadmissible. The Judge's signature was not proven in any of the three ways permitted.

In Mwangi v. Commonwealth, Record No. 081065 (Va. 2/27/2009)(Va. 2009) this Court held that an unsigned district court warrant was not a valid conviction for predicate purposes in a third offense DUI prosecution. This Court has also previously held that the signature of the judge authenticates an Order. Rollins v. Bazile, 205 Va. 613, 139 S.E.2d 114 (1964).

Although the Court of Appeals dealt with a related issue in Seaton v. Commonwealth, 42 Va. App. 739, 595 S.E.2d 9 (2004), that case is clearly distinguished from the facts in Seaton. Seaton dealt with Va. Code § 19.2-295.1 concerning the use of an order at sentencing, not as substantive evidence admitted to prove an element of the offense. No statute allows for the admissibility of these hearsay documents on an element of the offense in a criminal case without proof of their validity. To the extent that Seaton is in conflict with Code § 17.1-123 as applied in this case, it should be overruled.

It is submitted that the Code of Virginia § 8.01-389 relied upon the Court of Appeals in Seaton is inapplicable in a criminal case, as it applies only in civil cases. It appears in the code under "Civil Remedies and Procedures." The Code of Virginia § 8.01-1 provides that this title "shall apply to causes of action." "Action" is defined as being interchangeable with "suit" and includes all "civil proceedings." Code of Virginia § 8.01-2.

However, assuming without conceding that Code of Virginia § 8.01-389 is applicable in a criminal case as the Court of Appeals has previously held, that statute requires that to be received into evidence, the clerk of the court must authenticate and certify the records. There was no evidence of authentication nor certification in this case. The only argument for certification is what appears to be a stamp that says "A copy teste: Vickie Helmstutler Clerk, by _____ D.C." with a

signature, D. K. Patterson" on the line. This is not authentication nor certification. The Code of Virginia § 8.01-389 must be reconciled with and read with the definition of "authenticated" as set out in the Code of Virginia § 17.1-123.

No witness testified to the authenticity or certification of the documents. No presumption exists that documents are authentic Court records, nor are they self-proving. The stamp which stated "a copy teste" was not dated. There was no identification from the stamp of what Court, if any, the record came from or that it came from a Court or if a Court a Circuit Court. The person who signed the stamp is not identified. No Judge signed the documents. The clerk did not sign the documents. The documents do not even claim on their face to be certified or authenticated. There is no statement on the document that anyone from the Circuit Court, much

less the Circuit Court clerk, reviewed, attested, certified or authenticated the documents.

This Court has previously recognized that a "copy teste" is not a certification or authentication as required for presenting an appeal. (However, the Court did allow the appeal). See Brame v. Guarantee Finance Co. Inc., 139 Va. 394, 398, 124 S.E. 477 (1924).

The Court of Appeals reversed a case on similar facts in Carroll v. Commonwealth, 10 Va. App. 686, 396 S.E.2d 137(1990), and held that there is no presumption that legal documents are properly handled and that the defendant had no burden to prove the evidence is inadmissible.

Recently, this Court held in McMillan that juvenile court documents failing to show a conviction for a felony were not deemed to be an Order and as such were inadmissible.

The unsigned document was invalid on its face, it was not signed by a Judge. No evidence shows that any other method of authentication occurred. The argument that it is presumed valid, builds a presumption upon a faulty premise. Courts speak through orders. Cunningham v. Smith, 205 Va. 205, 135 S.E.2d 770(1964). Orders are only authenticated if signed. No testimony validated the document. To presume that the existence of a document is proof that it is a valid conviction presupposes that the defendant was convicted of that offense in that Court. A document invalid on its face cannot be presumed to be a valid Court order merely because it bears a stamp alleging that it is a "copy teste."

The evidence failed to authenticate the document as required by statute to show that this was a true and valid record signed by a Judge. The documents were not admissible and it was reversible error to admit them.

II. THE EVIDENCE WAS NOT SUFFICIENT TO PROVE THAT WALLER WAS PREVIOUSLY CONVICTED OF A VIOLENT FELONY. ASSIGNMENT OF ERROR 2.

Even though the appellant admitted at trial that he had previously been convicted of a felony, this admission had to be corroborated. Without the admission of the questioned documents, no corroboration existed and the evidence was insufficient to prove a prior felony conviction against the defendant. Pepoon v. Commonwealth, 192 Va. 804, 66 S.E.2d 854 (1951).

Even if this Court finds that Waller's admission alone was sufficient to prove a felony conviction, it does not prove beyond a reasonable doubt that Waller was convicted of a violent felony. He did not admit to being convicted of a violent felony.

> [1] It can be safely said that in Virginia there is no principle more firmly imbedded in the body of the law, or one that has been more often stated, than the principle that in every criminal case the evidence of the Commonwealth must show, beyond a reasonable doubt, every material fact

> necessary to establish the offense for which a defendant is being tried. This burden of proof never shifts. As we said in Hodge v. Commonwealth, 217 Va. 338, 341, 228 S.E.2d 692, 695 (1976), "any rule of state law which has the ultimate effect of shifting the burden of persuasion to the accused upon this critical issue is constitutionally infirm".

McGhee v. Commonwealth, 219 Va. 560, 561-562, 248 S.E.2d 808, (1978).

Without reliance on the documents wrongly admitted, the evidence failed to prove beyond a reasonable doubt that the defendant was convicted of a violent felony.

CONCLUSION

For failure to prove a prior felony conviction beyond a reasonable doubt, the conviction should be reversed and dismissed. For the introduction of inadmissible evidence, the conviction should be reversed and the defendant granted a new trial. For the failure to prove beyond a reasonable doubt that the appellant was convicted of a violent felony, the conviction should be

reversed and the appellant granted a new trial on the lesser charge.

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(d) of the Rules of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant and Appendix, along with one electronic copy of each on a CD, have been filed with the Clerk of the Supreme Court of Virginia. In addition, three (3) copies of each have been mailed, postage prepaid, to Donald E. Jeffrey, III, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 17th day of April, 2009.

GLENN L. BERGER