IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081920

JAMES LESTER WALLER

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

WILLIAM C. MIMS
Attorney General of Virginia

DONALD E. JEFFREY, III
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
(804) 371-0151

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STATEMENT OF THE CASE

James Lester Waller ("Waller" or "the defendant") was convicted in a bench trial in the Circuit Court of Pittsylvania County of one count of possessing a firearm after having been convicted of a violent felony. The court sentenced Waller to serve five years in prison on April 26, 2007.[1]

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[1] The sentencing order is not contained in the joint appendix.

Waller's petition for appeal to the Court of Appeals was refused on November 27, 2007. However, the Court granted his petition for rehearing by order dated January 4, 2008. The Court of Appeals affirmed his conviction in a published opinion dated September 2, 2008. Waller v. Commonwealth, 52 Va. App. 571, 665 S.E.2d 848 (2008).

By order dated March 12, 2009, this Court granted Waller's petition for appeal in part.

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.

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? (Assignment of Error I).

II. WAS THE EVIDENCE SUFFICIENT TO PROVE THAT WALLER WAS PREVIOUSLY CONVICTED OF A VIOLENT FELONY? (Assignment of Error II).

STATEMENT OF FACTS

On August 5, 2006, Deputy Marcus Jones was dispatched to the defendant's home in Pittsylvania County in response to an alleged "threat." He subsequently found the defendant, who had previously been convicted of numerous violent felonies, in possession of several firearms. The defendant admitted to Jones that he was "a felon." (App. 6-18, 58-65).

At trial, over defense objection, the court admitted copies "teste" of several orders from the Circuit Court of Henry County, showing the defendant had been convicted of multiple counts of armed robbery in 1975. Although these orders bore a clerk's signature (which appears to be a stamped "signature") and a signature line stating that a "D.C."[2] had also attested to them, none of the orders bore a judge's signature. (App. 18-33, 58-64).

One of the orders contained a judge's name typewritten in the upper right hand corner. That order imposed a five-year sentence with three years suspended. (App. 63-64). The other five orders showed five-year suspended sentences being imposed. (App. 58-62).

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[2] It can be reasonably inferred in this context that the notation "D.C." means "Deputy Clerk." The signature beside it shows that "T. K. Patterson" signed the documents. (App. 58-64).

During cross-examination, Waller conceded that he had been "convicted of felonies" and incarcerated, but said he did not remember if he had been convicted of robbery. (App. 39-40).

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S PRIOR CONVICTION ORDERS.[3]

The defendant argues that the trial court erred in admitting the orders showing he had been convicted of armed robbery in 1975.[4] This Court reviews claims regarding the admissibility of evidence under an "abuse-of-discretion" standard. See Ortiz v. Commonwealth, 276 Va. 705, 712, 667 S.E.2d 751, 756 (2008).

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[3] The Court of Appeals found the defendant had procedurally defaulted (under Rule 5A:18, the contemporaneous objection rule) the following arguments with respect to the orders because he had not made them in the trial court: 1) the orders were inadmissible because the stamps were "not dated"; 2) the person who signed the stamp is not identified; 3) the clerk is not identified as the circuit court clerk; and 4) the stamp did not name the circuit court from which it came. The defendant's failure to challenge this procedural default holding by assigning error to it renders these claims defaulted in this Court. Waller, 52 Va. App. at 575, n.1, 665 S.E.2d at 850, n.1. See Williams v. Commonwealth, 270 Va. 580, 583, 621 S.E.2d 98, 100 (2005) (specifically holding that failure to assign error to default holding under Rule 5A:18 waived consideration of merits of claim in this Court); see also Rule 5:25.

[4] It appears that the defendant was convicted of six different counts of armed robbery in 1975 (Case Numbers 16, 791, 792, 793, 795, 796, 797). (App. 58-64).

"This standard, if nothing else, means that the trial judge's ruling will not be reversed simply because an appellate court disagrees. Only when reasonable jurists could not differ [does this Court] say an abuse of discretion has occurred." Thomas v. Commonwealth, 44 Va. App. 741, 753, 607 S.E.2d 738, 743 (2005) (internal quotations and citations omitted). Or, as the Fourth Circuit has stated:

> "[a]t its immovable core, the abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because it would have come to a different result in the first instance...The deference that is the hallmark of abuse of discretion review is deference enough to appreciate reasonable disagreement."

Evans v. Eaton Corp. Long Term Disability Plan, 514 F.3d 315, 322 (4th Cir. 2008) (citations omitted).

The defendant's first question presented on appeal, succinctly put, raises issues regarding the interaction between Virginia Code § 8.01-389 (judicial records exception to the hearsay rule) and Virginia Code § 17.1-

123 (addressing authentication of orders from circuit court order books).[5] This authentication issue—considered in the unique context of ***circuit court order books*** which do not require a judge's signature on every order—appears to be one of first impression in this Court, which has recently addressed issues regarding authentication of orders from courts-not-of-record. See Mwangi v. Commonwealth, 277 Va. 393, 672 S.E.2d 888 (2009) ("in a court-not-of-record, a judge's signature proves the rendition of judgment"); Moreau v. Fuller, 276 Va. 127, 661 S.E.2d 841 (2008). At its core, the issue on appeal is whether the absence of any

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[5] This statute reads as follows:

§ 17.1-123. How orders are recorded and signed:

A. 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.

B. If a judge dies, retires or resigns before orders recorded in the order book have been authenticated, the orders shall have the same force and effect and shall be deemed authenticated when the signature of another judge of the same circuit court or the signature of the judge appointed to fill the vacancy or to preside over the court until the vacancy is filled is authenticated as provided in subsection A.

evidence of a judge's signature on the ***circuit court orders*** used to prove the defendant's prior felony convictions rendered them inadmissible.[6]

As the Court of Appeals has previously stated, Virginia Code § 8.01-389(A) "makes clear that 'the records of any judicial proceeding and any other official records of any court of this Commonwealth shall be received as prima facie evidence provided that such records are authenticated and certified by the clerk of court where preserved to be a true record.'" Seaton v. Commonwealth, 42 Va. App. 739, 756, 595 S.E.2d 9, 17 (2004)).[7]

In fact, the Court of Appeals' sound reasoning in Seaton addresses the issue here. The defendant, however, makes several arguments in response.

First, Waller argues that the documents showing he had been convicted of armed robbery were inadmissible because they were not "signed by a judge." (Def. Br. 5). The Court of Appeals properly rejected such a contention in Seaton. 42 Va. App. at 755-759, 595 S.E.2d at 17-19.

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[6] It is also noteworthy that the Commonwealth offered no direct proof of a signature elsewhere in the order book. See Va. Code § 17.1-123(a)(ii and iii).

[7] Although the General Assembly has used the words "authenticated" and "certified" in this statute, the Court of Appeals has previously held that the terms are synonymous. See Owens v. Commonwealth, 10 Va. App. 309, 311, 391 S.E.2d 605, 606-607 (1990) (interpreting earlier version of the statute).

The General Assembly has not abrogated this holding by statute. Indeed when the Court of Appeals decided the instant case,[8] it rejected the defendant's challenge, noting that "[b]ecause of the presumption of official

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[8] The Court of Appeals provided detailed reasoning for its rejection of this assertion as follows:

Historically, when clerks of court would hand-copy orders, they could not also copy a judge's signature. Thus, there arose the practice of the clerk attesting copies as genuine. The practice of including or excluding the judge's signature on a photocopy may vary from jurisdiction to jurisdiction." 1986-87 Va. Atty. Gen. Op. 46 (Nov. 21, 1986) (opining that "the signature of the judge is not a requisite for 'a copy teste'"). In 1996, the General Assembly standardized the conviction orders used in Virginia courts. See Code § 19.2-307 ("The final judgment order shall be entered on a form promulgated by the Supreme Court." 1996 Va. Acts, ch. 60). The Virginia Supreme Court later issued a conviction order form which includes a specific signature line for the judge. See Va. Sup. Ct. Rules, Part 3A, Appendix of Forms, Form 10 (adopted November 14, 1996, and effective January 1, 1997). Rule 1:1 provides that the "date of entry" of an order is when it "is signed by the judge." This proposition, however, presupposes the order is one intended to be signed by a judge -- which would include any order not exempted by statute from being individually signed under the historic order book protocols recognized by Code § 17.1-123(A)(ii) or (iii). Cf. Clephas v. Clephas, 1 Va. App. 209, 211, 336 S.E.2d 897, 899 (1985) (observing that, under historic order book practices, a "judgment occurs when a court directs the clerk to enter it on the court's order book"). Waller v. Commonwealth, 52 Va. App. at 580, n.4, 665 S.E.2d at 852, n.4.

For these reasons, the defendant's reliance on this Court's recent decision in Mwangi v. Commonwealth, 277 Va. 393, 672 S.E.2d 888 (2009)—a holding this Court specifically limited to orders from "court[s] not of record" not covered under the ambit of § 17.1-123—is misplaced.

regularity[9], the trial court had a reasonable basis for inferring that the order book included a judge's signature or a signed term order in compliance with Code § 17.1-123(A)(ii) or (iii)." Waller, 52 Va. App. at 580, 165 S.E.2d at 853. The Court of Appeals properly found this to be the case, even though the copies teste did not bear any indicia that a judge had ever signed the order, or anywhere in the order books.

Second, the defendant asserts that the documents are not "authenticated" or "certified" as required by law. Specifically, he argues that no witnesses testified regarding the authenticity of the document and that the signature of the clerk was not accompanied by a date. (Def. Br. 8). As the Court of Appeals noted in its *per curiam* order of November 27, 2007, however, there is no requirement under Virginia Code § 8.01-389(A) that any witness ***testify*** as to the authenticity of a document[10] or that the clerk's signature be dated.

Instead, as the Court of Appeals noted, "certification" means "the state of having been attested," while "attest means "[t]o bear witness;

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[9] See Gilmore v. Landsidle, 252 Va. 388, 396, 478 S.E.2d 307, 312 (1996) (discussing presumption of regularity).

[10] Indeed, the very purpose of this statute is to *avoid* the need for such testimony. See Ingram v. Commonwealth, 1 Va. App. 335, 338-339, 338 S.E.2d 657, 658-659 (1986).

testify," and "to authenticate by signing as a witness." (*per curiam* order quoting Black's Law Dictionary, 138, 241 (8th ed. 2004). Accordingly, the clerk's signature authenticated and certified the document and it was thus admissible under Code § 8.01-389(A).[11] In fact, the documents admitted in the instant case are similar in many respects to those the Court of Appeals found were admissible in Owens v. Commonwealth, 10 Va. App. at 310-311, 391 S.E.2d at 606-607.[12]

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[11] This statute establishes an exception to the hearsay rule provided that the judicial records sought to be admitted into evidence are properly authenticated. Taylor v. Commonwealth, 28 Va. App. 1, 11, 502 S.E.2d 113, 117 (1998) (en banc). Authentication is "the providing of an evidentiary basis sufficient for a trier of fact to conclude that the writing came from the source claimed." Walters v. Littleton, 223 Va. 446, 451, 290 S.E.2d 839, 842 (1982). Authentication also establishes that "a document is genuine and that it is what its proponent claims it to be." Owens v. Commonwealth, 10 Va. App. 309, 311, 391 S.E.2d 605, 607 (1990). A judicial record may be authenticated within the meaning of Code § 8.01-389(A) by the written certification or attestation of the clerk of the court holding the record. Id.

[12] In Owens, as in the instant case, the orders (bearing the notation that they were copies "teste") bore a stamped certification signed on behalf of the clerk of court by a deputy clerk. Thus, the defendant's reliance on Carroll v. Commonwealth, 10 Va. App. 686, 396 S.E.2d 137 (1990), a case in which the "certification" did not show that a "deputy clerk" had signed on behalf of the clerk, but instead simply bore the person's name, is misplaced. In addition, as is true in the instant case (App. 58-64), the certification of the clerk of court in Owens apparently did not state in which court the clerk served, even though the orders themselves apparently bore a header showing the court in which the proceedings occurred. See Owens, 10 Va. App. at 311, 391 S.E.2d at 606-608. Moreover, the orders

Waller also asserts that Virginia Code § 8.01-389 is only applicable in civil proceedings. (Def. Br. 7). However, he did not make this argument in the trial court, so consideration of it is barred under Rule 5:25. Moreover, he did not assign error to the Court of Appeals alleged error in so finding, so the claim is barred for that reason as well. See Rule 5:17.

In any event, the Court of Appeals has previously found § 8.01-389 to be applicable in criminal cases. See Seaton, *supra*; see also Taylor v. Commonwealth, 28 Va. App. at 10-12, 502 S.E.2d at 117-118; Slater v. Commonwealth, 15 Va. App. 593, 596, 425 S.E.2d 816, 818 (1993); Owens v. Commonwealth, 10 Va. App. at 311, 391 S.E.2d at 606-607. Clearly, the General Assembly is aware of these decisions and would have amended the statute had it disagreed with them.[13]

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in the instant case bore an order book and page number as was the case in Seaton, 42 Va. App. at 746, 595 S.E.2d at 12.

[13] The General Assembly has amended the statute twice (1995 and 1996) since the Slater and Owens cases were decided. See, generally, Weathers v. Commonwealth, 262 Va. 803, 805, 553 S.E.2d 729, 730 (2001) ("When the General Assembly acts in an area in which one of its appellate courts already has spoken, it is presumed to know the law as the court has stated it and to acquiesce therein, and if the legislature intends to countermand such appellate decision it must do so explicitly"). Moreover, this Court has previously held that other provisions of Title 8.01 are equally applicable in both criminal and civil cases. See Bellis v. Commonwealth, 241 Va. 257, 260, 402 S.E.2d 211, 213 (1991); Hall v. Commonwealth, 233 Va. 369, 374, 355 S.E.2d 591, 595 (1987).

Finally, the defendant argues that the Court of Appeals' holding in Seaton regarding § 8.01-389 is inapplicable here because in Seaton the Court addressed the admissibility of such authenticated court orders during a sentencing proceeding, not "as substantive evidence admitted to prove an element of the offense." (Def. Br. 6).[14] However, in Slater, the Court of Appeals held that an order adjudicating Slater as an habitual offender was properly admitted to prove an ***element*** of the offense of driving after having been declared an habitual offender. 15 Va. App. at 596, 425 S.E.2d at 817-818. Again, had the General Assembly intended to countermand this decision, it would have done so when it amended the statute in 1995 and 1996. See Weathers, 262 Va. at 805, 553 S.E.2d at 730; see also Daniels v. Warden, 266 Va. 399, 402-403, 588 S.E.2d 382, 383-384 (2003). The Court should reject this claim.

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[14] It is important to note that while the Commonwealth must prove the elements of an offense "beyond a reasonable doubt," "the measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a preponderance of the evidence." See Bloom v. Commonwealth, 262 Va. 814, 821, 554 S.E.2d 84, 87 (2001); see also Bourjaily v. United States, 483 U.S. 171, 175 (1987).

II. EVEN WERE THE COURT TO FIND THE PRIOR CONVICTION ORDERS INADMISSIBLE, THE PROPER REMEDY IS TO REMAND THE CASE FOR FURTHER PROCEEDINGS.

In his second Assignment of Error, the defendant argues if the Court finds the prior conviction orders were inadmissible (his first Assignment of Error), the evidence was insufficient to prove that he committed a violent felony. Hence, he reasons, he is entitled to reversal and remand for a new trial on the lesser charge of felon-in-possession of a firearm after having been convicted of a **nonviolent** felony. The Court should reject this claim.[15]

Clearly, the evidence presented at trial (the prior conviction orders and the defendant's own admissions to police and at trial to having been convicted of some unspecified felony) were sufficient to prove he was guilty of possessing a firearm after having been convicted of a violent felony.

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[15] The defendant also argues, in passing, that the evidence (besides the conviction orders) was insufficient to prove that he even committed a nonviolent felony. (Def. Br. 11). Although the Court need not reach this issue (which is not part of his Assignments of Error, see Rule 5:17), the record shows that Waller admitted to Deputy Jones that he had been convicted of a felony and Waller so testified at trial. (App. 17, 39). In fact, because he also made this admission during his trial testimony, Waller's reliance on Pepoon v. Commonwealth, 192 Va. 804, 66 S.E.2d 854 (1951) (Def. Br. 11) is misplaced. That case states only that "extradjudicial" confessions of guilt must be corroborated. 192 Va. at 808, 66 S.E.2d at 856.

Hence, were the Court to find that the trial court erred in admitting the 1975 conviction orders, the proper remedy would be to remand the case for a new trial on the **charged offense**. See Parsons v. Commonwealth, 32 Va. App. 576, 581, 529 S.E.2d 810, 812-813 (2000) (citing Burks v. United States, 437 U.S. 1 (1978)).[16]

CONCLUSION

For the reasons stated, the Commonwealth asks that this Court affirm the judgment of the Pittsylvania County Circuit Court and the Court of Appeals of Virginia.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Appellee herein.

By: _____
Counsel

[16] One of the cases cited in Parsons makes it clear that, in doing this "sufficiency" analysis, the Court considers both the admissible and inadmissible evidence presented at trial. See United States v. Simpson, 910 F.2d 154, 159 (4th Cir. 1990); see also Sprouse v. Commonwealth, 53 Va. App. 488, 493, 673 S.E.2d 481, 483 (2009).

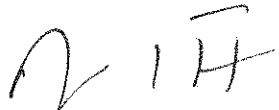
WILLIAM C. MIMS
Attorney General of Virginia

DONALD E. JEFFREY, III
Senior Assistant Attorney General
VSB 34844

OFFICE OF THE ATTORNEY GENERAL
900 E. Main Street
Richmond, VA 23219
(804) 786-2071 (Tel)
(804) 371-0151 (Fax)
djeffrey@oag.state.va.us

CERTIFICATE OF COUNSEL

On May 12, 2009, the required copies of this Brief for the Commonwealth were hand-filed with this Court, and the required number of copies were mailed to Glenn L. Berger, Esquire, BERGER & THORNHILL, P. O. Box 298, Altavista, Virginia 24517, counsel for appellant. Counsel for the Commonwealth also caused a copy of this brief to be e-mailed to scvbriefs@courts.state.va.us.



DONALD E. JEFFREY, III
Senior Assistant Attorney General