In The

Supreme Court of Virginia

RECORD NO. 082270

KENNETH L. SINGLETON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

KENNETH L. SINGLETON,

Appellant,

v.

Sup. Ct. Record No. 082270
Ct. App. Record No. 2381-07-1

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT'S OPENING BRIEF

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

NATURE OF THE CASE

The appellant, Kenneth L. Singleton ("Singleton"), respectfully represents that he is aggrieved by a final judgment of the Circuit Court for the City of Norfolk dated September 13, 2007, the Honorable Charles D. Griffith, Jr. presiding. The appellant will be referred to herein as "Defendant" or "Singleton". The appellee will be referred to herein as the "Commonwealth." Any reference to the Joint Appendix of the Proceedings in this case will be indicated by (A.___).

MATERIAL PROCEEDINGS

On September 12, 2007, Singleton, an attorney, appeared in front of Judge Griffith for a bond hearing for his client, Darrell Simpson. (A. 2). During this hearing, Judge Griffith summarily held Singleton in contempt for excusing his client from an earlier scheduled court date without any judge having signed a written continuance order. Singleton also did not appear on the scheduled trial date. (A. 3). However, Singleton had spoken with the attorney prosecuting the case who had agreed to a continuance in advance of the scheduled trial date. (A. 10). Both attorneys had signed a continuance order and the Commonwealth had released its witnesses before Singleton's office excused his client from appearing. (A. 10). Judge Griffith summarily held Singleton in criminal contempt and imposed a $250 fine, the statutory maximum without requiring a jury. (A. 3). *See* Va. Code § 18.2-457 (no court shall impose a fine in excess of $250 for summary contempt without empaneling a jury).

On May 2, 2008, the Court of Appeals agreed to hear the case. By order and published opinion dated October 7, 2008, the Court affirmed Singleton's conviction. (A. 12). Singleton filed a petition for rehearing *en banc*. (A. 19). By order dated November 7, 2008, the Court of Appeals

denied the petition. On April 17, 2009, this Court awarded Singleton an appeal.

QUESTIONS PRESENTED

1. Did the trial court err by summarily holding Singleton in criminal contempt of court where there was no evidence of any intention to obstruct or interrupt the administration of justice? (A. 2-5, 10). This question relates to Assignment of Error # 1.

2. Did the trial court err by holding Singleton in summary contempt for conduct that did not occur exclusively in the presence of the court or so near thereto as to justify invocation of summary contempt? (A. 2-5, 10). This question relates to Assignment of Error # 2.

3. Did the Court of Appeals err by affirming Singleton's conviction, holding both that the evidence was sufficient and that Singleton failed to preserve his due process objections to the trial court's finding of summary contempt. *Singleton v. Commonwealth*, 52 Va. App. 665, 667 S.E.2d 23 (2008)(A. 19). This question relates to Assignment of Error # 3.

ASSIGNMENTS OF ERROR

1. The trial court erred by holding Singleton in criminal contempt of court where there was no evidence of any intention to obstruct or interrupt the administration of justice. (A. 2-5, 10).

2. The trial court erred by holding Singleton in summary contempt for conduct that did not occur exclusively in the presence of the court or so near thereto as to justify invocation of summary contempt. (A 2-5, 10).

3. The Court of Appeals erred by affirming Singleton's conviction, holding both that the evidence was sufficient and that Singleton failed to preserve his due process objections to the trial court's finding of summary contempt. (A. 12-18).

STATEMENT OF FACTS

Darrell Simpson ("Simpson") retained Singleton to represent him in Norfolk Circuit Court for an appeal of a misdemeanor conviction for driving under the influence. (A. 10). The matter was originally set for a non-jury trial on August 30, 2007. (A. 10). Prior to this date, Singleton contacted the prosecuting attorney assigned to the case, Waverly Jones ("Jones"), to inquire about a continuance. (A. 10). Jones agreed to the continuance request and prepared a written continuance order; the parties agreed to a

new trial date of September 27, 2007. (A. 10). Jones called off his witnesses in the case, meaning the Commonwealth could not have proceeded in any event on the originally scheduled trial date, August 30, 2007. (A. 10). On August 28, 2007, Jones and Singleton met and both signed the continuance order. (A. 10) Singleton's office then contacted Simpson by phone and told him that he need not appear on August 30, 2007[1]. (A. 10).

On August 30, 2007, Jones appeared in front of Judge Griffith, presented the joint continuance order and made a motion to continue the case. (A. 2, 10). Judge Griffith rejected the continuance motion, presumably because neither Singleton nor his client was present. (A. 2, 10). On September 12, 2007, Jones and Singleton appeared in front of Judge Griffith to address Simpson's bond status and the continuance issue[2]. (A. 2). Singleton reiterated that the parties had agreed to continue

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[1] Because the trial court held no plenary hearing, all of these background facts were elicited by the judge during questioning of Singleton and Jones in court shortly before the court summarily held Singleton in criminal contempt.

[2] Singleton sought to withdraw his client's bond motion because the magistrate had given his client a bond. Judge Griffith would not allow Singleton to do so. Thus, Singleton faced a true Hobson's choice– vigorously defend himself against sudden contempt charges, or risk having his client incarcerated if he defended himself too assertively.

the case before he excused his client. (A. 2-3). Singleton's office only called Simpson to tell him he did not have to be in court on August 30, 2007 after the parties had agreed on a new trial date. (A. 4-5). Singleton did not know that the order had not been entered before he released his client. (A. 5). Early in the hearing, Singleton appeared to acknowledge that he had "no authority as a judge to excuse anyone from court." (A. 3, 5). However, Singleton insisted that "as an officer of the court, I did believe, in good faith, that after speaking with the Commonwealth Attorney, we had agreed on a date." (A. 5).

ARGUMENT

I. THE TRIAL COURT ERRED BY SUMMARILY FINDING SINGLETON GUILTY OF CRIMINAL CONTEMPT WHEN THERE WAS NO EVIDENCE THAT HE INTENDED TO OBSTRUCT OR INTERRUPT THE ADMINISTRATION OF JUSTICE.

Va Code § 18.2-456 governs criminal contempt in Virginia and allows a judge to punish for summary contempt "only" in certain specified cases. A trial court may find a party guilty of summary criminal contempt "only in the cases following": 1)"misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice"; 2) violence or threatened violence to a judge, juror, etc.; 3) vile or insulting

language addressed to a judge; 4) misbehavior of an officer of the court in his official capacity; and 5) disobedience or resistance to a lawful court order.

This Court has clearly defined contempt as "an act in disrespect of the court and its processes, or which obstructs the administration of justice, or tends to bring the court into disrepute." *Carter v. Commonwealth*, 2 Va. App. 392, 395, 345 S.E.2d 5 (1986). In *Carter*, the Court addressed whether a criminal defendant was guilty of criminal contempt by waiting until the day of his scheduled non-jury trial to request a jury. *Id.* When counsel for Carter indicated that his client had only advised him of his desire for a jury trial the preceding day, the court found Carter in contempt and imposed a 10-day jail sentence. The Court underlined that a person charged with criminal contempt "is entitled to the benefit of the presumption of innocence, and the burden is on the prosecution to prove the guilt of the accused." *Id.* at 396-397. The Commonwealth must prove the elements of the offense beyond a reasonable doubt. *Id.* The key question in the case was whether the Commonwealth's evidence sufficiently proved that Carter made the late

request for a jury trial "**with the intent to 'obstruct or impede the administration of justice'.**" *Id.* (emphasis added)

The Court continued to hold that "intent is a necessary element in criminal contempt and ... no one can be punished for criminal contempt unless the evidence makes it clear that he intended to commit it." *Id.*, quoting 17 Am. Jur. 2d *Contempt* § 100 (1964). Bare conclusory assertions of criminal intent are insufficient to support a conviction for criminal contempt; the "record must show facts to support proof that contempt was committed willfully." *Id.* (emphasis in original) In *Carter*, the Court reversed the defendant's criminal contempt conviction because there was insufficient evidence that Carter requested a jury trial "for the purpose of obstructing or interrupting the administration of justice ... "

Therefore, in order to sustain Singleton's conviction for criminal contempt, the evidence, viewed in a light most favorable to the Commonwealth, must demonstrate beyond a reasonable doubt that Singleton excused his client for "the purpose of obstructing or interrupting the administration of justice." Because the record unambiguously demonstrates that Singleton was seeking to facilitate the administration of justice by excusing his client under the circumstances of this case, the

Court should reverse his conviction for criminal contempt. Indeed, Singleton could not, as a matter of law, have formed the requisite specific intent to obstruct justice where he had been assured that the Commonwealth had released its witnesses and could not proceed.

In two more recent opinions, this Court affirmed criminal contempt convictions for lawyers who "scheduled multiple matters in different jurisdictions at the same time (because) there was sufficient evidence of willful intent to obstruct the administration of justice." *Brown v. Commonwealth*, 26 Va. App. 758, 762, 497 S.E.2d 147 (1998); *Robinson v. Commonwealth*, 41 Va. App. 137, 143, 583 S.E.2d 60 (2003). However, both cases reiterated the requirement that intent is a necessary element of criminal contempt. *Robinson*, 41 Va. App. at 143-144 ("intent is a necessary element in criminal contempt" and "no one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it"); *Brown*, 26 Va. App. at 149, quoting *Potts v. Commonwealth*, 184 Va. 855, 859, 36 S.E.2d 529, 530 (1946)(defining contempt as "any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice.") In both cases, the Court affirmed contempt convictions for attorneys because they purposefully scheduled multiple

cases in multiple jurisdictions at the same time, and, thus, had sufficient intent to convict them of criminal contempt. By contrast, Singleton has engaged in no such willful or intentional behavior, nor has his conduct in any way interfered with the administration of justice.[3]

Applying these precedents to the facts of this case, Judge Griffith was plainly wrong when he found there was sufficient evidence of Singleton's intention to obstruct or interrupt the administration of justice. It is undisputed that Singleton called the prosecuting attorney in the underlying case and secured his agreement to continue the case; Singleton did both of these things **before** his client's scheduled court date. (A. 10). Additionally, Singleton met with that prosecuting attorney and the two signed a continuance order which Jones eventually presented to the court. (A. 10). Perhaps most significant, Jones had released his witnesses for the original trial date and could not have proceeded even if Singleton and his client had been present. (A. 10). Finally, Singleton

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[3] Indeed, it could be argued that requiring criminal defense counsel to secure a written, entered order from a judge before excusing their clients from court, and subjecting them to criminal contempt convictions without such an order, would have a far greater likelihood of interrupting the administration of justice than the actions taken by Singleton in this case.

insisted to Judge Griffith that he had acted in good faith in releasing his client and was not aware that no judge had entered a continuance order when his office advised his client that his appearance was unnecessary. (A. 5). Singleton's actions had neither the intention, nor the effect, of obstructing or interrupting the administration of justice. This Court should overturn Singleton's summary criminal contempt conviction because there was insufficient evidence that he had the *mens rea* required by applicable case law.

II. THE TRIAL COURT ERRED BY HOLDING SINGLETON IN SUMMARY CONTEMPT FOR CONDUCT THAT DID NOT OCCUR EXCLUSIVELY IN THE PRESENCE OF THE COURT OR SO NEAR THERETO AS TO JUSTIFY INVOCATION OF SUMMARY CONTEMPT.

The trial court committed reversible error by applying summary contempt procedures to find Singleton guilty of criminal contempt where the purported contempt did not occur entirely in the court's presence or so near its presence as to justify summary contempt. The Court in *Robinson* emphasized that "[c]ontempt proceedings are categorized as either direct or indirect." *Robinson*, 41 Va. App. at 145. The difference between the two is "procedural": in a case of direct contempt, in which the contempt "is committed in the presence of the court, it is competent for it to proceed

upon its own knowledge of the facts, and to punish the offender without further proof." *Id.* However, when dealing with indirect contempts, "that is, such as are committed not in the presence of the court, the offender must be brought before the court by a rule or some other sufficient process." *Id.*, citing *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681, 682 (1978). Thus, "indirect or constructive contempt charges ... are not brought summarily, but must proceed under a more formal procedure than an immediate adjudication by the court." *Id.* at 146. Unlike the present case, in *Robinson*, the trial judge did not apply summary procedures, but issued a show cause. Additionally, the court afforded defendant an opportunity to obtain counsel, to prepare his case, and to have a plenary hearing on his guilt or innocence. *Id.* Judge Griffith allowed Singleton none of these safeguards before summarily finding him guilty of criminal contempt immediately after learning that he had excused his client without a continuance order signed by a judge. (A. 3).

It is well established that "[s]ummary punishment always, and rightfully, is regarded with disfavor." *Sacher v. United States*, 343 U.S. 1, 8 (1952). Likewise, the United States Supreme Court has indicated that "the power to punish summarily for contempt is limited because it provides an

exception to the normal due process requirements such as a hearing, counsel, and the opportunity to call witnesses." *Pounders v. Watson*, 521 U.S. 982, 988 (1997). In *Taylor v. Hayes*, 418 U.S. 488, 497-500 (1974), the United States Supreme Court reversed the criminal contempt convictions of an attorney because the summary procedure applied violated fundamental norms of the due process clause. The Court first cited with approval *Sacher*'s admonition that summary punishment is always rightfully viewed with disfavor. Further, "we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence." *Id.* (citation omitted)

The Court also cited the American Bar Association's advisory committee on judge's functions: "[b]efore imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment." Imposing criminal contempt sanctions without notice or an opportunity to defend "is inconsistent with the basic notions of fairness and is likely to bring disrespect upon the Court." *Id.* Finally, the Court stated that some procedure is "essential in view of the

heightened potential for abuse posed by the contempt power. ... The provision of fundamental due process for contemnors accords with our historic notions of elementary fairness." *Id.*

Because of these limitations, all of the conduct, and elements, necessary to establish contempt must occur in the Court's presence to justify the exceptional decision to forego procedures typically required by due process. In short, a court has the power to impose summary contempt "only (for) charges of misconduct ... (of which) all of the essential elements ... are under the eye of the court (and) are actually observed by the court." *In Re Oliver*, 333 U.S. 257, 275 (1948). Most important, in cases of alleged misbehavior where the judge lacks personal knowledge of any of the essential elements and "is informed thereof only by the confession of the party, or by the testimony under oath of others", the Court may not use its limited summary contempt powers. *In Re Savin*, 131 U.S. 267, 277 (1889).

Applying these principles to the instant case, Judge Griffith committed reversible error by summarily finding Singleton guilty of criminal contempt for conduct that did not occur exclusively in the presence of the Court. Judge Griffith could not learn the facts surrounding Singleton's

decision to excuse his client, or why Singleton did not appear–acts that occurred outside the court room–solely through his own observation. Indeed, Griffith found Singleton in contempt not for anything that he observed, but purely in response to Singleton's statement that he released his client without a signed order entered by a judge. (A. 2-3). Judge Griffith committed reversible error by applying his summary contempt powers despite the fact that not all of the elements and purported misconduct that served as the basis for the contempt occurred in his presence. Additionally, *Oliver* and *Savin* make clear that a trial court may not punish for summary contempt where it is relying on the confession of a party, or on testimony of others, such as the prosecuting attorney in the case, Waverly Jones. Because Judge Griffith based his contempt finding, in part, on the statements of Singleton and Jones about what occurred outside the court room, he overstepped the limited bounds of summary, direct contempt.

The purported contempt in this case–Singleton's office advising his client that his appearance was not necessary and Singleton not appearing on the scheduled trial date–clearly occurred outside the presence of the court. Additionally, the Court could not ascertain the reason for either

without eliciting incriminating statements from Singleton. As such, Singleton was entitled to a plenary hearing with the right of counsel and the right to prepare a defense against such an accusation. The trial court committed reversible error by applying summary contempt procedures to find Singleton guilty of criminal contempt where some of the elements of the offense, and underlying facts, were not actually observed by Judge Griffith and occurred outside his presence. Additionally, there is no indication in the record that the Court needed to apply its summary contempt powers for immediate vindication of the Court's authority. To the contrary, in *Robinson* and in *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007), the trial court correctly stayed a final finding of contempt until after defendants had been afforded a fair opportunity to respond to the charges and to obtain counsel.

In affirming Singleton's conviction, the Court of Appeals cited two Fourth Circuit opinions for the proposition that a "lawyer's willful absence from his client's trial, **without a legitimate reason**, is contemptuous." *United States v. Marx*, 553 F.2d 874, 876 (4th Cir. 1977)(emphasis added); *United States v. Linney*, 134 F.3d 274, 277 (4th Cir. 1998) Interestingly, in both cases, the judge did not immediately find the lawyers guilty of

contempt but issued a show cause and allowed for a separate hearing. *Marx*, 553 F.2d at 876; *Linney*, 134 F.3d at 277. Indeed, Linney was represented by counsel at his contempt hearing. Moreover, neither case remotely resembles the factual scenario in the present case involving Singleton. Singleton had spoken with the prosecuting attorney, who had agreed to a continuance, the two attorneys had signed a written continuance order, and the prosecutor had released its witness and could not proceed with the trial on the scheduled trial date. By contrast, in *Marx*, the attorney failed to appear in court for the trial because he had not been paid and the trial proceeded without him. Linney was at the court for the start of the trial and told the trial judge he was not prepared. *Linney*, 134 F.3d at 277. The district court denied the attorney's motions to withdraw and for a continuance and ordered Linney to be present when jury *voir dire* commenced. Linney then left the court and flew to another city, telling the deputy "you will have to come get me." *Id.* Because there is undisputed evidence in the present case that Singleton had a proper excuse for his absence, neither case supports the trial court's finding of contempt.

In its opinion denying Singleton's appeal, the Court of Appeals conceded that other jurisdictions were divided on the subject of whether an attorney's **unexcused** absence can serve as the basis for summary contempt. (A. 10), *comparing In Re Rosen*, 315 A.2d 151, 152-153 (D.C. 1974)(holding that summary contempt is proper where "an attorney fails to appear in court" and *Chula v. Superior Court of Orange County*, 368 P.2d 107, 110 (Cal. 1962)(holding that "failure of an attorney without a valid excuse to be present in court" constitutes a "direct contempt which the court is empowered to punish summarily") *with In Re Davis*, 602 N.E.2d 270, 276 (Ohio Ct. App. 1991)("Ohio has generally treated an attorney's absence from court as an indirect contempt"), and *State v. Jenkins*, 950 P.2d 1338, 1345, 1347 (Kan. 1997)("unexplained absence of an attorney is a hybrid" and the "characterization of the contempt as direct or indirect should be deferred until after the attorney has an opportunity to explain his absence").

Given the long line of precedents disfavoring summary contempt and warning of the abuses of that power, the decisions requiring some process before an attorney is held in contempt are the more persuasive authority. The Ohio Court of Appeals rightly underlined that summary contempt

should only be applied where "the nature or quality of the contumacious act (is) such that the orderly and effective conduct of the court's business requires its immediate suppression and punishment." *In Re Davis*, 602 N.E.2d at 263-4, citing *In Re Oliver*, 333 U.S. at 257. In other words, courts should dispense with even minimum procedural safeguards only where the conduct creates "an open threat to the orderly procedure of the court" such that if "not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke v. United States*, 267 U.S. 517, 536 (1925) Thus, the court in *In Re Davis* rightly concluded that summary contempt must not only be direct, but the contumacious conduct must create a "need for speed" to immediately punish the conduct. *In Re Davis*, 602 N.E.2d at 275. In the present case, summary contempt was wholly inappropriate because 1) there was no clear evidence of an unexcused absence from court without the court resorting to some fact finding; and 2) there was no need for immediate punishment of Singleton's purported contempt to vindicate the trial court's authority. The Commonwealth cannot plausibly assert that providing Singleton with some process would have, in any way, led to "demoralization" of the trial court's authority.

III. THIS COURT OF APPEALS IMPROPERLY HELD THAT SINGLETON FAILED TO PRESERVE HIS DUE PROCESS OBJECTIONS.

In its panel opinion in this case, the Court of Appeals declined to address Singleton's due process argument, holding that Rule 5A:18 barred Singleton from raising this issue for the first time on appeal. (A. 17-19). This Court should reverse that ruling for several reasons. First, this case must be viewed through the unique prism of Singleton's quandary in this case. In the blink of an eye, Singleton went to court to address his client's bond status and instantaneously became a criminal defendant with an immediate trial without access to an attorney or any procedural safeguards. Under these circumstances, under either the "good cause" or "ends of justice" exceptions of Rule 5:25, Singleton should not be barred from raising this issue for the first time on appeal. Equally important, Va. Code § 8.01-384 specifically provides that "if a party has no opportunity to object to a ruling or order **at the time it is made**, the absence of an objection shall not thereafter prejudice him ... on appeal." (Emphasis added)

In *Mason v. Commonwealth*, 7 Va. App. 339, 345, 373 S.E.2d 603 (1988), the Court of Appeals held that a defendant did not waive his right to

challenge improper, surprise comments made by the trial judge to the jury because he failed to make a contemporaneous objection. The Court held that there was a limited exception to Rule 5A:18 "where defense counsel ... was taken by surprise at the court's comments to the jury." *Id.* at 346. Since the trial court acted without consulting the lawyers, "we find that Mason did not have an opportunity to object to the trial court's ruling" and could, therefore, raise the issue for the first time on appeal. By analogy, Singleton had no opportunity to object to Judge Griffith's decision at the time it was made.[4] Even more so than the defense lawyer in *Mason*, Singleton was essentially ambushed by the trial judge when he went from an attorney to criminal defendant. It is hard to conceive of a situation where there is a greater surprise. Accordingly, Va. Code § 8.01-384 arguably allows Singleton to raise his due process concerns for the first time on appeal.

Finally, Rule 5:25 provides for two distinct exceptions to the contemporaneous objection rule, both of which apply under the unique

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[4] Because the statute states that there is no prejudice on appeal if a defendant has no opportunity to interpose an objection at the time a ruling is made, Singleton was under no obligation to file a post-conviction motion attacking the summary nature of the proceedings against him.

facts of this case. Rule 5:25 provides that there is an exception either "for good cause shown" or "to enable this Court to attain the ends of justice." Singleton acknowledges that these exceptions to Rule 5:25 are sparingly applied, but nonetheless asserts that this case is ideally suited for application of these exceptions. Indeed, the purpose of the rule is to give the trial judge "a fair opportunity to rule intelligently on objections while there is still an opportunity to correct errors in the trial court." *Vasquez v. Mabini*, 269 Va. 155, 163, 606 S.E.2d 809, 813 (2005). In this case, where Singleton had no warning that he had to instantly go from representing his client's interests, to representing himself in a criminal trial, good cause clearly obviated the need for a contemporaneous objection. Good cause is particularly compelling where it was the trial court's failure to afford Singleton even a modicum of process that resulted in his failure to apprise himself of his remedies for the judge's actions. Additionally, good cause exists because Singleton faced an untenable conflict between representing his own interests and fulfilling his ethical obligation to his client. If the trial court had allowed Singleton a separate hearing on the contempt charge, this conundrum would not have existed. Finally, the ends of justice exception also applies because the procedure afforded Singleton resulted

in a serious miscarriage of justice: an attorney, and officer of the court, was saddled with a criminal, misdemeanor conviction without any due process including the right to counsel. The Court of Appeals decision erroneously concluded that Singleton was procedurally barred from raising these important issues.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Singleton respectfully requests that this Court overturn his summary contempt conviction for two reasons: 1) the evidence was insufficient, as a matter of law, to prove that Singleton formed the specific intent to obstruct or interrupt the administration of justice; and 2) the trial court improperly dispensed with Singleton's due process rights and applied its summary contempt powers to convict Singleton for behavior that occurred, in part, outside the trial court's presence. Additionally, Singleton did not waive his right to raise either of these issues because he had no opportunity to object to this ruling at the time it was made, and because the good cause and ends of justice exceptions apply.

KENNETH L. SINGLETON

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CERTIFICATE

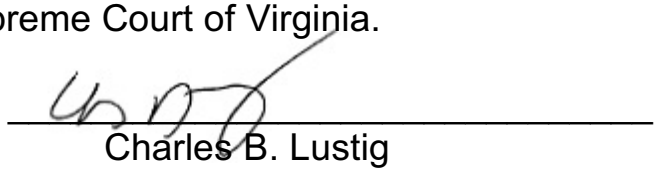
1. The name and address of Appellant is: Kenneth L. Singleton, 156 Newton Road, Virginia Beach, VA 23462-2410.

2. The names, addresses and telephone numbers for counsel for the Appellant are: Thomas B. Shuttleworth, tshuttlworth@srgslaw.com, and Charles B. Lustig, clustig@srgslaw.com, Shuttleworth, Ruloff, Swain, Haddad & Morecock, P.C., 4525 South Boulevard, Suite 300, Virginia Beach, VA 23452-1137, (757) 671-6000.

3. The name of the Appellee is: Commonwealth of Virginia.

4. The name, address and telephone number of counsel for the Appellee is: Joanne V. Frye, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219, (804) 786-2071. Ms. Frye's email address is jfrye@oag.state.va.us.

5. I certify that on the 22nd day of May 2009, three copies of this Opening Brief and Appendix were mailed, by first-class mail, postage prepaid, to Counsel for Appellee, Joanne V. Frye, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219 and on the 22nd day of May 2009, 15 paper copies and one electronic copy of this Opening Brief and Appendix were hand filed in compliance with Rule 5:26(d) of the Rules of the Supreme Court of Virginia.



Charles B. Lustig