
IN THE
Supreme Court of Virginia

RECORD NO. 090308

LAMONT D. WRIGHT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This case originated in the Circuit Court of the City of Portsmouth. The Honorable E. Preston Grissom presided over the hearing on the motion to suppress. The Honorable Mark S. Davis presided over the bench trial and the sentencing hearing.

On November 2, 2006, a grand jury indicted the appellant, Lamont D. Wright, for possession with intent to distribute cocaine in violation of §§18.2-248; 54.1-3446 through 3452 of the Code of Virginia (1950) as amended, and possess a firearm while in possession of a controlled substance with the intent to distribute in violation of §§18.2-308.4; 54.1-3446 through 54.1-3452; 18.2-10 of the Code of Virginia (1950) as amended.

Wright's motion to suppress the evidence was denied on December 11, 2006. Wright pled not guilty to the offenses at his arraignment and trial on February 6, 2007, and asked for a bench trial. The Circuit Court found Wright guilty of the two counts in the indictment. The Circuit Court ordered a presentence report and set sentencing for April 9, 2007.

At the April 9, 2007 sentencing hearing, the Circuit Court sentenced Wright on the possession with intent to distribute

conviction to five (5) years with all five (5) years suspended, conditioned on successful completion of five (5) years supervised probation upon release and substance abuse treatment upon release, a fine of \$500.00, and a six month suspension of Wright's operator's license. The Circuit Court sentenced Wright on the possession of a firearm while in possession with the intent to distribute conviction to five years incarceration in a Virginia state correctional facility.

The final orders in these cases were entered on April 10, 2007. The notice of appeal was timely filed. The record was received at the Court of Appeals on July 11, 2007. A judge of that Court denied the petition for appeal by Order entered December 7, 2007. Wright requested a three judge panel. Following oral argument before the three judge panel, that Court granted the petition for appeal in part on the single question presented by Order entered May 28, 2008.

In a published opinion dated January 13, 2009, the Court of Appeals affirmed the conviction. *See Wright v. Commonwealth*, 53 Va. App. 266, 670 S.E.2d 772 (2009). J.A. 5-24. Appellant appealed to this Court, and this Court granted an appeal on May 19, 2009.

ASSIGNMENTS OF ERROR

I. The Circuit Court erred in convicting Wright under Virginia Code Section 18.2-308.4(C).

II. The Court of Appeals erred in affirming Wright's conviction and holding that proof of constructive possession of a firearm is sufficient to support a conviction under Virginia Code Section 18.2-308.4(C).

QUESTION PRESENTED

Whether the Circuit Court erred in convicting Wright under Virginia Code Section 18.2-308.4(C).

(Relates to Assignments of Error I & II). Preserved at J.A.¹ 96-117.

STATEMENT OF FACTS

At trial on February 6, 2007, The Commonwealth called Detective G.B. Smith from the Portsmouth Police Department's special investigations unit as its witness. J.A. 38. Detective Smith testified that on September 9, 2006, he spoke with a confidential informant who told him that Wright was someone involved in the distribution of cocaine. J.A. 41. Smith was working part-time as

¹ All reference to the Joint Appendix will be designated as "J.A. ___".

security for Mallard Cove, an apartment complex. *Id.* While sitting in his unmarked police car on the evening of September 9th, Smith observed Wright's black Chevy Beretta speeding through the complex. J.A. 42. When Smith pulled Wright's car over, Smith observed a loaded .9 millimeter handgun on Wright's dashboard. Smith discovered Wright had lawfully purchased the firearm and then let Wright leave. *Id.*

On September 11th at 1:55 p.m., Smith was once again contacted by a confidential informant who told Smith that Wright was in the black Beretta out in Lee Hall apartments on Suburban Parkway, and that Wright was in possession of and was selling crack cocaine. J.A. 43-44.

Smith contacted Detectives Johnakin and Deluca and had them meet him at Wright's location. J.A. 44. They found Wright sitting in his car on Suburban Parkway. *Id.* Smith stopped Wright from putting his Beretta in drive. *Id.* He took Wright out of the Beretta and detained him. Smith advised Wright of the information he received from the informant and read Wright his rights under *Miranda*. Smith asked Wright if he had his gun with him, and Wright said he had left it at his house. J.A. 45. Wright denied having cocaine on him. J.A. 46.

Smith testified the informant told him that Wright kept his cocaine in the zipper area of his pants. *Id.* Wright attempted to pull away when the officers wanted to search his pants. *Id.* Smith recovered two bags of crack cocaine in the front zipper area of Wright's pants. J.A. 47. After recovering the crack-cocaine from his zipper area, Smith put Wright in his unmarked police SUV and began to talk with him on the way to Smith's office at 307 County Street. J.A. 48. Smith told Wright they needed to go back to his house and get his gun. J.A. 49. Once at Smith's office, Wright informed the officer he also had some crack-cocaine in his left shoe. Smith recovered approximately 2 grams from Wright's shoe. *Id.*

Smith had personal knowledge that Wright lived in Mallard Cove. In response to questions from Detective Smith, Wright told Smith that he lived with his mother and stepfather. Wright did not want his mother to get into trouble because she did not have anything to do with the cocaine. J.A. 50. Wright told Smith the gun was in his room by the rail of the bed. Wright said the scale would probably be in the dresser drawer. Smith asked Wright how much cocaine was at the house, and Wright agreed it would be about 125 grams. J.A. 50-51. Smith had Wright show him which key on Wright's key chain

would open the apartment door. J.A. 52. Smith told Wright that he could come with the police if he stayed calm. *Id.*

Once at Wright's home, Wright took the police upstairs to his room. Smith located the gun on the rail of the bed. The scale was in the top dresser drawer. *Id.* The cocaine was in the large closet in a Crown Royal bag in the pocket of a jacket hanging in the closet. The cocaine was in two bags that weighed about 123 grams together. J.A. 53.

On cross-examination, Detective Smith acknowledged that the confidential informant told him Wright was selling cocaine out on Suburban Parkway. Suburban Parkway was five miles from Wright's house according to Smith's best estimate. Smith admitted he had determined, based on his information, experience, and knowledge, that Wright had been selling drugs there at Suburban Parkway that day. J.A. 56.

Detective P. J. Grover testified that he went with Detective Smith and other detectives to 830 Lancer Drive to recover evidence. J.A. 60. Wright directed the police to three items: a digital scale; a gun that was essentially attached to a side of the bed frame up near the headboard; and a closet where they searched a jacket for

narcotics. J.A. 61. Grover identified Exhibit 1 as 5 grams of crack cocaine in two clear plastic bags that Smith recovered and turned over to him at 307 County Street. J.A. 61. Grover identified Exhibit 2 as two grams of crack cocaine in a clear plastic bag that was turned over to him from Detective Smith at 307 County Street. J.A. 62. Grover found 117 grams of crack cocaine in a Crown Royal bag that was inside the breast pocket of a men's XX size winter coat. This item was designated Commonwealth's Exhibit 3. J.A. 63.

Detective Grover packaged the firearm that was inside a holster attached to the bed. J.A. 64. The holster had a clip that was actually attached to the bed frame. The firearm, magazine, and two pieces of stock ammunition were admitted as Exhibit 4. J.A. 65-66. A box of .9 millimeter Ruger bullets was admitted as Exhibit 5. J.A. 67. Wright directed Grover to a digital scale in the middle right-hand dresser drawer. (Exhibit 6). J.A. 68. Also recovered from the bedroom were clear plastic bags with corners missing. (Exhibit 7). J.A. 68-69. Grover recovered personal papers belonging to Wright (Exhibits 8 & 9), as well as paperwork belonging to Derrick Wright (his brother) in the top left dresser drawer. (Exhibit 10). J.A. 71.

Detective Grover identified the photographs that were taken inside Wright's bedroom as Commonwealth Exhibit 11. J.A. 74. Grover said he would photograph the items prior to them being touched or moved. J.A. 75. The Circuit Court heard a stipulation to the testimony of Officer Swan who transported the items to the state laboratory and back. J.A. 77. Afterwards, the Circuit Court admitted all the Exhibits into evidence. J.A. 79-80. The laboratory certificate showing numerous items were positive for cocaine was admitted as Exhibit 12. J.A. 79-80; 122-127.

Detective Holley testified that just the amount initially found on Wright's person (over 4 grams) was inconsistent with personal use. J.A. 85. Holley was presented with a hypothetical that Exhibits 1 (over 4 grams found in zipper area) and 2 (2 grams found in shoe) were recovered from an individual who then directed the police to a residence where Exhibit 3 (117 grams in Crown Royal bag) was found. J.A. 85. Holley opined that "you just don't see a lot of users with a scale." J.A. 87. Holley also commented that "[A] lot of times what you'll find is someone that is a user simply doesn't want to be around a gun because that's one good way you can use your drugs and be all right. But if you have a firearm on you, the fact is that other

things could possibly happen, other than just losing your drugs.” J.A. 88.

Holley mentioned that the plastic baggies with the corners missing were an indication of how cocaine was wrapped. *Id.* At that point, Holley said that “...with everything combined, it’s certainly inconsistent with personal use to me, and I would go as far as to say that what has been presented to me is an item found on an individual, because of the packaging of some of the items and the other items not being packaged, that the 4 grams that were actually found on the individual, I would state that that would be inconsistent with personal use, basically, because of the 4 grams plus the weight – the 4 grams plus the packaging.” J.A. 89.

When the prosecution rested, the defense moved to strike the charge of possession of a firearm while in possession of cocaine with the intent to distribute. J.A. 96. The firearm was found 5 miles from where Wright physically possessed the cocaine. There was no evidence he ever sold from his house, or that the gun was ever used in conjunction with selling drugs. *Id.* Under section C of Code § 18.2-308.4, the most severe section, constructive possession is not enough. J.A. 103. Section C which carries a stiffer penalty uses the

language “while,” while the sections A and B use the language “simultaneous.” J.A. 108.

The Commonwealth argued Wright was guilty of Code § 18.2-308.4(C) because he simultaneously and constructively possessed the “big eight” of cocaine in his bedroom closet and the firearm on his bed. J.A. 101-102. The Circuit Court found that subsection C did not say the possession of the drugs and firearm had to take place in the exact location at the exact place.

The Circuit Court held that the language in *Jefferson v. Commonwealth*, 14 Va. App. 77, 414 S.E.2d 860 (1992) applied to subsection C. The Circuit Court ruled the language of subsection C of the statute was satisfied by the evidence presented. J.A. 117. The Circuit Court overruled the motions and found Wright guilty on both counts. *Id.*

ARGUMENT

The Circuit Court Erred in Convicting Wright under Code § 18.2-308.4(C) and the Court of Appeals erred in affirming that conviction.

Standard of Review

This Court previously set forth the basic principles of statutory interpretation in *Washington v. Commonwealth*, 272 Va. 449, 455, 634 S.E.2d 310, 313-314 (2006):

Statutory interpretation presents a pure question of law and is accordingly subject to *de novo* review by this Court. *Anslie v. Inman*, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003). Under basic principles of statutory construction, we must determine the General Assembly's intent from the words contained in a statute. *Commonwealth v. Diaz*, 266 Va. 260, 264-65, 585 S.E.2d 552, 554 (2003). This general rule applies except when the language of the statute is ambiguous or would lead to an absurd result. *Tiller v. Commonwealth*, 193 Va. 418, 420, 69 S.E.2d 441, 442 (1952); *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001).

Wright contends that his interpretation, as presented to the Circuit Court (J.A. 96-117), of subsection C of Virginia Code § 18.2-308.4, dealing with the possession of a firearm while committing the illegal possession with intent to distribute a controlled substance, is not ambiguous and does not lead to an absurd result in his case. If we examine the legislative history behind 18.2-308.4 and the distinctions

between current subsections A and B, and pertinent subsection C, it is clear that the principle of constructive possession that applies to subsections A and B does not apply to subsection C.

Discussion

The relevant section of Code § 18.2-308.4(C) states:

It shall be unlawful for any person to possess, use, or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner *while* committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with the intent to manufacture, sell, or distribute a controlled substance classified in Schedule I or Schedule II of the Drug Control Act.

(emphasis added). Wright did not possess the gun “while” he was initially stopped; instead the gun was approximately 5 miles away at his house. J.A. 56. During the trial, Detective Holley testified that just the amount initially found on Wright’s person was inconsistent with personal use. J.A. 85-89. Since the evidence suggested that Wright was selling or intending to sell crack-cocaine when he was initially stopped but did not have the gun, he should not have been convicted of the weapons charge.

In *Jefferson v. Commonwealth*, the Court of Appeals held that, “actual possession of both the firearm and the controlled substance is not required by the wording of Code § 18.2-308.4. Constructive

possession of either or both is sufficient for conviction.” *Jefferson v. Commonwealth*, 14 Va. App. 77, 80, 414 S.E.2d 860, 862 (1992).

This decision is not applicable to Wright’s case for two reasons. First, the decision was based on subsection A of Virginia Code § 18.2-308.4, which carries less punishment and uses different language than subsection C² of § 18.2-308.4. As the Court of Appeals noted in *Jefferson*:

Code § 18.2-308.4 (A) provides that “[a]ny person unlawfully in possession of . . . cocaine . . . who simultaneously with knowledge and intent possesses any firearm shall be guilty of a Class 6 felony.” *Jefferson* contends that the evidence is insufficient to support a finding that he possessed any of the discovered firearms with intent and knowledge while simultaneously possessing the cocaine found on the closet floor. We disagree.

Jefferson, 14 Va. App. at 79, 414 S.E.2d at 861. The Court of Appeals went on to say:

² The current subsection C of 18.2-308.4 was first enacted as subsection B of 18.2-308.4 in 1992 and was not in effect when *Jefferson v. Commonwealth* was decided. When subsection B was first enacted, it read as follows: “It shall be unlawful for any person to possess, use, or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit the illegal manufacture, sale, distribution, or the possession with the intent to manufacture, sell, or distribute a controlled substance classified in Schedule I (§ 54.1-3446) of the Drug Control Act or cocaine, coca leaves or any salt, compound, derivative, or preparation thereof as described in Schedule II (§ 54.1-3448) of the Drug Control Act.”

Similarly, actual possession of both the firearm and the controlled substance is not required by the wording of Code § 18.2-308.4. Constructive possession of either or both is sufficient for conviction. “To support a conviction based upon constructive possession, the Commonwealth ‘must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the substance and that it was subject to his dominion and control.’” *Brown v. Commonwealth*, 5 Va. App. 489, 491-492, 364 S.E.2d 773, 774 (1988) (quoting *Powers v. Commonwealth*, 227 Va. 474, 476, 316 S.E.2d 739, 740 (1984) (citing *Eckhart v. Commonwealth*, 222 Va. 447, 450, 281 S.E.2d 853, 855 (1981))).

Jefferson, 14 Va. App. at 80, 414 S.E.2d at 862. Second, the firearm five miles away in Wright’s home was not subject to his dominion and control “while” Wright possessed the cocaine (found in his zipper and shoe) with intent to distribute.

It cannot be said that Wright constructively possessed the firearm found at his home “while” he constructively possessed the cocaine found at his home. Indeed, the Court of Appeals did not address this situation in *Jefferson* but specifically referred to a similar probability in order to say that the issue was not before this Court:

Jefferson argues that interpreting the statute to include constructive simultaneous possession of specified controlled substances and firearms extends its impact beyond the bounds intended by the legislature. Jefferson contends that this interpretation would allow conviction for the possession of a small amount of cocaine in the home

while keeping a handgun or hunting rifle in a safe or attic. We need not decide that issue in this case because Jefferson was discovered leaving the room in which firearms and cocaine were found. We hold that the evidence in the record supports a finding that Jefferson simultaneously had constructively possessed cocaine and at least one firearm.

Jefferson, 14 Va. App. at 81, 414 S.E.2d at 862. Wright, on the other hand, was arrested five miles from the Mallard Cove apartment where his gun was found. Properly read, Code § 18.2-308.4(C) requires the Commonwealth to prove that an accused “possess[ed] a firearm while engaged in, *inter alia*, “the possession with the intent to ... sell ... a controlled substance.”

The Court of Appeals relied on this Court’s decision in *Bolden v. Commonwealth*, 275 Va. 144, 654 S.E.2d 584 (2008) as support for its conclusion that proof of constructive possession is sufficient to support a conviction under Virginia Code § 18.2-308.4(C). Bolden was indicted and convicted for violating subsection (C); thus, the Court of Appeals found that this Court “has implicitly concluded that, under proper circumstances, proof of constructive rather than actual possession of a firearm is sufficient to support a conviction under subsection (C).” *Wright v. Commonwealth*, 53 Va. App. 266, 281, 670 S.E.2d 772, 779 (2009).

But, in *Bolden*, the appellant exited a vehicle where he had been sitting in the driver's seat upon the approach of a police officer. A blue bag with a loaded .32 caliber handgun was inside the bag which was "right beside Mr. Bolden or he was sitting on it" according to the officer's testimony. *Bolden*, 275 Va. at 147, 654 S.E.2d at 585. The facts in *Bolden* provided circumstances completely consistent with a conclusion that Bolden constructively possessed the firearm in the blue bag on which he was sitting *while* he possessed with the intent to distribute the cocaine he dropped after exiting the car. Wright, on the other hand, possessed with intent to distribute cocaine while he sat in his black Beretta on Suburban Parkway. Meanwhile, his gun was five miles away at his home. Wright disagrees with conclusion of the Court of Appeals under these circumstances proof of constructive rather than actual possession of a firearm is sufficient to support a conviction under subsection (C).

Wright argues that to interpret Virginia Code § 18.2-308.4(C) to allow a conviction when an accused is in a remote location but simply has cocaine and a firearm in the home could not have been the intent of the legislature as indicated by the use of the word "while." The relevant meaning of the word "while" when used as a conjunction is

“(1) As long as; during the time that; (2) At the same time that; although; (3) Whereas; and.” The American Heritage Dictionary of the English Language, Fourth Edition (2000). Clearly, Wright did not have the firearm “during the time that” or “at the same time that” he possessed the cocaine found on his person. Wright stressed to the Circuit Court how substituting “while” for “simultaneously” indicated a legislative intent not to impose the five year mandatory sentence for someone who was attempting to sell or distributing cocaine while a gun he owned was five miles away (or in another county, city or state).

The legislature could have chosen to use the same wording used in subsections A and B of 18.2-308.4 (“to simultaneously with knowledge and intent”) in subsection C had it intended the same principles of constructive “simple” possession applicable in *Jefferson v. Commonwealth* to apply to possession with intent to distribute situations. “When interpreting statutory language, we must assume that the legislature chose with care the words it used and, where it includes specific language in one section but omits that language from another section, we presume that the exclusion of the language was intentional.” *7-Eleven, Inc. v. Dep’t of Environmental Quality*, 39

Va. App. 377, 397, 573 S.E.2d 289, 299 (2002). The legislature chose not to use the words “to simultaneously with knowledge and intent,” which the courts have held encompasses constructive possession. Instead, the legislature chose to use the word “while” and to make it clear that the five year mandatory prison sentence applies to persons who possess or use or display their firearm in a threatening manner at the same time they engage in the unlawful drug activity.

This Court has held “[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). “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).

In Wright’s case, a strict interpretation of the language used in subsection C of 18.2-308.4 does not permit a conviction unless the

accused possesses the firearm “while” he actually is engaged in the illegal possession with intent to distribute a controlled substance. Constructive possession will not suffice. “[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).

There was no evidence that Wright ever sold drugs from his home. There was also no testimony that Wright possessed the gun while he sold drugs. When Officer Smith first became aware of the gun, Wright was not in possession of drugs. Although other drugs were in the room where the gun was found, the fact that Wright left the gun at home suggested that he did not carry the gun while dealing. This behavior is not of the type the legislature intended to punish.

The Court of Appeals erred in holding “...although appellant had purchased the gun legally, the evidence “reasonably supported a finding that [appellant’s] gun protected his drugs,” [*United States v.*]

Ceballos-Torres, 218 F.3d [409,] at 415 [(5th Cir. 2000)], thereby providing the necessary nexus between appellant's constructive possession of the handgun and drugs, which were in close proximity to one another in his bedroom." If, as the Court of Appeals held, the legislature intended a nexus "between the drug possession and firearm possession" *Wright*, 53 Va. App. At 283, 670 S.E.2d at 780, then, the evidence here did not support a finding that Wright's gun protected his drugs. The expert witness's statement that "the gun ... is one of those things that you normally find with people that are doing something other than using drugs" J.A. 87, even in conjunction with the proximity of the gun to the drugs found in the closet does not establish the nexus.

The expert did not expressly opine on the significance of a person selling drugs out of their car while that person's gun was five miles away at home. The Court of Appeals found this nexus requirement after deciding Virginia Code § 18.2-308.4(C) was similar to 18 U.S.C. § 924(c)(1)(A), which criminalizes the possession of a firearm where that possession is "in furtherance of" a drug trafficking crime. *Wright*, 53 Va. App. at 284, 670 S.E.2d at 781. But in a recent federal court case interpreting the federal statute, *Delgado v. United*

States, 2009 WL 1451796 (E.D. Cal.), the United States District Court for the Eastern District of California said:

A person may violate § 924(c)(1)(A) either by “using or carrying” a firearm “during and in relation” to a drug offense or by “possessing” a firearm “in furtherance of a drug offense.” [*United States v. Arreola*, 467 F.3d [1153,] at 1159-60 [(9th Cir. 2006)]. To prove that a defendant possessed a firearm in furtherance of a drug offense, “the government must show that the defendant possessed the weapon to promote or facilitate the underlying crime.” *Id.* at 1160; *United States v. Krouse*, 370 F.3d 965, 967 (9th Cir. 2004). The mere possession of a firearm by a defendant convicted of a drug crime is not sufficient for purposes of § 924(c)(1)(A). *United States v. Rios*, 449 F.3d 1009, 1012 (9th Cir. 2006); *Krouse*, 370 F.3d at 967. An intent to use the firearm to promote or facilitate the drug offense “is sufficient when the facts in evidence reveal a nexus between the guns discovered and the underlying offense.” *Rios*, 449 F.3d at 1012; *Krouse*, 370 F.3d 968. Whether a sufficient nexus exists is a fact sensitive inquiry and “the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity.” *United States v. Norwood*, 555 F.3d 1061, 1069 (9th Cir. 2009); see *United States v. Hector*, 474 F.3d 1150, 1157 (9th Cir. 2007); *United States v. Mosely*, 465 F.3d 412, 416-18 (9th Cir. 2006). “Whether the requisite nexus is present may be determined by examining, inter alia, the proximity, accessibility, and strategic location of the firearms in relation to the locus of drug activities.” *Hector*, 474 F.3d at 1157; *Rios*, 449 F.3d at 1012; *Krouse*, 370 F.3d at 378.

Despite the assertion by the Court of Appeals, 18 U.S.C. § 924(c)(1)(A) is not similar to Virginia Code § 18.2-308.4(C) as possessing a firearm “during and in relation” to a drug offense or “in

furtherance of a drug offense” (*Delgado* citing *Arreola, supra*) is not the same as possessing a firearm “while” committing a drug offense. Virginia Code § 18.2-308.4(C) only proscribes possessing the firearm “while” or “during” the drug offense, and does not require the firearm possession be “in relation” to or “in furtherance of a drug offense.”

In any event, the Court of Appeals’ finding that Wright’s gun protected his drugs was not supported by the facts which show Wright did not carry this gun with him while he was selling drugs from his car five miles from his home. No facts proved Wright’s firearm “was possessed to advance or promote the criminal activity.” *Norwood*, 555 F.3d at 1069.

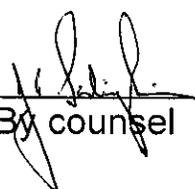
The Court of Appeal’s finding of a nexus between Wright’s firearm and his criminal activity was based on weak circumstantial evidence, namely, the proximity of the gun to the drugs in the closet. In sum, “proof by circumstantial evidence ‘is not sufficient ... if it engenders only a suspicion or even a probability of guilt. Conviction cannot rest upon conjecture.’” *Dove v. Commonwealth*, 41 Va. App. 571, 578, 586 S.E.2d 890, 894 (2003) (quoting *Littlejohn v. Commonwealth*, 24 Va. App. 401, 414, 482 S.E.2d 853, 859 (1997)).

Wright neither possessed the firearm “while” committing the offense of possessing with intent to distribute cocaine, nor was there a nexus between his criminal activity and the firearm he legally possessed.

CONCLUSION

For the foregoing reasons, Appellant, Lamont D. Wright, prays this Court to reverse his conviction for possession of a firearm while in possession of cocaine with the intent to distribute, and to enter final judgment of acquittal on that felony conviction.

RESPECTFULLY SUBMITTED
Lamont D. Wright



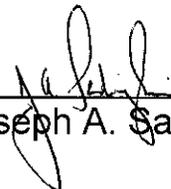
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CERTIFICATE

I, Joseph A. Sadighian, Esquire, Counsel for Appellant, do hereby certify that on June 29, 2009, fifteen copies of Appellant's Opening Brief were hand-delivered to the Clerk, Supreme Court of Virginia; and an electronic copy was filed by disc, CD, or by e-mailing to scvbrieffs@courts.state.va.us and on the same day mailed three copies of this Brief to Counsel for the Appellee, Joshua M. Didlake, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 – telephone: (804) 786-2071 - pursuant to Rule 5:26(d).

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



Joseph A. Sadighian, Esquire