In The
Supreme Court of Virginia

RECORD NO. 091120

ERIC AMIR GHAMESHOULY, s/k/a ERIC AMIR GHAMESOULY,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was charged with Assault and Battery of a Law Enforcement Officer, Failure to provide ID to law enforcement, and Possession of a Schedule I/II Controlled Substance (cocaine). On April 30, 2007, the Honorable Frederick B. Lowe heard testimony and argument regarding a motion to suppress the evidence as to the cocaine charge. That motion was denied. On July 24, 2007 the Appellant entered a conditional guilty plea to the charge of possession of cocaine and a not guilty plea to the charge of refusing to provide identification to a police officer, a violation of the Virginia Beach Municipal Code. The case involved a pure question of law and was tried based on stipulated facts. The appellant was convicted of failing to provide identification to a police officer.

On the charge of cocaine possession Appellant received 5 years, of which four were suspended. On the charge of refusing to provide identification to law enforcement, the Appellant received 12 months, all of which was suspended. Thus, the total sentence appealed by the Appellant is 5 years and twelve months, with an active sentence of one year.

Pursuant to a plea agreement and recommendation, the Appellant entered an Alford plea to the charge of assault on a law enforcement officer, and a guilty plea to driving on a suspended operator's license, as well as stipulating to a probation violation. The Appellant did not appeal

the convictions of assault on a law enforcement officer and driving with a suspended operator's license, or the probation violation.

Appellant timely filed a notice of appeal on July 31, 2007, as to the possession of cocaine charge and the municipal charge. The notice of appeal states the sentence received on both the state charge and the municipal charge. Furthermore, the notice states that appellant "does not appeal the convictions of assault on a law enforcement officer and driving with a suspended operator's license, nor the probation violation".

Appellant timely filed a properly formatted petition for appeal in the Virginia Court of Appeals in support of his appeal of both the state charge and the municipal charge. Responding, a brief was filed in the Virginia Court of Appeals on December 17, 2007 by Harvey L. Bryant, the Commonwealth's Attorney of the City of Virginia Beach, and the Deputy Commonwealth's Attorney, Thomas M. Murphy, who had been trial counsel.

The petition for appeal was reviewed by a judge of the Court of Appeals of Virginia, who denied the appeal as to the state charge and the municipal charge. Documenting that decision, the Court of Appeals of Virginia issued a *per curiam* order dated April 2, 2008. The style of that order refers to CR07-1533 and recites the appellees are: "Commonwealth of Virginia and City of Virginia Beach."

Appellant appealed this denial to a three-judge panel of the Virginia Court of Appeals. By order entered June 10, 2008, that panel denied the petition for appeal of the state charge, but granted the petition for appeal as to the municipal charge. Again, the order documenting that decision refers to CR07-1533 and recites the appellees are: "Commonwealth of Virginia and City of Virginia Beach."

With the decision of the three-judge panel, the appeal of the municipal conviction was forwarded to a merit panel of the Virginia Court of Appeals for determination.

On August 6, 2008, the Attorney General filed a "Motion to Amend the Caption." That motion stated:

> The remaining issue, therefore, involves only a local misdemeanor violation. Ordinarily, this office would not defend an appeal in such a case since the Commonwealth is not a proper party. Code § 2.2-511. Since, however, upon an appeal to the Supreme Court the appellant could again challenge his conviction under the state statute, this office believes it should remain involved at this stage. The proper party appellee is now the City of Virginia Beach and the Commonwealth's Attorney from that jurisdiction has agreed to become co-counsel in this matter.
>
> WHEREFORE, the Commonwealth requests that the caption of this case be amended to add the City of Virginia Beach as an appellee.

On August 21, 2008, the Clerk of the Virginia Court of Appeals, by letter, advised the Attorney General, with copy to appellant's counsel, as follows:

> The Court of Appeals has received the motion to amend the caption of the above-noted case to include the City of Virginia Beach as an appellee. However, upon review of the caption of this case and the orders entered therein, the City of Virginia Beach is listed as an appellee. Accordingly, the Court will not take any action on your request.

On August 12, 2008, the Attorney General filed his printed brief for consideration by the panel. In accordance with the representations contained in his August 6, 2008 motion to amend the caption, that brief is signed by the Attorney General and by "co-counsel in the matter," the Commonwealth's Attorney of Virginia Beach. The brief concludes: "Respectfully submitted, COMMONWEALTH OF VIRGINIA and CITY OF VIRGINIA BEACH, Appellees herein."

On September 26, 2008, the Attorney General filed a motion, based upon the provisions of Rule 5A:6(d)(1), to dismiss appellant's appeal "for the failure of the appellant to join an indispensable party . . . the appellant listed only the Commonwealth of Virginia as the appellee . . . [and] . . . [h]ere the City of Virginia Beach is . . . an indispensable party." No such argument had been included in the printed brief filed by the Attorney General and the City of Virginia Beach.

The Court of Appeals of Virginia entered an order requiring Appellant to reply to the Attorney General's motion to dismiss. On November 3, 2008, Appellant argued that: (1) he relied upon the August 21, 2008 letter

from the Clerk, noting the City was a named appellee; (2) when the Commonwealth's Attorney filed a brief responding to his appeal, i.e. the initial brief filed for consideration by the one-judge review, and the three-judge writ panel, that constituted a general appearance and a waiver of any Rule 5A:6 omission; (3) that the joinder of the Commonwealth's Attorney with the Attorney General in the printed brief prepared for consideration by the merit panel likewise constituted a general appearance by the City; and (4) at no point in time, prior to the filing of the Attorney General's motion to dismiss, had the question of a Rule 5A:6 omission ever been raised.

In an opinion dated May 5, 2009, the Court of Appeals of Virginia dismissed Appellant's appeal of his local misdemeanor conviction in a 2-1 decision.

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS OF VIRGINIA ERRED BY FINDING THAT THE FAILURE TO NAME THE CITY OF VIRGINIA BEACH IN THE NOTICE OF APPEAL IN A MISDEMEANOR APPEAL OF A CITY CODE VIOLATION IS AN ISSUE OF SUBJECT MATTER JURISDICTION, REQUIRING DISMISSAL OF THE APPEAL, AS OPPOSED TO NOTICE MATTER JURISDICTION, WHICH COULD BE, AND IN THIS CASE WAS WAIVED? (Relates to Assignment of Error I).

II. WHETHER THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF FAILING TO PRODUCE IDENTIFICATION TO LAW ENFORCEMENT UNDER VIRGINIA BEACH MUNICIPAL CODE SECTION 23-7.1, WHEN APPELLANT WAS NOT IN A PUBLIC PLACE OR A PLACE OPEN TO THE PUBLIC WHEN APPELLANT FAILED TO IDENTIFY HIMSELF, AND WHETHER THE COURT OF APPEALS OF VIRGINIA ERRED BY FAILING TO REACH THE ISSUE? (Preserved by Motion to Strike July App. 69-70). (Relates to Assignment of Error II).

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS OF VIRGINIA ERRED BY FINDING THAT THE FAILURE TO NAME THE CITY OF VIRGINIA BEACH IN THE NOTICE OF APPEAL IN A MISDEMEANOR APPEAL OF A CITY CODE VIOLATION IS AN ISSUE OF SUBJECT MATTER JURISDICTION, REQUIRING DISMISSAL OF THE APPEAL, AS OPPOSED TO NOTICE MATTER JURISDICTION, WHICH COULD BE, AND IN THIS CASE WAS WAIVED.

II. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF FAILING TO PRODUCE IDENTIFICATION TO LAW ENFORCEMENT UNDER VIRGINIA BEACH MUNICIPAL CODE SECTION 23-7.1, WHEN APPELLANT WAS NOT IN A PUBLIC PLACE OR A PLACE OPEN TO THE PUBLIC WHEN APPELLANT FAILED TO IDENTIFY HIMSELF, AND THE COURT OF APPEALS OF VIRGINIA ERRED BY FAILING TO REACH THE ISSUE. (Preserved by Motion to Strike July App. 69-70).

STATEMENT OF FACTS

Appellant and a woman occupied a hotel room as an overnight guest. The room was paid for, and registered to, another person. The police responded to a noise complaint lodged by the clerk, who heard a loud voice or loud voices in the room. (April App 28). Appellant had spoken with the clerk earlier in the night about noise. (April App. 30). Appellant was to stay in the room in which the police ultimately found him. (April App. 30). When the police arrived, two officers listened and then knocked on the door of the hotel room. (April App. 34). Inside, they heard a man's voice. The front door opened and the officers spoke briefly with a young woman who answered the door, then entered the room. (April App. 34).

Officer Harvey stated that the officers were not invited in and that the search was not consensual. (April App. 37). Officer Frederick testified that the officers were "invited" in by actions of the female occupant in opening the door, but did not testify that consent was asked for or given. (April App. 45).

The officers spoke with the appellant, who provided false information to them. (April App. 43). Appellant was arrested for failing to identify himself to a police officer and for an outstanding warrant. (April App. 45). A search incident to this arrest revealed cocaine in the pocket of a pair of pants, which the appellant put on subsequent to his arrest.

At the trial of the refuse to identify charge, the Honorable Patricia L. West reviewed the stipulated facts, heard argument and convicted the Appellant. The Court held, essentially, that Appellant had no standing and that the motel room was a "place open to the public" requiring identification. (June App. 43).

ARGUMENT

I. THE COURT OF APPEALS OF VIRGINIA ERRED BY FINDING THAT THE FAILURE TO NAME THE CITY OF VIRGINIA BEACH IN THE NOTICE OF APPEAL IN A MISDEMEANOR APPEAL OF A CITY CODE VIOLATION IS AN ISSUE OF SUBJECT MATTER JURISDICTION, REQUIRING DISMISSAL OF THE APPEAL, AS OPPOSED TO NOTICE MATTER JURISDICTION, WHICH COULD BE, AND IN THIS CASE WAS WAIVED.

In his dissent, the Honorable James W. Haley, Jr. notes that there are two issues before the Court: "First, is the failure to name an appellee in a notice of appeal of such jurisdictional import as to render that failure incapable of being waived, and thus requiring dismissal? Second, if that failure is capable of being waived, was it waived under the facts of the present case?" Ghameshlouy v. Commonwealth, 54 Va. App. 47, 675 S.E.2d 854.

As to the first issue, The Court of Appeals of Virginia relies upon its recent decision in Woody v. Commonwealth, 53 Va. App. 188, 670 S.E.2d 39 (2008). However, Woody v. Commonwealth never addresses the issue of whether an appellee may waive the appellant's failure to name the

appellee in his notice of appeal. Judge Haley addresses this issue in his dissent stating that the Supreme Court of Virginia "has also frequently reaffirmed the general principle that, while defects in subject matter jurisdiction may never be waived, statutory and rule-based procedural prerequisites for the valid exercise of a court's subject matter jurisdiction *may* be waived by the parties. See Porter v. Commonwealth, 276 Va. 203, at 228-29, 661 S.E.2d 415". Ghameshlouy at 864. Naming an appellee is a statutory and rule-based procedural prerequisite for the valid exercise of a court's subject matter jurisdiction and therefore may be waived.

The second issue then becomes whether or not the failure to name an appellee in the present case was waived. As Judge Haley noted in his dissent, "no challenge as to the 'jurisdiction' of this Court was ever raised prior to September 26, 2008, when the Attorney General filed his motion to dismiss, and, further, that the Commonwealth's Attorney of Virginia Beach did not join in that motion." Ghameshlouy at 867.

Judge Haley continues stating:

> In Gilpin, 257 Va. at 581-82, 515 S.E.2d at 125-26, our Supreme Court wrote:
>
> "An appearance for any other purpose than questioning the jurisdiction of the court—'*because there was no service of process*, or the process was defective, or the action was commenced in the wrong county, or the like' is general and not special, although accompanied by the claim that the appearance is only special." Norfolk and Ocean View Railway

> Co. v. Consolidated Turnpike Co., 111 Va. 131, 136, 68 S.E. 346, 348 (1910) (emphasis added). Joyce did not make a special appearance. Rather, by filing a grounds of defense and a counterclaim, Joyce made a general appearance in the trial court proceeding. . . . *A general appearance* "is a waiver of process, equivalent to personal service of process and *confers jurisdiction of the person on the court*." Nixon v. Rowland, 192 Va. 47, 50, 63 S.E.2d 757, 759 (1951). (Emphasis added).

On December 17, 2007, the Commonwealth's Attorney of the City of Virginia Beach filed a reply brief for consideration by the Virginia Court of Appeals. That brief was initially considered by a judge of the Virginia Court of Appeals, and later by a three-judge panel of the Virginia Court of Appeals. The orders entered by the Virginia Court of Appeals documenting the decision of the initial judge considering the brief, and the decision of the three-judge panel, include the City of Virginia Beach as an appellee. After the writ was granted as to the municipal charge, the Commonwealth's Attorney joined as co-counsel with the Attorney General in the printed brief submitted to the merit panel.

Accordingly, the City of Virginia Beach, by counsel, entered a general appearance in this case and participated in this case at every stage of the proceedings. By doing so, the City of Virginia Beach waived any objection to the jurisdiction of the Court of Appeals to hear Appellant's case. Therefore, the Court of Appeals erred in dismissing Appellant's appeal of his local misdemeanor conviction.

II. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF FAILING TO PRODUCE IDENTIFICATION TO LAW ENFORCEMENT UNDER VIRGINIA BEACH MUNICIPAL CODE SECTION 23-7.1, WHEN APPELLANT WAS NOT IN A PUBLIC PLACE OR A PLACE OPEN TO THE PUBLIC WHEN APPELLANT FAILED TO IDENTIFY HIMSELF, AND THE COURT OF APPEALS OF VIRGINIA ERRED BY FAILING TO REACH THE ISSUE. (Preserved by Motion to Strike July App. 69-70).

Virginia Beach Municipal Code section 23-7.1 states:

> Sec. 23-7.1. Providing identification to police officer.
> It shall be unlawful and a Class 1 misdemeanor for any person at a *public place* or place open to the *public* to refuse to identify himself by name and address at the request of a uniformed police officer or of a properly identified police officer not in uniform, or to provide false information in response to such a request, if the surrounding circumstances are such as to indicate to a reasonable man that the *public safety* requires such identification. (Ord. No. 1570, 12-16-85) (emphasis added).

The appellant was illegally arrested and charged with the aforementioned offenses. He did not commit a crime in the presence of the arresting officers; the arresting officers did not have an arrest warrant. The appellant did not attempt to escape.

The officers' stated purpose in entering the room was to check for physical abuse. The appellant's name and identification had nothing to do with that purpose. No community caretaker function could exist at that point: demanding the appellant's identification is beyond the scope of the caretaking function.

Even if such a demand were not beyond the scope of the function, the ordinance only requires that a person "at a public place or place open to the public" provide identification. At trial the Commonwealth conceded and the trial court held that the hotel room was not a public place. (App. at 74).

The term "a place open to the public" is not defined in the Virginia Beach Municipal Code nor has it been defined by a court in the Commonwealth of Virginia. The inside of a rented, closed, hotel room is not a place open to the public. Members of the public are not free to come and go at their discretion into and out of a rented, closed hotel room. For the sake of argument, if the hotel room door was open and people were coming and going as they wished, that particular hotel room might be viewed as "open to the public". However, that is not the case here, which involves a rented hotel room with its door closed. There is no one entering or exiting the room. Members of the public are not free to come and go as they please. Therefore, the subject hotel room is not open to the public, and the appellant did not violate the statute.

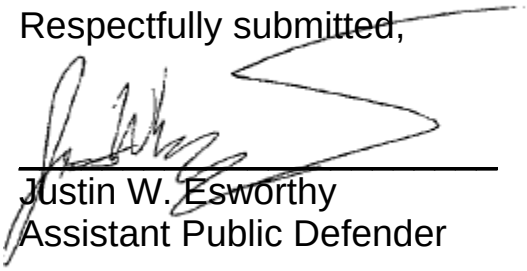
The Virginia Supreme Court has upheld the constitutional validity of "stop and identify" statutes. See Jones v. Commonwealth, 230 Va. 14, 334 S.E.2d 536 (1985). In Jones, however, the defendant was on a

public street. In another case, a front porch of a house was determined to be a pubic place. See Crislip v. Commonwealth, 37 Va. App. 66 (2001). In this case, involving a closed rented hotel room, the arrest was not supported by probable cause because the appellant was not required to provide identification to the police according to Virginia Beach Municipal Code section 23-7.1, and was therefore illegal. Thus, the search incident to arrest was invalid. The exclusionary rule prohibits the introduction of evidence acquired during an illegal search. See Wong Sun v. United States, 371 U.S. 471 (1963). As a proximate result of an illegal search and seizure, the cocaine is fruit of the poisonous tree and must be suppressed.

CONCLUSION

For the reasons stated the appellant requests that his convictions be reversed and vacated or remanded for further consideration by the trial court.

Respectfully submitted,



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CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify that the appellant's name is ERIC AMIR GHAMESHOULY, S/K/A ERIC AMIR GHAMESOULY and counsel for the appellant is Justin W. Esworthy, Esq., Assistant Public Defender, 2425 George Mason Drive, Post Office Box 6160, Virginia Beach, Virginia 23456, (757) 427-6050. The appellee is the Commonwealth of Virginia and counsel for the Commonwealth of Virginia is Eugene Murphy, Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071.

Fifteen paper copies and one electronic copy on CD of the foregoing Opening Brief and Appendix were hand filed with the Clerk at the Supreme Court of Virginia and three copies of the foregoing Opening Brief and Appendix were mailed, via U.S. Mail, postage prepaid, to counsel for the appellee on this 21st day of October, 2009.

Counsel wishes to request oral argument.

Justin W. Esworthy
Assistant Public Defender