# 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 APPELLEE CITY OF VIRGINIA BEACH

**Mark D. Stiles (VSB No. 30683)**
**Christopher S. Boynton (VSB No. 38501)**
**Natalie P. Mann (VSB No. 71785)**
**OFFICE OF THE CITY ATTORNEY**
**Municipal Center, Building One**
**2401 Courthouse Drive**
**Virginia Beach, Virginia 23456**
**(757) 385-4531 (Telephone)**
**(757) 385-5687 (Facsimile)**
**cboynton@vbgov.com**
**nmann@vbgov.com**

***Counsel for Appellee***
***City of Virginia Beach***

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

# TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 1

QUESTION PRESENTED ..... 2

FACTS ..... 2

ARGUMENT ..... 4

I. The City is an indispensible party and must be named in the notice of appeal ..... 5

II. Due to the lack of jurisdiction, the argument regarding whether or not the failure to name an indispensable party is a waivable defect becomes moot ..... 6

CONCLUSION ..... 8

CERTIFICATE ..... 9

# TABLE OF AUTHORITIES

**Page(s)**

## CASES

Asch v. Friends of the Community of Mount Vernon Yacht Club,
251 Va. 89, 465 S.E.2d 817 (1996) ..... 5

Jay v. Commonwealth,
275 Va. 510, 659 S.E.2d 311 (2008) ..... 5

Vaughn v. Vaughn,
215 Va. 328, 210 S.E.2d 140 (1974) ..... 5

Watkins v. Fairfax County Dep't of Family Services,
42 Va. App. 760, 595 S.E.2d 19 (2004) ..... 6

## STATUTES

Va. Code § 18.2-57(C) ..... 2

Va. Code § 18.2-250 ..... 1, 2, 7

Va. Code § 19.2-306 ..... 2-3

Va. Beach City Code § 23-7.1 ..... passim

## RULE

Va. Sup. Ct. R. 5A:6(a) ..... 6

## STATEMENT OF THE CASE

On February 24, 2007, the Virginia Beach Police Department arrested Eric Amir Ghameshouly ("Ghameshouly") for possession of cocaine, in violation of Virginia Code § 18.2-250 and refusal to provide identification to a law enforcement officer, in violation of Virginia Beach City Code § 23-7.1. On July 24, 2007, Ghameshouly entered a conditional guilty plea to the possession charge and the trial court convicted Ghameshouly in a bench trial of refusal to provide identification to a law enforcement officer.

Ghameshouly appealed his conviction of both the possession charge and the refusal charge to the Court of Appeals. The Court of Appeals refused Ghameshouly's petition with respect to the possession conviction and granted the petition with respect to the conviction for refusal to provide identification to a law enforcement officer. The Court of Appeals then dismissed the appeal of the city code violation for lack of jurisdiction. Ghameshouly now appeals the possession of cocaine conviction and dismissal of the appeal to this Court. This Court has directed the City of Virginia Beach ("the City") to file a brief stating whether the City was—or should have been—a party to Ghameshouly's appeal to the Court of Appeals.

For the following reasons, the City submits that it was a necessary party to Ghameshouly's appeal to the Court of Appeals. However, because Ghameshouly failed to name the City as an appellee in his notice of appeal, the City was not a party over which the Court of Appeals had jurisdiction. Additionally, because Ghameshouly did not notice an appeal from the order convicting him of violating the city ordinance, the Court of Appeals did not have jurisdiction over that issue. Thus, the Court of Appeals appropriately dismissed Ghameshouly's appeal of his conviction for violating Virginia Beach City Code § 23-7.1.

## QUESTION PRESENTED

Was the City of Virginia Beach a party to Ghameshouly's appeal of his conviction of Virginia Beach City Code § 23-7.1 to the Court of Appeals of Virginia?

## FACTS

On February 24, 2007, the Virginia Beach Police Department arrested Ghameshouly for the following violations: (1) failure to provide correct identification to a law enforcement officer, in violation of City Code § 23-7.1; (2) possession of cocaine, in violation of Virginia Code § 18.2-250; (3) assault on a law enforcement officer, in violation of Virginia Code § 18.2-57(C); and (4) probation violation, in violation of Virginia Code § 19.2-

306. The three state law violations were the subject of a plea agreement dated July 24, 2007 and endorsed by Ghameshouly and counsel. The trial court entered a sentencing order on the three state law offenses on August 1, 2007. Neither the plea agreement nor the sentencing order addressed the charge for violating the city ordinance.

The trial court—in a bench trial—also convicted Ghameshouly of violating Virginia Beach City Code § 23-7.1. The trial court entered a sentencing order reflecting this conviction on July 30, 2007.

On July 31, 2007, Ghameshouly filed a notice of appeal. In the notice, Ghameshouly set forth the case numbers assigned to all four violations. However, the notice of appeal did not identify the City as a party to the appeal. In addition, in the body of the notice, Ghameshouly stated his intention "to appeal from a final judgment of the Circuit Court of the City of Virginia Beach, rendered . . . on July 24, 2007." Ghameshouly specified that he was only appealing the possession of cocaine conviction contained in the July 24, 2007 order.[1]

According to the record however, there was no final order entered on July 24, 2007. Instead, that date corresponds with the date of the plea agreement addressing only the state law violations. Nowhere in the notice

[1] Apparently, Ghameshouly entered a conditional guilty plea to the charge of possession of cocaine.

of appeal does Ghameshouly specifically state his intention to appeal his conviction for failure to provide identification to a law enforcement officer as reflected in the final order dated July 30, 2007.

Prior to ruling on the merits of the appeal, the Attorney General moved the Court of Appeals to amend the caption of the case to add the City of Virginia Beach as an appellee. The Court denied the motion. Ultimately, the Court of Appeals denied Ghameshouly's petition with respect to the state law conviction for possession of cocaine, and granted the petition with respect to Ghameshouly's conviction under the city ordinance. A three-judge panel, in an opinion issued on May 5, 2009, dismissed Ghameshouly's challenge to his conviction under Virginia Beach City Code § 23-7.1. The court held that it lacked jurisdiction to hear the appeal due to Ghameshouly's failure to properly perfect his appeal.

Ghameshouly appealed the Court of Appeals' decision to this Court.

## ARGUMENT

The Court of Appeals appropriately dismissed Ghameshouly's appeal of his conviction under Virginia Beach City Code § 23-7.1 due to lack of jurisdiction. Ghameshouly failed to name the City in his notice of appeal and the notice of appeal does not specifically state Ghameshouly's intention to appeal the July 30, 2007 order memorializing his conviction

under the city ordinance. Thus, Ghameshouly did not properly perfect his appeal as required for the Court of Appeals to have jurisdiction.

I. *The City is an indispensible party and must be named in the notice of appeal*.

Ghameshouly was arrested and charged with violating a city ordinance, specifically § 23-7.1, and thus the City of Virginia Beach is an indispensible party to the appeal.

This Court has unequivocally held that the failure to join an indispensable party is a jurisdictional defect that requires dismissal of the appeal. See Asch v. Friends of the Community of Mount Vernon Yacht Club, 251 Va. 89, 91, 465 S.E.2d 817, 818 (1996) ("[A] court lacks the power to proceed with a suit unless all necessary parties are properly before the court."); see also Jay v. Commonwealth, 275 Va. 510, 517, 659 S.E.2d 311, 315 (2008) (stating that "dismissing rather than denying the appeal[ ]" renders the defect jurisdictional). Thus, to adjudicate an appeal, this Court must have jurisdiction over both the appeal itself and the indispensable parties. Vaughn v. Vaughn, 215 Va. 328, 330, 210 S.E.2d 140, 142 (1974). Where one, or both, is lacking, this Court cannot adjudicate the appeal. Id. For this Court to obtain jurisdiction over an individual who was a party in the trial court, the party must be named in the notice of appeal, otherwise this Court lacks jurisdiction over the person. Id.

Here, Ghameshouly failed to name the City in his notice of appeal. This failure resulted in a jurisdictional defect requiring dismissal of his appeal. Said differently, Ghameshouly filed an "ineffective" notice and never properly perfected his appeal as required by Rule 5A:6(a). See Watkins v. Fairfax County Dep't of Family Services, 42 Va. App. 760, 774, 595 S.E.2d 19, 26 (2004).

Moreover, the notice of appeal fails to reference the July 30, 2007 final order setting forth Ghameshouly's conviction under the city ordinance. Instead, Ghameshouly specifically states he is appealing his conviction of possession of cocaine, in violation of state law as set forth in the "order"—which in reality is the plea agreement—dated July 24, 2007.

Given the above, the Court of Appeals never had jurisdiction over the parties, particularly the City who was a necessary party, or the subject matter of the appeal. Thus, the Court of Appeals properly dismissed Ghameshouly's appeal.

II. *Due to the lack of jurisdiction, the argument regarding whether or not the failure to name an indispensable party is a waivable defect becomes moot.*

Ghameshouly contends that his failure to name the City as an appellee in his notice of appeal is an issue that nonetheless can be waived. He further contends that by virtue of failing to object to jurisdiction in the

early phases of the appeal and by joining in the brief of the Attorney General, the City via the Commonwealth's Attorney, waived any objection it may have had regarding the Court of Appeals' jurisdiction to hear the appeal. This argument is unavailing for the following reason.

Ghameshouly's argument that the Commonwealth waived the jurisdictional defect by moving to add the City to the caption pre-supposes that the notice of appeal was valid. However, as mentioned above, Ghameshouly never appealed his city ordinance conviction. Instead, the notice purports to appeal solely Ghameshouly's conviction under Virginia Code § 18.2-250.[2] Because Ghameshouly did not file a notice of appeal for the conviction under City Ordinance § 23-7.1, there was nothing to amend.

Given the above, any discussion regarding whether Ghameshouly's failure to name the City as an appellee is a waivable jurisdictional defect is moot. Thus, the Court of Appeals correctly declined to address this issue and appropriately dismissed the appeal for lack of jurisdiction.

[2] The notice specifically states that Ghameshouly is not appealing his conviction for assaulting a law enforcement officer, driving with a suspended operator's license, or violation of probation.

## CONCLUSION

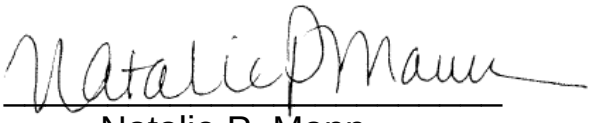
For the forgoing reasons, the City contends that it was a necessary party to Ghameshouly's appeal of his conviction, in violation of City Ordinance § 23-7.1. However, because Ghameshouly failed to name the City as an appellee in his notice of appeal, the Court of Appeals did not have jurisdiction over the City as a party, and thus did not have jurisdiction to hear the appeal. Moreover, because Ghameshouly did not actually appeal his conviction the Court of Appeals did not have jurisdiction over the issue. Accordingly, the Court of Appeals correctly dismissed the appeal.

Natalie P. Mann
(VSB No. 71785)
OFFICE OF THE CITY ATTORNEY
2401 Courthouse Drive
Virginia Beach, VA 23456
(757) 385-4531 (Telephone)
(757) 385-5687 (Facsimile)
NMann@vbgov.com

## CERTIFICATE

The undersigned certifies as follows:

I, Natalie P. Mann, Assistant City Attorney, Counsel for the City of Virginia Beach, hereby certify pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, that on the 16th day of November, 2009, fifteen paper copies and one electronic copy on CD of this Brief of Appellee were hand filed with the Clerk of the Supreme Court of Virginia and I further certify that a true copy of this Brief of Appellee was mailed, via U.S. Mail, postage prepaid, to counsel for Appellant, Justin W. Esworthy, Esquire, Office of the Public Defender, 2425 George Mason Drive, Virginia Beach, Virginia 23456 and counsel for Appellee, Eugene Murphy, Esquire, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219.



Natalie P. Mann