In The

Supreme Court of Virginia

RECORD NO. 091895

JACK EDWARD CARTER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATUTE

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IN THE

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BRIEF OF APPELLANT

I. MATERIAL PROCEEDINGS IN THE LOWER COURTS

A. Henrico County Circuit Court

Upon a bench trial in Henrico County Circuit Court Jack Edward Carter was convicted of grand larceny (Joint Appendix – 32) and sentenced to serve three years in prison with two and one half suspended for ten years (JA – 34, 37-38).

B. Court of Appeals

The Court on September 1, 2009, on a 2-1 decision, affirmed the conviction (JA – 39 to 50).

II. QUESTION PRESENTED

WHETHER THE COMMONWEALTH FAILED TO PROVE THE GRAND LARCENY INDICTMENT, THAT PAINT WAS STOLEN FROM THE STORE (JA – 30 to 32).

III. ASSIGNMENT OF ERROR

THE COMMONWEALTH FAILED TO PROVE THE GRAND LARCENY INDICTMENT; THAT PAINT WAS STOLEN FROM THE STORE (JA – 30 to 32).

IV. STATEMENT OF FACTS

LeDawn Sawyer, an employee of Home Depot at its West Broad Street Store in Henrico County said that on August 22, 2007 a woman attempted a return of merchandise (JA – 10). She was called to approve the return. The woman, Ms. Browning, had four 5 gallons of paint to return (JA – 11). The value was over $200 (JA – 13, 18, $398.92).

She obtained Ms. Browning's identification card. She recognized the name and contacted a loss prevention employee.

The police were also contacted. Successful efforts were made to delay Ms. Browning to await loss prevention and the police (JA – 12).

She never saw defendant Carter. Ms. Browning left the store accompanied by the police (JA – 12).

Jason Farrah, loss prevention investigator for Home Depot, responded to the call and responded to the West Broad Street store. He interviewed Browning and said she provided additional suspects (JA – 15).

Farrah went to O'Charley's restaurant, 2 or 3 blocks away.

He saw defendant running out the door with a beer in his hand. Carter was wearing a white T-shirt and black pants (JA – 16). Farrah was not dressed in any way that identified him as a Home Depot employee. Two police officers were near him and one grabbed Carter (JA – 17).

A video was maintained of the return area. It was given to the Commonwealth and admitted into evidence (JA – 18).

Co-defendant Tracy Browning was called as a witness by the Commonwealth.

She said she knew defendant a couple of months before this arrest (JA – 20). A few minutes before witnessing she had pled guilty to the grand larceny charge (JA – 21).

She and Carter caught a ride together and went to the Home Depot (JA – 21). There were five people in the pick up truck and she did not see any gallons of paint in the truck (JA – 22). She said Carter told her to wait by the store return desk. She was supposed to wait a few minutes and then go in after him (JA – 22). She saw him go into the store. Once in the store she went to the return desk. She stated he pushed the basket up to her and she pushed it to the return desk (JA – 23). Paint was in the basket (JA – 23), as she expected. They had discussed his bringing the paint before. She didn't know all the details about everything (JA – 23).

She went to the return desk and she said she was stalled until the police got there. She tried to return it, but no one was buying it (JA – 24).

She told the police what she was doing and about defendant Carter (JA – 25). The store employees and the police had already figured it out, she said (JA – 25).

She said the arrangement was for Carter to get the paint, bring it to the refund desk and she was to do the return and refund (JA – 27). The paint was never to leave the store (JA – 27). It was still in the same location where she got it and never left the store (JA

– 29). She stated that if the return was denied she was not sure if she would have taken the paint (JA – 29).

After her testimony the Commonwealth sought to amend the indictment to felony steal property or currency (JA – 30). The indictment was to steal paint of felony value (JA – 1). The Court denied the motion to amend (JA – 30).

Defendant moved to strike the Commonwealth's evidence (JA – 30).

While the Commonwealth showed the cans of paint were moved in the store, thus satisfying the asportation element, they failed to prove there was any intent to steal the paint. The theft involved money. The paint would be returned to the store for money and it was thus the money that was to be taken (JA – 30, 31).

The Commonwealth admitted it was unclear from Browning's testimony whether the paint was to be stolen (JA – 31). It argued the intent was to steal money through the use of the paint (JA – 31), that the two were stealing paint to return the paint for cash (JA – 31).

The Court denied the motion to strike saying the intent was to take the paint to get the money (JA – 32). Defendant rested

and renewed the motion to strike the evidence. It was denied (JA – 32).

In denying the defendant's motion to strike the court stated the evidence showed the intent of the scheme was to take the paint for a false refund and get the money. The paint was used as the vehicle to get the money (JA – 32).

Upon the whole evidence, the court ruled it was a plan to take something from Home Depot as if it had been purchased, then return it to Home Depot and get the money refund. The paint is moved as a vehicle to get the money (JA – 32).

V. ARGUMENT

The intent necessary to a larceny, § 18.2-95, is *inter alia*, to deprive the owner permanently of the item *Stanley v. Webber*, 260 Va. 90, 531 S.E.2d 311 (2000).

The indictment was for the theft of paint (JA – 1). Clearly the Commonwealth's evidence was that the paint was not to be stolen (JA – 27). It was asporated in the store *Welch v. Commonwealth*, 15 Va. App. 518, 425 S.E.2d 101 (1992) by defendant Carter, but it was not to be removed from the store. The paint cans went to the return desk but no further. The asportation of

the paint was not to steal it but use it as a devise to get money. The money would than be stolen. The trial court so concluded (JA – 32). As in *Welch, supra*, the movement of the item does not show it intended theft. To the contrary the evidence shows an intent to make a fraudulent item return and abscond with the stolen returned money. The paint clearly was never to be pilfered.

The Commonwealth recognized this and moved to amend the indictment to steal paint "to property or U.S. Currency..." The Court denied the motion (JA – 30).

The trial court ruled there was intent to steal and the paint was a vehicle to get the money. It denied the motions to strike the evidence (JA – 32).

The questions here would be like a thief who goes into a large store intending to steal a particular item by just walking out with it. But before he is out of the store he changes his mind; puts the first item down and steals a different kind of item. If the indictment charges the theft of the first item, there is a not guilty result because it was never stolen.

Here the indictment charges the theft of paint. The paint was not stolen. The Court ruled it was an agent of theft, a vehicle to

steal the money. But it was not stolen. There was no intent to steal the paint *Tarpley v. Commonwealth*, 261 Va. 251, 542 S.E.2d 761 (2001). That was the Commonwealth's evidence. It proved that the defendant was there to steal money. While there was asportation of the paint there was no intent to steal it *Welch, supra, 15 Va. App. 518, 425 S.E.2d 101 (1992).*

The majority opinion of the Court of Appeals (JA – 39 to 45) held that the evidence supported the rationality of the trial court's finding that Carter intended to steal the paint (JA – 45).

The inference made by the Court of Appeals that Carter, in a bar/restaurant two blocks away from the Home Depot refund desk would have gone back to get the paint if the refund was denied (JA – 41) is not part of the evidence. There is no factual basis for the presumption/conclusion

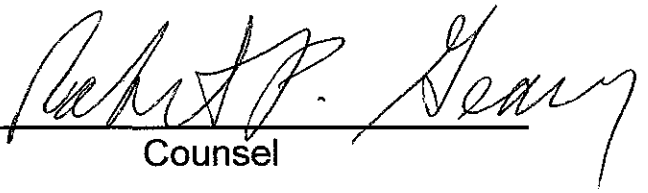
Carter has possession of the paint in the store. He moved it from its normal place to a spot near the refund area. Asportation is not complete until it is carried away *Pritchard v. Commonwealth*, 225 Va. 559, 562, 303 S.E.2d 911, 913 (1983).

The evidence failed to establish he intended to permanently deprive the store of the paint. He sought the money.

V. CONCLUSION

For the foregoing reasons appellant requests the Court to reverse his conviction and dismiss the matter.

JACK EDWARD CARTER

BY 
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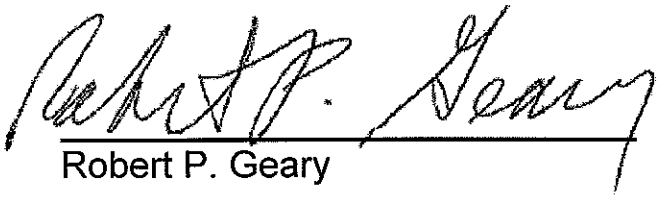
CERTIFICATE

Pursuant to Rule 5:26(d), I hereby certify that, on this 25th day of January, 2010, fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia, and three paper copies of the same have been sent via U.S. Mail, postage prepaid, to Erin M. Kulpa, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219. Counsel for Appellant desires oral argument.



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