In The

Supreme Court of Virginia

RECORD NO. 131822

CHARLES N. HAWKINS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF VIRGINIA AT RICHMOND

CHARLES N. HAWKINS,

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BRIEF OF APPELLANT

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

PRELIMINARY STATEMENT

The appellant, Charles N. Hawkins, respectfully represents that he is aggrieved by a final judgment by the Court of Appeals of Virginia dated the October 22, 2013, in a criminal proceeding wherein the appellant was the defendant. The appellant will be referred to herein as “Defendant” and the appellee as the “Commonwealth.” The Honorable Johnny E. Morrison, Judge of the Circuit Court of the City of Portsmouth, Virginia presided over Defendant’s trial on August 15, 2012. Any reference to the record contained in the Appendix will be referred to as “App. _”.

MATERIAL PROCEEDINGS IN THE COURTS BELOW

On August 15, 2012 Defendant appeared before the Circuit Court of the City of Portsmouth, the Honorable Johnny E. Morrison presiding, and pled not guilty to Possession of Ten or More Forged Bank Notes with Intent to Utter in violation of § 18.2-173 of the Code of Virginia of 1950, as amended, as charged in Indictment No.: CR12-1057. (App. 3, 46) Defendant waived trial by jury, and the court and the Commonwealth consented to the waiver. (App. 46-47 The Commonwealth presented evidence and rested. (App. 51-65) Defendant moved to strike the Commonwealth's evidence as insufficient to convict Defendant because (1) there was no evidence Defendant knew the bills were forged, (2) there was no evidence Defendant intended to utter or employ them as true, and (3) there was no evidence whether defendant possessed ten or more forged bank notes. (App. 65-69) The trial court overruled Defendant's motion to strike. (App. 70)

Defendant put on evidence and rested. (App. 71-96) Defendant again moved to strike the Commonwealth's evidence as insufficient for the same reasons as submitted at the time of Defendant's motion to strike at the conclusion of the Commonwealth's case-in-chief. (App. 96-97) The court overruled Defendant's second motion to strike. (App. 99) The court found

Defendant guilty of Possession of Ten or More Forged bank Notes with Intent to Utter and continued the matter for sentencing. (App. 99)

On November 8, 2012, the court received the Presentence Report and testimony from Glen Cassoni, Portsmouth Probation and Parole Officer. (App. 111, 112-113) After argument by counsel, the court sentenced Defendant to serve five (5) years in the Virginia State Penitentiary, with two (2) years and ten (10) months suspended upon successful completion of two (2) years supervised probation upon release from custody. (App. 131, 136-137) Defendant timely filed a Notice of Appeal. (App. 134-135)

In an Order dated May 16, 2013, the Court of Appeals granted Defendant's Petition for Appeal. (App. 140-141) On October 22, 2013, in an unpublished *per curiam* opinion, the Court of Appeals affirmed the judgment of the trial court. (App. 142-146) Defendant timely appealed to this Court, (App. 147-150) and, on March 17, 2014, this Court granted Defendant's appeal, limited to three Assignment of Error. (App. 151-153) Defendant now seeks relief from this Honorable Court.

STATEMENT OF FACTS

On May 14, 2012, Portsmouth Police Sergeant Travis Smaglo ("Smaglo") received information Defendant, who had outstanding warrants,

was in Big Daddy's in Portsmouth, Virginia. Smaglo received information describing Defendant's clothing and stating he would be near the pool tables. (App. 51-52) Portsmouth Police Officer Watts (Watts") entered Big Daddy's with Smaglo and went to the left of the pool table. (App. 53) Smaglo observed Defendant reach into his right pocket with his right hand. Smaglo drew his gun and told Defendant to remove his hand. Defendant did so and threw money on the floor. Smaglo then placed Defendant in handcuffs. (App. 53)

Smaglo collected the money from the floor. (App. 54) No money was recovered from Defendant. (App. 57-58) In the Big Daddy's parking lot Smaglo gave the money to Portsmouth Police Officer Ha ("Ha") and said, "This is Mr. Hawkins' money." Defendant stated, "That's not my money…that's not mine." (App. 54) Later Smaglo packaged the money at Police Headquarters and put it into property and evidence. (App. 55) There were eighteen $20.00 bills having four different serial numbers on the eighteen bills. (App. 56; Commonwealth's Exhibit #1, App. 9-16) Smaglo separated the bills into four sets with all of the bills in each set having the same serial number. (App. 55) On cross examination Smaglo contradicted his direct testimony and admitted that when he first saw Defendant, his

right hand was already in his right pocket. (App. 58) Smaglo did not see Defendant reach into his pocket. (App. 58)

United States Secret Service agent Dan Apperson ("Apperson") testified as an expert in detecting counterfeit currency. (App. 61) Apperson testified the bills lacked several security features of genuine United States currency, including, (1) color shifting ink, (2) the bills were not printed on genuine currency paper, and (3) the serial numbers on each of the four sets of bills were the same. (App. 62, 63, 64)

Keanna Wilson, ("Wilson") Defendant's sister, Kerry Irving, ("Irving") Defendant's girlfriend, and Charles Martin Smith, Jr., (Smith) Defendant's father all testified they were with Defendant in Big Daddy's on May 14, 2012. (App. 72, 81, 87) All three testified Defendant did not put his hand(s) in his pocket(s) and never pulled any money or other object from his pocket and never threw any money onto the floor. (App. 74, 83, 92, 95) All three also testified the police came in with guns drawn. (App. 72, 82, 92) Wilson testified she was money on the floor ten to fifteen feet from Defendant after he was handcuffed. (App. 75-76) Irving testified the money on the floor was "close" to where Defendant was handcuffed. (App. 85) Smith saw the money on the floor as the police came into Big Daddy's. (App. 91-92) The

money was between Defendant and two other men standing near the pool table. (App. 91)

ASSIGNMENTS OF ERROR

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT WHICH ERRED IN FAILING TO STRIKE THE COMMONWEALTH'S EVIDENCE AT THE CONCLUSION OF ALL THE EVIDENCE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT OF POSSESSION OF TEN OR MORE FORGED BANK NOTES WITH THE INTENT TO UTTER THEM BECAUSE THE COMMONWEALTH FAILED TO PROVE DEFENDANT POSSESSED THE NOTES. (Preserved at trial at App. 66-69, 97-98, 142, 145-146)

2. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT WHICH ERRED IN FAILING TO STRIKE THE COMMONWEALTH'S EVIDENCE AT THE CONCLUSION OF ALL THE EVIDENCE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT OF POSSESSION OF TEN OR MORE FORGED BANK NOTES WITH THE INTENT TO UTTER THEM BECAUSE THE COMMONWEALTH FAILED TO PROVE DEFENDANT KNEW THE NOTES WERE FORGED. (Preserved at trial at App. 66-69, 97-98, Op. 142, 145-146)

3. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT WHICH ERRED IN FAILING TO STRIKE THE COMMONWEALTH'S EVIDENCE AT THE CONCLUSION OF ALL THE EVIDENCE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT OF POSSESSION OF TEN OR MORE FORGED BANK NOTES WITH THE INTENT TO UTTER THEM BECAUSE THE COMMONWEALTH FAILED TO PROVE DEFENDANT INTENDED TO UTTER THE NOTES. (Preserved at trial at App. 66-69, 97-98, 142, 145-146)

STANDARD OF REVIEW

When a defendant challenges the sufficiency of the evidence on appeal, the reviewing Court views the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975); *see also*, *Baldwin v. Commonwealth*, 274 Va. 276, 278, 645 S.E.2d 433, 433 (2004). The finder of fact's verdict will not be disturbed on appeal for insufficiency unless it is plainly wrong or without evidence to support it. *Glenn v. Commonwealth*, 10 Va. App. 150, 153, 390 S.E.2d 505 (1990), citing *Traverso v. Commonwealth*, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988); *Commonwealth v. Duncan*, 267 Va. 377, 384, 593 S.E.2d 210, 214 (2004). The burden lies on the appellant "to show that the evidence failed to support the trial court's decision." *Jetter v. Commonwealth*, 17 Va. App. 745, 747, 440 S.E.2d 633, 634 (1994).

ARGUMENT AND AUTHORITY

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT WHICH ERRED IN FAILING TO STRIKE THE COMMONWEALTH'S EVIDENCE AT THE CONCLUSION OF ALL THE EVIDENCE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT OF POSSESSION OF TEN OR MORE FORGED BANK NOTES WITH THE INTENT TO UTTER THEM BECAUSE THE COMMONWEALTH FAILED TO PROVE DEFENDANT POSSESSED THE NOTES. (Preserved at trial at App. 66-69, 97-98, 142, 145-146)

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It is well established that on appeal, the evidence is viewed in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. *Glenn v. Commonwealth*, 10 Va. App. 150, 153, 390 S.E.2d 505, 507 (1990), citing *Traverso v. Commonwealth*, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988). However, it is not enough

for the evidence in a criminal case to create a suspicion or even a probability of guilt. Rather, the Commonwealth must establish beyond a reasonable doubt all elements of the offense. *Stover v. Commonwealth*, 222 Va. 618, 623, 283 S.E.2d 196 (1976). The credibility of the witnesses, the weight accorded their testimony and the inferences to be drawn from proven facts are matters to be determined by the fact finder. *Guda v. Commonwealth*, 42 Va. App. 453, 455, 592 S.E.2d 748, 749 (2004).

Virginia Code § 18.2-173 provides that if any person "has in his possession forged bank notes…knowing the same to be forged…with the intent to utter or employ the same as true…" is guilty of a Class 3 misdemeanor, but if he has ten (10) or more forged notes then he is guilty of a Class 6 felony. Therefore in this case the Commonwealth had to prove Defendant possessed ten or more forged bank notes knowing they were forged with the intent to utter the notes. In this case the evidence fell short of proving the elements necessary to convict Defendant.

POSSESSION:

First, the Commonwealth failed to prove Defendant actually possessed the forged bank notes. Smaglo's testimony was that Defendant consistently denied that the bank notes were his. (App. 54) Smaglo testified he saw Defendant throw money onto the floor as he was being arrested.

Smaglo's testimony on direct examination was, "I observed [Defendant] reach into his right shorts pocket with his right hand. At that point in time I drew my gun on him and told him to remove his hand twice, at which time he did remove his hand and threw a large sum of money on the floor." (App. 53) Smaglo was asked on cross examination what was Defendant doing with is hands before Smaglo approached Defendant. Smaglo answered, "Well, by the time I had noticed his hand when I first noticed him, his hand was already in his right—his right hand was in his right—pocket…" (App. 58) Smaglo did not see Defendant's hands until Defendant was already being apprehended by other police officers. (App. 58)

Smaglo was not certain when he first observed Defendant's hands and was not certain where Defendant's hands were. The officer's difficulty in recalling the placement and movement of Defendant's hand coupled with Defendant's denial of ownership is not sufficient evidence to prove Defendant ever possessed the forged notes. Smaglo did not count the notes at the time he collected them from the floor. Defendant must possess ten or more notes at the same time to be guilty of a Class 6 felony. The Commonwealth failed to establish that Defendant possessed ten or more forged notes at the same time.

KNOWLEDGE:

Second, the Commonwealth produced no evidence Defendant knew the notes were forged. Unlike the possession or other types of contraband, which are generally known by the possessors to be contraband by their very nature, counterfeit money is not so easily detected. Smaglo did not recognize the notes as counterfeit until the suspicious nature of the bills was pointed out to him. (App. 55) Defendant could easily have obtained the bills while playing pool or in some other sort of activity without ever knowing that they were counterfeit. As defense counsel stated in both of his motions to strike, (App. 67-69, 97-98) Defendant could have received the bills while gambling or even in a drug transaction. This would explain that Defendant did not know they were forged. This means of gaining possession of the bills would also explain Defendant's denial of ownership.

The Commonwealth argued that this case was similar to a drug "throw down" case. However the situations are dissimilar. Everyone knows that the possession of drugs is illegal, and the appearance of the drugs, including the packaging, tends to advise people of the nature of the contraband. However counterfeit cash is not so easily discerned. Defendant would not throw down cash because he knew it was counterfeit. However Defendant might well throw down cash if he knew it were the

proceeds of an illegal transaction such as gambling at pool or selling drugs. Defendant might well have reasoned the police were arresting him and hoping to find "marked" cash on him from some undercover drug buy or gambling activity. The Commonwealth's failure to prove Defendant knew the forged notes were counterfeit launches this Court into speculation that is not permissible.

INTENT:

Third, even if the Commonwealth had evidence that Defendant knowingly possessed ten or more forged bank notes, it must still establish Defendant intended to utter or employ them as true. "Intent is a state of mind that may be proved by an accused's acts or by his statements and may be shown by circumstantial evidence." *Wright v. Commonwealth*, 245 Va. 177, 193, 427 S.E.2d 379, 390 (1993); *Wilson v. Commonwealth*, 249 Va. 95, 101, 452 S.E.2d 669, 673-74 (1995). In this case the circumstances argue just as strongly against intent to utter as they do in favor of an inference of intent to utter. If the evidence is "equally susceptible of two interpretations one of which is consistent with the innocence of the accused, [the trier of fact] cannot arbitrarily adopt that interpretation which incriminates [the accused]." *Burton v. Commonwealth*, 108 Va. 892, 899,

62 S.E. 376, 379 (1908); *Commonwealth v. Smith*, 259 Va. 780, 529 S.E.2d 78, 79 (2000).

Additionally, if Defendant did possess the forged bills, there is no evidence he intended to employ them as true as required by § 18.2-173. Defendant could have possessed the bank notes with the intent to use them to buy drugs or other contraband or to satisfy gambling debts. All of these activities are illegal, but using counterfeit money to engage in illegal activities is not uttering or employing the notes as true as contemplated under the statute.

After the trial court denied Defendant's motion to strike the Commonwealth's evidence, Defendant put on evidence, rested and again moved to strike the Commonwealth's case. At this point the trial court "must consider the entire record in reaching its conclusion" and determine if in light of all the evidence produced, the Commonwealth has proven its case beyond reasonable doubt. *Spangler v. Commonwealth*, 188 Va. 436, 438, 50 S.E.2d 265, 266 (1948). The trial court abused its discretion and erred by denying Defendant's motion to strike at the conclusion of all the evidence.

Defendant produced evidence that Defendant did not possess the forged bank notes. None of Defendant's witnesses were impeached and

their credibility was not challenged by the Commonwealth. Evidence in a criminal case is insufficient if it creates a suspicion or even a probability of guilt. Rather, the Commonwealth must establish beyond a reasonable doubt all elements of the offense. *Stover v. Commonwealth*, 222 Va. 618, 623, 283 S.E.2d 196 (1976). The credibility of the witnesses, the weight accorded their testimony and the inferences to be drawn from proven facts are matters to be determined by the fact finder. *Guda v. Commonwealth*, 42 Va. App. 453, 455, 592 S.E.2d 748, 749 (2004).

Defendant's witnesses were credible and worth of belief by the trial court. The inferences that could reasonably be drawn from the facts in evidence were at least as great in support of Defendant's innocence as his guilt. If the evidence is "equally susceptible of two interpretations one of which is consistent with the innocence of the accused, [the trier of fact] cannot arbitrarily adopt that interpretation which incriminates [the accused]." *Burton v. Commonwealth*, 108 Va. 892, 899, 62 S.E. 376, 379 (1908); *Commonwealth v. Smith*, 259 Va. 780, 529 S.E.2d 78, 79 (2000).

The Attorney General, in its Brief filed in the Court of Appeals in the instant case, cited several federal court decisions setting forth circumstances supporting a finding of intent to defraud under 18 U.S.C. § 472. The only Virginia authority cited was the unpublished opinion

Siharath v. Commonwealth, No. 1351-12-2 2013 Va. App. LEXIS 122 (Va. Ct. App. Apr. 16, 2013). *Siharath* also relied on federal cases to supply the needed element of intent to affirm Siharath's conviction under § 18.2-173. *Siharath*, *Id*. at 7-8. There is however no controlling Virginia authority regarding the requisite intent to employ as true forged notes.

Section 18.2-173 and 18 U.S.C. § 472 both make the possession of counterfeit currency, with "an intent to defraud" (federal) or "employ as true" (Virginia), illegal. However the statutes are not identical and the courts in Virginia are without controlling authority as to the circumstances which might be considered as evidence of "intent to employ as true." Virginia trial courts may not simply adopt federal decisional law as the rule in Virginia for the adjudication of Virginia criminal charges which may share similarities with federal statutes. Without a Virginia basis to determine intent, Defendant's conviction is defective and should not be affirmed.

In this case the trial court abused its discretion and erred in failing to strike the Commonwealth's evidence. The evidence was in conflict whether Defendant threw the forged bills onto the floor of the pool room (App. 53) or whether the bills were already on the floor. (App. 91) Here the trial court disregarded the testimony of Defendant's witnesses. A fact finder may not arbitrarily disregard a reasonable doubt. *Burton v. Commonwealth*, 58 Va.

App. 274, 285, 708 S.E.2d 444, 450 (2011). Whether the reasonable hypothesis of innocence is "reasonable" is a question of fact and is subject to a "deferential appellate review." *Id*. Therefore on appellate review the question is not whether some evidence supports the hypothesis of innocence, but whether the incriminating evidence renders the hypothesis unreasonable. *James v. Commonwealth*, 53 Va. App. 671, 682, 674 S.E.2d 571, 577 (2009); *Burton v. Commonwealth*, 58 Va. 274, 286, 708 S.E.2d 444, 450 (2011).

In this particular case the evidence tending to incriminate Defendant does not render the explanation of innocence that arises from the testimony presented by Defendant "unreasonable." Therefore, the trial court abused its discretion and erred in failing to strike the commonwealth's case.

Whether Defendant intended to utter or employ as true the counterfeit bank notes was for the trial Court to determine. The judgment of the trial court without a jury is entitled to the same weight as a jury verdict and will not be set aside unless plainly wrong. *Martin v. Commonwealth*, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). Defendant contends the trial court did err in this case. The trial court committed reversible error in finding the evidence was sufficient to convict Defendant of knowingly possessing ten

(10) or more forged bank notes with the intent to utter or employ them as true.

When the sufficiency of the evidence to sustain a guilty verdict is challenged on appeal, the evidence is viewed in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). The finder of fact's verdict will not be disturbed on appeal for insufficiency unless it is plainly wrong or without evidence to support it. *Glenn v. Commonwealth*, 10 Va. App. 150, 153, 390 S.E.2d 505 (1990), citing *Traverso v. Commonwealth*, 6 Va. App. 172, 176, 366 S.E.2d 719, 721 (1988).

However, despite this deferential standard, a guilty verdict cannot be sustained where the evidence rises only to the level of suspicion, no matter how grave or strong the suspicion. *Crisman v. Commonwealth*, 197 Va. 17, 21, 87 S.E.2d 796, 799 (1955). It is not enough for the evidence in a criminal case to create a suspicion or even a probability of guilt. Rather, the Commonwealth must establish beyond a reasonable doubt all elements of the offense. *Stover v. Commonwealth*, 222 Va. 618, 623, 283 S.E.2d 194 (1981). Furthermore, the Virginia Supreme Court has unambiguously held that "circumstances of suspicion, no matter how grave or strong, are not

proof of guilt sufficient to support" a conviction. *Powers v. Commonwealth*, 182 Va. 669, 676, 30 S.E.2d 22, 25 (1944).

The Court of Appeals erred in affirming the trial court which erred in failing to strike the Commonwealth's evidence at the conclusion of all the evidence because the Commonwealth failed to prove (1) Defendant possessed the forged bank notes, (2) defendant possessed ten (10) forged bank notes at the same time, (3) knew the forged bank notes were counterfeit, and (4) intended to utter or employ as true the forged bank notes.

CONCLUSION

The Court of Appeals erred in affirming the trial court which erred in failing to strike the Commonwealth's evidence at the conclusion of all the evidence because the Commonwealth failed to prove (1) Defendant possessed the forged bank notes, (2) defendant possessed ten (10) forged bank notes at the same time, (3) knew the forged bank notes were counterfeit, and (4) intended to utter or employ as true the forged bank notes.

For the reasons stated herein and based upon the facts adduced at the trial of this matter and upon the law, the appellant, Charles N. Hawkins,

prays that his conviction for Possession of Ten or More Forged Bank Notes be reversed and dismissed.

Respectfully submitted,
Charles N. Hawkins

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CERTIFICATE

Pursuant to Rule 5:26(h) and Rule 5:32, I certify that, on April 28, 2014, fifteen bound copies Brief of Appellant and ten bound copies of the Appendix in this case, with ten electronic versions on a CD-ROM, have been hand-filed with the Clerk of this Court, and additionally three bound copies of the Brief of Appellant and one bound copy of the Appendix, with one electronic version on CD-ROM, have been served on:

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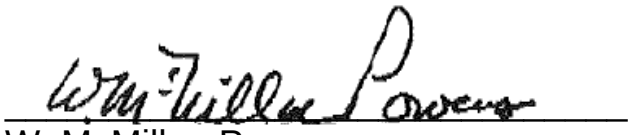
Counsel for the Appellee.

Further, pursuant to Rule 5:26 I certify that I have complied with the requirements of Rule 5:26; that this Brief of Appellant does not exceed 50 pages and contains 3,784 words which complies with the requirements of Rule 5:26(b). Counsel for appellant respectfully requests oral argument.



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