IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 131822

CHARLES N. HAWKINS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

VICTORIA JOHNSON
Assistant Attorney General
Virginia Bar No. 68282

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071 phone
(804) 371-0151 fax
vjohnson@oag.state.va.us

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1
ASSIGNMENTS OF ERROR 2
STATEMENT OF FACTS 3
ARGUMENT 6
I. Standard of Review 7
II. The evidence adduced at trial was sufficient to prove beyond a reasonable doubt that Hawkins knowingly possessed the counterfeit bank notes with the intent to utter or employ them as true..... 9
A. Possession 9
B. Knowledge 11
C. Intent to Utter or Employ as True 15
CONCLUSION 19
CERTIFICATE 20

TABLE OF AUTHORITIES

Page

Cases

Bateman v. Commonwealth, 205 Va. 595,
139 S.E.2d 102 (1964) 15

Black v. Commonwealth, 222 Va. 838,
284 S.E.2d 608 (1981) 10

Bolden v. Commonwealth, 275 Va. 144,
654 S.E.2d 584 (2008) 7

Britt v. Commonwealth, 276 Va. 569,
667 S.E.2d 763 (2008) 8

Brooks v. United States, 76 F.2d 871
(5th Cir. 1935) 19

Collins v. Commonwealth, 13 Va. App. 177,
409 S.E.2d 175 (1991) 13

Commonwealth v. Hudson, 265 Va. 505,
578 S.E.2d 781 (2003) 14, 15

Commonwealth v. McNeal, 282 Va. 16,
710 S.E.2d 733 (2011) 8, 10

Commonwealth v. Taylor, 256 Va. 514,
506 S.E.2d 312 (1998) 8

Covil v. Commonwealth, 268 Va. 692,
604 S.E.2d 79 (2004) 14

Hawkins v. Commonwealth, Record No. 2098-12-1
(Va. Ct. App. Oct. 22, 2013) 2

Hendrick v. Commonwealth, 32 Va. (5 Leigh) 707,
(1834) 19

Ingram v. Commonwealth, 192 Va. 794,
66 S.E.2d 846 (1951) 15

Jackson v. Virginia, 443 U.S. 307 (1979) 8

Jett v. Commonwealth, 59 Va. (18 Gratt.) 933, (1867) 19

Jones v. Commonwealth, 279 Va. 295, 687 S.E.2d 738 (2010) 15

McCain v. Commonwealth, 261 Va. 483, 545 S.E.2d 541 (2001) 18

Noakes v. Commonwealth, 280 Va. 338, 699 S.E.2d 284 (2010) 8

Parrish Ex. Rel. Lee v. Cleveland, 372 F.3d 294 (4th Cir. 2004) 11

Ruiz v. United States, 374 F.2d 619 (5th Cir. 1967) 13

Siharath v. Commonwealth, No. 1351-12-2, 2013 Va. App. LEXIS 122 (Va. Ct. App. Apr. 16, 2013) 7, 16

Spitzer v. Commonwealth, 233 Va. 7, 353 S.E.2d 711 (1987) 11

United States v. Berrios, 443 F. Supp. 408 (E.D. Pa. 1978) 16, 17

United States v. Hagan, 487 F.2d 897 (5th Cir. 1973) 19

United States v. King, 326 F.2d 415 (6th Cir. 1964) 13

United States v. Mitchell, 176 Fed. Appx. 676 (7th Cir. 2006) 16, 17

United States v. Perez, 698 F.2d 1168 (11th Cir. 1983) 16

United States v. Tucker, 820 F.2d 234 (7th Cir. 1987) 18

Wilson v. Commonwealth, 249 Va. 95, 452 S.E.2d 669 (1995) 16

Young v. Commonwealth, 275 Va. 587, 659 S.E.2d 308 (2008) 12

Other Authorities

18 U.S.C. § 472 16

Black's Law Dictionary, 4th ed. 15

Ronald J. Bacigal, Virginia Practice Series: Criminal Offenses and Defenses 312 (2009-2010) 7

Rule 5:1(f) 7

Section 8.01-680, Code of Virginia 7

Section 18.2-170, Code of Virginia 6

Section 18.2-173, Code of Virgina 1, 6, 16, 19

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

Following an August 15, 2012, bench trial in the Circuit Court for the City of Portsmouth, Charles Napoleon Hawkins was convicted of possessing, with the intent to utter or employ as true, ten or more forged bank notes, in violation of Virginia Code § 18.2-173. By order entered November 27, 2012, the trial court sentenced Hawkins to five years' incarceration, with all but two years and two months suspended.

In an unpublished opinion, the Court of Appeals of Virginia affirmed Hawkins' conviction. Hawkins v. Commonwealth, Record No. 2098-12-1 (Va. Ct. App. Oct. 22, 2013) (App. 142-46). This Court granted Hawkins' appeal from the Court of Appeals' judgment by order dated March 17, 2014.

ASSIGNMENTS OF ERROR

I. 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.

II. 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.

III. 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.

STATEMENT OF FACTS

On May 14, 2012, Sergeant Travis Smaglo of the Portsmouth Police Department received information that a suspect with several outstanding warrants, including charges for murder and possession of a firearm by a convicted felon, was at Big Daddy's, a local pool hall. (App. 18, 26-29, 51-52). Smaglo was informed the suspect would be wearing a white hat and blue checkered shorts, and would be near the pool tables. (App. 52). Smaglo arrived at Big Daddy's with several other officers and observed Hawkins in a white hat and blue checkered shorts. (App. 53).

While another officer approached Hawkins from the left, Smaglo approached him from the right. (App. 53). As he did so, Smaglo saw Hawkins reach into his right shorts pocket with his right hand. (App. 53). Smaglo drew his gun and twice told Hawkins to remove his hand from his pocket before Hawkins complied. (App. 53). When Hawkins removed his hand from his pocket, he withdrew "a large sum of money" and threw it on the floor. (App. 53). Smaglo re-holstered his weapon and handcuffed Hawkins. (App. 53).

Once Hawkins was in custody, Smaglo picked up "all the cash that was lying on the floor." (App. 53-54). This was the same "cash" Smaglo saw Hawkins throw on the floor. (App. 54). Smaglo turned the cash over

to another officer to be placed with the rest of Hawkins' personal property. (App. 54). When Hawkins heard Smaglo identify the cash as belonging to Hawkins, Hawkins said, "That's not my money." (App. 54). Smaglo told Hawkins, "Well, yes it is. You threw it on the floor. Why would you not want your money?" (App. 54). Although Hawkins continued to deny the money was his, the officers included it with his property. (App. 54). Smaglo did not search Hawkins and did not know whether any other currency had been recovered from Hawkins at the time of his arrest. (App. 57).

Later, the officers noticed the cash was not genuine.[1] (App. 55). The the eighteen, twenty-dollar bills Hawkins threw on the floor had only four serial numbers: five bills had the same, identical serial number, while another six bills a second serial number, four other bills had a third serial number, and three bills had a fourth serial number. (App. 10, 12, 14, 16, 55). Smaglo sorted and packaged the bills according to serial number and the officers obtained a warrant charging Hawkins for possession of forged bank notes. (App. 1-2, 55-56).

[1] Officer Ha, who first noticed the currency was not authentic, did not testify at trial. (App. 55).

In addition to the repeating serial numbers, the notes lacked several of the security features found on genuine United States currency. First, the bills lacked "color-shifting ink on the twenty marking on the bottom of the bill, so that when the bill is tilted slightly, it would change colors." (App. 62). Second, the bills were not printed on authentic currency paper. (App. 63). And, third, they bore the "tiny pink, blue and yellow dots . . . indicative of ink jet printing." (App. 63).

At trial, Smaglo testified to the facts of Hawkins' arrest as noted above (App. 51-58), and United States Secret Service Agent Dan Apperson gave his expert opinion that the currency at issue was indeed counterfeit, (App. 62-64). At the end of the Commonwealth's case-in-chief, the defense moved to strike the evidence. (App. 66-69).

The trial court denied the motion to strike and Hawkins presented evidence. (App. 70). Hawkins' half-sister, friend, and father all testified the police entered Big Daddy's with their guns drawn and told everyone to "get back." (App. 72, 73, 81, 82, 85, 87, 92). The three witnesses testified they never saw Hawkins put his hands in his pockets or remove anything from his pocket. (App. 74, 83, 92). However, Hawkins' father and half-sister admitted looking at the police, rather than Hawkins, during part of the relevant time. (App. 77-78, 95-96). And, Hawkins' half-sister and friend

both admitted there were officers standing between them and Hawkins at some points. (App. 78, 85).

Hawkins renewed his motion to strike at the conclusion of the evidence. (App. 97). The trial court denied the motion and convicted Hawkins as charged. (App. 99). Following the preparation of a presentence report and a sentencing hearing, the trial court sentenced Hawkins to five years' incarceration, with all but two years and two months suspended. (App. 136).

ARGUMENT

On appeal, Hawkins argues the Commonwealth failed to present sufficient evidence at trial to prove each element of Code § 18.2-173. Section 18.2-173 provides:

> If any person have in his possession forged bank notes or forged or base coin, such as are mentioned in § 18.2-170,[[2]]

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[2] Code § 18.2-170 states:
If any person (1) forge any coin, note or bill current by law or usage in this Commonwealth or any note or bill of a banking company, (2) fraudulently make any base coin, or a note or bill purporting to be the note or bill of a banking company, when such company does not exist, or (3) utter, or attempt to employ as true, or sell, exchange, or deliver, or offer to sell, exchange, or deliver, or receive on sale, exchange, or delivery, with intent to utter or employ, or to have the same uttered or employed as true, any such false, forged, or base coin, note or bill, knowing it to be so, he shall be guilty of a Class 4 felony.

> knowing the same to be forged or base, with the intent to utter or employ the same as true, or to sell, exchange, or deliver them, so as to enable any other person to utter or employ them as true, he shall, if the number of such notes or coins in his possession at the same time, be ten or more, be guilty of a Class 6 felony; and if the number be less than ten, he shall be guilty of a Class 3 misdemeanor.

Thus, the Commonwealth bore the burden to prove beyond a reasonable doubt that: (1) Hawkins possessed counterfeit currency;[3] (2) Hawkins had knowledge the currency was counterfeit; and (3) Hawkins had the intent to utter or employ the counterfeit currency as true. See Siharath v. Commonwealth, No. 1351-12-2, 2013 Va. App. LEXIS 122, at *7 (Va. Ct. App. Apr. 16, 2013).[4]

I. Standard of Review

"When reviewing the sufficiency of the evidence to support a conviction, [an appellate] Court will affirm the judgment unless the judgment is plainly wrong or without evidence to support it." Bolden v. Commonwealth, 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008); Code § 8.01-680. In making its determination, the appellate court "must examine

[3] The term "bank notes" as used in the statute "is a clear reference to currency." Ronald J. Bacigal, Virginia Practice Series: Criminal Offenses and Defenses 312, n. 68 (2009-2010).

[4] In accordance with Rule 5:1(f), this unpublished opinion is cited for informational purposes.

the evidence that supports the conviction" in the light most favorable to the Commonwealth, allowing it the benefit of all reasonable inferences from the evidence. Commonwealth v. McNeal, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011) (internal quotation marks and citation omitted). Thus, an "appellate court does not ask itself whether ***it*** believes that the evidence at the trial established guilt beyond a reasonable doubt." Britt v. Commonwealth, 276 Va. 569, 573-74, 667 S.E.2d 763, 765 (2008) (emphasis added). Instead, "the relevant question is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

"In sum, '[i]f there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial.'" McNeal, 282 Va. at 16, 710 S.E.2d at 735 (quoting Commonwealth v. Taylor, 256 Va. 514, 518, 506 S.E.2d 312, 314 (1998)). This Court "give[s] the trial court's judgment sitting as the factfinder the same weight as a jury verdict[.]" Noakes v. Commonwealth, 280 Va. 338, 345, 699 S.E.2d 284, 288 (2010) (internal quotation marks and quotation omitted).

II. The evidence adduced at trial was sufficient to prove beyond a reasonable doubt that Hawkins knowingly possessed the counterfeit bank notes with the intent to utter or employ them as true.

A. Possession

The Commonwealth proved Hawkins actually possessed ten or more forged bank notes. Smaglo testified that he ordered Hawkins twice, at gunpoint, to remove his hand from his right shorts pocket. (App. 53). When Hawkins did so, he threw what appeared to be a large sum of cash on the floor. (App. 53). After Smaglo handcuffed Hawkins and Hawkins was taken into custody, Smaglo collected the currency he saw Hawkins throw on the floor, which was later determined to be counterfeit. (App. 53-54). Smaglo identified the counterfeit currency the Commonwealth admitted into evidence at trial as the same currency he saw Hawkins remove from his pocket and throw onto the floor. (App. 53).

Hawkins challenges the proof of possession based on his own self-serving statements that the counterfeit currency was not his; Smalgo's direct trial testimony he saw Hawkins place his hand in his shorts pocket and testimony on cross-examination that Hawkins' hand was already in his shorts pocket when Smaglo first saw him; and his assertion that Smaglo did not count the forged bank notes he collected from the floor.

(Appellant's Br. 9-10). While Hawkins points out conflicts in the evidence adduced at trial, it is the fact finder's duty to resolve any conflicts in the evidence. McNeal, 282 Va. at 22, 710 S.E.2d at 736.

The trial court believed Smaglo's testimony and rejected Hawkins' denials. See Black v. Commonwealth, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981) (rejecting proposed hypotheses of innocence and concluding "[t]he fact finder need not believe the accused's explanation and may infer that he is trying to conceal his guilt"). Furthermore, whether Hawkins' hand was in or out of his pocket when Smaglo approached him is not critical to the question of whether Hawkins possessed the counterfeit bank notes (which were located in Hawkins' pocket). Smaglo consistently testified he saw Hawkins' right hand in his right shorts pocket, Hawkins reluctantly withdrew his hand after being twice ordered to do so at gunpoint, and when Hawkins withdrew his hand, Hawkins threw a quantity of what appeared to be currency onto the floor. (App. 53). Those essential facts put the counterfeit currency in Hawkins' possession.

As to Hawkins' argument that the Commonwealth failed to prove the number of forged bank notes he possessed, Smaglo testified Commonwealth's Exhibit 1 contained the "same currency [he] saw come from [Hawkins'] hand." (App. 54-56). Smaglo collected all of the

counterfeit currency from the pool hall floor and turned it over to another officer to be packaged with the rest of Hawkins' property. (App. 53-54). Smaglo later sorted, counted, and packed the counterfeit currency, and this counterfeit currency became Commonwealth's Exhibit 1. (App. 9-16, 54-55). Smaglo testified the money he picked up consisted of eighteen, twenty dollar bills. (App. 56). The evidence establishes Hawkins possessed a total of eighteen counterfeit twenty dollar bills when he was arrested.

Thus, the trial court had sufficient, credible evidence to find Hawkins possessed all eighteen forged bank notes.

B. Knowledge

Next, Hawkins argues the Commonwealth produced no evidence he knew the notes were forged. (Appellant's Br. 11-12).

Knowledge "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." Parrish Ex. Rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004); see also Spitzer v. Commonwealth, 233 Va. 7, 9, 353 S.E.2d 711, 713 (1987) ("Guilty knowledge is an essential element of the offense as defined by the statute," but "[a]bsent proof of an admission against interest, such knowledge

necessarily must be shown by circumstantial evidence.”). Circumstances tending to prove guilty knowledge include the defendant’s “acts, statements, and conduct” as well as evidence showing the “defendant’s knowledge of the nature and character of the [contraband] in his possession.” Young v. Commonwealth, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008).

Here, the circumstantial evidence was sufficient to prove Hawkins knew the currency he possessed was counterfeit. First, Hawkins’ furtive behavior when approached by the police indicated he knew that the currency in his right shorts pocket was counterfeit. (App. 53). Hawkins refused to take his hand out of his pocket until Smaglo ordered him to do so at gunpoint — and even at that, Hawkins hesitated long enough that Smaglo had to order him to remove his hand a second time. (App. 53).

Second, Hawkins possessed bank notes that were plainly counterfeit. Secret Service Agent Apperson identified the notes as counterfeit because they lacked security features such as color-shifting ink. (App. 62). Apperson and Smaglo both noted multiple bills bore the same serial number. (App. 55, 63). Most telling, the bills were not printed on genuine currency paper and bore the “tiny pink, blue, and yellow dots” indicative of

ink jet printing. (App. 63). The trial court could infer from these facts that Hawkins knew the currency was counterfeit.

Third, "[p]robably the strongest evidence of guilty knowledge is an attempt to abandon counterfeit currency when detection is feared." Ruiz v. United States, 374 F.2d 619, 620 (5th Cir. 1967). Hawkins' reaction to being surrounded by police officers was to reach into his pocket and throw away $360 (App. 53-54, 56), which is a reasonable basis from which to infer he knew the currency was counterfeit. See United States v. King, 326 F.2d 415, 416 (6th Cir. 1964) (concluding attempt to destroy or abandon counterfeit currency when capture imminent evidence of guilty knowledge); cf. Collins v. Commonwealth, 13 Va. App. 177, 179, 409 S.E.2d 175, 176 (1991) (affirming conviction and rejecting appellant's claim cocaine was left under his car by unknown person, rather than thrown there by him as officers approached; cocaine is "something of significant value and not something that one is likely to have abandoned or carelessly left in the area").

Fourth, Hawkins' false statement to Smaglo is indicative of guilt. Although Smaglo had seen him remove the counterfeit currency from his pocket and throw it on the floor only a short time before, Hawkins insisted the forged bank notes were not his. The trial court, sitting as fact-finder,

was entitled to consider this evidence and conclude from it that Hawkins was lying when he disclaimed ownership of the forged bank notes because he knew that they were forged, and was seeking to avoid criminal liability. See Covil v. Commonwealth, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) ("A false account . . . is a circumstance, similar to flight from a crime scene, that a fact-finder my properly consider as evidence of guilty knowledge.").

Finally, the trial court reasonably rejected Hawkins' various hypothetical explanations for disposing of the counterfeit currency. (App. 67-68). During his motion to strike, defense counsel argued Hawkins could have wanted to dispose of the counterfeit currency because it was the proceeds of illegal gambling, or because it was "drug money from selling drugs, drug money for the purpose of buying drugs. Maybe it's got some residue on it." (App. 68). As this Court explained in Commonwealth v. Hudson, 265 Va. 505, 513, 578 S.E.2d 781, 786 (2003), "[t]he issue upon appellate review is not whether there is some evidence to support" a defendant's hypothesis of innocence, but "whether a reasonable [fact finder], upon consideration of all the evidence, could have rejected" the defendant's theories and found him guilty beyond a reasonable doubt.

The Commonwealth met this standard. Viewing the evidence in this case as a whole, and in the light most favorable to the Commonwealth, a

reasonable fact finder could reject the defendant's theories and find he knowingly possessed the forged bank notes: Hawkins behaved in a furtive manner when Smaglo ordered him to remove his hand from his pocket; Hawkins abandoned eighteen, twenty dollar bills when he was approached by law enforcement; the currency was plainly counterfeit, as it lacked security features characterizing genuine currency and was printed on an ink jet printer; and Hawkins falsely denied the money was his, even though Smaglo had just seen him remove it from his pocket and throw it on the floor. See Hudson, 265 Va. at 514, 578 S.E.2d at 786 ("Circumstantial evidence is not viewed in isolation.").

C. Intent to Utter[5] or Employ as True

Finally, Hawkins argues the Commonwealth failed to establish to he intended to utter the counterfeit currency. Whether Hawkins had the requisite intent is "a factual question which lies peculiarly within the province of the [fact finder]." Ingram v. Commonwealth, 192 Va. 794, 801-802, 66 S.E.2d 846, 849 (1951). "Intent can be inferred from the facts and

[5] "The word 'utter' is defined in Black's Law Dictionary, 4th ed., page 1716, as meaning 'To put or send [as a forged check] into circulation. . . . to utter and publish.' It is an assertion by word or action that a writing known to be forged is good and valid." Bateman v. Commonwealth, 205 Va. 595, 599-600, 139 S.E.2d 102, 106 (1964).

circumstances of a case and shown by the acts of the defendant." Jones v. Commonwealth, 279 Va. 295, 299, 687 S.E.2d 738, 740 (2010). "Where the conduct of the accused under the circumstances involved points with reasonable certainty to a specific intent, the intent element is established." Wilson v. Commonwealth, 249 Va. 95, 101, 452 S.E.2d 669, 674 (1995).

The federal courts have recognized a number of circumstances which support a finding of intent.[6] Among these are possession of a large number of counterfeit bills; United States v. Berrios, 443 F. Supp. 408, 410 (E.D. Pa. 1978); taking counterfeit money to a commercial establishment, United States v. Mitchell, 176 Fed. Appx. 676, 678 (7th Cir. 2006); and segregation of counterfeit currency from genuine currency; United States v. Perez, 698 F.2d 1168, 1171 (11th Cir. 1983).

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[6] Only two unpublished Court of Appeals decisions address the intent to utter element in Code § 18.2 173 — the Court of Appeals decision in the case at hand and Siharath v. Commonwealth, No. 1351-12-2, 2013 Va. App. LEXIS 122, (Va. Ct. App. Apr. 16, 2013). However, the federal cases which involve convictions under 18 U.S.C. § 472 are helpful. Section 472 contains a similar intent element:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

Here, the Commonwealth proved Hawkins was in a pool hall with eighteen, twenty dollar bills, totaling $360 in counterfeit currency readily accessible in his right hand shorts pocket. (App. 52, 56). Plainly, Hawkins possessed a large sum of counterfeit bills. When a "defendant possesse[s] an unusually large number of counterfeit bills," a fact-finder may "infer that defendant obtained the currency purposefully for redistribution, rather than incidentally in the course of business." Berrios, 443 F.Supp. at 410.

Furthermore, Hawkins possessed the counterfeit currency in a commercial establishment — a pool hall — where the trial court could infer cash transactions were likely. See Mitchell, 176 Fed. Appx. at 678 (rejecting defendant's claim that he possessed counterfeit currency only as a novelty, rather than with the intent to defraud, in part because the defendant took the counterfeit currency with him to a bar). Additionally, there was no evidence before the trial court that Hawkins had any other money with him to pay for anything that night. (App. 57).

Next, while the record is silent as to whether any other, genuine currency was found in Hawkins' possession at the time of his arrest, Hawkins had no genuine currency intermingled with this large amount of counterfeit currency. (App. 56). The segregation of genuine currency from counterfeit currency tends to prove the intent to utter. United States v.

Tucker, 820 F.2d 234, 236 (7th Cir. 1987) ("[I]ntent may be inferred from the segregation of genuine from counterfeit money."). These circumstances, taken as a whole, prove Hawkins possessed the requisite intent to utter the counterfeit currency.

These circumstances are very similar to those long-recognized in Virginia cases involving possession of controlled substances with the intent to distribute. Circumstances indicating the intent to distribute include the quantity of the drugs seized and the manner in which they are packaged. McCain v. Commonwealth, 261 Va. 483, 493, 545 S.E.2d 541, 547 (2001). Similarly, Hawkins' possession of a large quantity of counterfeit money, which he had readily accessible in a commercial establishment, with no other, genuine money interspersed, supported the trial court's factual finding that Hawkins' possessed the counterfeit currency with the requisite intent.

Finally, there is no merit to Hawkins' claim that, had he possessed the forged bank notes "with the intent to use them to buy drugs or other contraband or to satisfy gambling debts" he would lack the intent to employ the notes as true. (Appellant's Br. 13). State statutes prohibiting the possession with the intent to utter or employ as true counterfeit currency, like Code § 18.2-173, were aimed at protecting "the citizens of this

commonwealth against the thefts and forgeries therein mentioned, and to punish the offenders," Hendrick v. Commonwealth, 32 Va. (5 Leigh) 707, 712 (1834), rather than "the legality or illegality of the transaction in which money is passed." Brooks v. United States, 76 F.2d 871, 872 (5th Cir. 1935); see also Jett v. Commonwealth, 59 Va. (18 Gratt.) 933, 951 (1867) (noting state and federal laws prohibiting counterfeit currency protect different policy interests but seek "to effect the same object, to wit, the suppression of counterfeits"). When counterfeit currency is put into circulation, even if it is originally for an illegal transaction, "somebody [will] ultimately be defrauded" by its use. United States v. Hagan, 487 F.2d 897, 898 (5th Cir. 1973).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

MARK R. HERRING
Attorney General of Virginia

_____
VICTORIA JOHNSON

Assistant Attorney General
Virginia State Bar No. 68282

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-5093 phone
(804) 371-0151 fax
vjohnson@oag.state.va.us

CERTIFICATE

On June 2, 2014, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to **W. McMillan Powers, Esq., Assistant Public Defender**, **1 Guardian Court, Post Office Box 460, Portsmouth, Virginia, 23705**, counsel for the appellant.

Pursuant to Rule 5:26(b), I certify the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 3,623 words.

In compliance with Rule 5:26(e), a digital copy of this brief was submitted to the Clerk of this Court and transmitted to opposing counsel via e-mail delivery.

The Commonwealth requests oral argument.

_____
Victoria Johnson
Assistant Attorney General