IN THE

Supreme Court of Virginia

RECORD NO. 140081

MAUREEN ANNE BLAKE,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

Alexis M. Downing (VSB 76674)
Assistant Public Defender
OFFICE OF THE PUBLIC DEFENDER
3 East Market Street
Leesburg, Virginia 20176
(703) 771-2507 x 107
(703) 771-2517 (Fax)
adowning@lee.idc.virginia.gov

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW 1
ASSIGNMENTS OF ERROR 4
STATEMENT OF FACTS 4
ARGUMENT 7

I. VIRGINIA CODE SECTION 22.1-254 REQUIRES A PARENT TO SEND HIS OR HER CHILD TO SCHOOL, AN OBJECTIVE THAT IS MET WHEN THE CHILD IS ENROLLED AND THUS, ABLE TO ATTEND SCHOOL..... 7

A. Standard of Review..... 7

B. The Rules of Statutory Construction Support the Conclusion That Blake Sent Her Children to School. 7

C. Interpreting Code § 22.1-254 Consistently with Other Provisions of the Statute, as Well as With Chapter Fourteen of Title 22.1 as a Whole Suggests That Enrollment Is Sufficient. 10

D. The Words Contained In The Statute Evince The General Assembly's Intent Not To Penalize Tardiness Under Code § 22.1-254..... 12

II. WHEN THE COMMONWEALTH ELECTS TO IMPOSE ADDITIONAL ELEMENTS SUCH AS KNOWLEDGE AND WILLFULNESS, THEY MUST PROVE THOSE ELEMENTS BEYOND A REASONABLE DOUBT. 14

A. Standard of Review..... 14

B. Knowledge and Willfulness Are Elements of the Law of This Case And Must Be Proven Beyond a Reasonable Doubt.... 15

C. Notice of Virginia Law Is Insufficient to Prove Blake Acted Knowingly..... 18

D. The Record Contained No Evidence from Which to Infer Blake's Conduct Was Willful..... 19

III. THE ISSUES OF NOTICE AND THE CONSTITUTIONALITY OF VIRGINIA CODE § 22.1-254 WERE NOT WAIVED BECAUSE

THEY WERE INCLUDED IN APPELLANT'S ASSIGNMENTS OF ERROR. 20

A. Standard of Review. 20

B. The Error Alleged in Blake's First Assignment of Error Was Properly Preserved and Legally Sufficient. 20

C. Blake's First Assignment of Error Specifically Addressed the Circuit Court Ruling. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Boynton v. Kilgore, 271 Va. 220, 623 S.E.2d 922 (2006) 7, 8

Bryan v. United States, 524 U.S. 184 (1998)..... 17

Chatman v. Commonwealth, 61 Va. App. 618, 739 S.E.2d 245 (2013) 21

Commonwealth v. Athey, 261 Va. 385, 542 S.E.2d 764 (2001)..... 8

Commonwealth v. Herring, 758 S.E.2d 225 (2014) 21

Correll v. Commonwealth, 269 Va. 3, 607 S.E.2d 119 (2005) 17

Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990)..... 14

Exxon Mobil Corp. v. Minton, 285 Va. 115, 737 S.E.2d 16 (2013)... 16

Findlay v. Commonwealth, 287 Va. 111, 752 S.E.2d 868 (2014) 20, 22, 26

First Nat'l Bank of Richmond v. William R. Trigg Co., 106 Va. 327, 56 S.E. 158 (1907)..... 21

Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 546 S.E.2d 696 (2001) 12

Harlow v. Commonwealth, 195 Va. 269, 77 S.E.2d 851 (1953)..... 22

Hubbard v. Henrico Ltd. Pshp., 255 Va. 335, 497 S.E.2d 335 (1998) 8

Jackson v. Virginia, 443 U.S. 307 (1979). 16

Kozmina v. Commonwealth, 281 Va. 347, 706 S.E.2d 860 (2011).... 7

Marshall v. Commonwealth, 58 Va. App. 210, 708 S.E.2d 253 (2011) 15

Preston v. Commonwealth, 281 Va. 52, 704 S.E.2d 127 (2011)..... 15

Prillaman v. Commonwealth, 199 Va. 401, 100 S.E.2d 4 (1957)..... 9

Smith v. Commonwealth, 282 Va. 449, 718 S.E.2d 452 (2011)..... 17

Stevens v. Commonwealth, 283 Va. 296, 720 S.E.2d 80 (2012)..... 20

Vaughn, Inc. v. Beck, 262 Va. 673, 554 S.E.2d 88 (2001)..... 7

Walton v. Commonwealth, 255 Va. 422, 497 S.E.2d 869 (1998)..... 15

Washington v. Commonwealth, 273 Va. 619, 643 S.E.2d 485 (2007) 16

Wesley v. Commonwealth, 190 Va. 268, 56 S.E.2d 362 (1949) 8

Young v. Commonwealth, 275 Va. 587, 659 S.E.2d 308 (2008)..... 15

Statutes

Virginia Code § 22.1-254..... *passim*

Virginia Code § 22.1-258.....11, 12, 13, 14

Virginia Code § 22.1-263..... 16

Virginia Code § 8.01-680..... 15

Other Authorities

Improving School Attendance, Virginia Department of Eduction, August 2005..... 10

Random House Webster's College Dictionary (Robert B. Costello, ed., Random House 1991) 9

Virginia SB 672, 2006 Sess. (January 19, 2006)..... 13

Rules

Rule 5A:12 ..... 21, 22

Rule 5A:20 21

IN THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

Supreme Court No. 140081

MAUREEN ANNE BLAKE
Appellant,
v.
COMMONWEALTH OF VIRGINIA,
Appellee.

OPENING BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINA:

COMES NOW, Appellant, Maureen Anne Blake (hereinafter "Blake" or "Appellant"), by counsel, and as her Opening Brief, states as follows:

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case originated in the Loudoun County Juvenile and Domestic Relations District Court. Appellant, Maureen Blake, was arrested and charged with three counts of contributing to the delinquency of a minor: one count for each of her three children. Joint Appendix (hereafter "J.A.") at 1, 3, 5. These offenses were

alleged to have occurred between September 15, 2011 and January 19, 2012. Id.

On February 29, 2012, the Commonwealth amended the charges to allege a violation of Virginia Code (hereafter "Code") § 22.1-254, a Class three misdemeanor pursuant to Code § 22.1-263. Id. Blake was convicted of all three counts. Id. at 2, 4, 6. A *de novo* appeal to the Circuit Court was noted on March 9, 2012. Id. at 7-9.

On August 16, 2012, the Honorable Thomas D. Horne of the Loudoun County Circuit Court, after hearing evidence and argument, denied Appellant's Motion to Dismiss. Id. at 13, 73-74 .

A bench trial commenced immediately thereafter in which Blake was found guilty.[1] Id. at 14-15, 120 . Immediately prior to the commencement of trial, the Commonwealth Attorney amended the warrants to specifically allege that Blake, "while being the parent of a child being between the ages of five and eighteen, to wit: K.E.B, [K.F.B., and K.A.B,] did fail to send said child to school during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, the failure being knowing and willful." Id. At 1, 3, 5. In each case, Blake

[1] Appellant was found guilty only for violations occurring after December 1, 2011. Id. at 120-121.

was fined five hundred dollars ($500.00). Id. at 14-15, 122. However, the each fine was suspended. Id.

The Court of Appeals, in an unpublished ruling, affirmed Blake's convictions. Id. at 27. It is from this ruling that Blake appeals.

ASSIGNMENTS OF ERROR

1. **The Court of Appeals erred by holding that the parent of a tardy child is criminally liable for failing to "send" his or her child to school, as used in Virginia Code § 22.1-254, where the child is enrolled and has zero unexcused absences.**

   Preserved in the trial court on August 16, 2012 during defense counsel's Motion to Dismiss, Motion to Strike and closing argument. J.A. at 52-74, 95-96, & 118; presented to the Court of Appeals as Assignment of Error I.

2. **The Court of Appeals erred by holding that knowledge and willfulness were not elements required to sustain appellant's conviction where the amended arrest warrant specifically alleged knowing and willful conduct.**

   Preserved in the trial court on August 16, 2012 during defense counsel's Motion to Strike and closing argument. J.A. at 95-96 & 116-118; presented to the Court of Appeals as Assignment of Error II.

3. **The Court of Appeals erred by holding that the issues of notice and the constitutionality of Code § 22.1-254 were not included in the Assignments of Error.**

   Preserved in the trial court on August 16, 2012 during defense counsel's Motion to Dismiss, Motion to Strike, and closing argument. J.A. at 52-74, 95-96, & 118; presented to the Court of Appeals as Assignment of Error I.

STATEMENT OF FACTS

Appellant, Maureen Blake, is the mother of three minor children: K.E.B., K.F.B, and K.A.B. (hereafter "the children"). At the time of trial, the children were eight, ten, and eleven years old,

respectively. Id. at 99-100. The children were, at all relevant times, enrolled at Lincoln Elementary, a Loudoun County Public School. Id. at 75.

During the relevant time period, Blake was responsible for transporting the children to school on Thursday mornings. Id. at 100. On some of those mornings, the children arrived at school late. Id. at 82. The delay ranged from five (5) to twenty (20) minutes. Id. at 90-91. In each instance, Blake explained why they were late, but the school attendance officer deemed each tardy unexcused. Id. at 87, 92.

Blake, K.F.B, and K.E.B suffer from Attention Deficit Hyperactivity Disorder (hereafter "ADHD"). Id. at 94,101-102. On some of the occasions at issue, the children were experiencing ADHD-related behavior manifestations. Id. at 103-105. In order to deal with those "behavioral incident[s]," Blake chose to send the children to school late, believing the children would be more productive at school if they were allowed to work through an "anger issue" beforehand, rather than send them in a socially unacceptable state. Id. Other times, the tardiness was due to inadvertence. Id. at 103.

To address these challenges, Blake and each of the children were taking medication prescribed by a psychiatrist and/or participating in family and individual therapy. Id. at 102, 105-106. In an effort to further address the issue, Blake hired a driver for November and December so that her own delays would not impact the children's' timely arrival at school. Id. at 106-107. However, even with these measures in place, the children arrived late to school on several occasions.

Despite their tardy arrival, there were no dates in which the children had unexcused absences from school. Each day the children were in Ms. Blake's custody, they attended school.

ARGUMENT

I. VIRGINIA CODE SECTION 22.1-254 REQUIRES A PARENT TO SEND HIS OR HER CHILD TO SCHOOL, AN OBJECTIVE THAT IS MET WHEN THE CHILD IS ENROLLED AND THUS, ABLE TO ATTEND SCHOOL.

A. Standard of Review.

Defining what it means to "send a child to school" is an issue of first impression. The term is defined neither by the Virginia Code nor by case law. In defining this term, the Court must apply the rules of statutory construction. Issues of statutory construction are reviewed *de novo*. Kozmina v. Commonwealth, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011).

B. The Rules of Statutory Construction Support the Conclusion That Blake Sent Her Children to School.

Perhaps the most basic canon of statutory construction is that the General Assembly's intent is determined "from the words contained in the statute." Vaughn, Inc. v. Beck, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001). Courts apply the plain meaning of those words *unless* those terms are ambiguous or applying the plain language would lead to an absurd result. Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006).

A statute is considered ambiguous "if the text can be understood in more than one way or refers to two or more things

simultaneously or when the language is difficult to comprehend, is of doubtful import, or lacks clearness or definiteness." Id. at 227, 926, n.8. (citations omitted).

Code § 22.1-254 is a penal statute because there is a criminal sanction upon violation. Penal statues must be strictly construed against the Commonwealth and they "cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit." Commonwealth v. Athey, 261 Va. 385, 388, 542 S.E.2d 764 (2001) (citations omitted). If the language used in the statute permits two "reasonable but contradictory constructions," the statutory construction favorable to the accused should be applied. Wesley v. Commonwealth, 190 Va. 268, 276, 56 S.E.2d 362, 365 (1949).

The rules of construction also provide that "[e]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." Hubbard v. Henrico Ltd. Pshp., 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998).

In interpreting Code § 22.1-254, the courts must also consider the related provisions regarding school attendance. "Statutes are not to be considered as isolated fragments of law, but as a whole, or as

parts of a great connected, homogeneous system, or a single and complete statutory arrangement." Prillaman v. Commonwealth, 199 Va. 401, 405-406, 100 S.E.2d 4, 7 (1957)(quoting 50 Am. Jur., Statutes, § 349, pp. 345, 346, 347).

Applying these rules to Code § 22.1-254 establishes that the legal requirements it embodies are satisfied in the instant case where the children were validly enrolled and had zero unexcused absences. Code § 22.1-254, states, in pertinent part:

> [E]very parent, guardian, or other person in the Commonwealth having control or charge of any child ... shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, **send** such child to a public school or to a private, denominational, or parochial school or have such child taught by a tutor or teacher.

(Emphasis added).

Although the statute clearly requires every parent to "send" their child to school, the statute fails to define what it means to do so. In context, "send" is an ambiguous term. Dictionaries define the term as "to cause or enable to go" as well as "to cause to be conveyed to a destination." Random House Webster's College Dictionary (Robert B. Costello, ed., Random House 1991). In deciding which of these definitions is to be used, the courts must follow the rules of statutory

construction, specifically, to read the term harmoniously with other related provisions

C. Interpreting Code § 22.1-254 Consistently with Other Provisions of the Statute, as Well as With Chapter Fourteen of Title 22.1 as a Whole Suggests That Enrollment Is Sufficient.

As stated quite clearly in the Virginia Department of Education's Improving School Attendance Resource Guide: Code § 22.1-254 "defines who is required to attend school and who is exempt." August 2005, p. 57. Subsection (A) identifies school-aged children, while providing various alternatives to public school that must be in session for an equivalent duration.

Subsections (B) and (D) of Code § 22.1-254 set forth exceptions to the general attendance requirement based on religious training or belief, concerns for a pupil's health, and for students who are deemed unable to benefit from education at school. Subsections (E) and (F) provide alternatives to traditional schooling through the creation of an individual alternative education plan or attendance at an alternative education program. Each of these statutory exceptions permit a child not to be enrolled in a traditional educational placement such as public, private, or parochial school, and thus, exempts a parent from "sending" their child to school.

Likewise, in analyzing the larger statutory framework, Code § 22.1-254 contains no language relating to daily attendance or truancy. Rather, these concerns are addressed by Code § 22.1-258. Code § 22.1-258 is the backbone of Virginia's truancy statutes. "It addresses the responsibility of students, parents, and school employees with respect to attendance, identification procedures and the provisions of services, as well as the imposition of sanctions in the event of continued noncompliance." Improving School Attendance, Virginia Department of Education, August 2005, pp. 59-60.

Unlike the provisions of Code § 22.1-254, which make non-compliance with its terms a misdemeanor offense, Code § 22.1-258 provides graduated intervention. It begins with parent contact "[w]henever any pupil fails to report to school for a total of five scheduled school days" and concludes with formal legal proceedings against the child and/or parent.

It is inconsistent to interpret Code § 22.1-254 such that a misdemeanor offense has been committed when a parent allows their child to miss five minutes of the school day, while Code § 22.1-258 provides that if the child misses the *entire day*, there is no crime. The

trial court's interpretation of Code § 22.1-254 obviates the need for § 22.1-258, as the school would have the ability to criminally prosecute both pupil and parent after a few minutes of school is missed. Under these circumstances, parents would do better to keep their child home for the day rather than to arrive five minutes late and risk prosecution. This could not be the intent of the General Assembly when it enacted Code § 22.1-254, and such a result would be inconsistent with the rules of statutory construction.

D. The Words Contained In The Statute Evince The General Assembly's Intent Not To Penalize Tardiness Under Code § 22.1-254.

Of greatest significance, in interpreting the meaning of "send," nowhere in Code § 22.1-254 does the text employ the term "tardy." In fact, nowhere in Chapter Fourteen of Title 22.1, does the General Assembly ever use the word. Rather, the statutes use the words "attendance," "fail to attend," and "absence." See e.g. Code § 22.1-258.

In its opinion in the case at bar, the Court of Appeals ruled "it is clear that tardiness is contemplated." However, courts must presume that the General Assembly chose its words with care. Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 100, 546 S.E.2d 696, 702

(2001). In choosing its words, the General Assembly never chose to use the word "tardy."

Further, when give the opportunity, the General Assembly specifically declined to amend Code § 22.1-254 to include chronic tardiness. See Va. SB 672, 2006 Sess. (January 19, 2006). Proposed Senate Bill 672 addressed the issue of late arrival by incorporating the concept of "chronic tardiness" expressly and requiring "the Board of Education to promulgate regulations defining 'chronically tardy' to identify those children who are in violation of compulsory school attendance by reason of being habitually and without justification absent from school for a significant portion of the day because of routine and substantial late arrival to school." Id.

The Court of Appeals' interpretation of Code § 22.1-254 brings tardiness within the statute's ambit, but in doing so provides no guidance to school administrators, parents, and/or courts with regard to compliance. Unlike Code § 22.1-258, the Court of Appeals ruling provides no boundaries as to how much time a student must miss before the parents are liable and no boundaries as to the number of hours a student may be tardy before criminal action is taken. Generally, appellate courts have expressed a preference for bright

line rules to encourage compliance, when possible. See e.g. Eaton v. Commonwealth, 240 Va. 236, 253, 397 S.E.2d 385, 395 (1990) (holding "[w]e share the U.S. Supreme Court's preference for "bright-line" rules for the guidance of those who must conduct and evaluate custodial interrogations."). Without such guidance, courts, parents, and school administrators are left to decide for themselves where to draw the line between "running late" and criminal conduct.

Untimely attendance is attendance nonetheless. Thus, it is not proscribed conduct in violation of § 22.1-254. An interpretation which requires parents to enroll their children in public school or its equivalent under § 22.1-254 and enforces daily attendance according to the provisions of § 22.1-258 is consistent with ensuring that children attend school to receive the benefits of an education and also gives clear direction to parents.

II. WHEN THE COMMONWEALTH ELECTS TO IMPOSE ADDITIONAL ELEMENTS SUCH AS KNOWLEDGE AND WILLFULNESS, THEY MUST PROVE THOSE ELEMENTS BEYOND A REASONABLE DOUBT.

A. Standard of Review.

"The trial court's interpretation and application of the term 'knowingly' ... is subject to *de novo* review." Marshall v.

Commonwealth, 58 Va. App. 210, 214-215, 708 S.E.2d 253, 255 (2011). In reviewing whether the evidence presented at trial was sufficient to sustain a conviction for the offense charged, the appellate court views the evidence in the light most favorable to the Commonwealth. Walton v. Commonwealth, 255 Va. 422, 425-26, 497 S.E.2d 869, 871 (1998). The court must then determine whether "the record contains evidence from which any 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Young v. Commonwealth, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008) (quotations omitted).

A judgment will not be set aside unless it is plainly wrong. Virginia Code § 8.01-680. "However, it is just as obligatory upon the appellate court, to set aside . . . the judgment of a court, when it is, in its opinion, contrary to the law and evidence, and therefore plainly wrong, as it is to sustain it when the reverse is true." Preston v. Commonwealth, 281 Va. 52, 57, 704 S.E.2d 127, 129 (2011) (citations omitted).

B. Knowledge and Willfulness Are Elements of the Law of This Case And Must Be Proven Beyond a Reasonable Doubt.

The Commonwealth has the burden to prove every essential element of the charged crime beyond a reasonable doubt. Washington v. Commonwealth, 273 Va. 619, 623, 643 S.E.2d 485, 487 (2007). An accused cannot be convicted of a crime unless the Commonwealth meets its burden of proof. Id. at 629, 643 S.E.2d at 490. "[A]n essential [element] of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979).

Elements agreed to by the parties become the law of the case, whether right or wrong, and cannot be questioned on appeal. See Exxon Mobil Corp. v. Minton, 285 Va. 115, 129, 737 S.E.2d 16, 26 (2013).

Virginia Code § 22.1-263, under which Blake was charged and convicted, states:

> Any person violating the provisions of either § 22.1-254, except for clause (ii) of subsection A, §§ 22.1-255, 22.1-258,22.1-267, or the parental responsibility provisions relating to compulsory school attendance included in § 22.1-279.3, shall be guilty of a Class 3 misdemeanor. Upon a finding that a person knowingly and willfully

> violated any provision of § 22.1-254, except for clause (ii) of subsection A, or any provision of §§ 22.1-255, 22.1-258, or § 22.1-267 and that such person has been convicted previously of a violation of any provision of § 22.1-254, except for clause (ii) of subsection A, or any provision of §§ 22.1-255, 22.1-258 or § 22.1-267, such person shall be guilty of a Class 2 misdemeanor.

"[K]nowingly" requires "proof of knowledge of the facts that constitute the offense." Bryan v. United States, 524 U.S. 184, 193 (1998). "'Willful' describes conduct that must be knowing or intentional, rather than accidental, and be done without justifiable excuse, without ground for believing the conduct is lawful, or with a bad purpose." Correll v. Commonwealth, 269 Va. 3, 13, 607 S.E.2d 119, 124 (2005).

Where the allegation employs two adverbs conjunctively, both words together define an element of the crime. See Smith v. Commonwealth, 282 Va. 449, 454, 718 S.E.2d 452, 455 (2011). "Stated differently, if the Commonwealth fails to prove beyond a reasonable doubt that the defendant's conduct was both [knowing and willful], the evidence is insufficient to support a conviction. Id.

Blake was convicted of a Class three misdemeanor. The statute, itself, does not require proof of a specific *mens rea.*

However, *in this case* where the Commonwealth amended the warrant(s) to specifically charge Blake with the "knowing and willful" failure to send her children to school, then the Commonwealth is bound by her election. Blake does not invite error or take inconsistent positions by agreeing to a higher burden of proof and then arguing that the burden has not been met.

C. Notice of Virginia Law Is Insufficient to Prove Blake Acted Knowingly.

The Court of Appeals held "whether or not notice was given under subsection (H) [of § 22.1-254] is not relevant to this analysis" because knowledge and willfulness are not elements of the class three misdemeanor. J.A. at 38. However, the trial court implied that notice was a relevant consideration. More specifically, the trial court found Blake guilty only for those violations occurring after she received a letter from the school attendance officer. J.A. at 120

Blake acknowledged that she received a letter from Ms. Melcher, the attendance officer for Loudoun County Public Schools, which detailed her "responsibility under Virginia law" to "get [the] children to school on time." Id. at 84. Yet, Code § 22.1-254 makes no explicit mention of timeliness as it relates to school attendance. Further, Ms. Melcher testified that tardies are excused by the

attendance secretary according to discretionary guidelines from the principal. J.A. at 83, 86. There was no other testimony about those discretionary guidelines, and nothing to suggest that the guidelines were ever communicated to Blake.

As a result, Blake had no way of knowing whether she was in violation of the principal's discretionary policy concerning tardiness. Or, in other words, Blake had no knowledge of the facts that would constitute the offense.

D. The Record Contained No Evidence from Which to Infer Blake's Conduct Was Willful.

The Commonwealth also failed to prove that Blake acted with the requisite willfulness to sustain a conviction. To that end, sometimes the children's' failure to timely attend school was accidental; for example, when the car keys were lost or when there was a mishap involving spilled milk. J.A. at 104, 91. On other occasions, Blake elected to resolve a behavioral problem at home prior to taking the children to school. J.A. at 104-105. In either case, the conduct was unintentional or done with the belief that it was lawful. In the absence of any evidence to the contrary, Blake's sincere exercise of parental discretion negates any willfulness. Instead, Blake made efforts to resolve the tardiness due to

inadvertence by hiring both a driver and a life coach. J.A. at 106-107. Thus, even if the Court were to find some evidence from which a reasonable fact finder might infer knowledge of the offense, there is no evidence to support the type of willfulness, i.e. bad purpose, necessary to sustain a conviction.

III. THE ISSUES OF NOTICE AND THE CONSTITUTIONALITY OF VIRGINIA CODE § 22.1-254 WERE NOT WAIVED BECAUSE THEY WERE INCLUDED IN APPELLANT'S ASSIGNMENTS OF ERROR.

A. Standard of Review.

Questions of law are reviewed *de novo*. See Stevens v. Commonwealth, 283 Va. 296, 302, 720 S.E.2d 80, 82 (2012). "A lower court's interpretation of the Rules of this Court, like its interpretation of a statute, presents a question of law that we review *de novo*." Findlay v. Commonwealth, 287 Va. 111, 114, 752 S.E.2d 868, 870 (2014)(quotations omitted).

B. The Error Alleged in Blake's First Assignment of Error Was Properly Preserved and Legally Sufficient.

"Rule 5A:18 governs the preservation of issues for appellate review in the Court of Appeals, and Rule 5:25 is its counterpart for the preservation of issues for appellate review in this Court. Those Rules provide that "[n]o ruling of the trial court . . . will be considered as a

basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling." Commonwealth v. Herring, 758 S.E.2d 225, 232-233 (2014)(citations omitted).

The Rules of the Supreme Court of Virginia and precedent also impose requirements for assignments of error as to both form and substance. With regard to form, assignments of error must be identified in list form under a separate heading titled "Assignments of Error." Rule 5A:12(c)(1). Along with the assignment, there must be an exact reference to the pages of the transcript where the alleged error has been preserved. Id. See also Rule 5A:20(c). The exact page reference is not the assignment of error itself, but a separate and related requirement. Chatman v. Commonwealth, 61 Va. App. 618, 625, 739 S.E.2d 245, 248 (2013).

With regard to substance, the assignments of error must be clear and concise without extraneous argument and contain the specific errors in the rulings below. Rule 5A:12(c)(1). See also First Nat'l Bank of Richmond v. William R. Trigg Co., 106 Va. 327, 341, 56 S.E. 158, 163 (1907) (citation omitted). The Rule also provides that "[a]n assignment of error which does not address the findings or rulings in the trial court . . . , or which merely states that the judgment

or award is contrary to the law and the evidence[,] is not sufficient." Rule 5A:12(c)(1)(ii).

"The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which [the] appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignments, [the] appellee would be unable to prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file, in civil cases, assignments of cross-error." Harlow v. Commonwealth, 195 Va. 269, 271-72, 77 S.E.2d 851, 853 (1953).

However, the specificity requirement does not demand the inclusion of a "because" clause or its equivalent. See Findlay at 116, 752 S.E.2d at 871. Requiring a "because" clause would be impossible to satisfy in many instances and "would create an unnecessary procedural trap that may bar appellate review of meritorious claims. Id.

The Court of Appeals declined to address the constitutionality of Code § 22.1-254 holding it was not preserved. J.A. at 38. However, in footnote six, the Court of Appeals acknowledged that "appellant raised these issues in the trial court." J.A. at 31. Because the constitutionality issue was raised in the trial court and objected to at the time of ruling, it was properly preserved for consideration on appeal. In addition, the exact references to the trial transcript where the error was preserved were included with the Assignment of Error, as required. To the extent that the alleged error concerns the sufficiency of Blake's first assignment of error due to failure to specifically address the Circuit Court's ruling, it is distinct from the issue of preservation.

C. Blake's First Assignment of Error Specifically Addressed the Circuit Court Ruling.

Blake's first Assignment of Error in her opening brief in the Court of Appeals read:

1. "The trial court erred in ruling that Virginia Code 22.1-254 prohibits a parent from occasionally allowing his/her child to be tardy to school where the child is otherwise validly enrolled and regularly attending." Opening Brief, p. 1.

In addressing Blake's constitutionality claim, the Court of Appeals held that "Appellant did not include the issues in her petition

for appeal and necessarily, could not include them in her opening brief." J.A. at 31. Contrary to the Court of Appeals' assertion, both the petition for appeal and the opening brief addressed the constitutionality of Code § 22.1-254. More specifically, Blake's petition for appeal and her opening brief argued that the trial court's application was unconstitutional. Petition for Appeal, pp. 5-7, Opening Brief, pp. 15-18.

In her Motion to Dismiss before the trial court, Blake argued that tardiness in the exercise of parental discretion was not a crime because Code § 22.1-254 was void for vagueness where(1) there was no notice of prohibited conduct and (2) the statute encouraged arbitrary and discriminatory enforcement. J.A. 52-74. At trial, Blake referenced the notice prong of the void for vagueness argument and also specifically renewed her motion to dismiss at both the motion to strike and in closing argument. Id. at 95-96, 118. The language used during argument in the trial court and throughout the petition for appeal and opening brief was identical and squarely addressed the circuit court ruling.

In ruling on Blake's Motion to Dismiss, the trial court stated:

> I think a proper analysis of this 254 is helped by the attorney general's opinion that was decided on January

> 31, 2005, in the application of the Browning-Ferris doctrinal statutory construction to the statute in question since it was amended after the attorney general's opinion in 2005. Specifically, the attorney general came to the conclusion that 254, at least the way I read this opinion, applies not only to absenteeism but tardiness and early departures. And then, if you go to 279.3, that defines the duty of the parent to insure that the 254 requirements are met. And then 263 has its own separate criminal penalty relating to compulsory school attendance under 279.3 as it applies to 254. And there's really no need for the general assembly to have amended 254, given the fact that the attorney general had already opined that 254 applied to, at least the way I read this opinion, one of the -- it's not necessarily the only aspect of this opinion but the statement is, **A parent's awareness and support of his child's absence from school does not itself allow repeated absenteeism, tardiness or early departures. So the Court will – and I do not believe that the statute is facially invalid**. I'll deny your motion. I'll note your exception to the Court's ruling.
>
> (Emphasis added). J.A. at 72-74.

Thus, the phrasing of Blake's first assignment of error adequately encompassed the trial court's ruling that Code § 22.1-254 does not grant parents the discretion, i.e. "a parent's awareness and support," to permit occasional tardiness. Although it is the duty of appellant's counsel to lay his finger on the error, there is nothing in the case law or the rules to suggest that the assignment must state, verbatim, the ruling or finding of the lower court.

Blake's first Assignment of Error did not include a "because" clause, but one is not required. The requirement is only that the assignment specifically address the ruling of the trial court, which it did, such that "the court and opposing counsel [are] on notice as to what points [appellant]'s counsel intends to ask a reversal of the judgment or decree and prevents them from having to hunt through the record for every conceivable error which the court below may have committed." Findlay, at 116, 752 S.E.2d at 871 (citations omitted).

As in Findlay, the Attorney General in this case understood the issues on appeal well enough to prepare a focused brief and to argue that Code § 22.1-254 is not unconstitutionally vague. Moreover, to the extent that there was any question as to whether Blake's first assignment of error specifically addressed a ruling of the trial court, the Court of Appeals declined the opportunity to resolve the question by denying Blake's motion to amend. J.A. at 26.

CONCLUSION

For the foregoing reasons, Appellant prays this Court vacate the convictions and dismiss the charges against her, or in the

alternative, this Court remand the matter to the Court of Appeals to address the merits of Blake's constitutional challenge to the statute.

Respectfully Submitted,
MAUREEN BLAKE
By Counsel

By:

Alexis Downing, Esq. (VSB 76674)
Assistant Public Defender
Office of the Public Defender
3 East Market Street
Leesburg, Virginia 20176
(703) 771-2507, ext. 107
(703) 771-2517 facsimile
adowning@lee.idc.virginia.gov
Counsel for Appellant

CERTIFICATE

1. Appellant:
   Maureen Blake
   202 Hackley Court
   Purcellville, Virginia 20132

2. Counsel for Appellant:
   Alexis M. Downing, Esq.
   Assistant Public Defender
   Office of the Public Defender
   3 East Market Street
   Leesburg, Virginia 20176
   (703) 771-2507, extension 107
   (703) 771-2517 facsimile
   adowning@lee.idc.virginia.gov

3. Appellee: Commonwealth of Virginia

4. Counsel for Appellee:
   Kathleen Martin
   Senior Assistant Attorney General
   Office of the Attorney General
   900 East Main Street
   Richmond, Virginia 23219
   (804) 786-4740
   (804) 371-0151 facsimile
   oagcriminallitigation@oag.state.va.us

5. Counsel for the Appellant was court-appointed for this appeal.

6. I certify that on July 15, 2014, fifteen (15) true and accurate copies of this Opening Brief were hand-delivered to the Clerk of the Supreme Court of Virginia.

7. I certify that on July 15, 2014, three (3) true and accurate copy of this Opening Brief was mailed, first-class, postage prepaid to Kathleen Martin, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main

Street, Richmond, Virginia 23219, telephone: (804) 786-4740; facsimile (804) 371-0151; email: oagcriminallitigation@oag.state.va.us.

8. I certify that this Opening Brief meets the word count limit of Rule 5:26. This document has a word count of **5,090** words and is composed of twenty seven pages, exclusive of the cover page, table of contents, table of authorities and certificate.

9. Appellant requests the opportunity to state orally and in person the reasons supporting her Opening Brief in this matter.

Alexis Downing, Esq. (VSB 76674)
Assistant Public Defender
Office of the Public Defender
3 East Market Street
Leesburg, Virginia 20176
(703) 771-2507, ext. 107
(703) 771-2517 fax
adowning@lee.idc.virginia.gov
Counsel for Appellant