Return to
FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

207 VA 165

Record No. 6156

In the Supreme Court of Appeals of Virginia at Richmond

JAMES C. HAMMER

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF NEWPORT NEWS

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6156

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 9th day of June, 1965.

JAMES C. HAMMER, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Corporation Court of the City of Newport News
Douglas M. Smith, Judge

Upon the petition of James C. Hammer a writ of error and *supersedeas* is awarded him to a judgment rendered by the Corporation Court of the City of Newport News on the 14th day of December, 1964, in a prosecution by the Commonwealth against the said petitioner for a felony (Indictment No. 7); but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

* * * * *

DEFT'S. EXH. #2.

12-2-64.

D. M. L.,

State of Virginia,
City of Newport News, to-wit:

TO ANY AND ALL SERGEANTS, SHERIFFS, AND CONSTABLES OF THE SAID CITY AND STATE:

WHEREAS, Lt. F. L. Martin-Sgt. H. T. Williams of Police Department has this day made complaint and information on oath before me, Forrest B. Wall Judge of the Municipal Court of the said City, that James Clifford Hammer on the 22nd day of April, 1964, in the said City, did unlawfully and feloniously walk into the home of one Mrs. H. G. Phillips, 504 Hosier St., Newport News, Va., against the peace and dignity of the Commonwealth of Virginia.

PRELIMINARY HEARING WAIVED.

THESE ARE THEREFORE, in the name of the Commonwealth, to command you forthwith, to apprehend and bring before the Judge, Municipal Court of the said City, the body of the said James Clifford Hammer to answer the said complaint, and to be further dealt with according to law.

Given under my hand and seal this 22nd day of May, 1964.

FORREST B. WALL (Seal)
Judge, Municipal Court.

I send the accused James Clifford Hammer on to the Grand Jury of the Corporation Court of said City of Newport News, for further investigation and trial.

Given under my hand and seal this 22nd day of May, 1964.

FORREST B. WALL (Seal)
Judge, Municipal Court, City of Newport News, Va.

(on back)

GRAND JURY.

Commonwealth of Virginia,

Charged with Burglary

v.

Accused James Clifford Hammer.

Executed this....day of ....., 19...., at.....o'clock ....M., by arresting.....at..... and delivering him at the Police Station or (to the Judge, Municipal Court) of the City of Newport News.

.....
Policeman.

ACCUSED IN JAIL.

• • • • •

page 2 } Virginia:

In the Juvenile and Domestic Relations Court for the City of Newport News:

Commonwealth of Virginia,

v.

James C. Hammer.

WAIVER OF PRELIMINARY HEARING.

I, James C. Hammer, being arrested and charged with a felony, to-wit: Burglary (2 counts), do hereby waive preliminary hearing on this 22nd day of May, 1964.

JAMES C. HAMMER.

Filed 6/2/64.

F. B. BARHAM, Clerk.

page 3 }

* * * * *

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Newport News and now attending the said Court, at its June term, nineteen hundred and sixty-four, upon their oaths do present; That James C. Hammer on the..... day of April, in the year one thousand nine hundred and sixty-four, in the said City, a certain dwelling house of one Mrs. H. G. Phillips, known as residence number 504 Hosier Street, in the said City of Newport News, then and there situate, in the night time of that day, feloniously did enter with intent to commit rape therein; and did then and there on the day aforesaid, in the city aforesaid, attempt to commit rape upon the body of the said Mrs. H. G. Phillips, against her will and by force, against the peace and dignity of the Commonwealth of Virginia. Upon the testimony of, Lt. F. L. Martin sworn in Court, and sent to the Grand Jury to give evidence.

(on back)

Ind. #7

* * * * *

Indictment for Burglary with Intent to Commit Rape (18.1-88 of the Code of Virginia), A FELONY a true bill.

.....
Foreman.

Filed 8 day of June, 1964.

December 14th, 1964... Court Reporter Sworn...

Deft. present in Court with his heretofore appointed Attorney's, H. Kostel & H. Bateman.

This matter having been partially heard on December 2nd, 1964, and continued until this date, all parties present, and upon conclusion of Deft's. evidence, Motion of Deft. by Counsel to Dismiss this charge on grounds that a Conviction would be Contrary to the law and evidence, also that the Complaining witness Mrs. Phillips could not see the accused well enough to identify the Deft., also that no act or action was taken to actually commit Rape, that the Complainant was

only told to strip, and the charge *shoudl* be reduced to Breaking & Entering or assault.... Overruled... Exception...

Deft. Hammer found Guilty as charged and sentenced to Six (6) years in the State Penitentiary, said sentence to run concurrent with the sentence imposed in Indictment #4...

Motion of Deft. by Counsel to set aside verdict as being contrary to law & Evidence, Overuled... Exception...

Deft. Remanded to Jail...

* * * * *

page 13 }

* * * * *

On an indictment for a felony, to-wit: Burglary with intent to commit rape-Indictment No. 7 returned by June 1964 Grand Jury.

This day came the attorney prosecuting for the Commonwealth and the prisoner, James C. Hammer (who was represented by Harry Kostel and Herbert Bateman, attorneys heretofore appointed by the Court), was led to the bar in the custody of the jailer of this Court, and Morris Schneider, Court appointed Court Reporter, was sworn to faithfully and accurately take down and transcribe the proceedings herein, and the said James C. Hammer being arraigned, and upon advice of counsel, pleaded not guilty to said indictment, and upon advice of counsel and with the consent of the attorney prosecuting for the Commonwealth, and the Court, waived trial herein by jury, and the Court proceeded to hear and determine this case without the intervention of a jury. Thereupon, the defendant, by counsel, moved the Court to quash this indictment upon the ground that no warrant was served on the defendant outlining the charges against him, and therefore the defendant did not know what the charges were and consequently could not prepare an adequate defense, which said motion the Court doth overrule, and to which action of the Court in overruling said motion, the defendant, by counsel, excepted. And the defendant, by counsel, moved the Court to dismiss this indictment upon the ground that the warrant herein alleges that the defendant walked into the house of the complaining witness herein and that the indictment charges the defendant with burglary with intent to commit rape, which said motion the Court doth overrule, and to which action of the Court the defendant, by counsel, excepted. And the evidence of the Commonwealth being fully heard the

defendant, by counsel, moved the Court to dismiss this indictment upon the ground that the identification by the complaining witness herein was not sufficient to sustain his conviction, which said motion the Court doth overrule, and to which action of the Court in overruling said motion, the defendant, by counsel, excepted. And the defendant's evidence being partially heard, on motion of the defendant, by counsel, this case is continued for further hearing until December 14, 1964. Thereupon, the said James C. Hammer is remanded to jail. And the record made by the Court Reporter herein of the said proceedings is filed with the papers in the case.

Entered Dec. 2, 1964.

* * * * *

page 14 } Virginia:

In the Corporation Court for the City of Newport News, the 14th day of December, 1964.

* * * * *

This day came again the attorney prosecuting for the Commonwealth and the prisoner, James C. Hammer (who was represented by Harry Kostel and Herbert Bateman, attorneys heretofore appointed by the Court), was again led to the bar in the custody of the jailer of this Court, and Morris Schneider, Court appointed Court Reporter, was sworn to faithfully and accurately take down and transcribe the evidence and proceedings herein, and the evidence being completed, the defendant, by counsel, moved the Court to dismiss the charge against him upon the grounds that a conviction would be contrary to the law and the evidence and that the complaining witness, Mrs. Phillips, could not see the accused well enough to identify him and that there was no act or action taken to actually commit rape and that the complainant was only told to strip and, therefore, the Court, failing to dismiss the charge against the defendant, should reduce the charge to breaking and entering or assault, which said motion the Court doth overrule and to which action of the Court in overruling said motion, the defendant, by
page 15 } counsel, excepted. Thereupon, the Court doth find the accused, James C. Hammer, guilty as charged in said indictment of burglary with intent to commit rape, in that he entered the dwelling house of one Mrs. H. G. Phillips known as Number 504 Hosier Street, in the City of Newport News, Virginia, in the night time, feloniously with in-

tent to commit rape and doth fix and ascertain his punishment to be imprisonment in the public jail and penitentiary house of this Commonwealth for the term of six (6) years. Thereupon, the defendant, by counsel, moved the Court to set aside its judgment herein as being contrary to the law and the evidence, which said motion the Court doth overrule and to which action of the Court, the defendant, by counsel, excepted. Thereupon, it being demanded of the prisoner if any thing he had or knew to say why this Court should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay thereof, it is considered by the Court that the said James C. Hammer be imprisoned in the public jail and penitentiary house of this Commonwealth for the term of six (6) years, the term of his imprisonment therein by the Court herein fixed and ascertained, there to be kept imprisoned and treated in the manner directed by law for the term aforesaid, or until he be otherwise discharged by due course of law, and that the Commonwealth recover against the said James C. Hammer the costs of this prosecution. And it is ordered that no credit be allowed the said James C. Hammer for any time spent in confinement awaiting trial on this indictment, such credit having been allowed him on Indictment No. 4. And it is ordered that the sentence herein imposed upon the said James C. Hammer shall run concurrently with a sentence of thirty (30) years this day imposed upon him on Indictment No. 4. Thereupon, the said James C. Hammer is remanded to jail. And the record made by the Court Reporter herein of the said proceedings is filed with the papers in the case.

* * * * *

page 17 }

* * * * *

Filed Feb. 12, 1965.

F. B. BARHAM, Clerk.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To F. Baxter Barham, Clerk, Corporation Court of the City of Newport News, Virginia:

Notice is hereby given that the defendant, James C. Hammer, appeals in the above styled case and will apply for a writ of error.

ASSIGNMENTS OF ERROR.

The following are assignments of error:

1. That the conviction of the defendant was contrary to due process of law guaranteed to him under Article 1, Sections 8 and 10 of the Constitution of Virginia, and the 4th, 5th, 6th and 14th Amendments to the Constitution of the United States in the following regards:

a. In that the Court failed to dismiss the subject indictment when the defendant had been taken into custody and held in confinement without any arrest warrant or other valid process contrary to statute, and without being advised until after the subject indictment as to the nature and circumstances surrounding the charges for which he was being held, and when the defendant was denied the right or opportunity to engage counsel at a crucial stage of his confinement and the investigation of charges against him.

b. In that the Court erred in admitting into evidence an incriminating statement signed by the defendant, which was extracted from him as a result of threats, promises, duress and coercion, denial of the right and opportunity to retain counsel, the wrongful and illegal nature of the page 18 } defendant's being taken into and held in custody without a valid warrant for his arrest or reasonable notice of the charge or charges against him and induced by the results of illegal searches and seizures.

2. That the Court erred in failing to dismiss the indictment charging the defendant for entry with intent to commit rape on the ground that there was a material variance between the charge stated in the indictment and that stated in the unserved, unexecuted arrest warrant pursuant to which he was indicted, which arrest warrant simply charged the defendant "* * * did unlawfully and feloniously walk into the home of Mrs. H. G. Phillips * * *".

3. That the Court erred in excluding the following evidence offered on behalf of the defendant for purposes of showing the incriminating statement of the defendant was inadmissible.

a. Exclusion of testimony of Police Lieutenant Mapes regarding his participation in alleged illegal searches and seizures, which defendant contends were a procuring cause of his making incriminating statements.

b. Exclusion of evidence as to investigative procedures, including continued interrogation and the execution of addi-

tional *incrminating* statements subsequent to defendant's signing such a statement as to this matter, and further, the Court's ruling that any evidence respecting these matters subsequent to the time of the statement in question were immaterial and were not to be considered on the question of admissibility of the said incriminating statement in this case.

c. Exclusion of testimony of the defendant's father that he was advised by the Chief of Police that charges could or might be brought for possession of stolen goods unless the defendant co-operated with the police, said testimony having been offered as tending to establish that the defendant's incriminating statement was induced by threats of officials of the Police Department.

d. Exclusion of testimony of the defendant that Police Lieutenant F. L. Martin advised that it would be unnecessary to employ an attorney for the defendant.

page 19 } e. Exclusion of evidence as to the defendant's schedule or routine during the day he was taken into custody as being immaterial to the question of the admissibility of his incriminating statement.

f. Exclusion of the defendant's testimony concerning the manner and circumstances of the investigation and interrogation to which he was subjected after he was taken into custody.

4. That the Court erred in over-ruling the motion of the defendant made at the conclusion of the Commonwealth's case to dismiss the indictment on the grounds the evidence was insufficient as a matter of law, and also that the Court erred in denying the same motion made at the conclusion of the defendant's case.

5. That the Court erred in denying defendant's motion to set aside the verdict and to dismiss the indictment against the defendant on the grounds the verdict was contrary to the law and the evidence, or in the alternative to the defendant a new trial.

JONES, BLECHMAN,
WOLTZ & KELLY
By HARRY J. KOSTEL
HERBERT H. BATEMAN

* * * * *

page 20 }

* * * * *

NOTICE OF TENDERING MEMORANDUM OF STIPULATION TO JUDGE.

To Marvin M. Murchison, Commonwealth's Attorney for the City of Newport News, Virginia:

You are hereby notified that on the 12th day of February, 1965, at 9:30 a.m., in the Corporation Court of the City of Newport News, Virginia, the undersigned will tender to the Honorable Douglas M. Smith, Judge of the said Court, the original Memorandum of Stipulation in the above styled cause, and respectfully ask the Honorable Judge of said Court to certify the same.

JONES, BLECHMAN,
WOLTZ & KELLY
By HARRY J. KOSTEL
HERBERT H. BATEMAN
Counsel for the Defendant.

Filed Feb. 12, 1965.

F. B. BARHAM, Clerk.

* * * * *

page 21 }

* * * * *

Received from the Court and filed Feb. 19, 1965 with transcript of evidence.

F. B. BARHAM, Clerk.

MEMORANDUM OF STIPULATION.

James C. Hammer hereinafter referred to as defendant was tried in the Corporation Court for the City of Newport News, Virginia, on December 14, 1964, on three indictments as follows:

1. That said defendant on the....day of April, 1964, in the said City of Newport News, Virginia, with force and arms in

and upon one Mrs. H. G. Phillips, feloniously did make an assault, and her, the said Mrs. H. G. Phillips, then and there, to-wit, on the day and year aforesaid, in the City aforesaid, feloniously did attempt to ravish and carnally know against her will and by force, against the peace and dignity of the Commonwealth of Virginia.

2. That the said defendant on the....day of April, 1964, in the City of Newport News, Virginia, a certain dwelling house of one Mrs. H. G. Phillips, known as residence number 504 Hosier Street, in the said City of Newport News, then and there situate, in the night time of that day, feloniously did enter with intent to commit rape therein; and did then and there on the day aforesaid, in the City aforesaid, attempt to commit rape upon the body of the said Mrs. H. G. Phillips, against her will and by force, against the peace and dignity of the Commonwealth of Virginia.

3. That the defendant did on the....day of April, 1964, in the City of Newport News, Virginia, in and upon one Mrs. H. G. Phillips, did make an assault, and her, the said Mrs. H. G. Phillips, then and there unlawfully, maliciously and feloniously did assault and cause bodily injury with intent, her, the said Mrs. H. G. Phililps, then and there to maim, disfigure, disable and kill against the peace and dignity of the Commonwealth of Virginia.

page 22 } The defendant having waived trial by jury and the Court and Commonwealth Attorney having concurred in said waiver, the Court heard the evidence and after hearing the evidence the Court found the defendant not guilty of indictments numbered 1 and 3 above, but found the defendant guilty of indictment numbered 2 above, and on December 14, 1964, sentenced the defendant to serve six years in the State penitentiary.

At the outset of the trial the defendant moved to quash the indictments on the ground that the arrest warrants issued and on which the indictments are based, were not served on the defendant and, as a result of that fact, the defendant had no way of knowing the nature and seriousness of the charges against him or the identity of his accusers. The Court overruled the motion to which ruling of the Court the defendant did duly except. The defendant then moved the Court to dismiss indictment numbered 2 above on the ground that the arrest warrant issued and on which indictment numbered 2 is based, materially varied from the charge set forth in the indictment in that the arrest warrant simply charged that the defendant "* * * did unlawfully and feloniously walk into the home of Mrs. H. G. Phillips * * *". The Court overruled

this motion and the defendant again duly excepted to the ruling of the Court.

The Court over the objection of the defendant admitted into evidence a confession made by the defendant on May 15, 1964, copy of said confession being attached hereto and made a part hereof and marked for identification as Commonwealth Exhibit No. 1. It was stipulated by counsel at the time the confession was introduced that the evidence taken in the case of *Commonwealth* v. *Hammer* (Alma Haase charges) from Line 3 at Page 156 through Line 19 at Page 370, and Line 19 at Page 433 through Line 16 at Page 434, would be incorporated into the record in this case.

At the conclusion of the Commonwealth's case the defendant moved to dismiss the indictments on the page 23 } ground that the evidence was insufficient as a matter of law which motion was overruled by the Court and the defendant duly excepted. The defendant upon resting his case renewed his motion to dismiss the indictments which motion was again overruled by the Court to which ruling the defendant again duly excepted.

The defendant, after the Court made its finding of guilty on indictment numbered 7, moved the Court to set aside the verdict as being contrary to the law and evidence or in the alternative to grant the defendant a new trial which motion the Court overruled to which ruling the defendant duly excepted.

We the undersigned do hereby agree that the foregoing is a true and correct version of a portion of the evidence, motions, objections and exceptions in the case of Commonwealth *v.* James C. Hammer tried in the Corporation Court of Newport News, Virginia, on December 14, 1964.

Given under our hands this 12th day of February, 1965 and certified by the judge on the 19 day of Feb. 1965.

DOUGLAS M. SMITH, Judge.

MARVIN M. MURCHISON
Commonwealth Attorney.

HARRY J. KOSTEL
Counsel for Defendant.

HERBERT H. BATEMAN
Counsel for Defendant.

page 24 } SPECIAL REPORT.

Newport News, Va., May 15, 1964

Subject: James C. Hammer W/M/25 10371 Warwick Blvd.
Charged with: Burglary and assault attempt rape
Officer in case: Lt. F. L. Martin and Sgt. H. T. Williams
Witnesses: (Give Address) Mrs. H. G. Phillips 504 Hasier St. LY6-3846

Chief of Police:

I herewith submit report on the above case and the facts, so far as I am able to learn to date are:

After being warned of any statement that he made could be used as evidence in court either for or against him, James C. Hammer W/M/25 10371 Warwick Blvd. made the following statement to Lt. F. L. Martin and Sgt. H. T. Williams in the Detective Bureau on May 15, 1964, at 12:45 p.m.

On April 22, 1964 about 6:30 p.m. I left my home to walk around to my mother in law's house located at 311 Hasier St. When I arrived at my mother-in-law's home I decided not to go in. I turned around and walked on home. I went into the house and watched television for about a hour. Things was dull around the house since I was there by myself. I decided that Hilton needed a little action and I was going to get my gun and my knife and go out and scare the hell out of somebody.

I went to the dresser drawer and got my 38 cal. revolver nickle plated and my hunting knife. I left the house and started walking east on Pasr St. When I got to the corner of Post St. and Hasier St. turned left and started walking north on Hasier St.

When I arrived in front of 504 Hasier St. I saw that the porch light was burning. I was *carring* a 38 cal. nickle plated revolver in my right hip pocket and my hunting knife in my left rear pocket. I was wearing a blue baseball cap, *blck* short sleeve sweat shirt, light green trousers, white socks, and brown loafers. I stood there and looked at the house for a few minutes then I decided to go into the house.

I walked up the side walk, *the* up the steps. I pulled the screen door open and walked in. The front wooden door was open at this time. When I got into the living room, I looked around but I did not see anyone. I heard a noise in one of the

back room's I took my handkerchief from my pocket and tied it across the lower part of my face. Then I took my 38 cal. nickle plated revolver from my right rear pocket and my hunting knife from my left rear pocket. I walked into the dinning room to see the noise was. I met a lady walking towards me. She said *id* you want money I don't have any, then I said for her to take her clothes off and I would page 25 } show her what I wanted. She reached up and pulled a button off of her blouse. Then she reached and got her purse off of the dresser. She took a $5.00 from the purse and offered me the money. I told her I didn't want the money and I left by the back door and went on home.

Witness Sgt. H. T. Williams

Signed JAMES C. HAMMER
In Charge of Case

(This report to be made to the Chief of Police on all cases going to Corporation Court then copied in duplicate and a copy furnished the Commonwealth's Attorney.)

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Defendant's Exhibit #2	2
Waiver of Preliminary Hearing	3
Indictment	4
Order—December 2, 1964	5
Judgment—December 14, 1964	6
Notice of Appeal and Assignments of Error	7
Notice	10
Memorandum of Stipulation	10
Special Report	13