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Record No. 6949

In the
Supreme Court of Appeals of Virginia
at Richmond

HARVEY CHRISTIAN

v.

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OF ROANOKE

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. 6949

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 18th day of April, 1968.

HARVEY CHRISTIAN,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

From the Hustings Court of the City of Roanoke
Richard T. Edwards, Judge

Upon the petition of Harvey Christian a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Roanoke on the 16th day of October, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony; 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.

* * * * *

AFFIDAVIT
Record No. 6949

* * * * *

Comes now the Plaintiff in Error, Harvey Christian, and says as follows:

(1) That he is Plaintiff in Error and that the Commonwealth of Virginia is Defendant in Error in a certain case now before the Supreme Court of Appeals of the State of Virginia in which case a writ of error and *supersedeas* was awarded on April 18, 1968 to a Judgment rendered by the Hustings Court for the City of Roanoke on October 16, 1967.

(2) That he is a pauper and is proceeding with Court appointed counsel.

(3) That he is without means and is unable to pay or secure to be paid the costs of printing the record in the heretofore mentioned case.

Harvey Christian

I, J. P. Jordan, a Notary Public in and for the State of Virginia and the County of Augusta, do hereby certify that Harvey Christian, whose name is signed to the above, personally appeared before me on the 27 day of August, 1968.

Given under my hand this 27 day of August 1968.

J. P. Jordan
Notary Public

My commission expires: July 11, 1970.

Recd. 9-3-68

* * * * *

CERTIFICATE

This is to certify that this Court has investigated the ability of Harvey Christian, who was convicted in this Court, to pay for the cost of printing the record in pursuit of his appeal to the Supreme Court of Appeals in Virginia and is of the opinion that he is unable to pay, or secure to be paid, such costs of printing.

Richard T. Edwards, Judge

August 29, 1968

* * * * *

RECORD

* * * * *

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* * * * *

This day came the Attorney for the Commonwealth and Harvey Christian who stands indicted of a felony, to-wit: Statutory burglary and larceny, was led into court in the custody of the jailor of this court and also came George W. Wooten, his attorney, who was heretofore appointed by the Court to represent the accused.

Whereupon the accused was arraigned and after private consultation with George W. Wooten, his counsel, did not enter any plea and the Court entered a plea of not guilty for the accused. And thereupon the accused, after having been first advised by his attorney, waived trial by a jury and with the concurrence of the Attorney for the Commonwealth and of the court, here entered of record, the court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence the defendant, by counsel, moved the court to strike the Commonwealth's evidence on grounds they did not prove beyond a reasonable doubt that a crime was committed, which motion the court overruled, and the defendant, by counsel, excepted. Thereupon the court doth find the defendant Harvey Christian guilty of Statutory Burglary and fixes his punishment to be two (2) years in the penitentiary.

And it being demanded of the accused if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this court that the said Harvey Christian be and he hereby is sentenced to confinement in the page 7 } penitentiary of this Commonwealth for the term of two (2) years, the period by the Court ascertained as aforesaid, and that the Commonwealth of Virginia do recover against the said Harvey Christian its costs by it about its prosecution in this behalf expended.

And it is further Ordered that as soon as possible after the entry of this order the prisoner be removed and safely conveyed according to law from the jail of this court to the said penitentiary, therein to be kept, confined and treated in the manner provided by law.

The court orders that the prisoner be allowed credit for the time spent in jail awaiting trial. The Court certifies that at all times during the trial of this case the accused was personally present.

And the prisoner is remanded to jail.

Enter: 10/16/67

R. T. Edwards, Judge

* * * * *

page 8 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: The Clerk of the Hustings Court City of Roanoke, Virginia:

The Court Appointed Counsel for Harvey Christian, the defendant in the above styled action, does hereby give notice of appeal to the Supreme Court of Appeals of Virginia from the final order entered in the Hustings Court for the City of Roanoke, pursuant to a trial without a jury whereby the defendant was convicted and sentenced to two years in the State Penitentiary, said trial being held on October 16th, 1967. The following is set forth as the assignment of error:

(1) The Court committed error in failing to grant the defendant's motion to strike made at the conclusion of the Commonwealth's evidence.

Harvey Christian
By George W. Wooten
Court Appointed Counsel

HUNTER, FOX and FOX
Suite 310, Seven-O-Seven Building
Roanoke, Virginia 24011

* * * * *

Received December 14, 1967 and filed, Patsy Testeman, Deputy Clerk

* * * * *

TRANSCRIPT OF THE EVIDENCE INTRODUCED AND PROCEEDINGS HAD upon the trial of the above styled case in the Hustings Court of the City of Roanoke, Virginia, on October 16, 1967, the Honorable RICHARD T. EDWARDS, Judge of said Court presiding.

APPEARANCES: Lawrence L. Koontz, Jr.
Assistant Commonwealth Attorney

George W. Wooten
Counsel for Defendant.

* * * * *

page 1 } October 16, 1967

The Court: This is *Commonwealth of Virginia* vs. *Harvey Christian.* Stand up Mr. Christian. You are charged with breaking and entering a certain dwelling belonging to Mrs. Cabaniss. Do you understand the nature of the charge?

Mr. Christian: Yes, sir.

The Court: Have you gone over the facts of this case with your Attorney?

Mr. Christian: Yes, sir.

The Court: Are you prepared to go to trial?

Mr. Christian: Yes, sir.

The Court: Anything you want to say before you do go to trial?

Mr. Christian: No, sir.

The Court: Are you satisfied with your lawyer?

Mr. Christian: Yes, sir.

The Court: The Clerk will read the indictment.

The Clerk: (Reading indictment) How say you guilty or not guilty?

Mr. Christian: I don't know what to say.

The Court: All right, enter a plea of not guilty. Do you realize that you are entitled to a trial by jury if you wish it?

Mr. Christian: Yes, I realize that.

The Court: Do you wish a jury trial?

page 2 } Mr. Christian: No, sir.

The Court: You do not? All right, have a seat. With the concurrence of record of the Commonwealth Attorney we will proceed.

Mr. Koontz: Yes, your Honor.

Mr. Koontz: If it please the Court, we—the Attorney for Mr. Christian and myself had a conference sometime last

week. The owner of the property, Mrs. E. L. Cabaniss, is an elderly woman and is actually unable to be here. He has agreed that her sister, Mrs. E. F. Jamison—

The Court: That's all right.

Mr. Koontz: —will be a competent witness to identify the property.

The Court: All right. Cabaniss is the name. Cabaniss is the way it is pronounced.

Mr. Koontz: All right.

The Court: Call the first witness.

Mr. Koontz: Sergeant Wills.

SERGEANT G. O. WILLS, a witness called on behalf of the Commonwealth, after first being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Koontz:

Q. You are Sergeant G. O. Wills with the Roanoke City Police Detective Bureau?

page 3 } A. Yes, sir.

Q. Sergeant Wills, back on April the 19th of this year did you make an investigation at the home of Mrs. Emblyn L. Cabaniss on Jefferson Street?

A. Yes, sir, at 1015 South Jefferson Street.

Q. Now is that in the City of Roanoke?

A. It is in the City of Roanoke.

Q. All right, sir. Just tell the Court then what you did and what you found.

A. On the request of Mrs. Myers, who is present, we investigated there and found that the house had been broken into by a window glass on the South side of the house had been broken and then the window raised. In investigating in the house we found that there was much evidence that someone had been staying in the house from wine bottles, food and stuff that was thrown on the floor. Partial cans of pork and beans and such things as if someone had been in and out of the house. There was so much in this house—so much furniture and antiques of various nature that we—Mrs. Myers was unable to tell exactly what was missing other than a couple of clocks from the mantle. And in making this investigation I had received information previous to this time that —from Officer Castleman in reference to some property that

he had taken off of a prisoner. I believe that he can testify to that.

page 4 } Q. All right, now Officer let's go back just briefly. You say a window was broken. Did you find any glass and, if so, where did you find it?

A. On the in and outside of the window.

Q. Did you make an—

The Court: I didn't hear what he said.

The Witness: On the in and outside of this room that the window was in.

Mr. Koontz: (Continues examination)

Q. Did you make an examination of the window sill?

A. Yes, I did. There was dust disturbed in the window sill and some dirt that—there had been—there had been—curtains that were on the window had been pushed aside and—

Q. All right, now were you able to locate the owner of this home?

A. No, I didn't talk to Mrs. Cabaniss. I talked to Mrs. Jamison, her sister, and Mrs. Myers.

Q. All right, she is here. We will let her testify to that. All right, would you answer Mr. Wooten's questions?

CROSS EXAMINATION

By Mr. Wooten:

Q. How did you get in, Sergeant Wills?

page 5 } A. Mrs. Myers, I believe, had the key to the front door. It had a padlock.

Q. The house was secure when you were there and the window when you first went there?

A. Yes, this window glass was smashed out and he could have gotten in there. Of course, we had a call previously to that time out there to the same place, where I understand, that the back door had been forced open; but I didn't investigate that one.

Q. But when you were there the house was locked and secure except for this window and you had to get somebody to let you in; is that right?

A. Well yes, Mrs. Myers was there at the time when I went out there. I went out there to her—she called the police, I believe, and met me out there. She was waiting for me.

Q. Did it look like one or more persons had been staying in the house or something to that effect; is that right?

A. Well you couldn't tell how many were there. There were empty wine bottles thrown around there and cans of pork and beans partially consumed. I mean they were about empty and there was some food left in them. Part of a box of crackers had been consumed. They were—

Q. Any of the beds slept in or anything like that?

page 6 } A. Some of the beds were messed up. You couldn't tell if they had been slept in, but they were disarranged. The whole house was in a wreck in that drawers was dumped on the floor all over the house, general ransacked.

Mr. Wooten: All right, thank you very much, Officer.

Mr. Koontz: Thank you, Officer. Mrs. Myers, will you take the stand, please?

MRS. MAUDE MYERS, a witness called on behalf of the Commonwealth, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Koontz:

Q. Mrs. Myers, will you tell the Court your full name?

A. Mrs. J. S. Myers, Mrs. Maude Myers.

Q. Where do you live, Mrs. Myers?

A. 302 Washington Avenue, Southwest.

Q. Mrs. Myers, do you know—I have difficulty pronouncing this name, the Cabaniss—Mrs. Cabaniss?

A. Mrs. Cabaniss.

Q. Mrs. Cabaniss?

A. Yes, she is the President of the Viaud School.

Q. All right, and you—what do you do at the Viaud School?

page 7 } A. I am the Secretary and Treasurer—

Q. All right.

A. —and Teacher.

Q. Are you familiar with her home at 1015 Jefferson Street?

A. Yes.

Q. Do you have any particular responsibility with reference to that home?

A. Well Mrs. Rasmussen and I have to look after her property while—during her absence. She is ill.

Q. Now is she an elderly woman?

Mrs. Maude Myers

A. Yes, she is.

Q. Does she live here in the City?

A. Well her home is here at 1015, but she is with her daughter and her son who is a Surgeon in Toledo, Ohio.

Q. So this is her home place?

A. That is her home place.

Q. Now you look up at Judge Edwards and I think everybody can hear you. That is her home?

A. Yes.

Q. But she is not there at this time?

A. She is not there and hasn't been there for quite sometime.

A. Was she there during the month of April of this year?

A. Well I don't think so. I don't think so.

page 8 } Q. Well now on or about the 19th of April of this year did you go to her home and find anything unusual there?

A. Well Mrs. McIndoe, who lives the second house from her and who has lived there since the Cabaniss's have lived in the house, called the school and she said—

Q. Well now don't go into what she said.

A. Well—

Q. But did you have an occasion to go to that home?

A. No, no, not until she called and said it was broken into.

Q. Well then did you go down to her home?

A. I called the officers and when they came we went in.

Q. All right, and what was there when you got there? Was there anything unusual about the place?

A. Everything was torn up.

Q. All right, were the doors locked or unlocked?

A. They were unlocked.

Q. They were unlocked?

A. The back door had been broken in and it was open and the dining room window had been broken out; and the front door—the lock had been broken or there was a bolt that was in the front door and it was on the table in the hall.

page 9 } Q. I see. Now how often would you check by the house?

A. Well we didn't have any special time to check the house but Mrs. McIndoe was looking out for it and if there was anything irregular about it she would call us.

Q. Now had you given anyone permission in the owners absence to be in the home during this time?

A. No.

Mrs. Maude Myers

Q. To your knowledge the house was secure in her absence?
A. Well the doors and the windows were locked.
Q. All right, now did you attempt or make any attempt to find out what was missing in the house?
A. Yes, we did. Her son came down from Washington and there were things that her sister, Mrs.—

The Court: Jamison.
Mr. Koontz: Jamison?

The Witness: (Continues)
A. Mrs. Jamison came. Mrs. Jamison was born and raised in the house.
Q. Mrs. Myers, I want to show you several articles first of which appears to be a metal purse of some sort and ask if you can identify that?
A. I can identify the card.
Q. What is that?
page 10 } A. This?
Q. Whose is that?
A. That is Mrs. Cabaniss, Mrs. L. B., Mrs. Luther B. and Mrs. Emblyn J. She was—Her husband was Luther B.
Q. All right, can you recognize this flashlight?
A. Yes, she carried that to school for many years.
Q. Now who is that?
A. Mrs. Cabaniss.
Q. Mrs. Cabaniss?
A. Yes.
Q. Well now some of these articles are just a little bit awkward, Mrs. Myers. Could you just look over here at this table on your left? Can you identify any of these articles?
A. Yes.
Q. Which one can you—
A. The clock.
Q. This large clock?
A. Uh huh, on the mantle.
Q. On whose mantle?
A. Mrs. Cabaniss's mantle.
Q. And does it belong to her?
page 11 } A. It belongs to her.
Q. How about the smaller clock?
A. That clock also.
Q. All right, are you familiar with the value of any of these articles?

Mrs. Maude Myers

A. No.

Mr. Koontz: All right, thank you. Answer Mr. Wooten's questions.

CROSS EXAMINATION

By Mr. Wooten:

Q. Mrs. Myers, Mrs. Cabaniss is out in Ohio; is that right?

A. Yes.

Q. Now you indicated that when you went up to the house after getting this report—

A. I don't—I didn't—

Q. When you went up to the house after getting this report, the doors were open?

A. The window was broken and the doors were open.

Q. The doors were open and the window was broken?

A. Yes.

Q. Is that the first such occasion that you
page 12 } have found the doors were open at the house?

A. Yes.

Q. It had never happened before?

Q. Well it was broken into twice.

Q. Before this occasion?

A. No, it was broken into—I don't know whether—well twice we were called down there. Twice we called the police officers. The dates I don't recall. I didn't record them, but I am sure you all have them.

Q. Well was one time before this occasion that we are talking about today? Or was it *aftwards*?

A. After.

Q. Somebody broke into the house since this—

A. Yes.

Q. —April the 19th or 18th?

A. Yes, it was broken into the second time.

Q. Uh huh. When were you at the house last? Do you remember before you were called down there?

A. No.

Q. Do you have any idea at all?

A. It was after she had been gone quite sometime. She lived in the apartment, in Mrs. McIndoe's apartment, the second house from there. Had an apartment there.

Mr. Wooten: All right, thank you, Mrs. Myers.

Mrs. Mattie Jamison

page 13 } Mr. Koontz: Thank you Mrs. Myers. Mrs. Jamison.

MRS. MATTIE JAMISON, a witness called on behalf of the Commonwealth, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Koontz:

Q. What is your full name, Mrs. Jamison?

A. Mrs. Mattie Jamison.

Q. Do you live here in the City?

A. No, I live in the County.

Q. In the County?

A. Yes.

Q. Who is your sister?

A. Mrs. Cabaniss.

Q. Mrs. Cabaniss?

A. Yes.

Q. Did you have an occasion, Mrs. Jamison, to go over to your sister's home on Jefferson Street after this incident that has been described?

A. No.

Q. You did not go to the home?

A. I didn't go, no.

page 14 } Q. Well now since that time have you made any attempt to determine what, if anything, was taken from the home?

A. Only in the other Court.

Q. Well let me ask you this. The various articles here on this table to your left can you identify any of those?

A. Yes, I can identify practically all of them.

Q. All right, there is a—

A. I explained in the other Court that the purse belonged originally to my mother and father.

Q. Yes, ma'am.

A. And that these thing were mother's to start with and then when mother and *poppa* died these things were left to my sister, the house and everything in it—

Q. Yes, ma'am.

A. —were left to her and do these were things that originally belonged to my mother and then belonged to my sister, Mrs. Cabaniss.

Mrs. Mattie Jamison

Q. Is that why you are familiar with them?
A. Yes, yes, I grew up with them.
Q. All right, this gold vase I suppose that is—
A. Yes.
page 15 } Q. Was that part of your sister's property?
A. It was part of mother's and then my sister's.
Q. Now how about these glasses?
A. Well I can't identify the glasses.
Q. Not sure?
A. No, the magnifying glass I can.
Q. This small magnifying glass?
A. Yes, that belonged to mother originally.
Q. All right, do you know anything about the value of these articles?
A. No, no, I have no idea. Mother collected antiques and she kept them and she lived in that house over sixty years and there is quite a few things in there. I have no idea of the value of them.
Q. Did you go from time to time to your sister's home?
A. Yes, but not too often after mother passed away.
Q. Well now while she was away from the home did you authorize anyone to go into the home?
A. No, and I didn't go in it either. I had no reason to go into the house.
Q. All right, and where were these articles the last time you saw them?
page 16 } A. That clock there was on the mantle in the living room. There was—what we had was a parlor and a living room.
Q. This large clock?
A. The large clock and as well as I remember that little gold vase was on the table in the hall. And this was in my sister's bedroom upstairs.
Q. That is the little metal purse?
A. This is the little—uh huh—little card case as we called it. A little silver card case.
Q. A card case?
A. And I thought there was one card case that had her initials on it.

Mr. Koontz: All right, Mrs. Jamison would you answer Mr. Wooten's questions?
The Witness: Yes.

Mrs. Mattie Jamison

CROSS EXAMINATION

By Mr. Wooten:

Q. Mrs. Jamison, you have identified this. How about this? (Flashlight)

A. I can't tell that the flashlight—

Q. You can't tell that?

A. No.

page 17 } Q. How about—you have identified this clock. How about this clock?

A. I don't remember where that was, but it was in the house.

Q. In the house?

A. It was in the house, and the vase.

Q. The vase?

A. And that little pan like thing was on the table in the—

Q. This pan?

A. Uh huh, in the hall.

Q. And the glass, how about that?

A. That was in—I think in her bedroom.

Q. All right.

A. In the dresser drawer.

Q. You say you don't know about the glasses?

A. I don't know about the glasses.

Q. How about these razors?

A. I don't know about those either.

Mr. Wooten: Okay, that's all. Thank you.

The Court: Mrs. Jamison, what was your mother's name?

The Witness: Jennings, Mrs. R. B. Jennings.

The Court: Oh yes, she was the one that was interested in birds.

page 18 } The Witness: That's right. She was interested in most everything.

The Court: I think I took a bird study from her when I was a boy scout.

The Witness: I don't doubt it. I don't doubt it. Mother lived there ever since they moved there in 1901 and then my sister, Mrs. Cabaniss, never moved away.

The Court: I see.

The Witness: She married and lived upstairs and raised her three children in the upstairs apartment.

The Court: I remember that place.

The Witness: I am sure you do.

Officer J. E. Castleman

The Court: But it is vacant now?

The Witness: Yes, yes, and it was vacant—it has been vacant off and on—

The Court: I see.

The Witness: And after mother died she didn't go back to the house to live. She got an apartment down the second door with the McIndoe's. And Mr. McIndoe was living at that time and he looked after the house for her and looked after the yard.

The Court: I remember that quite well.

The Witness: Yes, I am sure you do.

The Witness stands aside.

Mr. Koontz: Officer Castleman.

page 19 }

OFFICER J. E. CASTLEMAN, a witness called on behalf of the Commonwealth, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Koontz:

Q. You are Officer J. E. Castleman of the Roanoke City Police Department?

A. Yes, sir.

Q. Officer Castleman, back within the latter part of the second week of April of this year did you have any contact with the defendant, Mr. Christian, here?

A. Yes, sir, I did.

Q. Now just tell the Court the circumstances under which you contacted him.

A. Officer Mills and myself turned off of Jefferson Street going East on Albemarle and noticed Mr. Christian and another subject walking East. Mr. Christian appeared to be drunk and I stopped him and placed him under arrest for drunk and in doing so be became disorderly and also a disorderly charge was placed against him.

Q. Well now Officer let me ask you this. Where was he arrested with relation to 1023 South Jefferson Street?

A. It would be about two blocks away.

Q. And that is in the City?

page 20 } A. Yes, sir.

Q. All right sir, did he have anything with him?

A. Yes, sir, he did. He was carrying a rather large bag filled with some of these articles over here and another subject was carrying another bag.

Q. All right, can you identify the articles that Mr. Christian was carrying?

A. Yes, sir.

Q. Can you do that for us?

A. Yes, sir, the magnifying glass and both glasses, the pan, the purse and the razors, and I believe another knife in here; sort of a paring knife, or a kitchen knife. All of the small articles on the table were in a little bag. And the larger articles, the clocks, were in another bag, in a larger shopping bag.

Q. He was carrying them in a shopping bag?

A. Yes, sir.

Q. All right, did you ask him about them?

A. Yes, sir, I did. We—as we placed him under arrest I warned him of his rights and told him he didn't have to make any statement.

Q. Well let me ask you this before you go into that. At that time were you investigating any break-in?

A. No, sir.

page 21 } Q. All right, you were just—

The Court: What was the date, Mr. Castleman?

The Witness: The 13th your Honor, and he stated that that was part of an inheritance his mother had left him. He stated that she had died recently and that was part of her inheritance she had left him.

Mr. Koontz: (Continues examination)

Q. I see. Did he give an address, his home address, at that time?

A. No, sir, I don't believe he did. I believe he gave an address somewhere in Southeast to the Docket Sergeant. He never would tell us where his mother's house was located.

Mr. Koontz: All right, answer Mr. Wooten's questions.

Officer J. E. Castleman

CROSS EXAMINATION

By Mr. Wooten:

Q. Officer, was Mr. Christian carrying all of the things?

A. No, sir, this other subject was carrying—

Q. He had some of them?

A. Yes, sir, we asked him—the other subject about it and he stated that he didn't have anything to do with it and Mr. Christian said all the property belonged to him.

page 22 } Q. Mr. Christian had all the smaller items in a bag and the other fellow had the larger—

A. Yes, sir.

Q. —items, the clocks in a bag?

A. Yes, sir.

Q. What was this other man's name?

A. I don't recall it. It should be on file downstairs in the police report.

Q. A routine drunk arrest?

A. Yes, sir.

Mr. Wooten: That's all, thank you.

The Court: Mr. Castleman, where was he taking the stuff?

The Witness: He stated, your Honor, that he was taking it down to his house in Southeast. Said he was—

The Court: In which direction was he going?

The Witness: He was going East on Albemarle. He was right at Second and Albemarle when we arrested him, in Southeast.

The Court: Second and Albemarle?

The Witness: Yes sir, it's a small street Church and he was going toward Third Street, Southeast.

The Court: He was only about a block from his house; wasn't he?

The Witness: Yes, sir, I think his address was

page 23 } 119, one of the lower numbered streets. I don't recall directly. It was Fourth Street or Fifth Street, somewhere along in there. A right good distance.

The Court: Thank you, sir.

The Witness stands aside.

Mr. Koontz: Mrs. Rasmussen.

Leona Charlotte Rasmussen

LEONA CHARLOTTE RASMUSSEN, a witness called on behalf of the Commonwealth, after first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Koontz:

Q. How do you pronounce your name? I am really sorry.

A. Rasmussen.

Q. Rasmussen. I hope I will be able to say that again. Tell the Court your full name, please?

A. Leona Charlotte Rasmussen.

Q. Now did you go down to the home we have been discussing this morning?

A. Yes, with Mrs. Myers.

Q. But you didn't actually discover the break-in though; did you?

A. No, indeed I didn't.

Q. Do you recall when it was that you went
page 24 } down?

A. It was in the Spring, I believe April, but I can't remember the date.

Q. You don't remember the date?

A. No, I don't remember the date.

Q. Well now do you know whether or not—when you went down you had no way of knowing actually when the place was broken in; do you?

A. No, I don't, except that we got a phone call from Mrs. Cabaniss's neighbor and said that the back door had the glass knocked out of it.

Q. Do you remember the date?

A. I am sorry I don't.

Q. Could it have been on April the 13th?

A. Well it could have been around there.

Mr. Koontz: All right, will you answer Mr. Wooten's questions?

CROSS EXAMINATION

By Mr. Wooten:

Q. It could have been the 15th, 16th, 12th, 10th or any day; couldn't it?

A. I don't remember the date.

Leona Charlotte Rasmussen

Mr. Wooten: I see. Thank you.

Mr. Koontz: Any questions, your Honor?

The Court: Was it reported immediately to the
page 25 } police?

The Witness: Yes, it was. It was reported immediately.

The Court: Thank you very much.

Mr. Koontz: Thank you ma'am.

The Witness stands aside.

Mr. Koontz: The State rests.

Mr. Wooten: May I have a minute Judge to talk to Mr. Christian?

The Court: You certainly may.

Mr. Wooten: I move to strike the Commonwealth's evidence on the grounds that they have failed to establish the crime beyond a reasonable doubt. The Commonwealth has shown that the house was broken into, no indication of who broke in there or how the things got out of there. The doors and stuff were open when the thing was discovered and the defendant, of course, was arrested on another charge of posessing some of the stuff and I am just not really sure whether that presumption completely ties him to a larceny case.

The Court: Inference, it doesn't apply to the same. It is an inference in breaking and entering though.

Mr. Wooten: Well that is the end of the motion, your Honor.

The Court: All right, motion overruled. The de-
page 26 } fendant was found in possession of articles which came from the house within a block from the premises and the house was broken into. There is an inference only, not a presumption, in the case of breaking and entering; but if you take in consideration the other facts and circumstances then I have to overrule the motion.

Mr. Wooten: Just another question, Judge. (Talks to client) Judge, the defendant does not wish to testify and has no other evidence.

The Court: Very well. All right, there will be no rebuttal evidence. Do you gentlemen have a recommendation?

Mr. Koontz: Your Honor, we do not have a mutual recommendation.

The Court: All right, stand up please, Harvey. The Court having heard the evidence in this case on your plea of not guilty, I am going to find you guilty of statutory burglary as

charged in the indictment. Now before I fix punishment do you have anything to say or does your lawyer have anything to say about it?

The Defendant: Your Honor please, yes, I would like to say something.

The Court: Very well.

The Defendant: Judge, at the time this thing happened I had been drinking quite heavy and I was pretty sick. I was sick to the point of being out of my mind and I would like a chance to make restitution of any property, page 27 } other than this stuff here, that was gone out of that lady's house. If you will give me probation I think I have got almost a year already.

The Court: You have almost what?

The Defendant: Almost a year.

The Court: To what?

The Defendant: I have got almost a year of time pulled already.

The Court: You mean the time you have been in jail?

The Defendant: Yes, sir.

The Court: When did you go to jail?

The Defendant: In April.

The Court: Why was this case so slow in coming up here?

The Defendant: I was in the hospital eighty-four days.

The Court: Whereabouts?

The Defendant: Up in Marion.

The Court: At Marion.

The Defendant: Yes, sir.

The Court: You were sent up there for observation?

The Defendant: Yes, sir, I was taking medicine all the time I was up there.

The Court: Are you an alcoholic?

page 28 } The Defendant: Yes, sir.

The Court: I would be much more inclined to consider it if I knew a little more about you and you explained what took place.

The Defendant: Well I can explain.

The Court: From what it appears to me—from what testimony has taken place so far, it appears to me like you and several other drunks went up there and proceeded to live off the place and whenever you needed whiskey you would haul out a piece of furniture and sell it.

The Defendant: Well that is not the way it happened but I can explain to you how I got into the place. I went there with a man and woman and she had the key to the back door and during the time that we were in there she tried to hit

him with a wine bottle and missed him and the bottle went out through the glass. I can explain that to you but that is all I remember about it.

The Court: Well who were the man and woman?

The Defendant: I don't know, they just wanted some money to buy wine and liquor and I gave it to them.

The Court: They were just some old drunks like you?

The Defendant: It was just a man and woman about thirty years old.

The Court: They had already gained access?

page 29 } The Defendant: She had a bunch of keys on a ring of regular keys for the back door.

The Court: You don't know who she was?

The Defendant: No, sir, I don't know.

The Court: You never saw her since—before, I mean?

The Defendant: I have been in jail ever since.

The Court: How long did you live up there?

The Defendant: We were in there a couple of days.

The Court: How long have you been drinking like this? How many years?

The Defendant: About four years.

The Court: About four years?

The Defendant: Yes, sir, but the Doctor up at Marion said if I got drunk any more that I might not recover my sanity at all.

The Court: I think that is a good observation. Christian, do you come from Botetourt County? Does your family come from Botetourt County?

The Defendant: No, my family originally came from McDowell County, West Virginia.

The Court: McDowell, did you grow up around here?

The Defendant: Yes, I grew up in Roanoke since I was ten.

The Court: All right, now what have you got to recommend?

page 30 } Mr. Koontz: Judge, the Court having found Mr. Christian guilty I would like for the Court to be familiar with this man's record.

The Court: All right, if you have got a copy show it to Mr. Wooten.

Mr. Wooten: I have seen it, Judge.

The Court: Have a seat, Mr. Christian.

Mr. Koontz: Have you seen it?

Mr. Wooten: I know what his record is, Judge. I have seen it.

The Court: What is your age?

The Defendant: Forty-five.

Mr. Koontz: Judge, it is on that record that I would recommend that Mr. Christian be given two years in the Virginia State Penitentiary. I think based on his record it has been one break after another for him. I think that the people of this City are entitled to the protection of their property and the only way in the world that you can convince someone like Mr. Christian is to send him to the *penitentary.* It has been one suspended sentence after another.

Mr. Wooten: Judge, this is the first time that I think Mr. Christian has been to the hospital. He is quite a different person from when I first met him up here in jail I am no great judge of human character in my life
page 31 } but I think he has realized a lot because of his visit up at the hospital. And he was in pretty bad shape when I first visited him in jail, not only from his drinking, but from his mental condition. Let's get realistic about this thing in talking about the fact that Mr. Christian has committed a crime. It hasn't been a heinous crime and it hasn't been a—not a great deal of money involved and when you get down there to Richmond in a situation like Mr. Christian has it is not going to be—probably not going to be just what time you see fit to sentence him to. There is going to be a lot more than that. And Judge, I just don't feel that this crime warrants all that punishment. I think he ought to be punished but I think he could be punished in a way that would benefit him and do—

The Court: How are you going to benefit him?

Mr. Wooten: Judge, he told me when I talked to him that he could straighten out. Now you have seen this more than I have. I don't know what he is going to do. He might straighten out and he might not. But he has—

The Court: Well if he hasn't straightened out by forty-five he is not in shape to be straightened out now.

Mr. Wooten: Well he has a right rude awakening on some of this information that he told me the doctors gave him concerning the complete loss of his mind if he be-
page 32 } comes intoxicated again severely like he was before.

The Court: All right, stand up, Mr. Christian. I have heard the evidence, Harvey Christian. You are more to be pitied than I guess punished. You have allowed your life to get away from you and you have been in one jail and out of another. You have now become a confirmed alcoholic I am convinced, and if we have to look after you, if the State has to look after you, we will put you in a place where we can

look after you. That is the only thing I know to do with you. Under the circumstances, having found you guilty of breaking and entering and statutory burglary as charged in the indictment, I am going to fix your punishment at two years in the Virginia State Penitentiary. All right, take charge of the defendant.

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CERTIFICATE

I, Lena Testerman, Court Reporter, designated and appointed to report this case, do hereby certify that I was duly sworn, that the proceedings herein were taken by Electronic Machine and accurately transcribed to the best of my ability, and that this transcription is a true and accurate account of all the evidence taken, motions and the Court's action thereto, and other incidents of the trial in the case of *Commonwealth of Virginia* vs. *Harvey Christian,* tried in the Hustings Court of the City of Roanoke, Virginia, on the 16th day of October, 1967.

Given under my hand this 15th day of December, 1967.

Lena Testerman
Court Reporter

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CERTIFICATE

I, Richard T. Edwards, Judge of the Hustings Court of the City of Roanoke, Virginia, do hereby certify that the foregoing is a true and correct stenographic copy and report of the evidence and other incidents of the trail therein, all questions raised and all rulings thereon and exceptions noted in the case of *Commonwealth of Virginia* v;. *Harvey Christian,* in said Court on the 16th day of October, 1967, and it appears in writing that Leroy Moran, Attorney for the Commonwealth, had reasonable notice when this report of the testimony and other incidents of the trial would be presented for certification, and which was presented to me on the 15 day of December, 1967, within sixty days after final order and signed by me within seventy days.

I also certify that the Court Reporter reporting said case was sworn to take and transcribe said testimony and other incidents faithfully and accurately to the best of her ability.

Given under my hand this the 15 day of December, 1967.

Richard T. Edwards
Judge of the Hustings Court of
the City of Roanoke, Virginia

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CERTIFICATE

I, Walker R. Carter, Jr., Clerk of the Hustings Court of the City of Roanoke, Virginia, do hereby certify that the foregoing stenographic copy or report of the testimony and other incidents of the trial in the case of *Commonwealth of Virginia* vs. *Harvey Christian,* was filed with me as Clerk of said Court on the 15th day of December, 1967.

Walker R. Carter, Jr., Clerk
of the Hustings Court of the City
of Roanoke, Virginia

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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