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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6950

In the Supreme Court of Appeals of Virginia at Richmond

BILLY WAYNE COFFEY

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF LYNCHBURG

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. 6950

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.

BILLY WAYNE COFFEY, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Corporation Court of the City of Lynchburg
O. Raymond Cundiff, Judge

Upon the petition of Billy Wayne Coffey a writ of error and *supersedeas* is awarded him to a judgment rendered by the Corporation Court of the City of Lynchburg on the 4th day of December, 1967, in a prosecution by the Commonwealth against the said petitioner for violation of probation; 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

* * * * *

The undersigned, Billy Wayne Coffey, Plaintiff in error makes oath that he is unable to pay or secure to be paid, the cost of printing the record in the case in the caption hereof.

BILLY WAYNE COFFEY

Rec'd. 5-6-68—Card H. G. T.

* * * * *

CERTIFICATE

* * * * *

I, O. Raymond Cundiff, Judge of the Corporation Court for the City of Lynchburg, Virginia, hereby certify that I have investigated the financial ability of Billy Wayne Coffey to pay, or secure to be paid, the cost of printing the record in the case in the caption hereof, and am of the opinion that the plaintiff in error is unable to pay or secure to be paid, the cost of printing the record in the case.

O. RAYMOND CUNDIFF, Judge of the Corporation Court for the City of Lynchburg

Recd. 5-6-68. H. G. T.

* * * * *

RECORD

page 9 }

* * * * *

At Lynchburg Corporation Court, November 7, 1966.

* * * * *

This day came the Commonwealth's attorney, and the said

Billy Wayne Coffey, who stands indicted of statutory burglary, #1, was led to the bar in custody of the jailor of this court, and said accused also appeared by J. Frank Shepherd, his attorney previously employed. And said accused being seventeen years of age, his parents, Henry Thomas Coffey and Thelma B. Coffey, were present in court throughout the trial of this case.

The accused having been duly arraigned on October 7, 1966, in his own proper person pleaded guilty to the charge of statutory burglary #1, after consultation with and advice of his said attorney, and the court on that day, being of the opinion that the accused fully understood the nature and effect of his plea, proceeded to hear the case without the intervention of a jury, and continued the case until today.

And the court having heard the evidence and argument of counsel, and having read and considered the report required by §§ 16.1-164 and 16.1-176 of the 1950 Code of Virginia, as amended, doth this day find the accused guilty of statutory burglary, #1, as charged in the indictment, and doth ascertain and fix his punishment at confinement in the penitentiary of this Commonwealth for three years.

Thereupon it being demanded of the accused if anything for himself he had or knew to say why the court should not proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is considered by the court that the accused, the said Billy Wayne Coffey, be confined in the penitentiary of this Commonwealth for the aforesaid term of three years, to be computed from the date of expiration of sentence this day imposed upon said accused for concealing stolen goods, and that he pay the costs of this prosecution.

And it is ordered that the city sergeant of this city, upon a proper warrant from the lawful authorities of
page 10 } said penitentiary, do deliver the body of the said Billy Wayne Coffey, who has been present in his own proper person at all time throughout the trial of this case, to the duly authorized agent of the superintendent of said penitentiary, to be conveyed hence to said institution, therein to be confined and treated in the manner directed by law.

On motion of the accused, and upon the recommendation of the Commonwealth's attorney, and it appearing compatible with the public interest, the court doth order that execution of the aforesaid sentence to the penitentiary be suspended upon condition that the said accused, Billy Wayne Coffey, be of good behavior in all respects for the term of five years

from the date of his release after serving sentence this day imposed upon said accused for concealing stolen goods, and be and he is hereby placed on probation under the general supervision of the state probation and parole officer of this court, to report to the said probation and parole officer as and when he shall reasonably require and direct, to obey such reasonable rules and regulations as the said probation and parole officer shall prescribe for him, and not to leave the jurisdiction of this court without the permission of said probation and parole officer, during the term of five years aforesaid, and shall pay said costs.

And the prisoner is remanded to jail.

* * * * *

page 11 }

* * * * *

At Lynchburg Corporation Court, November 7, 1967.

* * * * *

It appearing that on the 7th day of November, 1966, said accused was convicted in this court of statutory burglary, No. 1 and No. 2, and his punishment fixed at confinement in the penitentiary of this Commonwealth for three years in each case, with execution suspended upon condition that said accused be of good behavior in all respects for the term of five years from the date of his release after serving sentence *inposed* upon him on the 7th day of November, 1966, for concealing stolen goods, and he was placed on probation under the usual terms and conditions; on motion of the Commonwealth's attorney that said accused has violated the terms and conditions of said suspension and probation, the Court doth order that a rule and *capias* be issued against said accused, returnable forthwith, requiring him to show cause, if any he can, why said suspension and probation should not be revoked.

* * * * *

page 14-A } DEFENDANT'S EXHIBIT #1

* * * * *

At Lynchburg Corporation Court, November 7, 1966.

* * * * *

This day came the Commonwealth's attorney, and the said Billy Wayne Coffey, who stands indicted of statutory burglary, #1, was led to the bar in custody of the jailor of this court, and said accused also appeared by J. Frank Shepherd, his attorney previously employed. And said accused being seventeen years of age, his parents, Henry Thomas Coffey and Thelma B. Coffey, were present in court throughout the trial of this case.

The accused having been arraigned on October 7, 1966, in his own proper person pleaded guilty to the charge of statutory burglary #1, after consultation with and advice of his said attorney, and the court on that day, being of the opinion that the accused fully understood the nature and effect of his plea, proceeded to hear the case without the intervention of a jury, and continued the case until today.

And the court having heard the evidence and argument of counsel, and having read and considered the report required by §§ 16.1-164 and 16.1-176 of the 1950 Code of Virginia, as amended, doth this day find the accused guilty of statutory burglary #1, as charged in the indictment, and doth ascertain and fix his punishment at confinement in the penitentiary of this Commonwealth for three years.

Thereupon it being demanded of the accused if anything for himself he had or knew to say why the court should not proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is considered by the court that the accused, the said Billy Wayne Coffey, be confined in the penitentiary of this Commonwealth for the aforesaid term of three years, to be computed from the date of expiration of sentence this day imposed upon said accused for concealing stolen goods, and that he pay the costs of this prosecution.

And it is ordered that the city sergeant of this city, upon a proper warrant from the lawful authorities of
page 14-B } said penitentiary, do deliver the body of the said Billy Wayne Coffey, who has been present in his own proper person at all time throughout the trial of this case, to the duly authorized agent of the superintendent

of said penitentiary, to be conveyed hence to said institution, therein to be confined and treated in the manner directed by law.

On motion of the accused, and upon the recommendation of the Commonwealth's attorney, and it appearing compatible with the public interest, the court doth order that execution of the aforesaid sentence to the penitentiary be suspended upon condition that the said accused, Billy Wayne Coffey, be of good behavior in all respects for the term of five years from the date of his release after serving sentence this day imposed upon said accused for concealing stolen goods, and be and he is hereby placed on probation under the general supervision of the state probation and parole officer of this court, to report to the said probation and parole officer as and when he shall reasonably require and direct, to obey such reasonable rules and regulations as the said probation and parole officer shall prescribe for him, and not leave the jurisdiction of this court without the permission of said probation and parole officer, during the term of five years aforesaid, and shall pay said costs.

And the prisoner is remanded to jail.

O. R. C., Judge

* * * * *

page 14-C } DEFENDANT'S EXHIBIT #2

* * * * *

At Lynchburg Corporation Court, November 7, 1966.

* * * * *

This day came the Commonwealth's attorney, and the said Billy Wayne Coffey, who stands indicted of statutory burglary, #2, was led to the bar in custody of the jailor of this court, and said accused also appeared by J. Frank Shepherd, his attorney previously employed. And said accused being seventeen years of age, his parents, Henry Thomas Coffey and Thelma B. Coffey, were present in court throughout the trial of this case.

The accused having been arraigned on October 7, 1966, in his own proper person pleaded guilty to the charge of statutory burglary #2, after consultation with and advice of his said attorney, and the court on that day, being of the opinion

that the accused fully understood the nature and effect of his plea, proceeded to hear the case without the intervention of a jury, and continued the case until today.

And the court having heard the evidence and argument of counsel, and having read and considered the report required by §§ 16.1-164 and 16.1-176 of the 1950 Code of Virginia, as amended, doth this day find the accused guilty of statutory burglary #2, as charged in the indictment, and doth ascertain and fix his punishment at confinement in the penitentiary of this Commonwealth for three years.

Thereupon it being demanded of the accused if anything for himself he had or knew to say why the court should not proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is considered by the court that the accused, the said Billy Wayne Coffey, be confined in the penitentiary of this Commonwealth for the aforesaid term of three years, to be computed from the date of expiration of sentence this day imposed upon said accused for statutory burglary #1, and that he pay the costs of this prosecution.

And it is ordered that the city sergeant of this city, upon a proper warrant from the lawful authorities of
page 14-D } said penitentiary, do deliver the body of the said Billy Wayne Coffey, who has been present in his own proper person at all time throughout the trial of this case, to the duly authorized agent of the superintendent of said penitentiary, to be conveyed hence to said institution, therein to be confined and treated in the manner directed by law.

On motion of the accused, and upon the recommendation of the Commonwealth's attorney, and it appearing compatible with the public interest, the court doth order that execution of the aforesaid sentence to the penitentiary be suspended upon condition that the said accused, Billy Wayne Coffey, be of good behavior in all respects for the term of five years from the date of his release after serving sentence this day imposed upon said accused for concealing stolen goods, and be and he is hereby placed on probation under the general supervision of the state probation and parole officer of this court, to report to the said probation and parole officer as and when the shall reasonably require and direct, to obey such reasonable rules and regulations as the said probation and parole officer shall prescribe for him, and not leave the jurisdiction of this court without the permission of said probation and parole officer, during the term of five years aforesaid, and shall pay said costs.

And the prisoner is remanded to jail.

O. R. C., Judge

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page 14-E } DEFENDANT'S EXHIBIT #3

* * * * *

At Lynchburg Corporation Court, November 7, 1966.

* * * * *

This day came the Commonwealth's attorney, and the said William Wayne Coffey, who stands indicted of statutory burglary, #3, grand larceny #2, and concealing stolen goods, appeared in court in his own proper person, in custody of the jailor of this court, and said accused also appeared by J. Frank Shepherd, his attorney previously employed; and it appearing to the court that the accused had a preliminary hearing on said charges, at which time he was likewise represented by the said J. Frank Shepherd, counsel of his choice.

The accused being seventeen years of age, his parents, Henry Thomas Coffey and Thelma B. Coffey, were present in court throughout the trial of this case.

Thereupon the Commonwealth's attorney, with the consent of the court, says that he will not further prosecute the accused upon the charges of statutory burglary #3, and grand larceny #2, but retains the charge of concealing stolen goods, as contained in the indictment. It is therefore considered by the court that the accused be discharged of the charges of statutory burglary #3, and grand larceny #2.

Thereupon the accused being duly arraigned, in his own proper person pleaded guilty to the charge of concealing stolen goods, as contained in the indictment, after consultation with and advice of his said attorney, and the court being of the opinion that the accused fully undersood the nature and effect of his plea, proceeded to hear and determine the case without the intervention of a jury, and having heard the evidence and argument of counsel, and having read and considered the report required by §§ 16.1-164 and 16.1-176 of the Code of Virginia, as amended, the court doth find the accused guilty of concealing stolen goods, as charged in the indictment, and doth ascertain and fix his punishment at confinement in the penitentiary of this Common-

page 14-F } wealth for two years.

Thereupon it being demanded of the accused if anything for himself he had or knew to say why the court should not proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is considered by the court that the accused, the said William Wayne Coffey, be confined in the penitentiary of this Commonwealth for the aforesaid term of two years, to be computed from the date of this judgment, but deducting therefrom thirty-one days spent by the accused in jail awaiting trial in this case, and that he pay the costs of this prosecution.

And it is ordered that the city sergeant of this city, upon a proper warrant from the lawful authorities of said penitentiary, do deliver the body of the said William Wayne Coffey, who has been present in his own proper person at all time throughout the trial of this case, to the duly authorized agent of the superintendent of said penitentiary, to be conveyed hence to said institution, therein to be confined and treated in the manner directed by law.

And the prisoner is remanded to jail.

O. R. C., Judge

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page 15 }

* * * * *

At Lynchburg Corporation Court, December 4, 1967.

* * * * *

It appearing that on the 7th day of November, 1966, said accused was convicted in this court of statutory burglary, #1, and his punishment fixed at confinement in the penitentiary of this Commonwealth for three years, with execution suspended upon condition that said accused be of good behavior in all respects for the term of five years from the date of his release after serving sentence imposed upon said accused the same day for concealing stolen goods, and he was placed on probation under the usual terms and conditions; and on motion of the Commonwealth's attorney the said accused has violated the terms and conditions of said suspension and probation, a rule and *capias* were issued against said accused, requiring him to show cause, if any he can, why

said suspension and probation should not be revoked; and this day came the Commonwealth's attorney, and the said accused appeared in his own proper person in custody of the jailor of this court, and said accused also appeared by J. Murrell Daniel, his attorney heretofore appointed for him by the court, and said accused in his own proper person pleaded not guilty to violation of his suspension and probation, and thereupon the Commonwealth's evidence being heard, the accused by his attorney moved the court to strike said Commonwealth's evidence and to dismiss said rule, on the ground that at the time of the alleged violation of said suspension and probation the said accused was on parole granted by the State Parole Board, and had not begun his probation under the said order of November 7, 1966, and said motion being argued, the court doth overrule the same, and said accused by his attorney excepted; and thereupon the evidence being further heard, in full, and the argument of counsel being heard, the court doth find the accused guilty of violation of the terms and conditions of said suspension and probation, and doth order that said suspension and probation be revoked, and that said accused shall serve the original sentence in this case.

The said accused by his attorney having indi-
page 16 } cated his intention to appeal the judgment of this court, the court doth order that execution of said judgment be suspended for a period of sixty days from this day.

And the prisoner is remanded to jail.

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page 18 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

* * * * *

TO THE HONORABLE GEORGE MARTIN, CLERK OF THE CORPORATION COURT FOR THE CITY OF LYNCHBURG, VIRGINIA.

TAKE NOTICE, that pursuant to Rule 5:1, §4 of the Rules of the Supreme Court of Appeals of Virginia, the Defendant,

Billy Wayne Coffey, by Counsel, files his Notice of Appeal from the final judgment rendered against him in the Corporation Court for the City of Lynchburg, Virginia, on the 4th day of December, 1967, and within sixty (60) days from the date of the final judgment, and assigns error as follows:

1. The Court erred in revoking a probationary sentence not in force and effect.

2. The Court's judgment was contrary to law and the evidence.

J. MURRELL DANIEL,
Counsel for Defendant
1112 First & Merchants Bank Bldg.
Lynchburg, Virginia

* * * * *

Filed: Dec. 15, 1967. GEO. W. MARTIN, Clerk

* * * * *

page 3 } The Court: You are charged with violation of your probation. Are you pleading guilty or not guilty?

Billy Wayne Coffey: Not guilty.

The Court: All right, have a seat. Mr. Jester, you want to make a statement at this time?

Mr. Jester: Your Honor please. In this court on November 7th, 1966, this accused was convicted of two offenses of statutory burglary and he was given a term of three years in the penitentiary, to be computed from the expiration of the sentence imposed upon him in case No. 1. In case No. 1 he was also given a term of three years and that second sentence was suspended and he was placed on probation. As the court may or may not recall, at the November term, 1967, he was again convicted in this court, during which time he was on probation for several felonies, one for statutory burglary and one or more of grand larceny.

page 4 } The Court: This is the one that we were talking about the wording of the suspension wasn't it, Mr. Daniel?

Mr. Daniel: Your Honor please, yes sir, the evidence will be and can't be disputed, I think, that this man was on parole at the time this alleged probation violation occurred. A warrant has been issued for violation of that parole, and it is our contention that he was not yet on probation, because

he hadn't finished serving the sentence according to the language of the court which imposed the probationary sentence, and that there is a difference between probation and parole. And for that reason, he can't be guilty of both offenses, because he was on parole rather than probation. He had not yet got to the point where he had started serving his time on probation.

Mr. Jester: Do you have copies of those orders?

The Court: Yes, sir, I have a copy of the orders of November 7th, 1966. I'm reading the No. 1 first. "That he shall be of good behavior for a term of five years from the date of his release after serving the sentence this day im-
page 5 } posed upon the accused for receiving stolen goods."
When was he released from receiving stolen goods?

Mr. Daniel: He's never really been released. He was put on parole. He served a certain amount of that time and then he was turned out of the penitentiary, but was on parole at the time. He hadn't finished serving his parole period.

The Court: Well, at the time these offenses were committed, he was on parole?

Mr. Daniel: That's right.

The Court: But he had been released from the penitentiary from serving the time.

Mr. Daniel: He was from behind the bars. I think that's what the argument is about now, Judge. I started to make a motion last time and you said save it for today. I want to make a motion to quash these proceedings on the ground that, I think we can stipulate, on the ground that
page 6 } he had not reached the stage where he had started serving according to this court's order, because he was still on parole. Also, I believe, that we can stipulate that he was still on parole at the time, and that now he is charged with both parole violation and probation violation as a result of the same acts.

The Court: The release is his release from the penitentiary. It doesn't mean his release from his parole.

Mr. Daniel: It says from the date of his release after having served sentence.

The Court: Well, after serving—release from the institution he is serving sentence in.

Mr. Daniel: But Judge, the Court says that probation and parole are two different things.

The Court: That's right.

Mr. Daniel: Well, you haven't finished your sentence until you finish your parole is my contention.

The Court: No—

page 7 } Mr. Daniel: Well, this particular question hadn't been passed on, but in *VICK* VS. *COMMONWEALTH,* 201 VA., they say—they are not talking about this same thing—it says Section 19-269 applies only to the serving of sentences to confinement in prison. That's dealing with whether they run concurrent or not. An order granting probation is not a sentence to confinement, indeed it has the opposite effect. A probation order stays, relieves, or prevents a person from confinement in prison. Then in the "Richmond Times Dispatch" of November the 21st, 1967, in an editorial on parole, they quote what they say is the definition of the two, given by the attorney general. It says "Probation and parole are often confused in the public mind. Here's how the two concepts are defined in the Attorney General's survey of release procedures. Probation: the postponement of final judgment or sentence in a criminal case, giving the of-
page 8 } fender an opportunity to improve his conduct and to readjust himself to the community, often on conditions imposed by the Court and under the guidance and supervision of an officer of the court. Parole: the release of an offender from a penal or correctional institution after he has served a portion of his sentence, not his sentence, under the continued custody of the state and under conditions that permit his reincarciration in the event of misbehavior."

Now, I haven't gotten the Attorney General's opinion, but I—

The Court: I agree with that.

Mr. Daniel: Well, then he hasn't—

The Court: This order says the date of his release after serving the sentence. That's when he goes on parole or probation, the minute he is released from an institution serving his sentence.

Mr. Daniel: That's not what the Attorney General says is the definition.

The Court: That's what this order says.

Mr. Daniel: No. No. That's what I mean. This court says when he finishes serving his sentence. The
page 9 } Attorney General says that you haven't finished serving your sentence just because you are out on parole. That is what I understood the definition that they give you in *socialogy* anyhow, is that when you are on parole, you are really serving your time here on the outside. You are serving your sentence on the outside, whereas probation, you haven't yet started serving your sentence.

The Court: What do you have to say about that, Mr. Jester?

Mr. Jester: Your Honor please. I can't agree with Mr. Daniel. I think it was certainly the intent of the court that the probation would begin the moment he was released from custodial confinement, and that date, of course, would be dependent not upon any order of this court, but upon his conduct and what happens to him in the penitentiary while serving the first sentence. Otherwise, you would have perhaps, maybe in some cases, you would have a period page 10 } where there would be no supervision, if you had to wait three years for the probation to start.

Mr. Daniel: Well, you are supervised when you are on parole.

Mr. Jester: Well, there may be some situation where they don't make parole. They serve, one half, and get out for good conduct. If you follow your argument to a larger conclusion—

The Court: I think we'd better make up the record in this case. Let's go ahead and prove for the record the date of his conviction and let the probation officer come around to make the record up.

Mr. Daniel: I do want to treat that as a motion which I will renew after we have heard—

The Court: Yes, sir.

* * * * *

page 11 } HENRY C. ROBERTSON, JR., Who has been first duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. Jester:

Q. Please state your name.

A. Henry C. Robertson, Jr.

Q. Mr. Robertson, what is your employment?

A. Probation and parole officer.

Q. Of this Court?

A. Yes sir.

Q. For what period of time have you been so acting?

A. Going on eleven years.

Q. I'll ask you whether or not you have had under your supervision this accused, Billy Wayne Coffey?

A. I have.

Q. Mr. Robertson, do you have anything in your files to show the date of the original conviction of Billy Wayne

Coffey, which was the basis for you having him under your supervision?

page 12 } A. Yes I do.

Q. What is it?

A. November the 7th, 1967, court order from this court.

The Court: You said '67, didn't you?

Witness: '66, excuse me.

Q. How many court orders are there for convictions for him in 1966?

A. I have two. Actually there were three orders, but we do not get a copy of an order when a man goes to the penitentiary.

Q. All right. Will you tell us in substance what order No. 1 provided. You needn't go into all the details, just enough to get it in the record.

A. He was convicted of statutory burglary and—

Q. How much sentence was imposed upon him?

A. Three years.

Q. And that was on November 6th, 1967?

A. November 7th, 1966.

Q. '66, right. Now, did he go to the penitentiary pursuant to that order?

A. He went to the penitentiary on another order, not this order.

Q. Not that order? All right, when did he go to the penitentiary?

page 13 } A. What day?

Q. Well, was it in connection with a series of convictions that occurred at the same time this one did?

A. It did.

Q. Was he released from the penitentiary?

A. He was.

Q. When was he released?

A. On May the 2nd, 1967.

Q. So I take it from your testimony, that he actually was convicted of three felonies in this court in November, 1966, and he was to serve the time on one of them and the other two sentences then were to be on probation?

A. That's correct.

Q. Now, when he was released to you in May of 1967, did he come immediately under your supervision?

A. He did.

Henry C. Robertson, Jr.

Q. Was he under your supervision as a parolee or a probationer, or do you make any distinction?

A. Actually, in our office we interpret that he is on probation and parole at the same time even though administratively our records are set up for parole.

Q. But you treat him as a—under both provisions of the law?

A. We do.

page 14 } Q. Now, while he was on probation, did he violate any of the penal laws of this Commonwealth?

A. He did.

Q. When did he commit the offense for which you say was a violation?

The Court: Find out whether he has been convicted of it, first. Find the order of conviction and—

Mr. Jester: He's been convicted.

The Court: That's right.

A. You want the date of it?

Q. I want the date of the offense. I've got to show that it's since his release in May of 1967, or rather since November of 1966.

A. There are a number of them. Each date?

Q. Yes sir.

A. The first was alleged to have occurred on June the 17th, during the late hours of June the 17th, or the early morning hours of June the 18th, 1967.

The Court: Now name the offenses as you go along, Mr. Robertson.

A. That was grand larceny of a motor vehicle.

Q. What court was he convicted in?

A. This court.

page 15 } Q. Did all of these convictions which you are now testifying to take place in the Corporation Court for the City of Lynchburg?

A. They did.

Q. All right, Sir, go ahead.

A. The second offense is reported to have occurred on June the 19th, 1967, and that was grand larceny of an automobile. The third during the evening of June the 19th, 1967, grand larceny of an automobile, and the fourth, June the 28th, 1967, which was statutory burglary.

Q. What sentence was imposed upon him for those several offenses?

A. Two years in the penitentiary on each, with the sentences to run consecutively, but execution of three of the two year sentences were suspended, leaving a two year sentence to serve.

Q. And those convictions which you have just testified, concerning, took place when?

A. November the 7th, 1967.

Mr. Jester: All right, witness with you.

page 16 } CROSS EXAMINATION

By Mr. Daniel:

Q. Mr. Robertson, do you know—now you said that his original sentence that you are now seeking to revoke probation on, which is the subject of the proceedings here, was November the 7th, 1966?

A. '66.

Q. And how much time was he given to serve in the penitentiary on the sentence that he was actually required to serve time in the penitentiary?

A. Two years.

Q. So, at the time that all the offenses that you just recited that form the basis of this revocation here today, he was on parole, is that correct?

A. Probation and parole.

Q. Well, I mean, what do they call it when they turn him loose down at the penitentiary?

A. When they turned him loose, he was released on parole.

Q. On parole, and when would that parole term have expired?

A. November 2nd, 1968.

page 17 } Q. Well, now, he would certainly, without any argument, the basis of the offenses you listed would have come within time of the term he was on parole?

A. That's right.

Q. Has he also been charged in a warrant or some paper from the parole board charged with violation of parole, as a result of these same acts that you have recited forming the basis of this hearing today?

A. He has.

Q. And was that a warrant or petition or order or what?

Henry C. Robertson, Jr.

A. Well, actually it is a local detainer we issue and then it is later replaced by a warrant or detainer from the parole board.

Q. Who hears the merits of the—that charge and where?

A. I would assume the parole board in Richmond after the man returns.

Q. They certainly don't do it here, do they?

A. They do not do it here.

Q. And you have been a parole officer how long, probation officer?

A. More than eleven years.

Q. And you know that you don't hear them and that they are heard by the parole board?

page 18 } A. They are not heard here. I assume they are heard by the parole board.

Q. Now, when a man is convicted of a felony and he is not required to serve any actual time, and comes under your jurisdiction, what do you call that?

A. Probation.

Q. You don't call that parole, do you?

A. No.

Q. Because he hasn't yet started serving any sentence, is that correct?

A. He can be on probation and still have to serve some sentence.

Q. I mean if he doesn't have to serve any sentence, though.

A. He's on probation.

Q. Now, on parole, you do serve some time, don't you? In order to be on parole, you've got to go in the penitentiary and the parole board then lets you out on certain conditions, isn't that correct?

A. That's correct.

Q. And those conditions are usually that he report to you and he is under your observation and, to a certain extent, control during that period?

A. That is correct.

page 19 } Q. So then, the difference you see in parole and probation is that in one, parole, he serves time behind bars and in probation he doesn't. Now, what training did you have for this type of job, is it mainly a *socialogy* type thing, Mr. Robertson?

A. Yes sir.

Q. And do you ever hear of this type of definition of parole as being—you're serving your time on the outside, the rest

of your time on the outside,—that you are a convict serving your time on the outside?

A. I've heard that saying, yes sir.

Q. Did you understand that to be the definition of what parole was?

A. It's certainly not my definition of it.

Q. Did I show you this editorial from the "Times Dispatch", showing what they purport the attorney General says is the difference between parole and probation?

A. Yes sir.

Q. I believe at this time there is considerable confusion in your office, and all the offices as to what the real difference is, and you feel there is a need for clarification, do you not?

A. There's never been any question in my mind as to the difference between probation and parole.

Q. You know what it is?

page 20 } A. I can only speak for myself.

Q. A man has not completed his sentence when he is on parole, until he has served out that term the parole board puts on him?

* * * * *

page 21 } By Mr. Daniel:

Well, what I'm saying is, a man has not finished his sentence simply because he is put on parole, has he?

A. I couldn't really answer that. If he goes back, he's going to pick up where he left off on that sentence.

Q. That's by statute, isn't it?

A. But if he stays out on parole, he doesn't have to serve any more time.

Q. He has to serve under the conditions the parole board puts him under though when they release him.

The Court: Let me ask him a question here.

By The Court:

Q. If a man comes out on parole and he has two years left of his sentence, and he comes out and for one year he is out, and then his parole is revoked, does he go back and serve the two years or just serve, or does he get credit for the time that he was out?

A. He picks up the day he comes out on parole. Goes back to that day as if he—

page 22 } Q. And the time he's out on parole is not counted as serving his time?

A. That's right.

Q. So, when he goes back to the penitentiary, he has two years to serve even though he's been out for a year?

A. That's correct.

Q. Even though he's been on parole for a year. In a sense, he's not serving his time?

Mr. Daniel: In the sense of being behind bars.

The Court: Well, he's not—he doesn't get credit for it when he goes back.

Mr. Daniel: See, Judge, this court sentences him to two years in the penitentiary, and this court has no control over what the parole board does, but the court doesn't revoke its sentence because the parole board does, that's my point.

By Mr. Daniel:

Q. Now, when this man came on parole under your jurisdiction, did you require him to fill out any forms or

page 23 } *or* anything of that kind?

A. I did.

Q. And weren't they all—and didn't they all use the term parole? Have you got any of them with you?

A. Yes.

Q. Could we see—

A. Wait a minute, let me check. (Pause) No, I haven't, they have all been forwarded to—

Q. They were all headed parole and not probation?

A. It was what we call a parole monthly report.

Q. And you use a different report for parolees than what you use for probation, do you not?

A. We do.

Q. And you set them up under different headings in your office, parolees and probationers?

A. We do.

Mr. Daniel: That's all.

RE-DIRECT EXAMINATION

By Mr. Jester:

Q. I don't know if this will help the record or not, but I'll ask you this question anyway. Mr. Robertson,

page 24 } has it ever come to your knowledge that you will have a prisoner, who has been paroled from a conviction in one court of record, who at the same time is serving a probation sentence in another court of record?

Mr. Daniel: I object to that as not being relevant to this case.

The Court: Well, it's a question of whether or not he keeps him under parole and probation supervision at the same time. I think it's relevant to this case.

Mr. Daniel: He's not saying about this case, Your Honor. He's asking about in some other cases. He said what he did in this case.

The Court: He said he could be on probation and parole at the same time, according to what I understand.

Mr. Daniel: I know, but what I am saying is what this man was. Well, I object to the question.

The Court: I'm going to overrule your motion.

Mr. Daniel: And I except to the ruling of the court.

page 25 } By Mr. Jester:

Q. Then I take it, Mr. Robertson, that you do have as a factual matter, certain cases in which you do have dual control, both probation and parole.

* * * * *

The Court: You want to offer any evidence, Mr. Daniel?

Mr. Daniel: Your Honor please, I want to move to strike the evidence here, or the prior proceedings, or dismiss the accused, which ever motion is proper on the grounds that he had not yet begun, according to the orders of this court, to serve any probationary term, that he was on parole and he is now charged with both offenses, because of the same acts and that can't be in law, and that the evidence here page 26 } fully fails to support a—the charges against him now.

The Court: Well, the Court in reviewing the record here, on November the 7th, 1966, he was convicted of statutory burglary, Case No. 1, and he was given a term of three years in the penitentiary. On that same day he was given a term of two years in the penitentiary for receiving stolen goods, which he was ordered to serve and the order further provided that the term of five years from the date of his release

after serving sentence this day imposed. The Court was intending in that order that the release referred to was a release from an institution.

Mr. Daniel: But if Your Honor please, the court was quoting from that and then said it intended. I object to that.

The Court: Well, I think the court can interpret its own orders.

Mr. Daniel: All I want to say is that I object.

page 27 } The Court: You can object, I understand that you are objecting to it, but I am telling you what the release from the institution was, the intention of the court was, and when he was released from the institution in May, then he has been convicted of these series of cases since then, although he was on parole at the same time he may have been on probation. It is not unusual to have a man on parole and probation at the same time, and one act of violating the law will also revoke the probation and revoke the parole, too. So the court's of the opinion that he is guilty of violating his probation under this order of November the 7th, and I'm going to revoke it, and order him to serve the three year sentence in the penitentiary. Now, as to case No. 2—

Mr. Daniel: Now, Your Honor please, I want to talk with him to see if he wants to offer any evidence before—

The Court: I'm overruling your motion. I didn't think you had any evidence that you wanted to offer.

page 28 } Mr. Daniel: Well, I'll just move to strike now.

The Court: All right, I'm overruling your motion to strike.

Mr. Daniel: All right, to which we except.

The Court: Now, do you have any evidence that you want to offer?

Mr. Daniel: If Your Honor please, we don't want to offer any evidence, except I would like to make sure that we have put all the orders in the court's record concerning this.

The Court: Yes, all of the orders are here.

Mr. Daniel: And he has indicated to me that he wants to appeal the court's decision, and we would ask the court to suspend the execution of this judgment for a term of sixty days to get a—

The Court: Well, I haven't finished on my,—what I was going to do yet. I am going to order that the revocation of the statutory burglary, No. 1, However, I do think that 3 years and the other time he got will be sufficient

page 29 } and I'm not going to revoke the statutory burglary, No. 2. I'm just going to just dismiss that and he will only have the three year term, not the other term. Now, what is it that you want?

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Affidavit of Poverty	2
Judge's Certificate	2
Record	2
Order—November 7, 1966	2
Order—November 7, 1967	4
Defendant's Exhibit No. 1	5
Defendant's Exhibit No. 2	6
Defendant's Exhibit No. 3	8
Judgment—December 4, 1967	9
Notice of Appeal and Assignments of Error	10
Proceedings	11, 21
Witnesses:	
Henry C. Robertson, Jr.	14