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Clerk Supreme Court of Appeals
Richmond, Va.

Record No. 7127

In the Supreme Court of Appeals of Virginia at Richmond

DAVID NEAL MARTIN

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY

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. 7127

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of December, 1968.

DAVID NEAL MARTIN, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Arlington County
Walter T. McCarthy, Judge

Upon the petition of David Neal Martin a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Arlington County on the 8th day of August, 1968, 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.

* * * * *

JUDGE'S CERTIFICATE

* * * * *

Certificate in Accordance With §19.1-289 of the 1950 Code of Virginia

This Cause came on to be heard this 12th day of May, 1969, upon the motion of Leo R. Andrews, Jr., court appointed attorney for the defendant, for a certificate in accordance with §19.1-289 Code of Virginia, as amended, 1950, and it

Appearing to the Court, after ascertaining that the defendant is indigent within contemplation of law as evidenced by the affidavit of poverty found on page 51 of the record before the Supreme Court of Appeals for the Commonwealth of Virginia, that the defendant is entitled to have the costs of the printing of the record paid for by the Commonwealth, in that I have investigated by oral examination and of the opinion that the defendant is unable to pay the costs, it is therefore

Ordered, Adjudged and Decreed, that the Clerk transmit a certified teste copy of this Certificate to Howard G. Turner, Clerk of the Supreme Court of Appeals of Virginia, to be included in Record No. 7127.

/s/ Charles S. Russell
Judge

* * * * *

Recd 5-15-69 HGT

* * * * *

RECORD

page 3 }

* * * * *

The Grand Jurors of the Commonwealth of Virginia, in and for the said body of the said County of Arlington, and now attending the said Court at its December Term, 1967,

upon their oaths do present that David Neal Martin did, while in the said County of Arlington, on or about the 28th day of January, 1968, feloniously make an assault upon one Robert Mason, and by striking and beating, and by putting the said Robert Mason in fear of serious bodily harm, did then and there feloniously attempt to take, steal and carry away of the goods, chattels and money belonging to the said Robert Mason, from the person, in the presence of, and against the will of the said Robert Mason, with the intent to permanently deprive the owner thereof, feloniously and against the peace and dignity of the Commonwealth.

Witnesses sworn and sent to the Grand Jury by the Court to give evidence this 12th day of February, 1968:

Det. Cauffman, Arlington County Police Department
Officer Jenkins, Arlington County Police Department

* * * * *

page 12 }

* * * * *

To the Sheriff of said County or any Police Officer, Greeting:

You Are Commanded to take Robert Mason, 6626 Potomac Avenue, Fairfax County, Virginia, if he be found in your bailiwick, and him safely keep so that you have his body before the Judge of the Circuit Court of Arlington County Forthwith, to testify and the truth to say on behalf of the Commonwealth in a certain matter of controversy in our said Court before the said Judge depending and undetermined; and have then and there this writ: (case of Commonwealth of Virginia vs. David Neal Martin, C-5829).

Witness H. Bruce Green, Clerk of said Court, at the Courthouse of the said County, this 7th day of May, 1968 and in the 192nd year of the Commonwealth.

H. Bruce Green, Clerk

By: Benson Taylor
Deputy Clerk

Executed and brought the body of Robert Mason before the Circuit Court Judge of Arlington County, Va. on 5-7-68.

* * * * *

Rec'd Sheriff's Office Arl. Co., Va., May 7, '68.

* * * * *

page 32 } May 8, 1968

We the jury find the Defendant Guilty of attempted Robbery and fix his punishment at eighteen months in the penitentiary.

Warren F. Watts
Foreman

* * * * *

page 34 }

* * * * *

Pursuant to Adjournment the 8th day of May 1968 came the Commonwealth of Virginia, by its Attorney, the Defendant pursuant to his recognizance and his Attorney, Leo R. Andrews, Jr.

Thereupon the Defendant moved the Court to strike the evidence of the Commonwealth of Virginia; which said motion the Court denied and to which said ruling of the Court the Defendant duly excepted.

Whereupon the Defendant informed the Court that he had no evidence to present to the Court and therefore rested his case.

Thereupon the Defendant renewed his motion to strike the evidence of the Commonwealth which said motion the Court again denied and to which said ruling the Defendant duly excepted.

Whereupon the matter of instructions was argued by counsel.

Thereupon the Jury returned to the jury box and was instructed by the Court and after hearing closing arguments of the Attorney for the Commonwealth and counsel for the Defendant, the Jury retired to its room to consider its verdict and after a time returned into Court and presented the following verdict, to-wit:

May 8, 1968

"We the jury find the Defendant Guilty of Attempted Robbery and fix his punishment at eighteen (18) months in the penitentiary.

(Signed) Warren F. Matts
Foreman"

Whereupon the Defendant moved the Court for leave to file any motions he deemed desirable; which said motion the Court granted and accordingly ordered said motions, if any, to be filed, with authorities in support, on or before May 17, 1968, with copies to the Attorney for the Commonwealth.

It Is Further Ordered by the Court that this case be and the same hereby is continued to May 17, 1968 for the setting of a date on which to hear the motions if any are filed.

It Is Further Ordered by the Court that the appearance bond herein remain in full force and effect.

Entered this 14th day of May 1968.

Walter T. McCarthy
Judge

* * * * *

page 51 }

* * * * *

AFFIDAVIT

This Day appeared before me the undersigned, a Notary Public, in and for the County of Arlington, in the State of Virginia, David Neal Martin, who after being first duly sworn, deposes and says that he is financially unable to pay or secure to be paid the Cost of printing the record in the Supreme Court of Appeals of Virginia, in the cause wherein he was the defendant.

David Neal Martin

Subscribed and sworn to before me this 29th day of July, 1968.

E. E. Gibbon
Notary Public

My Commission Expires 19 July 1969.

Filed Jul 29 1968, H. Bruce Green, Clerk, Circuit Court, Arlington County, Va., By: V. Green, Deputy Clerk.

page 52 }

* * * * *

The 26th day of July, 1968, came the Commonwealth of Virginia, by its Attorney, the Probation Officer for the Circuit Court of Arlington County, Virginia, the Defendant pursuant to his recognizance, and his Attorney, Leo R. Andrews, Esquire.

Whereupon the Probation Officer aforesaid presented his report herein in open Court in the presence of the accused and the accused was asked by the Court if he could read and upon receiving an affirmative reply, the said report was handed to him for examination by him and his Attorney.

Thereupon the Defendant and his Attorney read said report and returned same to the Court, which ordered it filed as a part of the record in this case and after inquiry both the Defendant and his Attorney stated that they did not desire to cross-examine the investigating officer.

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, the Court heard sworn testimony and counsel for the Defendant made a statement to the Court.

The Court being of the opinion that the verdict of the Jury is right and proper doth hereby find the Defendant "Guilty" of Attempted Robbery as charged in the indictment herein.

Thereupon the Court taking into consideration said statement and all of the evidence in the case, the report of the said Probation Officer and the argument of counsel, doth ascertain and fix the punishment of the accused to be confinement in the penitentiary of this Commonwealth for a period of eighteen months and payment of the costs of this proceeding.

It Is Further Ordered by the Court that the period of incarceration shall not be extended for non-payment of the costs herein.

The Court certifies that at all times during the trial of this case the accused was personally present.

It is Also *Oredered* by the Court that Leo R. Andrews, Jr., Esquire, appointed to represent the Defendant herein be paid a fee of $250.00 for his services; same to be paid by the Com-

monwealth of Virginia, as provided in title 14.1-184 of the Code of Virginia, as amended.

Whereupon the Defendant signified his intention of applying to the Supreme Court of Appeals of Virginia for a Writ of Error to the Judgment of the Court and therefore moved the Court to suspend the execution of the sentence herein for a period of ninety days to permit the Defendant to apply for a Writ of Error; which said motion the Court granted and accordingly ordered that the execution of the sentence pronounced against the Defendant be and the same hereby is suspended for ninety days.

Thereupon the Defendant represented to the Court that he was without funds with which to retain counsel to prosecute this appeal and requesting the services of the same, the Court appointed Leo R. Andrews, Esquire, a discreet Attorney to represent him for the appeal of this case.

page 53 } It Is Ordered by the Court that the personal appearance bond of the Defendant be released and the personal recognizance terminated.

It Is Further Ordered by the Court that the Appeal Bond is fixed at One Thousand ($1,000.00) Dollars with approved surety thereon, conditioned as the law directs.

And the Defendant is hereby remanded to jail.

Entered this 8th day of August 1968.

Charles S. Russell
Judge

* * * * *

page 56 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To the Clerk of the Circuit Court of Arlington County:

Counsel for David Neal Martin, defendant in the above styled case in the Circuit Court of Arlington County, Virginia, hereby gives notice of appeal from the Order entered in this case on July 26, 1968, and sets forth the following assignment of error:

1. The Court erred in refusing to grant defendants motion to strike the evidence of the Commonwealth at the close of the Commonwealth's case and at the conclusion of the trial prior to submitting the issues to the jury.

2. The Court erred in finding the defendant guilty when there was insufficient evidence to support a finding of guilt.

By Leo R. Andrews, Jr.
Leo R. Andrews, Jr.
Attorney for Defendant

* * * * *

Filed Sep 10 1968, H. Bruce Green, Clerk, Circuit Court, Arlington County, Va., By: V. Green, Deputy Clerk.

page 57 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: H. Bruce Green
Clerk of the Circuit Court
Arlington County, Virginia

Notice is hereby given that David Neal Martin appeals in this case.

The following errors are assigned in addition to the two previously assigned:

The Circuit Court erred:

1. In allowing the testimony of a witness' prior identification of defendant, without benefit of line-up, resulting in a violation of due process contrary to the Fourteenth amendment of the United States Constitution.

2. In allowing the testimony of a witness' prior identification whereby said identification resulted from a confrontation where defendant was deprived of his Sixth Amendment right to counsel.

3. In allowing any testimony of witness' prior identification in violation of the Rule of Law set forth in Stovall vs. Denno, 388 U.S. 293 (1967).

David Neal Martin

By: David Neal Martin
Counsel

* * * * *

page 1 }

* * * * *

Before:

Honorable Walter T. McCarthy, Judge, and jury.

Appearances:

R. O. Graham Guthrie, Esq., Assistant Commonwealth Attorney

Leo R. Andrews, Jr., Esq., 1400 North Uhle Street, Arlington, Virginia, counsel for the defendant.

* * * * *

page 3 } PROCEEDINGS

The Clerk: Commonwealth of Virginia against David Neal Martin.

Mr. Guthrie: Ready for the Commonwealth, Your Honor.

Mr. Andrews: Ready for the defense, Your Honor.

The Court: All right, gentlemen, proceed.

Mr. Guthrie: Your Honor, may I approach the bench?

The Court: .....Certainly.

Mr. Guthrie: Your Honor, the witness for the Commonwealth, Robert Mason, who was the victim in this case, was summoned and has been served with a notice to appear here today, but he is not here this morning. He called me on the phone on several occasions, and he stated to me he did not want to appear here because he has already appeared a number of times in Court, and he wanted to drop the *charages* and have nothing further to do with the case. I told him he would have to appear and make himself available until the case had been heard.

The Court: All right.

Where does he live?

Mr. Guthrie: He lives in Arlington County.

I also told him, Your Honor, to call Mr. Hassan, page 4 } of the Commonwealth Attorney's office, to discuss the situation and, to my knowledge, he has not as yet called.

The Court: You will just have to send for him.

Mr. Guthrie: Yes, sir.

The Court: You will have to issue a capias for this man.

Mr. Guthrie: Yes, sir, Your Honor.

The Court: As I understand it, you said he has been summoned, and he isn't here.

Mr. Guthrie: That is correct, Your Honor.

I have heard from him, and he admitted to me that he had been served. And, at the end of our conversation, he indicated to me that he would be here, and that is why I didn't go further with it.

The Court: Had he ever been here before?

Mr. Guthrie: Yes, sir.

He was on a companion case and had testified in the Courtroom. Some of these police officers here know him.

The Court: And, what is his name?

Mr. Guthrie: Robert Mason, Your Honor.

Mr. Andrews: This officer is going out now, Your Honor, to see if they can locate him. As I understand it, he was not served personally. He says he doesn't live in page 5 } Arlington, but that he lives in Fairfax County.

Mr. Guthrie: I am sorry, Your Honor.

The Court: According to this return, it shows that he had been served on the 25th day of April.

All right.

Now, are all these officers here: Officer Kinney, Officer Jenkins, Officer Marcey and Officer Haring?

Mr. Guthrie: Yes, sir, Your Honor.

The Court: I will go in my office, and we will have to get a summons—I mean a capias for this man.

The Court will take a short recess.

(Whereupon, a short recess was taken.)

The Court: Is the defendant ready?

Mr. Andrews: Ready for the defendant, Your Honor.

The Court: All right.

Empanel the jury.

(Whereupon, the jury was empaneled.)

(Whereupon, the jury was sworn.)

The Court: All right.

The jury will retire.

(Whereupon, the jury retired.)

The Court: Is this witness, Robert Mason, here yet?

Mr. Guthrie: No, sir, Your Honor, he is not.

page 6 } The Court: All right.

We will recess until 1:30 p.m.

At that time, he should be, and we will be ready to proceed.

Mr. Andrews: For the record, Your Honor, I would like the record to reflect that the defendant objects to the delay in this trial. He has been ready to proceed for trial since 10:00 o'clock this morning.

The Court: Mr. Andrews, we haven't continued the trial yet. The proceedings haven't gotten to that point yet.

Court is recessed.

(Whereupon, at 10:30 a.m., the hearing was recessed, to reconvene at 1:30 p.m.)

AFTERNOON SESSION

(1:45 p.m.)

The Court: All right, gentlemen, proceed.

Mr. Guthrie: The witness is here, Your Honor, and we are ready to go to trial.

The Court: Mr. Mason, the record reflects that you were summoned to be here as a witness, and the Commonwealth Attorney tells me that you told him you weren't coming here. I am going to issue a Rule against you to show cause why you should not be held in contempt of Court, or you

page 7 } can agree to have it heard right now, whichever you prefer.

Do you want to have a trial and get a lawyer?

Mr. Mason: The fact of it is, Your Honor, I went with the Fletcher case before here about five times. And, I also—that is, after the Fletcher case, there was a mistrial, and I also informed the Commonwealth Attorney—that is the Assistant Commonwealth Attorney, that I felt it was all over with, and that is the way it should be.

Now, like I was talking about earlier here, I can't say that I can identify this man right now because four months have gone by since this all happened. This all happened four months ago.

The Court: Mr. Mason, this is a decision that isn't yours to make. Now, Mr. Mason, you have gotten a judge, the

bailiff, the defendant, two attorneys, the clerk and about thirty jurors here this morning, all waiting around a half a day because you weren't here after you had been summoned. And, I am going to fine you $20 for not showing up this morning.

Now, gentlemen, please proceed.

Mr. Andrews: Ready for the defendant, Your Honor.

Mr. Guthrie: Ready for the Commonwealth, Your Honor.

The Court: I would like to add, Mr. Mason,
page 8 } that if you leave here without permission, I am going to issue a Rule against you for contempt of Court.

All right, proceed, gentlemen.

Mr. Andrews: At this time, Your Honor, I would like to object to any testimony being admitted from Robert Mason, in view of the fact of what he has just said prior to my objection. I will take exception to any testimony that he will testify to. It is a fact, also, Your Honor, that he is being compelled to be here, obviously against his will, and he is being coerced into testifying.

Now, I would like the record to show the defendant objects to this. And, the defendant also objects to any testimony subsequently entered in this cause at this trial.

The Court: Objection overruled.

Are you ready to go ahead?

Mr. Andrews: Yes, Your Honor.

The Court: All right.

Bring the jury in.

(Whereupon, the jury returned to the jury box.)

(Whereupon, the jury was sworn.)

The Court: All right, gentlemen, proceed with your opening remarks.

page 9 } Mr. Guthrie: Ladies and gentlemen of the jury, as you have already heard, this case involves a charge of attempted robbery against the defendant, as well as the charge of felonious assault in connection with that attempted robbery.

Now, the Commonwealth's evidence consists of testimony of several witnesses, including the victim of this assault, and attempted robbery.

Also, it will consist of some real evidence shown to you and given to you for your examination at a later time. The

Commonwealth's evidence will disclose the following facts:

The evidence will show that Mr. Mason, on the evening of the 27th of January, 1968, was in a hospital visiting a friend. This friend had a car which had apparently been stuck in the snowstorm at an earlier time. The car had been left at the corner, approximately at the corner of South 8th Street and Walter Reed Drive in Arlington County, Virginia. Mr. Mason told her he would be glad to go and start the car and run the motor so the battery would not go dead.

The evidence will show that he left the hospital at approximately 8:00 o'clock and went to a restaurant and grill bar in the Washington and Lee Shopping Center. While there, he had four beers. He stayed there for approximately two and a half hours. He left there and went to where the car was located. He got into the car and started the car. He let the motor run, of course. Being January, it was a very cold evening, and he turned on the heater. Now, in the course of sitting there with the heater on—that is the heat emitting from the heater, the probable effect of some heat and the lateness of the hour, because about this time, it was 12:00 or 12:30 on the 28th of January, he fell asleep. He was awakened at approximately 1:30 on the morning of the 28th by the two men who were standing outside of his car. One of them opened the door and said, "You get out of there," or words to that effect. He said—that is, Mr. Mason said, "What is this all about? What do you want?"

page 10

One of the men said, "We want your wallet," or words to that effect. This man, the witness will identify as Francis Fletcher.

Now, Francis Fletcher was accompanied by another man, who the evidence will point out, was the defendant. While Francis Fletcher beat Mr. Mason with his fists on the face, the defendant also beat Mr. Mason with what is described as a riding crop type thing—a shiny rod, which could have been a radio antenna. Mr. Mason will state that he struck back as his assailants assaulted him, and he fell to the ground, screaming for help.

page 11

Now, at this time, with the noise and the confusion, the two assailants fled down 8th Street. Mr. Mason got up and went looking for the police. Shortly thereafter, on South Walter Reed Drive, Mr. Mason met Officer Kinney—excuse me, Officer Jenkins of the Arlington County Police Force. Officer Jenkins interviewed Mr. Mason and took a description which he described in a subsequent broadcast.

He put this description over the radio, and several suspects were picked up. Among them, the defendant and Mr. Fletcher were found several blocks away from the scene. They were taken back to the scene of the assault and the attempted robbery and were arrested. They were placed under arrest and taken away to jail.

Now, it is the Commonwealth's contention in this case that these facts show, beyond a reasonable doubt, the defendant is guilty of the offense of attempted robbery and felonious assault.

Now, although Francis Fletcher was the man who actually said the words, "We want your wallet," or words to that effect, the defendant was present aiding and abetting Mr. Fletcher. He was even encouraging him by his presence.

page 12 } Later, you will be instructed by the Court as to the effect of this on his guilt of being the principal in the first degree.

Now, ladies and gentlemen of the jury, the Commonwealth contends, also, that no money, in fact, was taken, that the acts committed by these two men in the attempt to take money had gone so far in furtherance of the crime, that it constituted a legal attempt to commit robbery. Thank you.

Mr. Andrews: Ladies and gentlemen of the jury, I will start my introductory remarks by telling you that the Commonwealth must prove its case within the precise and narrow terms of the indictment—that is the alleged felonious assault and attempted robbery.

The Commonwealth Attorney has presented a pretty nasty picture. Now, as I understand it, the Commonwealth Attorney, on this particular night, was home in bed. He didn't witness all this by personal knowledge. In other words, what he said is going to have to be proven, and the burden rests upon the Commonwealth to prove by the evidence, the allegations as set forth in the indictment.

It is for you, ladies and gentlemen of the jury, to find out what are the facts, and you are to determine the facts from the evidence as you hear it from the witness stand. This

page 13 } is your sole duty here, and that duty is to determine what really went on—what truly went on, on this particular night.

I call your attention to what I consider the crux of this case. This can be summed up and called identification. Now, we don't argue with the facts, or the fact that Robert Mason was assaulted that night. We accept the Commonwealth's version that he was assaulted. We do quarrel, however, with

who did the assault, and who did the attempted robbery—that is the alleged assault and the alleged attempted robbery.

Actually, ladies and gentlemen of the jury, the only thing that I can see is that David Martin did that night associate himself with a man well known to the police, namely Francis Fletcher. The police have known Fletcher for a long, long time. Now, to the best of my knowledge, there is no reason for the police to know David Martin.

So, ladies and gentlemen, to sum up briefly here, I want to call your attention—that is, I want you to judge the evidence and to listen very carefully to one individual particularly, namely Robert Mason, the victim of this supposed attempted robbery and attempted felonious assault. While you listen to his testimony, I want you to keep one thing in mind above everything else. It is called identification.

Now, can he, Robert Mason, positively and suffi-
page 14 } ciently identify David Martin as being the man along with another assailant, or can he not? I feel that once you weigh this evidence in your mind, there will be reasonable doubt in your mind, and you have to come to a determination that David Martin was not in fact there at the scene of the alleged crime. Thank you.

The Court: Call your first witness.

Mr. Guthrie: I call Mr. Mason, Your Honor.

Whereupon, ROBERT MASON, was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Guthrie:

Q. What is your full name, please?

A. My name is Robert W. Mason.

Q. And, where do you reside, sir?

A. 6626 Potomac Avenue, Alexandria, Virginia.

Q. Calling your attention to the 27th day of January, 1968, do you recall where you were the evening of that date?

A. Let me think about it a little.

Now, that was back in January—right?

page 15 } Q. Yes, sir.

A. I was on Walter Reed Drive and South 8th Street.

Robert Mason

Q. What time of day was that?
A. It was possibly about a quarter of 2:00.
Q. Now, where had you been prior to that?
A. I had been to the hospital.
It was earlier, 9:00 o'clock that morning—excuse me, I mean that evening, and then I started *our* for a restaurant.
Q. Why had you been at the hospital?
A. I was there to see a friend—a lady friend.
Q. I see.
Now, that was the previous evening. Isn't that correct?
A. Same evening, yes, sir.
Q. That is—that would be the 27th of January, would it not?
A. No.
It was the 28th.
Q. No.
What I mean is the evening of the 27th. There seems to be some confusion about the day—that is the following day.
The following morning was the 28th.
page 16 } A. No, sir.
I corrected my statement. I said 9:00 o'clock. It was 9:00 o'clock in the evening.
Q. On the 27th?
A. On the 28th.
Q. On the 28th?
A. This is when the crime transpired.
Q. You said it was 2:00 o'clock on the morning of the 28th that you were on South 8th Street?
A. Right.
Q. Now, I am asking you where you were the previous evening to that at 8:00 o'clock?
And, you say you were at the hospital?
A. No, no.
The previous night I was home.

The Court: Apparently, you don't realize the date. You must remember the date changes at 12:00 o'clock at night.
The Witness: I see. I see what you mean now. I understand now.

By Mr. Guthrie:
Q. So, your visit to the hospital was on the evening of the 27th?

Robert Mason

A. Right.

page 17 } Q. So, about 9:00 o'clock you were at the hospital that evening?

A. Right.

Q. Then, how long did you stay at the hospital do you suppose?

A. I was there from 7:00 until 9:00 o'clock.

Q. And, when you left the hospital, where did you go?

A. I left there and went to the Washington and Lee Shopping Center to a restaurant.

Q. What did you do there?

A. I drank a few beers, and I played shuffleboard.

Q. How long did you stay there?

A. I think I stayed there until approximately a quarter to 12:00. It was around 12:00 o'clock when I left.

Q. Where did you go when you left the restaurant?

A. I went to the address of Walter Reed Drive and South 8th Street.

Q. Why did you go there?

A. To start the motor of a car.

Q. What car?

A. The car that belonged to my lady friend—the woman that was in the hospital.

Q. Why were you going to start that car?

page 18 } A. Well, she had been in the hospital two weeks, and the car hadn't been started at all. It was just sitting there all this time.

Q. And, did you, in fact, start the car?

A. Yes, I did.

Q. What happened then?

A. What happened?

Q. What time was it when you went to start the car?

A. I'd say it was around a quarter to 12:00—around 12:00 o'clock, somewhere in there.

Q. All right.

Please continue.

A. I left the car around there and took the battery off.

Q. What happened then?

A. Then, I fell asleep on the front seat of the car.

Q. How long did you remain asleep?

A. Well, from—I would say I left the car running there around a half hour—that is from 1:30 to a quarter of 2:00.

Q. Why did you happen to wake up at a quarter of 2:00?

Robert Mason

A. I was bodily pulled out of the car.

Q. By whom?

A. By Mr. Fletcher.

page 19 } Q. Well, first of all, did you hear anything which woke you or what was your first awareness?

A. When I saw the two men.

Q. Was anything said between you and anyone else at that time?

A. You are referring to Mr. Fletcher, the one outside the car?

Q. Yes.

A. No.

Nothing was said at first. He just hit me in the face about five times—real fast. And, after that, I asked what the problem was, and he proceeded to say something, and he hit me several more times, and this is when he asked me for my wallet.

Q. Was there anyone else present at that time?

A. Yes, there was.

Q. Who?

A. Another man.

Q. Another man?

A. Yes, sir.

Q. What did this other man do during the time Fletcher was hitting you?

A. He was there with an antenna, I presume.

page 20 } Mr. Andrews: Objection.

I object to an assumption. He can tell what it was to the best of his knowledge.

The Court: Objection overruled.

By Mr. Guthrie:

Q. You say there was an antenna?

A. Yes.

Q. What connection did that have to this incident?

A. I was being hit in the back with it.

Q. Do you know who it was who was hitting you with this in the back?

A. Yes, I know.

I know it was Fletcher. I know he was in front of me.

Q. Are you positively sure how many men were there, beside you, at that time?

Robert Mason

A. Yes.

I am sure—two men.

Q. Two men?

A. Uh huh.

Q. As you were being hit with this radio antenna, and as Mr. Fletcher was hitting you, what were you doing then?

page 21 } A. Well, we had a scuffle, and I was swinging so as to try to get away—that is, to get him away from me. After he asked for my wallet, then the next thing I knew I was being hit from behind, and I fell to the ground.

Q. Then, what happened?

A. Well, then I got up and yelled for help. I ran down Walter Reed Drive.

Q. Now, were you able to observe what the other men did?

A. Yes.

They ran in the opposite direction.

Q. Were you able to observe where they ran?

A. Yes.

They ran down on 8th Street.

Q. South 8th Street?

A. Yes.

Q. Were you able to observe in which direction they ran?

A. Well, it would be east, I believe.

Q. Now, after you ran away, what did you do?

A. After I ran away, I yelled for help, and I turned around and saw they weren't following me. I went back to the car then.

Q. What did you do then?

page 22 } A. Well, I took the car, and I put the car in reverse and went out on Walter Reed Drive, and I saw a police officer coming down the street.

Q. What did you do then?

A. Well, then, of course, I stopped and pulled around in front of him, and he stopped. I told him what happened, and I gave him the details.

Q. Now, do you know the name of the officer to whom you spoke?

A. Yes, sir.

Officer Jenkins.

Q. Did you give him a description of the men who assaulted you?

A. Yes, I did.

Robert Mason

Q. Do you remember now what the description of that man was?

A. One was small, and the other was heavier built.

Q. Do you remember telling anything to the police officer about them?

A. Well, one was short and stocky, and the other one, I thought was—you know, tall and heavy set.

Mr. Guthrie: Your Honor, may we approach the bench?

The Court: Certainly.

page 23 } Mr. Guthrie: Your Honor, the Commonwealth proposes at this point to introduce identification testimony concerning the identity by the victim of his assailants when they were brought back within a short time after the attempted robbery.

Now, I believe counsel for the defendant may have some objections, and I believe these should be heard without a jury.

Mr. Andrews: That is correct, Your Honor, at this point.

The Court: All right.

Let the jury retire.

(Whereupon, the jury retired.)

By Mr. Guthrie:

Q. Now, Mr. Mason, did there come a time subsequent to that when you were given an opportunity to attempt to identify any suspects presented for your observation as the men who assaulted you?

A. Yes.

It was later that night. It was a quarter after 2:00 by this time.

Q. Could you tell the Court the circumstances of this?

A. Well, I had already given a description to Officer Jenkins, and Officer Jenkins broadcasted this

page 24 } description on his radio. Well, later, Officer Jenkins got a call on his radio to go over to the other side of Glebe Road—that is South Glebe Road, to identify some suspects they had there. As we went there—that is when we pulled up, there was one man standing, and two men in the car. I said, "No" that was not them.

Q. Were you given any further opportunity to examine suspects?

Robert Mason

A. Yes.

Later, another call came through, and we went to South 2nd Street.

Q. What transpired there?

A. As we pulled up, the officer there had his headlights on. They were shining on the street, and I identified one man during this time. I identified Mr. Martin, and then I identified Fletcher.

Q. I see.

Now, Mr. Mason, was there any uncertainty about your identification at that time?

A. No, sir.

Not at that time, no, sir.

Q. Now, how long after you saw these two gentlemen did you actually identify them as definitely being the
page 25 } ones who assaulted you?

How many seconds or minutes did it take you to arrive at a definite conclusion?

A. Do you mean after I first observed them?

Q. Yes.

A. Well, I don't know.

I imagine it was two minutes—one or two minutes or so. It was when we first pulled up.

Q. From the time you first saw them, how long after that did it take you to identify them as being the men who assaulted you?

A. Well, I think when I pulled up on the scene, I said that was him.

Mr. Guthrie: I propose to have this testimony put before the jury concerning the identification of the two suspects, and I believe counsel for the defendant will have some objection.

Mr. Andrews: Could I ask the witness a question, Your Honor?

The Court: Certainly.

CROSS EXAMINATION

By Mr. Andrews:

Q. Mr. Mason, when you pulled up, as you say,
page 26 } to the scene, are we talking about the scene of the crime?

Robert Mason

A. No, sir.

Q. What scene are we talking about?

A. We are talking about being on South 2nd Street.

Q. South what street?

A. 2nd Street—South 2nd Street.

Q. Did you ride up to the scene in the patrol car of Officer Jenkins?

A. Yes, I did.

Q. And, what were the two gentlemen doing there?

Where were they positioned at the scene you speak of? I am speaking in reference to Fletcher and Martin.

A. Martin was standing to the right, and when we first pulled up, he was in front of the cruiser with the headlights on. And, Fletcher was on the other side. I didn't see him at first.

Q. Where were the police officers?

A. They were on the other side of the car there.

Q. In other words, Martin and Fletcher were in custody of the police officers. Is that correct?

A. Yes, sir.

Q. Didn't you just testify that you had heard Officer Jenkins being radioed that two suspects were being

page 27 } held?

A. Did I testify to that earlier?

Q. Just a few minutes earlier—did yo utestify that you were taken to a scene where two suspects were, and you identified them as not being the ones that assaulted you, and then you testified that Officer Jenkins received a call over his radio which you overheard in which they were holding two other suspects?

A. No.

I didn't know where we were going. They were talking a different language. I did not hear him say that when we got to the scene, yes, sir.

Q. You heard this when you got to the scene where Martin and Fletcher was—where they had the two suspects there?

A. Yes.

Mr. Andrews: Your Honor, this question has been raised before.

The Court: You testified in answer to his question, which is really the important part of this discussion, that you heard they had two suspects before you identified them.

Robert Mason

The Witness: Well, sir, I assumed the thing of it is, we went to the first place. There was suspects there, and we immediately went to the other scene on South 2nd Street, page 28 } sir.

The Court: When you got there, there were two persons there that you are now calling suspects.

How did you arrive at that conclusion?

How did you arrive at the conclusion that they were suspects?

What led you to that conclusion?

The Witness: Well, sir, this is the sixth time I have been to Court. I observed that they considered them suspects because they were arrested.

The Court: Your thought they were arrested, and there was a police car there?

The Witness: Yes, sir.

The Court: They were standing right by the police car?

The Witness: Yes, sir.

The Court: And, the police officer was how far away?

The Witness: Well, I don't know—maybe two feet from the car.

The Court: And, did you hear anybody say they were suspects?

The Witness: I don't know, sir. It has been so page 29 } long.

The Court: You don't remember?

The Witness: No, sir.

The Court: You were of the definite opinion at that time they were under arrest?

The Witness: Yes, sir, I guess so.

The Court: You can't state: "I guess so."

Was it your opinion they were under arrest or not?

The Witness: Yes, sir, it was.

The Court: All right.

Proceed.

Mr. Andrews: I move at this time this testimony be stricken.

I think it is a flagrant violation of Wade and Gilbert of anybody being under arrest or in custody. These men were, and there is no question about that, in custody and were made to stand in a line-up which was not quite a line-up. This is a show-up.

If the police are willing to have an identification made, I

submit to the Court they should have gone down to the station house and had a line-up. This not only violates Wade and Gilbert, but I submit it violates Stovall. This was unnecessarily suggested to satisfy due process. I submit the line-up should have been conducted in the police

page 30 } station, which was not the case in this instance. I can conceive of no justification why the police had to conduct a show-up in front of squad cars, or even one squad car, out there on a street where the alleged crime was supposed to have been committed.

The proper line of procedure, I submit, would have been a line-up in the station house with five or six other people that looked similar to Mr. Martin and Mr. Fletcher. There is nothing to suggest that the defendant could have been placed in a proper line-up. I submit that due processes were violated at this particular show-up, which produced an identification that is not the product of the witness' objective judgments, and that it was a suggestive atmosphere, because, as he testified, he was under the impression the men were under arrest.

Therefore, I submit his reasoning was impaired, and that the police produced a suggestive atmosphere for identification. I don't see how Mr. Mason could answer otherwise than the assailants were these two men, Fletcher and Martin.

Last of all, Your Honor, I argue that the defendant, Martin, was deprived of his Constitutional Sixth Amendment Right to assistance of counsel at any pretrial show-up or line-up.

page 31 } And, I ask that any testimony as far as identification elicited from this individual be stricken from this case.

Mr. Guthrie: Prior to argument, Your Honor, may I ask the witness a question?

The Court: Certainly.

REDIRECT EXAMINATION

By Mr. Guthrie:

Q. When you arrived with Officer Jenkins at the point where the defendant and Mr. Fletcher had been held, was anything said to you as you arrived there with Officer Jenkins concerning either of these two men?

A. No, sir, there was not.

Robert Mason

Q. Was anything said to you by anyone at that scene concerning either of these two men prior to the time you identified them?

A. No, sir.

I'd say no.

Q. Can you tell the Court about how long it was after you actually had been beaten that you arrived on this scene with Officer Jenkins?

A. I will say it was twenty minutes—fifteen or twenty minutes.

Q. How far was it from there to the place where
page 32 } you were attempted to be robbed?

A. I would say seven blocks—or about six blocks.

Mr. Guthrie: Your Honor, that concludes my questioning.

Mr. Andrews: I would just like to raise one point regarding Gilbert and Stovall.

The Court: I am particularly interested in what you have to say about Stovall. I have some acquaintance with the Wade case. However, I don't know about the other two cases.

Mr. Andrews: Of course, the Wade case and the Gilbert case put forth the principle.

The Stovall case puts forth the principle that the identification was so suggestive that the judgment of the complaining witness was so prejudiced by the circumstances that arrive—that when the police conducted a line-up in a suggestive manner—I believe the Court phrases it as impairs the objectivity of the witness—and this establishes for the principle that the indentification under such circumstances is not the product of the witness' object judgment and is more suggestive.

that the evidence was presented in the same manner or in-
the Fletcher trial, which was held prior to the
page 33 } hearing today. Judge Winston ruled on the same
point; although it is not binding on you, however, I raise it for what it is worth. He ruled—

Mr. Guthrie: (Interposing) I would object to any ruling in any other case. We have no evidence before this Court that the evidence was presented in the same manner or involved the same people.

The Court: That is true about any ruling as cited in another Court. It more than likely isn't the same.

Robert Mason

Mr. Andrews: The facts in the Fletcher case are certainly, I think, the same as in the Martin case. I think Mr. Guthrie termed the codefendants as companion cases.

Judge Winston in the Fletcher case ruled: any pretrial *indentification* under Stovall should be stricken.

The Court: I don't think the Stovall case has any real bearing on this problem. I will see what it has got to say in the Wade and Gilbert cases.

Mr. Andrews: Your Honor, all these cases—these three cases were decided the same day. They were all companion cases.

Wade was the first case of the three companion cases decided on June 17, 1967. Following the Wade case is the Gilbert case. I also have here the Bachelor case, Your Honor.

The Court: All right.

page 34 } We will take a ten minute recess.

(Whereupon, a short recess was taken.)

The Court: All right.

Proceed.

Mr. Andrews: Your Honor, the witness testified that he assumed the man to be under arrest—that both men were under arrest. Now, I assume it's a case covered under Stovall and was highly suggestive. As far as the argument goes, a counsel had not been appointed. Of course, counsel had not been appointed. The men were under arrest. They were in custody. Counsel should have been appointed as soon as possible. They are entitled to counsel. There is no question in my mind, they were under arrest, and they were entitled to counsel. Whether or not, it was appointed counsel is immaterial.

When you go through a line-up, Wade says you have a Sixth Amendment Right—a Constitutional Right to assistance of counsel at a show-up or line-up.

We submit, while they were at the line-up, they were entitled to counsel, and they were deprived of the right to counsel, and we ask the Court to strike all testimony of identification elicited out of this show-up.

page 35 } The Court: Motion denied.

Mr. Andrews: I would like to state my exception for the record.

Robert Mason

I would like to reiterate the principle set forth in the Wade and Gilbert case.

The Court: I don't see any sense arguing all over again. It's in the record, isn't it?

Mr. Andrews: Well, just for the purposes of the record, Your Honor, yes.

The Court: If you think you have left anything out, please go ahead.

Mr. Andrews: That's all I have, Your Honor.

The Court: All right.

Bring in the jury.

(Whereupon, the jury returned to the jury box.)

REDIRECT EXAMINATION (Resumed)

By Mr. Guthrie:

Q. All right now, Mr. Mason, when the jury retired, I believe I was discussing with you the description you gave to the officer who was interviewing you concerning this case and what you did after you gave this description.

A. Yes, sir.

Q. Now, calling your attention to the time
page 36 } when you gave the description you said you gave
to Officer Jenkins, what happened after that?

A. You want me to go over the whole thing from the beginning?

Q. Yes.

A. Well, when I gave the description, we went over to South Glebe Road, and there were suspects in the car. They were evidently suspects. He asked me if I could identify them, and I said no, I couldn't.

Q. Then, what did you do?

A. That was a matter of a few minutes we were there. Then, we went to South 8th Street—or South 2nd Street, I mean—2nd Street it was.

Q. Where was that?

Where on South 2nd Street were you, if you remember?

A. I don't remember the hundred block, but it was east. 2nd Street runs north and east, and we were headed toward the east.

Q. What happened when you arrived there?

Robert Mason

A. As we pulled up there, one gentleman was standing in front of the car, and the headlights were on.

Q. Were there any police cars there?

A. Yes.

page 37 } Q. As you were riding in?

A. Yes.

Q. Approximately how many officers did you see, if any?

A. I saw three police officers.

Q. Were any other men there, other than the officers?

A. Yes.

There were two men there.

Q. What did you do when the car in which you were riding stopped?

A. We pulled over to the side, and then this officer turned the headlights towards the two men standing there.

Q. Did you observe anything unusual about the two men?

A. What?

Q. In other words, were you able to recognize these two men?

A. As I pulled over, yes.

One man was the big heavy set man, and I identified him.

Q. What did you say to the officer, if you remember, about that man?

A. I said, "I think that one of those men there was one of them."

Q. Which one were you referring to?

page 38 } Which man were you referring to?

A. I was referring to the heaviest set fellow.

Q. He was the one who did what you say he did when you were at your car and being hauled out of your car?

A. The heavy set one hit me with the aerial in the back.

Q. Do you see that man in this Courtroom here today—the one that you identified?

Mr. Andrews: Objection.

No proper foundation laid to formulate that he was hit from behind. The man who hit him from behind wasn't placed at the scene. I would expect the Commonwealth to lay a little more foundation.

The Court: Objection overruled.

Mr. Andrews: Please note my exception.

The Court: Certainly.

Please proceed.

Robert Mason

By Mr. Guthrie:

Q. Again, I will ask you: Do you see the man in the Courtroom here today—the man whom you identified as being the heavy set man who hit you in the back?

A. I see Mr. Martin, yes, sir.

Q. Will you please point him out to the jury?

page 39 } A. He is the gentleman there.

All the same—may I say something?

Q. Just answer the question.

A. Yes, sir.

Q. When you were back at your car and you were struck from behind by this man who have now identified as the defendant, Martin, did you have an opportunity to see the face of the man who hit you in the back?

A. Sir?

Q. In other words, was he, at any time, where you could see his face?

A. Yes, sir.

One time, yes.

Q. I see.

When was that?

A. That was when I just got out of the car.

Q. After you identified the defendant, you said there were two men there.

Were you able to recognize the other man?

A. Yes.

Q. Did you identify him?

A. Yes, I did.

Q. What did you say to the officer concerning

page 40 } him?

A. I said he was the other one.

Q. Have you subsequently learned who the other man was —whom you identified?

A. Yes, sir.

Q. Who was that?

A. It was Fletcher—Mr. Fletcher.

Mr. Guthrie: I have no further questions at this time.

RECROSS EXAMINATION

By Mr. Andrews:

Q. Mr. Mason, is that Robert Mason?

Robert Mason

A. Right, yes, sir.

Q. Mr. Mason, you testified on the night of the 27th you visited a lady friend. Is that correct?

A. That is correct.

Q. You testified that at 8:00 o'clock you left the hospital. Is that correct?

A. That is right.

Q. All right.

And, then you were at the hospital?

Where did you go from there?

A. I went to this restaurant in the Washington and Lee Shopping Center.

page 41 } Q. Do you know the name of the restaurant?

A. I did remember, but I don't now.

Q. You don't remember?

A. No, sir.

I don't remember.

Q. Now, let's see—first of all I will ask you a very simple question before we go any further.

Now, Mr. Mason, are you positively sure at this time that this man, David Martin, sitting at the counsel table, was the man you alleged struck you in the back at the scene of 8th Street and Walter Reed Drive?

Can you positively, in your own mind, be sure that David Martin is the man who struck you in the back?

A. I can honestly say, I can't right this minute. It has been four months since this happened.

Q. All right, Mr. Mason, you have an opportunity now to look at David Martin while he is standing up. He is here not more than fifteen feet away from you. I want you to tell the jury and the Court, if you can be sure, that it was David Martin, who was the man who struck you on the night of the 28th?

A. No, I cannot.

Mr. Andrews: I have no furher questions.

page 42 } Mr. Guthrie: I have another question, Your Honor.

The Court: Proceed.

Robert Mason

REDIRECT EXAMINATION (Continued)

By Mr. Guthrie:

Q. All right, Mr. Mason.

On the evening when you did identify the defendant as being the man who struck you, were you absolutely sure he was the one at that time?

A. Was I absolutely sure?

Q. Yes.

A. I was reasonably sure, yes.

Q. You were reasonably sure?

A. Yes, sir.

Q. Only now you are not as sure as you were that night because you have not seen him between then and now?

A. True.

Q. If you could be assured this was the same man you did, in fact, identify on that evening, would that make you reasonably sure as you were then?

Mr. Andrews: Objection.

The Court: Objection sustained.

Mr. Guthrie: I have just one more question, Your Honor.

page 43 } The Court: Proceed.

By Mr. Guthrie:

Q. Did you attempt to give your billfold to the man who asked you for it?

A. Did I attempt to give my billfold?

No, sir.

Q. Why didn't you?

A. Why didn't I?

Q. Yes.

Why didn't you?

A. Well, for some reason I got enough belting around. I wasn't going to hand it to him. This was the reason.

Mr. Guthrie: I have no further questions.

Mr. Andrews: I have no further questions of this witness at this time.

The Court: You may step down.

Proceed with your next witness.

Mr. Guthrie: I call Officer Jenkins to the stand.

James R. Jenkins

Whereupon, JAMES R. JENKINS, was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

page 44 } DIRECT EXAMINATION

By Mr. Guthrie:

Q. Officer Jenkins, calling your attention to the 27th of January, 1968—just a minute.

First of all, tell the Court your full name?

A. James Russell Jenkins.

Q. And, your occupation?

A. I am a police officer, Arlington County Police Department.

Q. Were you so employed on the 27th day of January, 1968?

A. Yes, I was.

Q. Did your duty take you to the southern part of Arlington?

A. Yes, sir.

Q. Calling your attention to the early morning hours of the 28th of January, did you have occasion to come in contact with Robert Mason?

A. Yes.

Q. Would you tell the Court the circumstances of this contact with him?

A. I had received a call to respond to the 700 block of South Walter Reed Drive, and when I arrived at
page 45 } that hundred block at Walter Reed Drive, there was a Chevrolet automobile parked in the middle of the road, heading southbound on Walter Reed Drive. I was headed northward. I stopped directly opposite, and there was a gentleman standing over next to a paddy wagon parked behind this car. The gentleman was Mr. Mason.

Q. Did you have any conversation with Mr. Mason at that time?

A. Yes.

Q. Could you relate that conversation to the Court?

The Court: Is this admissible?

Mr. Andrews: I would object, Your Honor.

I don't see any purpose in relating the conversation because it is hearsay.

James R. Jenkins

The Court: It seems to me—clearly hearsay.

Objection sustained.

Mr. Guthrie: The purpose, Your Honor, was to introduce into evidence the description given to the police officer by the complaining witness.

The Court: Objection sustained.

By Mr. Guthrie:

Q. Now, Officer Jenkins, what did you do after you talked with Mr. Mason?

page 46 } A. I asked him to have a seat in the scout car.

Q. What did you do then?

A. I proceeded to ask him questions and get some information for my report.

Q. Did there come a time you took him any where?

A. Yes, sir.

Q. Where did you take him?

A. First, I took him to South 8th and Glebe Road in Arlington County, Virginia.

Q. For what reason did you take him there?

Mr. Andrews: I would object to all this as repetitious and having no relative value.

I take exception to the question by the Commonwealth.

The Court: It doesn't appear to be repetitious to me.

Objection overruled.

By Mr. Guthrie:

Q. For what reason did you take him to Glebe and South 8th Street?

A. South 8th and South Glebe Road—that is where I took him, yes, sir.

Q. For what reason?

A. An automobile had been stopped there with

page 47 } three occupants in it.

Q. What happened when you arrived there?

A. When I arrived at the scene, one of the occupants was standing to the rear of the car, and another officer had stopped the automobile and had two additional occupants get out of it for identificational purposes.

Q. Was Mr. Mason able to make an identification of these people?

A. He said they were definitely not the ones.

Mr. Andrews: If I may object—there has been no testimony of why he was there to identify the three people in the automobile. There has been no foundation laid as far as this defendant is concerned. There has been no testimony elicited now from this witness. He cited. He made out a report, and that is all.

The Court: This man did not attempt to identify anybody. Objection overruled.

Mr. Andrews: Please note my exception.

The Court: Certainly.

Please proceed.

By Mr. Guthrie:

Q. What did you do after Mr. Mason failed to
page 48 } identify these people?

A. I responded to another location.

Q. With Mr. Mason?

A. Yes, sir.

Q. What happened when you arrived at that location?

A. When I arrived at that location?

Q. Yes.

First, describe the scene at that location when you arrived?

A. You mean the second location?

Q. Yes.

A. The second location was on 2nd Street and South Adams Street—south of South 2nd Street. I was headed east on South 2nd, and I made a right-hand turn to head south—Adams Street. There were several other police vehicles gathered in the area. I didn't get any closer than—let's say, about sixty-five feet. The police officers had two individuals stopped. They were standing in front of the scout car, which, as I say, was parked some sixty to sixty-five feet from the cruiser.

Q. What did Mr. Mason do when you arrived?

A. I asked that one of the individuals be asked to step out from in front of the scout car, where they
page 49 } were standing, and from that position, we could only see from the shoulders up. I asked to have one of them step out from in front of the scout car so we could see from the headlights.

Q. And, did he so step out?

A. Yes, sir, he did.

James R. Jenkins

Q. And, did Mr. Mason say anything at this time?
A. Yes, he did.
Q. Would you please tell the Court and jury what he said?

Mr. Andrews: Objection.
The best evidence would come from Mr. Mason.
Mr. Guthrie: Your Honor, this is to show what Mr. Mason stated at that time.
The Court: Objection overruled.

By Mr. Guthrie:
Q. Will you please tell the Court and jury what Mr. Mason said after the man stepped in front of the headlights of the car?
A. He said, "That's him. The heavy one is the one who hit me from behind."
Q. Now, do you know who that man was?
A. Yes, sir.
Q. Who?
page 50 } A. Mr. Martin, the gentleman sitting there in the sweater.
Q. Was there any other man at that location besides the officers there?
A. Yes, there was.
Q. Did Mr. Mason look at the other man?
A. Yes.
Q. Did he make any remarks about him?
A. Yes.
Q. What did he say?
A. He said, "That is the little one that drove me out of the car."
Q. Then, what was done to the two men identified?
A. I walked up to both of them and placed them under arrest for attempted robbery, and I advised them of their Constitutional Rights.
Q. Had they been placed under arrest prior to that time by any other officers, do you know?
A. I don't know.
Q. Did you secure any evidence from either of these two men?
A. Yes.
Q. What evidence did you secure?

page 51 } Mr. Andrews: May we approach the bench, Your Honor?

The Court: Certainly.

(Whereupon, a brief bench conference was held.)

The Court: Please proceed.

By Mr. Guthrie:

Q. What evidence did you secure from either of the two men?

A. A sport coat.

Q. When you got the coat, what did you do with it?

A. I took possession of it, and I marked it. Then, I turned it into the property office.

Q. Do you remember what marking you put on the coat?

A. Yes, sir.

I put my initials on it.

Q. Between the time that you took this coat into the property room and today, have you at any time, between these times, taken it out of the property room?

A. Yes, sir.

Q. When was that?

A. At another trial.

Q. And, did the coat leave your custody at all during the time it was out of the property room?

page 52 } A. No, sir.

Q. And, did you put the coat back into the property room at the conclusion of your use of it?

A. Yes, sir.

Q. Do you have the coat with you now?

A. Yes, sir.

Q. When did you take it out of the property room last?

A. This morning—at 9:45 a.m.

Q. I ask you to see if you can find your initials on the coat where you marked it?

A. Yes, sir.

These are my initials—J. R. J. (indicating) It is also marked with number 264, which is my administrative number of the Arlington County Police. It is dated 1-28-68, and the time being 3:10 a.m.

James R. Jenkins

Mr. Guthrie: I offer this in evidence as Commonwealth's Exhibit 1.

The Court: It is admitted. The clerk will mark it.

By Mr. Guthrie:

Q. Now, Officer Jenkins, why did you take this coat into your custody?

A. It had stains on it. It had what appeared to be blood stains on it right here (indicating).

page 53 } Q. Show the jury the stains that you saw.

A. There were right in this area right here (indicating).

Q. I see.

A. Where the cut places are here.

Mr. Guthrie: Your Honor, counsel and I agree to stipulate the stains on this coat are of type O blood.

Mr. Andrews: May I see that?

Mr. Guthrie: Certainly.

I have no further questions of this officer.

CROSS EXAMINATION

By Mr. Andrews:

Q. Officer Jenkins, if I can take you back to the time when you were first stopped by Mr. Mason?

A. Yes, sir.

Q. Now, was he driving a car when he stopped you while you were in the patrol car?

A. No, sir.

Q. Was he just walking along?

A. No, sir.

Q. When did he first approach you, Officer Jenkins?

A. After I came to a stop, he was directed over to me.

Q. In conclusion, when did you first observe Mr. Mason?

A. He was standing in the 700 block of South

page 54 } Walter Reed Drive.

Q. Was there anyone standing with him?

A. What?

Q. Was there anybody with him?

A. Yes, sir, there was.

Q. Who?

A. Officer Rouse.

James R. Jenkins

Q. Officer Rouse?
A. Yes, sir.
Q. Was he the only person along with Mr. Mason?
A. I don't recall whether he had a partner with him or not, sir.
Q. Of course, when you saw Officer Rouse, you stopped your squad car. Right?
A. Yes, sir.
Q. Did you proceed to get out and go over to Mr. Mason and Officer Routh?
A. Yes, sir.
Q. What was the first thing said between you and Officer Routh or whoever you spoke to first?
A. He said someone had been robbed.

The Court: Who said this?
Mr. Andrews: I take it, it was Officer Rouse.

page 55 } By Mr. Andrews:
Q. Was it Officer Rouse?
A. Yes, sir.
Q. What did you say?
A. I got out of the car and went over to him.
Q. What did you do then?
A. I believe at that time I asked Mr. Mason where it had happened.
Q. What was the reply?
A. He pointed or he indicated back toward the corner of South 8th and Walter Reed Drive.
Q. At that time, what did you say?
A. I told him to go over and have a seat in the scout car.
Q. Then, you proceeded to do what?
A. I put out some information over the radio.
Q. What information did you relay over the radio?
A. I relayed a description of the two individuals he described to me.
Q. So, he described some individuals to you?
A. Yes, sir.
Q. When did this description take place?
A. He gave me a partial description while we
page 56 } were parked in the middle of Walter Reed Drive and the rest of the description once he moved the car out of the lane of traffic.

James R. Jenkins

Q. This description—I take it that it came subsequent to the time Officer Rouse said he—Mr. Mason had been robbed?

A. Yes, sir.

Q. Let's make one thing clear—did Mr. Mason give the description to Officer Routh or did you, Officer Jenkins?

A. I don't know whether I gave the description to Officer Rouse or not.

Q. Then, you are saying Mr. Mason gave the description of the two assailants, or how many there were, to you?

A. Yes, sir.

Q. What was the description?

A. The description of the number one assailant was: a white male, approximately twenty-five years old, five foot seven, one hundred fifty to one hundred sixty pounds. He didn't know the color of the man's eyes or hair. He said he had a light complexion. The only description of clothing he gave was: He was possibly wearing a sweater.

Now, number two subject was: a white—

Q. (Interposing) Excuse me—there is one thing about the statement, Officer.

Do you know who he referred to on a subsequent date?

Do you know who he made reference to when page 57 } he described number one to you?

A. Yes, sir.

Q. Who was that?

A. Mr. Fletcher.

Q. Mr. Fletcher?

All right.

You testified that Mr. Mason said he had on a white sweater?

A. He said he was wearing a sweater.

Q. All right.

Did Mr. Mason make any mention of a coat?

A. No, sir, not at that time.

Q. Okay.

What condition did Mr. Mason appear to be in?

A. His clothing was disarranged, and he had blood on his face.

Q. How much blood?

A. Sir?

Q. How much blood?

A. I guess—I would say a fair amount. It was not so much you couldn't see out of the eyes.

Q. But, he was bleeding?

page 58 } A. Yes, sir.

Q. Had he been drinking?

A. He said he had.

Q. Did he tell you how much he had drunk?

A. I don't recall him saying anything about any amounts, sir.

Q. Was he coherent?

A. Yes, sir.

Q. Did he appear frightened?

A. Yes, sir.

I believe he was.

Q. Did he appear ill?

A. Sir?

Q. Did he appear ill to you?

A. No, sir.

Q. All right.

Did there come a time when he described the second assailant?

A. Yes, sir.

There did come a time.

Q. What was the description given to you by Mr. Mason of the second assailant?

A. He said he was a white male, approximately

page 59 } twenty-five years of age, five foot nine, very much heavier than the first subject described.

Q. Did he say how much heavier?

A. I believe he said over two hundred pounds.

Q. Over two hundred pounds?

A. Yes.

Q. Go on.

Please continue.

A. He didn't know the color of his eyes. He believed the color of his hair was brown. He stated he had a light complexion and was wearing, possibly, a, I believe he said, dark green or brown sweater.

Q. What else, Officer Jenkins?

A. What else?

Q. Yes.

Did he have a hat or a coat on?

A. No, sir.

That is all I recall.

Q. He didn't give you a description of a coat?

James R. Jenkins

A. No, sir.

Q. Did he give you a description of a hat?

A. No, sir.

Q. Did he give you a description of any scars?

page 60 } A. No, sir.

Q. He did not describe any scars?

A. No, sir.

Q. Did Mr. Mason relate any details of the assault or of any allegation of an assault?

A. Yes, sir.

Q. What did he relate to you as far as the alleged assault and of the details surrounding it?

A. He said he was asleep on the front seat of the car.

Q. Did he give you any indication why he was asleep?

A. He said that he had to have the heater running, and that he had had a few beers, and it was sort of early in the morning, and he just fell asleep due to the combination of the heat and the beers. He said the door on the driver's side was opened and some remarks were made. And, someone dragged him out of the car.

Q. Did he say who this someone was?

A. At that time?

Q. Right.

As far as whether it was number one or number two assailant?

A. He said it was the number one assailant. He said that it was number one that he had a conversation

page 61 } with, and they scuffled.

He said number two assailant hit him from behind with an object.

Q. Excuse me, Officer, I want you to think back very carefully, and tell me exactly how did he relate to you that he was hit by number two assailant?

Did he say I think number two hit me from behind?

How did he convey the impression he was hit by number two?

A. He said he was hit from behind by the number two assailant with an object repeatedly like this (indicating). Not one or two times but several times. He emphasized that *they* way he was being hit was like the pecking of a chicken.

Q. Is that what he said: "like the pecking of a chicken"?

A. I believe he described it as being "like the pecking of a chicken."

James R. Jenkins

Q. What else did he say?

A. He said that he knocked the number one assailant to the ground and then scuffled with him. Number one assailant got up, and both of the assailants fled.

Q. Officer Jenkins, did there come a time thereafter you made an investigation of this case?

page 62 } A. Yes, sir, there did.

Q. Did you attempt to look into in any way "the antenna" that he said he was struck by?

A. No antenna was mentioned, sir.

Q. The complaining witness said he was struck from behind the head by an antenna. This is my recollection of the testimony.

Now, did he indicate to you what weapon he was struck from behind with?

A. No, sir.

Q. What impression did you get of how he was struck from behind?

Was the assailant using his fists?

A. No, sir.

He said he was sttuck by an object. He didn't know what type of object it was. He said it was a long object. He said it was probably as long as a riding crop, and it was metallic. That was the only description I was given.

Q. In your investigation of this case, did you go back to the scene to observe whether or not the object was left at the scene that could have been the instrument which was used when he was struck?

A. Yes, sir.

page 63 } Q. Did you find any objects?

A. No, sir.

Q. Directing your attention to the time you drove up with Mr. Mason to the—is it 8th and Walter Reed Drive—South 8th and Walter Reed Drive?

A. Yes, sir.

Q. All right.

Now, directing your attention to where Mr. Martin was supposed to have been?

A. Yes, sir.

Q. Where was this?

A. This was 2nd and South Adams Street.

Q. Excuse me, directing your attention, Officer, to when

you arrived at the scene, was Fletcher and Martin being restrained?

A. Yes, sir.

Q. You testified, I believe, that the first person you saw upon arriving at the scene was Mr. Fletcher. Was this correct?

A. No, sir.

Q. Which defendant person did you see at the scene first?

A. Mr. Martin.

Q. What was Mr. Martin wearing at the time?

page 64 } A. Pardon me?

Q. Was he wearing a coat?

A. Yes, sir.

Q. What kind of a coat was it?

A. I believe it was a suede-type material with a fur collar. It had fur around the collar on the inside anyway.

Q. In your previous conversation with Mr. Mason, did he tell you that assailant number two, in his mind, was Mr. Martin, and he was wearing a coat?

A. No, sir.

Q. Upon arriving at the scene at 2nd and South Adams, did you have occasion to view Mr. Fletcher?

A. Yes, sir.

Q. Was Mr. Fletcher wearing a coat?

A. Yes, sir.

Q. He wasn't wearing a sweater. Right?

A. I don't recall what he had on underneath.

Q. The important thing was, he was wearing a coat, was he not?

A. Yes, sir.

Q. Directing your attention back to Mr. Mason and going backward to when Mr. Mason was with Officer Rouse, now upon your preliminary conversation, upon your

page 65 } preliminary interviews with Mr. Mason, did he tell you assailant number one was wearing a coat?

A. No, sir.

Q. What did he tell you number one was wearing?

A. Possibly a sweater.

Q. What did you interpret "possibly wearing a sweater" to mean?

Did he have one on or didn't he?

A. He didn't know.

James R. Jenkins

Q. He didn't know what kind of clothing assailant number one had on?

A. That is correct.

Q. He did relate to you the assailant was almost on top of him?

I believe you said Mr. Mason flipped the assailant off him?

A. I said he scuffled with him.

Q. He said he scuffled with him, and he told you he possibly had on a sweater?

A. Yes, sir.

Q. Did he relate to you any scars that either assailant had?

A. No, sir.

page 66 } Q. Did he tell you he got a good look at assailant number two?

I am now making reference to Mr. Martin.

A. I don't recall if he ever made that exact statement; no, sir.

Q. Did he make a statement that he got a good look at Mr. Fletcher?

A. It was not that exact statement.

No, sir.

Q. When Mr. Mason indicated that Mr. Martin an and Mr. Fletcher were the alleged assailants, what did you do at that time?

A. I got out of the scout car and walked up and placed them both under arrest for attempted robbery.

Q. It is my understanding from your testimony that Mr. Mason identified these people while in your squad car?

A. Yes, sir.

Q. When Mr. Mason indicated that Mr. Martin and Mr. Fletcher, from Mr. Mason and yourself when he made the identification?

A. Approximately sixty feet.

Q. Sixty feet?

A. Yes, sir.

page 67 } Q. What time in the morning was it?

A. It was approximately ten minutes after 2:00 in the morning.

Q. Let me get this straight once and for all—at approximately a distance of sixty feet in the headlights of an auto-

mobile, Mr. Mason identified Mr. Fletcher and Mr. Martin as being his assailants?

A. Yes, sir.

Q. Once more, Officer—directing your attention back to the period when Mr. Mason was initially giving you a description of the alleged assailants, did he indicate either one of them wore a beard?

A. No, sir.

Q. Did he say one was clean shaven and one wasn't clean shaven?

A. No, sir.

He made no such statements.

Mr. Andrews: Thank you, Officer, that is all I have.

REDIRECT EXAMINATION

By Mr. Guthrie:

Q. How far would sixty feet be in relation to this Courtroom?

A. I would say probably from here to about page 68 } the fifth or sixth row of seats there (indicating).

Q. Do you see that man sitting in the back seat of the Courtroom?

A. Yes, sir.

Q. Have you ever seen him before?

Mr. Andrews: I object.

Mr. Guthrie: Your Honor, I am attempting now to establish the distance.

The Court: Objection sustained.

The circumstances under which this identification was made were entirely different from the lights and everything in this Courtroom. In addition, the man sitting back there is one of the deputy clerks of the Courthouse.

Proceed.

By Mr. Guthrie:

Q. Did you say, in your opinion, it would have been about sixty feet?

A. Yes, sir.

That is approximately fifty or fifty-five.

James R. Jenkins

Q. When you talked to Mr. Mason concerning his statement that assailant number one might have been wearing a sweater, did he offer an explanation why he thought the assailant had been wearing a sweater?

page 69 } A. Yes, sir.

Q. Why?

What was the explanation given?

A. He said when he was scuffling with him, the assailant grabbed him around the head, and he felt the fabric drawing across the side of his face. He said it was a very rough fabric.

Q. Did you say that Mr. Mason took you back to this scene where this happened?

A. Yes, sir.

Q. And, I believe you testified that that was South 8th Street and Walter Reed Drive?

A. Yes, sir.

Q. Is that in Arlington County?

A. Yes, sir, it is.

Mr. Guthrie: I have no further questions.

RECROSS EXAMINATION

By Mr. Andrews:

Q. You said Mr. Mason took you back to the scene?

A. Yes.

Q. Was this subsequent to the identification made by Mr. Mason?

A. Yes, sir.

page 70 } Q. At this time, where were the suspects?

A. I don't know, sir.

Q. Let me ask you this—what did you find when Mr. Mason took you back to the scene?

A. I found a pack of cigarettes on the lawn where they had scuffled.

Q. You found a pack of cigarettes on the lawn?

A. Yes, sir.

Q. You found a pack of cigarettes where Mr. Mason said they scuffled, you mean?

A. Yes, sir.

Q. Had you seen any other evidence of a scuffle?

A. No, sir.

John N. Kinney

Q. Did you find blood on the ground?
A. No, sir.
Q. There was no physical evidence that you could see back at the scene that would indicate Mr. Mason had a scuffle?
A. No, sir.
Q. The only thing you know is what he told you?
A. Yes, sir.

Mr. Andrews: I have no further questons of this witness, Your Honor.

Mr. Guthrie: I have one more question, Your
page 71 } Honor.

The Court: Proceed.

REDIRECT EXAMINATION

By Mr. Guthrie:
Q. Did there come a time when you observed either of the defendants, Mr. Fletcher or Mr. Martin, at the police station?
A. Yes, sir.
Q. Did you observe anything unusual?

Mr. Andrews: That wasn't covered on my cross examination, and I will object.
The Court: Objection sustained.
Mr. Guthrie: I have no further questions.
The Court: Call your next witness.
Mr. Guthrie: I call Officer Kinney, Your Honor.

Whereupon, JOHN N. KINNEY, was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Guthrie:
Q. What is your full name, please?
A. John N. Kinney.
page 72 } Q. And, your occupation, please?
A. I am a police officer of the Arlington County Police Department.
Q. Is that in Virginia?
A. Yes, sir.

John N. Kinney

Q. What do your duties involve?

Do they involve anything unusual?

A. I am assigned to the Canine Corps.

Q. I see.

What are your duties in the Canine Corps concerning dogs?

A. My duty involves the handling of a dog.

Q. What training are these dogs given—specifically what training are you given?

Are you assigned to a specific dog?

A. Yes.

Just one.

Q. What training has your dog been given?

What training had your dog been given prior to January 27th or 28th this year?

A. Fifteen weeks of training with the individual handler. The dog is trained to track and to attack on command. The dog is trained to seek and search buildings and page 73 } grounds. That is the major field they are trained in.

Q. Had your dog been given training prior to January 28, 1968?

A. Yes.

He got—that is, we got out of school on December 22nd of 1967.

Q. All right, Officer.

Now, calling your attention to the early morning hours—that is approximately 1:30 a.m. on January 28th, did you have occasion to be on duty at that time and date?

A. Yes, sir.

Q. While on duty on that date, did anything unusual occur?

A. I had a call of man screaming for help on the 800 block of Walter Reed Drive.

Q. What did you do when you heard the call?

A. I responded to the area at that time. I didn't know the nature of the call. One of the officers advised it was an attempted robbery.

Q. And, what did you do then?

A. The victim showed the first officer on the scene exactly the point where he was pushed to the ground. There was still a cigarette pack there, and I think a couple page 74 } of cigarettes were lying on the spot. I then at-

John N. Kinney

tempted to track with the dog from that point on.

Q. And, were you successful?

A. Partially, yes.

Q. Where did the dog go?

A. Well, first, the dog, when he is trained in tracking, he is trained only on human scents, and he is trained specifically with a certain amount of equipment. The equipment consists of tracking harness and a long rope, which is required to be put on the dog before you attempt to track because that is how he associates the exercise of tracking. It took me, maybe four or five minutes more, to put on this outfit. I then took him over to the spot and pointed at the ground and told him to track. At that time, he sniffed at the spot where the ground was disturbed, and he took off with his nose down and his tail up in the direction of 8th Street. He then cut back through this alley and came out in the alley behind the apartment. He then continued north for approximately one hundred yards. Now, all this time, his nose was down and his tail was up, indicating to me he is tracking. Well, after this time, he seemed to lose the track and he began to wander. I tried to pick it up and finally gave it up.

page 75 } Mr. Guthrie: Your Honor, at this point, I believe counsel and I can stipulate that this diagram is a true representation of the area concerned in this case.

The Court: Do you offer that in evidence?

Mr. Guthrie: Yes, sir.

I offer this in evidence as Commonwealth's Exhibit Number 2, Your Honor.

The Court: It will be marked and entered into evidence as Commonwealth's Exhibit 2.

Mr. Andrews: At this point, Your Honor, I would like to state an objection to the testimony of this particular witness.

His testimony was the tracking was only partially successful. I object to his testimony as being irrelevant in this case and has no probative value.

Mr. Guthrie: If I can ask a question, I think I will satisfy counsel' objections.

The Court: Please proceed.

John N. Kinney

By Mr. Guthrie:

Q. With the regard to the possibility of several human scents being in one area, which of these scents are dogs trained for or inclined by the nature of the beast to follow?

A. The freshest scent.

Q. I see.

page 76 } Mr. Andrews: I still renew my objection.

His testimony is irrelevant in this case and has no probative value.

The Court: I instruct the jury the motion is under consideration.

Please proceed.

By Mr. Guthrie:

Q. Officer Kinney, with relation to this diagram, can you please draw a line from the point at which you began your tracking and the point at which your dog lost the scent?

The Court: Mr. Guthrie, put the diagram on the board and let everybody see it.

Mr. Guthrie: Yes, Your Honor.

By Mr. Guthrie:

Q. All right, Officer Kinney, which way is north on this diagram?

A. Here (indicating).

Q. You are pointing to South Walter Reed Drive and South 8th Street.

Is that where you began your tracking?

A. Approximately right here (indicating), at the gas stop right here (indicating).

Q. Using my pen, Officer, will your draw a line
page 77 } in showing the route that you took, until you got to the point where your dog lost the scent?

A. It doesn't show, but there is an alley here (indicating). There are garages here (indicating) and so forth.

Q. Could you put the initial for your last name at both ends of this line?

A. Yes, sir.

(Whereupon, the witness put in his initial.)

John N. Kinney

Mr. Guthrie: I have no further questions, Your Honor.

CROSS EXAMINATION

By Mr. Andrews:

Q. All right, Officer Kinney, you say the scent ran out?

A. Yes, sir.

Q. Looking at this diagram, how far is it from there to here (indicating)?

A. I would judge, maybe, three hundred yards.

Q. Three hundred yards?

It is my understanding you put the dog on a pack of cigarettes?

A. Not necessarily a pack of cigarettes, but the area where the ground was scuffed up and disturbed.

page 78 } Q. How was the ground disturbed?

A. It looked like some one sort of—like somebody was rolling around there in a scuffle. There was loose dirt. There was disturbed moist ground. At that time, it wasn't dry.

Q. Had there been a heavy dew?

A. I don't know whether it was a heavy dew or whether it was not. There was no grass at that particular point. There was just mud.

Q. This was a lawn, but there was no grass?

A. No.

Q. Upon whose directions did you do that particular portion of ground?

A. The victim pointed out the spot.

Q. Was Officer Jenkins present at this time?

A. I believe he was, yes, sir.

Q. He was?

A. He was in his car, I think, with the victim.

Q. I see.

A. Right here (indicating).

Q. At what point did the victim tell you where the scene was where he was pushed to the ground?

A. I don't really know what point because I

page 79 } was out cruising the area when I was called back to meet Officer Jenkins. I believe I was called back to meet him, and the victim pointed over to the area and said, "That is where I was attacked."

Q. You then proceeded to take the dog over there?

John N. Kinney

A. Yes, sir.

Q. Is there a sidewalk there, Officer Kinney?

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

Q. How far in toward the black here (indicating) is this particular mark?

A. Well, there are cars parked there. It is angle parking.

Q. It was not parallel parking?

A. No, it was not parallel parking. It was angle parking. It may take in part of the apartment. I don't know from this drawing. It was approximately, I would say, maybe eight feet from where the cars were parked and the curb.

Q. Now, the only personal property or items of personal property found was a pack of cigarettes. Is that correct?

A. Yes, sir.

That is all there was.

Q. Is it highly probable that the dog would have picked up a scent on a pack of cigarettes?

page 80 } A. He could if they were handled recently.

Q. I presume cigarettes are handled quite frequently.

All right, Officer.

At any rate, it was a distance of approximately three hundred yards?

A. Yes.

Approximately three hundred yards.

Q. What time of night was this?

A. That would have been about 2:00 o'clock in the morning—a little after maybe.

Mr. Andrews: I have no further questions of this witness.

The Court: The witness is excused.

Mr. Andrews: I am going to ask again, Your Honor, at this time to strike the testimony of this witness. It is too speculative, and it opens up the possibilities of too many things.

If the tracking of the scent led to a particular place, fine. But, insofar, as it only goes in one direction and gives out three hundred yards from where he picked the scent up, I submit this proffers absolutely nothing. It opens up the possibilities of speculation and I move at this time for the Court to strike this testimony.

page 81 } Mr. Guthrie: This line goes towards South

Arthur F. Marcey

2nd Street and Adams Street where both these defendants were.

Mr. Andrews: That hasn't been pointed out.

Mr. Guthrie: This map was stipulated to as an accurate representation of the area, and this shows where the two defendants were picked up.

Furthermore, the only testimony concerning who was in the area, when this started, was the testimony of the complaining witness of the three people there. That is, the complaining witness, Mr. Mason, the defendant and Mr. Fletcher. Now, the only evidence concerning in which direction all these people ran, other than this, was the testimony of Mr. Mason. In a written statement, he stated he ran up South Walter Reed Drive. He also testified his two assailants ran down South 8th Street. There is adequate foundation laid in that respect. His testimony gave confirmation as to the direction of travel. He indicated the direction they traveled in, and this does indicate a general track of travel to where they were picked up. And, I think it is very relevant.

The Court: The Court will consider its relevancy when the Commonwealth's case is completed.

Please proceed, gentlemen.

Mr. Andrews: I have no further questions of
page 82 } this witness.

Mr. Guthrie: I have no further questions.

The Court: Call your next witness.

Mr. Guthrie: I call Officer Marcey.

Whereupon, ARTHUR F. MARCEY, was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Guthrie:

Q. Would you state your name, please?

A. Officer Marcey.

Q. And, what is your occupation?

A. I am an Arlington County police officer.

Q. Were you so employed on the 28th of January, 1968?

A. Yes, sir, I was.

Q. Did you have occasion at that time to investigate an attempted robbery involving Robert Mason?

Arthur F. Marcey

A. Yes, sir.

Q. In the course of your investigation, did you have occasion to search any suspects?

A. Yes.

page 83 } Q. What the search involve?

A. Well, I was—

Q. (Interposing) First, Officer, where did you begin this search?

A. At the corner of 8th and Walter Reed Drive.

Q. Where did you go from there?

A. I met Officer Kinney at the scene of the robbery, and he advised which way he had tracked them. He and I were going down through the area, taking his dog over there again and trying to retrack. We then went back to our cars and started down 8th Street. He made a left-hand turn to go down 2nd Street. He made a left-hand turn on 2nd heading west. I made a right-hand turn, and as I made a right turn on 2nd Street, going towards Adams, I spotted two men on Adams Street.

The Court: These are the first two men the complaining witness spoke of?

Mr. Guthrie: He was not there at the scene, Your Honor. He was not there at first. That was another officer.

By Mr. Guthrie:

Q. Please continue.

A. I turned onto Adams Street off of 2nd Street, which led me to these two men matching the description

page 84 } —that is the partial description I had gotten on the radio.

Q. What did you do then?

A. I stopped the two subjects.

Q. What were they doing when you first saw them?

A. They were just walking down the street.

Q. What did they do when you stopped?

A. They stopped in front of the car where I asked them to stay.

Q. And, what did you do with these two men?

A. I proceeded to get identification from them.

Q. Who were they?

A. One was Mr. Fletcher, and the other was Mr. Martin

Q. Do you see either of them in the Courtroom here today?

Arthur F. Marcey

A. I see Mr. Martin, yes, sir.

Q. Were you present when Mr. Mason came around to that location?

A. Yes, sir.

Q. Did you observe anything Mr. Mason did while there?

A. Well, I was standing there in front of the scout car with Mr. Martin and Mr. Fletcher when Mr. Mason was brought to the scene and identified both subjects.

Mr. Guthrie: I see.

page 85 } I have no further questions.

CROSS EXAMINATION

By Mr. Andrews:

Q. Officer Marcey, you testified that you were going up Adams Street after coming off of 2nd. Right?

A. I was on 2nd and made a right to get on Adams Street.

Q. You were coming down this street right here (indicating)?

A. If that is 2nd Street, yes, sir.

Q. You took a right right here (indicating), didn't you?

A. Yes, sir.

Q. Okay.

Would you step out here, Officer Marcey?

A. Yes, sir.

(Whereupon, Officer Marcey did as instructed.)

Q. Are you familiar with this map, sir?

A. Well,—

Q. (Interposing) Well, Officer, this is Adams Street, and this is 2nd.

Can you tell us about where approximately on Adams you first observed the suspects?

page 86 } A. One, whatever this is here (indicating), looks like that street. Here is that vacant lot (indicating) which is approximately in here (indicating).

Q. Whereabouts did you say you first saw them?

Was it right in the middle?

A. There is a street light about where I saw them first, I think. I believe it was the first street light. They were walking this way (indicating) coming down the street, and I saw them, and I turned toward them.

Arthur F. Marcey

Q. Were they walking toward you?
A. They were walking toward 2nd Street.
Q. You observed them walking toward you?
A. I came down Adams Street—excuse me, 2nd Street and I was looking up Adams Street, and I saw the two subjects.
Q. All right.
Now, Officer Marcey, I'd like to take you back to that night when you first observed the suspects. You drove up and had them in your spotlights, did you not?
A. No.
I had them in my headlights.
Q. What did you do then?
A. I got out of the car, and I asked them for identification.
page 87 } Q. Did you pull your revolver?
A. Yes, sir.
Q. Then, you did what?
A. I stood by my car doorway and had my partner radio in we had two suspects.
Q. You were just standing there and getting identification from them?
A. Yes, sir.
Q. Did they give you identification?
A. Yes, sir.
Q. They did?
A. Yes.
But, not until another car arrived on the scene.
Q. You held them in custody until another car came?
A. Yes, sir.
Q. Yes, go on.
Please continue.
A. I might add that neither one of them saw my gun because I had the bright lights on, and they couldn't see me.
Q. They couldn't see you?
A. Well, as far as see me, yes, they could. But, not where the gun was.
page 88 } Q. You did have them in custody?
A. Yes, I did.
Q. Did any of the suspects—that is, did either of the two suspects say anything to you?
A. Yes.
Mr. Fletcher did, I believe.
Q. Mr. Fletcher did, you believe?

Arthur F. Marcey

A. Yes, sir.
Q. Are you sure it was Mr. Fletcher?
A. It was Fletcher, yes, sir.
Q. What did he say to you?
A. He asked me what I wanted, and I told them I had to hold them there because they matched the description of two suspects I was looking for.
Q. Had you seen Fletcher before?
A. Yes, sir.
Q. When?
A. Maybe a year or so ago.
Q. You knew who Francis Fletcher was then?
A. Yes.
I didn't recognize him at first though.
Q. With the passing of time, you realized who it was?
A. Yes, sir.
page 89 } Q. Had you ever seen Mr. Martin before?
A. No, sir.
Q. When was your first observation of Mr. Martin?
A. The night of the robbery was the first time.
Q. In the course of the arrest?
A. Yes, sir.
Q. Directing your attention back to the time when Mr. Fletcher asked you what you wanted—
A. (Interposing) Yes, sir.
Q. (Continuing)—is that what he said?
A. I believe so.
Q. In response, you said what?
A. I believe I told him they matched the description of two suspects that I was looking for.
Q. Did he reply?
A. Yes.
He said they had not done anything. Fletcher said this.
Q. What did you say, if anything?
A. I just got the identification from them.
Q. Did Mr. Martin say anything?
A. I don't believe so, no.
Q. What time was this?
page 90 } A. It was a little after 2:00 o'clock. It was around 2:10 or 2:15.
Q. 2:10 or 2:15?
A. Yes, sir.

Arthur F. Marcey

Q. What kind of condition was Mr. Fletcher in—let me ask you that?

A. What do you mean by that?

Q. Was he bleeding or did he have any cuts on him?

A. I didn't notice at the time.

Q. Had he been drinking?

A. He might have been.

Q. Were they drunk?

A. Not when I saw them.

Q. To the best of your observation, had they been drinking?

A. No, sir.

I can't testify. I don't know.

Q. You don't know whether they had been drinking or not?

A. No, sir.

Q. Were they very coherent?

A. Mr. Fletcher was. He was the only one that said anything to me.

page 91 } Q. Did Mr. Martin say anything at all to you?

A. I don't recall anything.

Q. It is my understanding from your testimony that you did have a gun drawn on Mr. Martin and Mr. Fletcher, and they were in custody?

A. Yes, sir.

Q. And, you were awaiting the arrival of Mr. Mason and Officer Jenkins or whoever?

A. I was waiting for Mr. Mason, yes, sir.

Q. At the time of the identification by Mr. Mason, would you describe to the jury and to the Court the position where Mr. Martin and Mr. Fletcher were?

A. When Officer Jenkins arrived on the scene with the victim, they stood in front of the car—in front of the headlights.

Q. You were in the car?

A. No, sir.

I was standing outside the car.

Q. You were standing outside the car?

A. Yes, sir.

Q. In reference to the car, where were they standing and where were you standing?

A. I was standing to my left front.

page 92 } Q. You were parallel to Mr. Fletcher and Mr. Martin?

Arthur F. Marcey

A. I was standing approximately by the left front fender.
Q. They were standing in front of the car?
A. No, sir.
They were off on my right, just standing directly in front of the car.
Q. Okay.
Then, what happened?
A. Officer Jenkins brought Mr. Mason up to the scene.
Q. Did Mr. Mason see you?
A. I don't recall.
Q. How far away were you from Mr. Martin?
A. Where was I standing, you mean?
Q. Right.
A. Mr. Martin was standing in front of me.
Q. He was standing in front of you?
A. Just off to my right.
Q. Did Mr. Mason see you?
A. I don't know whether he did or not.
Q. But, in your testimony you say you were two feet away from Mr. Martin?
A. There was two, three or four feet between
page 93 } us—maybe five or six.
Q. Just answer the question, please.

The Court: Your testimony is that they were some feet away. Is that correct?
The Witness: No, sir.
The Court: It isn't?
The Witness: Would you please repeat the question?

By Mr. Andrews:
Q. It is my understanding that you were two feet away from Mr. Martin at the time when Mr. Mason *identifed* Mr. Martin?
A. Yes, sir.
He was standing right next to him.
Q. How many other police officers were standing around Mr. Martin?
A. Just myself.
Q. Where were the other officers?
A. They were standing with Mr. Fletcher in front of my car.

Arthur F. Marcey

Q. How far away from Mr. Fletcher was Mr. Martin?
A. Fifty or sixty feet.
Q. What?
A. Are you asking me how far was Mr. Fletcher from Mr. Martin?
page 94 } Q. Right.
A. Ten feet, I'd say.
Q. Ten feet?
A. Yes, sir.
Q. Now, Officer, this is an important question.
Now, when Officer Jenkins had his beam shining down toward you and Mr. Martin and Mr. Fletcher, were you all together?
A. When he had his what?
Q. His light beams?
A. His light beams?
Q. Let me reconstruct the scene briefly.
It is my understanding from the testimony elicited so far—

The Court: (Interposing) Don't argue the case. He is not going to answer any questions as to whether anybody else can estimate the distance. You ask him what he knows.
Mr. Andrews: Yes, Your Honor.

By Mr. Andrews:
Q. Now, Officer, to the best of your knowledge, when Mr. Mason identified the two suspects, he was sitting in Officer Jenkins' car. Is this correct?
A. Yes, sir.
page 95 } Q. It is my understanding the identification took place by allowing the suspects to line up, sixty feet away, in front of the headbeams of the car. Is that correct?
A. Yes, sir.
Q. In this identification procedure, were Mr. Fletcher and Mr. Martin together in the light beam?
A. No.
They went out one at a time.
Q. Who went first?
A. I believe it was Mr. Martin.
Q. How did he get in front of the beam?
A. He walked over to the car. We asked him to step away from the very front of the car and go over to the side.

Arthur F. Marcey

Q. Was this to get into the light of the beams?
A. Yes, sir.
Q. Then, how long was he front of the beams?
A. A few seconds, I would say.
Q. The, what happened?
A. Officer Jenkins said, "There are the two suspects."
Q. Wait a minute, Officer. We just have one man in front of the light beam.
I now draw your attention to who went first. You said it was Mr. Martin, did you not?
page 96 } A. I believe it was Mr. Martin.
Q. Mr. Martin went first?
A. I believe so.
Q. He was there a few seconds in front of the beams?
A. Yes.
Q. Then, what happened?
A. Then, Mr. Fletcher went in front of the light beams. I don't really recall whether it was Mr. Fletcher who went first or whether it was Mr. Martin who went first.
Q. They were put in front of the light beams—one at a time. Isn't that correct?
A. Yes, sir.
Q. And, just for a few seconds. Isn't that correct?
A. Yes, sir.
It was not very long.
Q. After this was done, was there a conversation between you and Officer Jenkins?
A. Officer Jenkins said, "There are the two suspects."
Q. On what authority did he say this?
A. The man identified them.

The Court: Now, I don't know whether the witness knows this. I don't know whether he knows this.
Please proceed.

page 97 } By Mr. Andrews:
Q. Did Mr. Mason come forth and tell you that they were the two men?
A. No, sir.
Q. Did Officer Jenkins relate to you, "There are the two men"?
A. Yes, sir.
Q. What did you do with the two men thereafter?

A. They were first searched.
Q. Then, what happened?
A. Then, they were taken to the station.
Q. What happened then?
A. Officer Jenkins read them a statement advising them of their rights.
Q. This was after they were identified?
A. Yes, sir.

Mr. Andrews: I have no further questions.
Mr. Guthrie: I have no further questions.
The Court: Call your next witness.
Mr. Guthrie: I call Officer Haring.

page 98 } Whereupon, GILBERT A. HARING, was called as a witness on behalf of the Commonwealth, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Guthrie:
Q. Will you please state your full name?
A. Gilbert A. Haring.
Q. And, what is your occupation?
A. I am a police officer for the Arlington County Police Department.
Q. I call your attention to the date of 28th of January, 1968.
Were you on duty that day?
A. I was.
Q. On that day, were you on duty in the Arlington County Police Department office or building?
A. Yes, sir, I was.
Q. While there, did you have occasion to see Francis Fletcher?
A. I did.
Q. As you observed Francis Fletcher, did you
page 99 } see or notice anything unusual about his appearance?
A. He appeared to have been in a fight.
Q. Why did you make that determination?

Gilbert A. Haring

Mr. Andrews: Excuse me, Officer. Where did you say you were located?

The Witness: At the police station—the Arlington County Police Station.

The Court: Please proceed, Mr. Guthrie.

By Mr. Guthrie:

Q. Now, Officer, on what did you base this opinion?

A. From examining his hands and clothing.

Q. What did his hands look like?

A. They were scratched, and there was blood on his hands, and there was blood on his clothing. I located a key secreted behind the ring on his left—correction, I mean right hand. It was a handcuff key. In finding that key, I examined his hand, and there was a cut where his ring pressed into his finger, and there was blood between the fingers.

Mr. Guthrie: I have no further questions.

CROSS EXAMINATION

By Mr. Andrews:

Q. Officer, you just testified to the fact that you saw blood on Francis Fletcher's hand. Is that cor-
page 100 } rect?

A. Yes, sir.

Q. And, you observed this in the station house?

A. Yes, sir.

In the station house.

Q. What time was this?

A. This was 3:00 a.m. to 3:30 a.m., approximately.

Q. You were on duty in the police station at this time?

A. No, sir.

I was on the road that night, but I had to come into the police station on a different matter.

Q. I see. I understand.

Now, Officer, what prompted you to examine Francis Fletcher?

A. I knew him.

Q. You knew him before?

A. Yes, sir.

Q. You knew who Francis Fletcher was?

A. Yes, sir.

Gilbert A. Haring

Q. Did you secure authority from any individual or any superior to examine Francis Fletcher?

A. No, sir.

Q. As a matter of fact, you took it on your own to examine Francis Fletcher?

page 101 } A. Yes.

I took it on my own.

Q. It is my understanding from your testimony, there was a ring and a key involved?

A. That is correct.

Q. Which hand was involved?

A. His right hand.

Q. And, there was blood on the right hand?

A. There was blood between the fingers on his right hand, yes, sir.

Q. Did he have a cut on his right hand?

A. Yes.

He had a cut where his ring pressed into the finger. It pressed right on the ring finger.

Q. Did he give you any explanation why he was bleeding?

A. No.

Q. He was bleeding then?

A. He wasn't bleeding when I saw him. There was a cut on his right hand which could have been bleeding. However, at that time it wasn't bleeding then. It was just dried blood.

Q. It was just dried blood?

A. Yes.

page 102 } Q. And, this was around 3:30 a.m.?

A. Yes.

Q. Did he give you an explanation?

A. No, sir.

Q. Did you ask him for an explanation?

A. He was talking on the telephone when I observed his hand and the ring, and I walked over and found the key. The other officers were talking to him.

Q. What did you do then?

A. I took the key away from him. I took the handcuff key from him.

Q. Where is the key now?

A. I think I have it at home.

Q. You took the key home with you?

A. Yes.

Q. Did you make a report of this?

Robert Mason

A. We had the key photographed and put it on the bulletin board for the men to beware of such a thing.

Q. Did you make a report on how you found it, and under what conditions you found it?

A. No, I didn't?

Q. It is my understanding you didn't ask Mr. Fletcher why he was bleeding?

page 103 } A. The other officers were talking to him. I don't believe I talked to him at all. He was on the telephone when I found this key, and I was to his back, and he held his hand up, and I just saw the key protruding from underneath the ring. I grabbed his hand and turned it over, and I took the key out, and I turned his hand over and looked at the other part of the hand to make sure there wasn't something else in there.

Q. I understand.

But, you didn't have an opportunity to ask Francis Fletcher how he got cut up?

A. I didn't ask him. I didn't do it. I am sure it was asked, but I didn't do it.

Mr. Andrews: I have no further questions.

Mr. Guthrie: I have no further questions of this witness.

The Court: The witness is excused.

Call your next witness.

Mr. Guthrie: At this time, I would like to recall Mr. Mason for one questions, and that will complete the Commonwealth's case.

page 104 } Whereupon, ROBERT MASON, was recalled as a witness, having been previously sworn, was further examined and testified as follows:

DIRECT EXAMINATION

By Mr. Guthrie:

Q. Now, Mr. Mason, the events about which you previously testified to concerning an assault on you, could you tell the Court and jury what County did these events occur in?

A. Arlington County.

Mr. Guthrie: I have no further questions.

Mr. Andrews: Am I limited to that?

Robert Mason

The Court: If you want to ask him anything, go ahead. But, I don't want you to rehash something that has already been covered. If you have forgotten something, go ahead.

Mr. Andrews: This is just re-emphasizing.

The Court: You can do that when you argue the case. If you forgot anything and you think it is material, proceed.

Mr. Andrews: Please bear with me a moment, Your Honor.

CROSS EXAMINATION

page 105 } By Mr. Andrews:

Q. Prior to the 28th of January, you had never seen Mr. Martin before, have you?

A. No, sir.

I haven't.

Q. And, you haven't seen him since, have you?

A. I don't believe I have.

No, sir.

Q. When you identified Mr. Martin being one of the assailants in the beam of light—that is in the headlights of Officer Jenkins' car, how many seconds did you have an opportunity to observe him?

A. I'd say ten, fifteen seconds—something like that.

Q. Ten or fifteen seconds?

A. Right.

Q. How many beers did you say you had that night?

A. I didn't say, sir.

Q. Well, how many beers did you have?

A. Four or five.

Q. Then, you fell asleep in the car and—

A. (Interposing) It was draft beer.

Q. (Continuing)—then you were awakened?

A. That is correct.

page 106 } Q. You were awakened by somebody jerking you out of the car?

A. That is right.

Q. What did you do after being jerked out of the car?

A. I was immediately hit in the face.

Q. You were immediately hit in the face?

A. Yes, sir.

Q. It is my understanding on your previous testimony, you screamed. and then you saw someone else as soon as you saw Mr. Fletcher?

Robert Mason

In other words, you observed two men. Is this correct?
A. That is correct.
Q. You testified that Francis Fletcher immediately hit you in the face upon awakening you out of a sleep in an automobile at 2:30 in the morning. Is this correct?
A. Yes, sir.
Q. As soon as he hit you in the face, what did you do?

The Court: Haven't you been over this before?
Mr. Andrews: No, Your Honor, I have not.
I haven't been over this before because of the positive identification which the witness replied in the negative at this time with the officers.
page 107 } The Court: All right.
Go ahead.

By Mr. Andrews:
Q. As soon as Mr. Fletcher hit you in the face upon jerking you out of the car, what did you do at that instant?
A. Well, he hit me four or five times before I knew what was happening.
Q. He hit you four or five times?
Is that exactly right?

The Court: He doesn't know whether that is exactly right or not. Let's leave that for arguing the case.
Please proceed.
Mr. Andrews: Yes, Your Honor.

By Mr. Andrews:
Q. When you first came to your sense, what did you observe after you were hit four or five times?
A. That is when I observed there were two men standing there.
Q. At this time, were you on the ground?
A. No.
I was standing up.
Q. While you were standing up, did Fletcher keep hitting you?
page 108 } A. He hit me four or five more times after that.
Yes, sir.
Q. What happened then?

Robert Mason

A. He asked me for my wallet.

Q. You, of course, refused to give it to him?

A. I did.

Q. Did the other man ever say anything to you directly? Did you ever hear him talk?

A. No, sir.

He never spoke a word.

Q. He never spoke to you?

A. That is correct.

Q. He never spoke a word, and he never asked you for any money?

A. No, sir.

He didn't.

Q. Francis Fletcher did all the talking. Is this correct?

A. Yes, sir.

Q. Mr. Mason, do you wear glasses?

A. No, sir.

Q. You weren't having any trouble seeing people?

In other words, you don't need glasses to see.

page 109 } Is that right?

A. That is right.

Q. Directing your attention back to the scene *were* you were pulled out of the car, who was the person who pulled you out of the car?

Can you describe the clothing he had on?

A. I gave a description that he either had a jacket or a sweater on. He had on dark clothes.

Q. Who did you give this description to?

What is the description you are going to recite?

Who did you give it to?

A. I gave this description in the Fletcher trial, sir.

Q. Excuse me.

What officer, I am talking about?

What person did you give this description to?

A. Officer Jenkins.

Q. You testified that he had on either a coat or a sweater?

A. Either a sport coat or a sweater, but the clothing was dark.

Q. Can you describe the other assailant?

A. Yes, sir.

Q. What did you say he had on?

page 110 } A. He also had either a dark sweater on or a jacket—a lightweight jacket.

Robert Mason

Q. Was it a dark leather jacket?
A. Right.
Q. Were there any scars?
Did you identify these men by any scars?
A. Let me see.
I don't believe so.
Q. Did you identify him, the second assailant next to Francis Fletcher, by pointing out any characteristics such as scars?
A. No, I didn't
Q. Tell the Court and the jury how you described assailant number two?
A. How I described him?
Q. Yes.
How you described him to Officer Jenkins.
A. I described him as being five foot nine, about one hundred ninety pounds and wearing a dark coat.
Q. How many pounds did you say?
A. One hundred ninety.
Q. One hundred ninety?
A. Uh huh.
page 111 } Q. Directing your attention back to the time before Officer Jenkins and you arrived at the identification center, had any conversation passed between you and Officer Jenkins?
A. You mean the time between the time when we went to the scene?
Q. Right.
A. No, sir.
Q. You didn't say a word?
A. Oh, well, I don't think it was anything relevant.
Q. You talked about the case?
A. No, sir.
Q. You realize I have in mind the time from the time he broadcasted the description of the assailant to the time you went to actually see Mr. Martin and Mr. Fletcher?
A. Do you mean other than when he went over to that one place on Glebe Road?
Yes, we went there, yes, sir.
Q. Then, you went to the scene. Is that correct?
A. Yes, sir.
Q. Did you have an opportunity to discuss the case with Officer Jenkins?

A. Not at that time.

I was just—of course, the radio was on and
page 112 } they were talking back and forth over that.

Q. But, you didn't discuss the case prior to when you saw Mr. Martin and Mr. Fletcher?

A. No, sir.

Q. Now, Mr. Mason, I am going to ask you again: Can you positively identify Mr. Martin today?

The Court: You have been over that. He said he couldn't.

Mr. Andrews: He said no, Your Honor. He said no.

The Court: If there is any difference between "he couldn't" and "no" you got it right.

Please proceed.

By Mr. Andrews:

Q. Were the two assailants clean shaven?

A. They were clean, yes.

Q. Were they clean shaven?

A. Yes, sir.

Q. Did either one have a beard?

A. No.

They didn't have a beard.

Q. Then, they were clean shaven?

A. Yes.

They were clean shaven.

page 113 } Mr. Andrews: I have no further questions.

Mr. Guthrie: I have no questions.

The Court: The witness is excused.

Mr. Mason, you are excused as soon as you attend to that other business. The next time that you do that, I am going to hold you in contempt of Court. Do you understand that?

The Witness: Yes, sir.

The Court: The witness is excused.

Mr. Guthrie: Your Honor, may we approach the bench?

The Court: Certainly.

Mr. Guthrie: Your Honor, counsel and I have agreed to stipulate Mr. Mason's blood type was typed on March 2nd, and it was entered as type O. The same type we have already stipulated to was on the jacket.

The Court: Mr. Andrews, do you agree to that?

Mr. Andrews: I would say there is no objection to this about the coat, but I think that any connection with—

Robert Mason

The Court: (Interposing) You will admit this, but you claim it is irrelevant?

Mr. Andrews: That is right, Your Honor.

It is highly prejudicial.

The Court: All right.

page 114 } Is there any other evidence?

Mr. Guthrie: I have no other evidence, Your Honor.

The Court: The jury is excused, and the Court is recessed until tomorrow morning at 10:00 o'clock.

The jury will be governed by the same instructions as given to you before.

(Whereupon, the jury retired.)

The Court: Now, then, gentlemen, the two questions that have not yet been ruled upon will take up tomorrow morning.

There is the question of the use of the dog, and this last stipulation, whether it is going to be admitted or not.

Court is recessed until tomorrow morning at 10:00 o'clock.

The *prisioner* will be remanded to the custody of the sheriff.

Mr. Andrews: No, Your Honor.

This man is on personal recognizance.

The Court: All right.

He will be released upon the same condition he heretofore has been released.

Court is recessed until 10:00 o'clock tomorrow

page 115 } morning.

(Whereupon, at 5:00 p.m., the trial was recessed, to reconvene at 10:00 a.m., Wednesday, May 8, 1968.)

* * * * *

Wednesday, May 8, 1968

The trial commenced at 10:00 o'clock a.m.

Before:

Honorable Walter T. McCarthy, Judge and a jury.

Appearances:

R. O. Graham Guthrie, Assistant Commonwealth Attorney.

Leo Andrews, Esq., 1400 North Uhle Street, Arlington, Virginia, counsel for the defendant.

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page 116 }

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page 118 }

PROCEEDINGS

The Court: We will continue with the case of Commonwealth vs. David Martin.

The objection to the introduction of the stipulation in regard to blood was before the Court. Does anybody have anything more to say about it?

Mr. Andrews: No, Your Honor—just to emphasize the fact I think it is unreliable evidence at this time. It has been brought to my attention Type O blood is very prevalent among humans and, also, I would object to the fact that—

The Court: Off the record.

(Discussion off of the record.)

The Court: On the record.

Mr. Andrews: There are three matters before the Court at this particular moment. It is the testimony involving the ring, the dogs and the blood when we dismissed yesterday.

I object, generally, on the same grounds—all three. They are unreliable. No foundation has been laid and no connecting factor. As far as I am concerned, there are gaps as far as the admittance of blood identification.

Type O blood, I understand, is prevalent among
page 119 } humans. We haven't had an analysis run on
either Fletcher or the defendant Martin in this case. I believe the Commonwealth has run an analysis on the victim's blood. I believe Mr. Guthrie did say it was Type O. I stipulated that the analysis was Type O to release the FBI man—no point in having him be present all day, but I

do object to the admittance of the testimony that it be Type O—

The Court: (Interposing) Has the Commonwealth concluded its case?

Mr. Guthrie: Yes, sir, except for argument on this.

The Court: Is there any evidence as to what type blood is on the sleeve?

Mr. Guthrie: Yes, sir.

I believe we stipulated to that—Type O.

The Court: On the sleeve—and the blood of who, now?

Mr. Andrews: Mason. That is not enough to be allowed in evidence in this case, because a proper foundation hasn't been laid. It is speculative in that so many people have O blood types. The fact a blood test wasn't run on Fletcher or defendant Martin, I submit it is too speculative. It is open to conjecture on the part of the jury.

page 120 } The same goes for the dog testimony, Your Honor. I think it is not enough to allow this technical testimony to be considered by the jury, because it is too speculative. The jury surmises many different things from that previous testimony about the dog.

I move at this time that that also be stricken.

On other point as far as the identification of the ring and the key and the blood on Fletcher's hand as evidenced by the testimony of Officer Haring as viewed in the Police Department. I see no proper foundation laid to admit that testimony as it is irrelevant and no proper foundation to connect that particular scene or that particular evidence to the guilt or innocence of the defendant Martin as formulated and charged in the indictment.

I ask, at this time, that that testimony be stricken.

Mr. Guthrie: Your Honor, as it stated to the Court yesterday, it is the Commonwealth's contention that Martin's case rises or falls with Fletcher's. If Martin's alibi is good, then Fletcher's is and vice versa. If one is bad, the other is bad. Therefore, proof of Fletcher's guilt in this case is proof of Martin's guilt.

page 121 } The proof of the blood on Fletcher's coat coupled with the proof that the victim's blood is the same type found on the cot coupled with the testimony of the victim, uncontradicted, that he was assaulted in such a way that the coat was rubbed across his face, coupled with the testimony of the officer that his face was bloody when they came upon him. It all tends definitely to indicate that the blood on that sleeve is the victim's blood,

and the fact that this blood is the same type in both areas is corroborative of that indication from the testimony.

Therefore, I think it is very relevant.

As far as tracking by the dogs, I would cite to the Court 29 A.M. Jur. 2nd Sec. 378 Evidence. A survey of the cases, however, reveal that most Courts in which the question of admissibility of evidence by trailing by bloodhounds has been predicated on the position that a proper foundation being laid—

The Court: (interposing) He is just talking about irrelevancy.

Mr. Andrews: I did object about the proper foundation. They tried to tie it into a pack of cigarettes.

The Court: That isn't what he is talking about now. He is talking about whether this is competent evidence to produce in any case—the evidence that a dog tracked somebody.

page 122 } Mr. Guthrie: He did object to the foundation which was laid. I submit that the proper foundation was laid.

The Court: If that is what he is talking about, that part of it is overruled.

Mr. Guthrie: As far as the relevancy of that testimony, evidenced by the diagram, indicating the trail the dog took, this line leads South on 8th Street, which was testified to as the direction in which the assailants had fled. Therefore, the dog's tracking at that point was corroborated by the witness' testimony. Furthermore, the dog's track, then, took a turn through the apartment houses there and led in the general direction toward the spot where the defendant and Mr. Fletcher were later apprehended.

I think this is very relevant evidence of the direction of flight leading directly to where they were apprehended. It is, therefore, indicative that they were the ones, in fact, fleeing in that direction. I see no possibility it is not relevant.

The Court: You haven't answered about the ring.

Mr. Guthrie: I don't understand his objection to the ring. The fact that it was pushed back on the man's finger indicating a fight, I think that shows the relevancy. The testimony concerning the handcuff key, I believe, it has little relevancy.

page 123 } I would not object to that being stricken. As to the fact the ring was pushed on Fletcher's finger and had skinned his finger. I think it is for the jury to determine whether it was by hitting a door or whatever, but the only evidence is it was the result of a fight, substantiated by other's testimony in the case, and, also, by blood

on his hand, the same hand and the right sleeve where his ring was. I think that shows the relevancy of that.

The Court: Anything more?

Mr. Andrews: No foundation has been laid as far as his ring situated backwards in order to fight. This is surmised by the prosecution and speculation. I think the mere observance of the ring in the station house is not, in itself, enough to allow this point to go to the jury.

The Court: The objection to the use of the blood sampling is sustained. I have got considerable doubt about that and I don't see how the—really be of any material advantage to the Commonwealth's case to produce it in this way. I can see how it could be quite dangerous. The objection to the testimony in regard to the dog is overruled.

The defendant testified the direction in which his assailant left—the dog, it is corrobative of that testimony. Just in passing, the failure of the dog might well be to the advantage of the defendant. I say, in passing instead of
page 124 } hurt, if you will. That doesn't keep you from objecting to it.

The objection to the testimony in regard to the ring is overruled. It seems to me it is relevant to the issues in this case, so the blood testimony will be disallowed.

The motion to strike out the testimony in regard to the dog and the ring is disallowed.

Mr. Andrews: Would Your Honor note my exception?

The Court: Does the defendant propose to take the stand. Do you have any witnesses?

Mr. Andrews: I would like to make a motion to strike the Commonwealth's evidence at this time.

Your Honor, at this time, the defendant wishes to request the Court to strike the evidence of the Commonwealth on three grounds. First of all, I would like to note the first ground is the insufficient identification. It is elementary that the defendant has to be placed at the scene of the crime where there is no connecting factor to the corpus delicti.

We submit in this case when you take the testimony of the defendant Mason, when he stated in open Court
page 125 } that he could not possibly identify the defendant in this case, David Martin, as to whether or not he was the assailant on the night of January 28th and compare it with the testimony by the four officers that no positive identification of the defendant in this case is made, we submit, Your Honor, that the defense—that the prosecution not rise above the testimony of the star witness; namely,

Robert Mason in this case and go forth and produce this connecting factor, I just spoke of to connect the defendant to the scene of the crime.

We don't argue whether or not the evidence is sufficient to ascertain whether or not he was assaulted. We do say there is a lack of sufficiency of evidence to establish the fact whether or not the defendant was at the scene of the alleged crime at the time of the assault. In support thereof, I would like to cite the John's case 208 Virginia 370 and Terry vs. Commonwealth 174 Virginia 507 and cases there cited.

The second ground is that the defendant was deprived of the Constitutional right to the assistance of counsel, the pre-trial line-up. The Wade and Gilbert cases hold that a suspect has a constitutional right—be afforded the assistance of counsel at a pre-trial arrangment.

Mr. Guthrie: I object to that. It has already
page 126 } been ruled on.

The Court: He is making a motion to strike.

Mr. Andrews: We submit confrontation at the pre-trial line-up at the time the suspect was held in custody in front of the automobile lights was a confrontation in which counsel should have been present. We submit that if you allow this case to go to the jury, that the trial here today is a mere formality—that the actual trial took place on January 28th at 3:00 o'clock in the morning when the accused confronted the victim and was identified at that particular instance, and, in support thereof, I cite the Wade case 388 U.S. 218 and the Gilbert case 388 U. S. 263.

Your Honor, the third ground of the motion to strike the Commonwealth's evidence is that the defendant was deprived of due process of law. We submit that the rule of Stoval is applicable here. As I read Stoval, that without justifiable circumstances, a one-man showup, which I submit in essence this was, even though the suspect Fletcher was also present, is too unnecessarily suggestive to satisfy due process requirements.

We submit that no justifiable circumstances existed in this case. We also further submit that the circum-
page 127 } stances surrounding the defendant's pre-trial confrontation with Mason and induced an identification, which was not the product of the witness' objective judgment and that the Commonwealth's capitalization on it resulted in a deprivation of due process.

We submit that the most critical point in the proceedings

against the defendant is the pre-trial identification, that the defendant was deprived of the most elementary safeguards of law. In their understandable zeal to secure identification, we submit that the police simply destroyed the possibility of an objective impartial judgment by the complaining witness Mason as to whether the defendant, in fact, was the man who had attacked him.

In support thereof, I cite Stoval vs. Dino 388 U.S. 293 and Palmer vs. Peyton 359 Federal 2nd 19.

The Court: What was the first ground you stated?

Mr. Andrews: The first ground was insufficient positive identification by the victim.

The Court: And, lack of counsel at confrontation?

Mr. Andrews: And, deprivation of due process.

The Court: The third ground is violation of his rights, fourteenth amendment.

Mr. Andrews: Under Stoval, Your Honor.

page 128 } The Court: The motion is denied.

The question of identification, the lack of evidence to prove identification appears to me to be without merit.

The second ground, the application of the Wade case, it seems to me is not applicable to this case because the fact that it was in hot pursuit and if, as indicated by the case decided in the District of Columbia, the Wade case, is not applicable and the language of the Wade case indicates that confrontation is intended to apply to a different type of case and this kind of a confrontation in the circumstances of this case are such as to also take it out of the area involving this last case that you are concerned with, the fourteenth amendment.

The circumstances here are such as to eliminate any dangers pointed out by that case, particularly in view of the refusal of the prosecuting witness to accept the first suggestion offered to him, if that is what it amounted to, by the police when the first two people were confronted.

The motion is denied.

Mr. Andrews: Would Your Honor note my exception to your ruling? At this time, I would like to state to the Court that the defense does not wish to proceed put-

page 129 } ting any defense on.

The Court: He is here. You have talked to him about this. If he does not want to testify, he doesn't have to, of course.

Mr. Andrews: I have apprised him of his rights and I ask the Court and ask the defendant, for the record, to notify him of his right to testify and of his election.

The Court: You know you have a right to testify and you know you don't have to and that it cannot be used against you. You have decided you don't want to testify.

Defendant Martin: Yes, Your Honor.

The Court: On advice of counsel?

Defendant Martin: Yes.

The Court: Do you have any other evidence?

Mr. Andrews: No, we don't at this time. I do renew my motion to strike based on the previous grounds ruled on.

The Court: The motion is denied and the Court will receive instructions by both parties.

Mr. Andrews: Would Your Honor note my exception to the ruling.

The Court: Off the record.

(Discussion off the record.)

page 130 } The Court: On the record.

* * * * *

The foregoing transcript, consisting of two bound volumes, containing an aggregate of 130 pages, was tendered to and signed by me this 4th day of October, 1968, in the place and stead of the Honorable Walter T. McCarthey, who is absent from the court this day by reason of illness.

Charles S. Russell
Judge

* * * * *

A Copy—Teste:

H. G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas*	1
Judge's Certificate	2
Record	2
Indictment	2
Warrant—Robert Mason	3
Verdict of Jury—May 8, 1968	4
Order—May 14, 1968	4
Affidavit of Poverty	5
Judgment—August 8, 1968	6
Notice of Appeal and Assignments of Error	7, 8
Proceedings	9, 25, 70
Witnesses:	
Robert Mason	15, 65
James R. Jenkins	32
John N. Kinney	47
Arthur F. Marcey	53
Gilbert A. Haring	62
Judge's Certificate	78