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Clerk, Supreme Court of Appeals

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Record No. 7171

In the
Supreme Court of Appeals of Virginia
at Richmond

JOSEPH PLUMMER

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT OF THE CITY OF NORFOLK

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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7171

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 10th day of March, 1969.

JOSEPH PLUMMER, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Corporation Court of the City of Norfolk
William Moultrie Guerry, Judge

Upon the petition of Joseph Plummer a writ of error and *supersedeas* is awarded him to a judgment rendered by the Corporation Court of the City of Norfolk on the 19th day of September, 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.

CERTIFICATE

This is to certify that I, W. Moultrie Guerry, Judge of the Corporation Court of the City of Norfolk have investigated the matter of the ability of Joseph Plummer to pay or secure to be paid the cost of printing the records in the case of *Joseph Plummer* v. *Commonwealth of Virginia,* Record No. 7171, now pending before the Supreme Court of Appeals of Virginia and I am of the opinion that Joseph Plummer, the plaintiff-in-error, is unable to pay or to secure to be paid such costs.

Signed this 27 day of Feb., 1970.

WMG, Judge

Recd 3-3-70 HGT

* * * * *

AFFIDAVIT

* * * * *

This day personally appeared before me, Melvin Jay Radin, a Notary Public in and for the City and State aforesaid, Joseph Plummer, who, having first been duly sworn, deposes and says as follows:

That I, Joseph Plummer, hereby certify the following:

1. That on the 19th day of September, 1968, I was convicted of a felony in the Corporation Court of the City of Norfolk, Virginia.
2. That a writ of error and *supersedeas* was awarded me to the said judgment rendered against me by the Corporation Court of the City of Norfolk, Virginia, on the 19th day of September, 1969.
3. That I am unable to pay or to secure to be paid the cost of printing the records in this case.

Joseph Plummer

Subscribed and sworn to before me this 26th day of February, 1970.

Meli Jay Radin
Notary Public

My commission expires: 1/17/71

* * * * *

RECORD

* * * * *

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* * * * *

In the Corporation Court of the City of Norfolk,

The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk, and now attending the said Court, at its February term, 1968, upon their oaths, present that Joseph Plummer to-wit on the 14th day of December in the year 1967, in the said City of Norfolk did unlawfully and feloniously have in his possession a certain tool, to-wit, an iron crowbar, known as a burglarious tool, with intent feloniously therewith, to commit burglary, against the peace and dignity of the Commonwealth of Virginia.

* * * * *

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* * * * *

MOTION TO QUASH AND DISMISS

Now Comes the defendant, Joseph Plummer, who moves this Honorable Court to enter an order dismissing the indictment now pending against him charging your defendant with the unlawful possession of burglarious tools, a violation of the provisions of section 18.1-87 of the Code of Virginia, 1950, as amended, and in support of this motion the defendant respectfully represents as follows:

1. That on March 26, 1968 your defendant was convicted by this Honorable Court of an attempt to commit Statutory Burglary.
2. That the present indictment relates only to that possession of burglarious tools which was incident to the act for which your defendant was convicted on March 26, 1968.
3. That your defendant has been convicted of an attempt to commit Statutory Burglary and to now permit the Commonwealth to prosecute your defendant for possessing a burglarious tool in his attempt to commit Statutory Burglary

would violate the safeguards against double jeopardy as contained in the Constitution of the United States and in the Constitution of Virginia.

4. That your defendant's alleged attempt to commit Statutory Burglary included his possession of the burglarious tool and was in effect the same act. Therefore, page 12 } to permit a prosecution of your defendant on the present indictment would be a violation of the provisions contained in section 19.1-259 of the Code of Virginia, 1950, as amended.

In Consideration Whereof, your defendant moves this Honorable Court to quash and dismiss the indictment now pending against him.

Joseph Plummer

State of Virginia
City of Norfolk, to-wit:

I, Meli Jay Radin, a Notary Public in and for the City and State aforesaid, do hereby certify that Joseph Plummer, whose name is signed to the foregoing, has acknowledged the same before me in my City and State aforesaid, to be the truth to the best of his understanding.

Given under my hand this 18th day of September, 1968.

My commission expires 1/17/71

Meli Jay Radin

Melvin J. Radin
309 Rotunda Building
Norfolk, Virginia 23510

I hereby certify that a true copy of the foregoing was delivered to Mr. Charles Jenkins, Assistant Commonwealth Attorney, on this 18th day of September, 1968.

Meli J. Radin

Filed 9-18-68

Katherine V. Respess, Clerk
By: Thomas E. Baldwin, D. C.

* * * * *

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* * * * *

In the Corporation Court of the City of Norfolk, on Thursday, the 19th day of September, 1968.

Joseph Plummer, who stands indicted for Possession of Burglarious Tool, was this day again led to the bar in the custody of the Jailor of this Court and came as well the Attorney for the Commonwealth in the person of Charles E. Jenkins, II and Melvin J. Radin, attorney for the defendant, pursuant to adjournment order of this Court entered on September 18, 1968. And the Court having heard the evidence introduced on behalf of the Commonwealth, the defendant, by counsel, moved the Court to strike the Commonwealth's evidence, which motion having been fully heard and determined by the Court is overruled, to which action of the Court in overruling said motion, the defendant, by counsel, duly excepted, and the Court doth overrule the motion heretofore made by the defendant to Quash and Dismiss the said indictment, to all of which action of the Court in overruling said motion, the defendant, by counsel, duly excepted. And the Court having heard all the evidence, the defendant, by counsel, renewed his motion to strike the Commonwealth's evidence, which motion having been fully heard and determined by the Court is overruled, to which action of the Court in overruling said motion, the defendant, by counsel, duly excepted. And the Court, having heard all the evidence and argument of counsel, doth find the defendant guilty of Possession of Burglarious Tool as charged in the indictment and doth fix his punishment at confinement in the Penitentiary for the term of Two Years. Whereupon it being demanded of him if anything for himself he had or knew to say why the Court should not here and now proceed to pronounce judgment against him according to law and nothing being offered or alleged in delay of judgment it is accordingly the judgment of this Court that

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the defendant be and he is hereby sentenced to confinement in the Penitentiary of this Commonwealth for the term of Two Years, subject to a credit of no days spent in jail awaiting trial and that he be required to pay the costs of his prosecution, including $100.00 attorney's fee, which said amount is hereby allowed Melvin J. Radin, his court appointed attorney. And the Court doth further order that the Two Year sentence imposed on this indictment shall run concurrent with the Four Year sentence imposed in this Court on the 26th day of March, 1968. Thereupon the defendant, by counsel, moved the Court to set aside its judgment and grant the defendant a new trial on the grounds that the said judgment is contrary to the law and the evidence, which motion having been fully heard and determined by the Court is overruled, to

which action of the Court in overruling said motion, the defendant, by counsel, duly excepted. Thereupon the defendant, by counsel, moved the Court for a Sixty-Day stay of execution to the aforesaid judgment in order to apply to the Supreme Court of Appeals of Virginia for a writ of error, which motion, having been fully heard and determined by the Court, is sustained and the Court doth order that the execution of the aforesaid judgment be and the same is hereby suspended for the period of Sixty-Days or until the Supreme Court of Appeals shall deny said writ of error if prior thereto.

And the prisoner was remanded to jail.

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ASSIGNMENTS OF ERROR

In accordance with Rule 5:1, Section 4, the defendant for his Assignments of Error states as follows:

1. The trial court erred in entering the final judgment order of conviction dated September 19, 1968.
2. The trail court erred in failing to set aside the final judgment order of conviction and to grant a new trial.
3. The trial court erred in failing to sustain the defendant's motion to strike the Commonwealth's evidence after the Commonwealth had rested.
4. The trial court erred in permitting Officer D. H. Fowler to testify as to the radio message that came out over the air.
5. The trial court erred in overruling the defendant's Motion to Quash and Dismiss.

Joseph Plummer

By Melvin J. Radin
Of Counsel

* * * * *

Filed 11-15-68

Katherine V. Respess, Clerk
By: G. C. Thomas, D.C.

* * * * *

Joseph Plummer

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above entitled cause in said Court on September 18 and 19, 1968, before the Honorable William Moultrie Guerry, Judge of said Court.

APPEARANCES:

Mr. Charles E. Jenkins, II
Assistant Commonwealth's Attorney

Mr. Melvin Jay Radin
Attorney for the Defendant

* * * * *

page 2 } Defendant arraigned by the Clerk on charge of possession of burglarious tools and plead not guilty.

Clerk: Do you wish to be tried by the Court or by a Jury?
Defendant: By the Judge.

(Defendant sworn by the Clerk.)

By the Court:
Q. What is your name?
A. Joseph Plummer.
Q. How old are you?
A. Thirty-five.
Q. How old?
A. Thirty-five.
Q. Were you able to employ your own attorney in this case?
A. No, sir.
Q. Have you talked to Mr. Radin, the lawyer the Court appointed for you?
A. Yes, sir.
Q. Do you understand that you're entitled to a jury trial if you want one?
A. Yes, sir.
Q. What conclusion did you reach after discussing this case with Mr. Radin?
page 3 } A. What you mean?
Q. What did you decide to do?
A. I decided to be tried by the Judge.
Q. And to plead not guilty?
A. Yes, sir.
Q. Were you influenced by Mr. Radin in doing that?

Joseph Plummer

A. No, sir.
Q. Was this your own decision?
A. Yes, sir.
Q. How many times has Mr. Radin seen you about your case?
A. About three or four times.
Q. When he talked it over with you did he show an understanding of the facts of your case?
A. Yes, sir.
Q. Have you any complaint against Mr. Radin in his representation of you?
A. No, sir.
Q. Is he proceeding satisfactorily to you?
A. Yes, sir.
Q. Do you have any complaint against any police officer that is involved in investigating your case?
A. No, sir, except for the things that they said, I mean in Court.
Q. Things that they said?
page 4 } A. Yes, sir, you know, wasn't true things.
Q. Did they cuss you out?
A. No, sir; no, sir. I don't mean anything like that, I mean just their—
Q. Were you mistreated by the police?
A. No, sir.
Q. Well then, you don't have any complaint against any police officer that is involved in investigating your case?
A. No.
Q. Did Mr. Radin ask you whether or not you had any witnesses?
A. Yes, sir.
Q. And what did you tell him?
A. No.
Q. I ask you now, do you have any witnesses that would be of help to you?
A. Not at this time, no, sir.
Q. Do you understand all of the questions that I have asked you?
A. Yes, sir.
Q. What?
A. Yes, sir.
Q. Is there anything you want to ask me about those questions?
A. No, sir.
page 5 } Q. Now, Mr. Radin, have you had sufficient time

Joseph Plummer

to prepare yourself as attorney to represent this defendant?

A. Yes, sir, Your Honor.

Q. Would a continuance of it enable you to do a better job?

A. No, sir, Your Honor.

Q. Are you prepared to deal with it and try it today?

A. Yes, sir, Your Honor.

Witnesses sworn and excluded on motion of the defense counsel.

The Court: Gentlemen, what is your pleasure as to this motion to quash?

Mr. Radin: Your Honor, the motion is based primarily on the fact that this man has been convicted by this Court, Judge Bullock presiding at the time, of an attempt to commit statutory burglary. At that time the evidence presented against this man was solely circumstantial. One of the pieces of evidence was that he, when the police officer arrived at the scene, he found the defendant crouched over
page 6 } a crowbar, which is the burglarious tool referred to in the present indictment.

The Court: Now just a minute. I don't know whether you want to go into the facts of the other case with me now.

Mr. Radin: Well, just as well summarize them, that's it. I don't think there'd be any dispute as far as that. There's no other way I can argue the double jeopardy provision, Your Honor.

The Court: All right.

Mr. Radin: At this point, Your Honor, I would like to say we're acceptable—my client previously requested a trial by the Court but Judge Bullock said he would disqualify himself. It was not that I had anything against this Court—

The Court: What reason?

Mr. Radin: Because he had heard the previous case and he didn't feel that he could hear this one.

The Court: As I understand your motion—I've read it—it seems to be because he was convicted of an attempt to commit burglary, and a prosecution under the
page 7 } charge of possession of burglarious tools would be double jeopardy?

Mr. Radin: Yes, sir.

The Court: Can a man be convicted of burglary and possession of burglarious tools?

Mr. Radin: No question, yes, sir, Your Honor; and he

could be convicted of attempt and possession but not in this particular case.

The Court: Now let me get that last point straight. You admit that a defendant could be convicted of either burglary or attempted burglary?

Mr. Radin: Yes, sir.

The Court: And possession of burglarious tools growing out of the same incident, and that it would not be double jeopardy?

Mr. Radin: Well now, I eliminate the words growing out of the same incident.

The Court: It would have to be the same case. If he burglarized one place and was convicted of possession of burglarious tools on another date, of course it would be two entirely different offenses.

Mr. Radin: Reason I say growing out of the same incident, if a man had a hacksaw and a chisel in his car and
page 8 } he—say he just had a hacksaw and he used a chisel or crowbar to break in, but the only burglarious tool found was a hacksaw; it might not grow out of the same, it might not be out of the same incident. When I say incident I'm referring to the actual breaking or attempt to break itself, and that is the basis I'm making this motion.

The Court: What makes this case different from the usual?

Mr. Radin: Your Honor, this man was not, the normal possession case of burglarious tools is when the effort to commit the burglary is thwarted by some reason not within the alleged burglar's own person. Perhaps there's an extra guard or extra watchman, he has all of the tools and he's ready and he doesn't commit the burglary; or there's a burglary at some address and some distance away you find a man with burglarious tools and you can't prove that he committed the burglary, but you have burglarious tools. Since the mere possession raises a *prima facie* case under the statute he's prosecuted. But in the instant situation the only
page 9 } evidence presented, indicated that this man was found on the premises of the Norfolk Brass and Copper Works. That's the location of an attempt, that's the place. The building on that address was the scene of the attempted burglary. The only evidence is that he was on that scene crouched over a crowbar owned by Norfolk Brass.

Now I have the transcript from the previous trial here. The possession that he had he didn't use it—I mean, excuse me, he may have used it but the possession and use is something different. I've looked in the books and I found nothing. I find nothing exactly on the point in the burglary statute, but I do find in Black's Law Dictionary under the word "possession" a reference to the possession of liquor, and

the "possession of liquor which is made unlawful is possession under some claim of right, control, or dominion, with knowledge of facts." And then goes on, "taking a drink of intoxicating liquor on invitation of owner thereof does not constitute criminal 'possession'". *Colbaugh* v. *U. S.* happened in Oklahoma when it was still dry. Okla-
page 10 } homa's been wet for five or ten years. This man used a crowbar in a burglary allegedly, circumstantial evidence may prove, and that's it. And there is nothing more, there's no possession, he didn't even possess it, and that's it. It would seem to me they have already convicted him of burglary.

The Court: I'll have to hear the evidence as to whether he possessed the burglarious tools. That's one of the items the Commonwealth is going to have to prove in this case. But to get back to the legal principle involved, as a general principle isn't it possible for a man to be caught inside of a building in possession of a crowbar and a sledge hammer and an axe, and that he be convicted both of burglary and possession? Isn't that possible?

Mr. Radin: I understand there are cases to that point.

The Court: Have you got any cases to tell me he can't be convicted under both under the theory of double jeopardy?

Mr. Radin: No, I do not.

The Court: Have I arrived at the crux of your point?

Mr. Radin: Yes, sir.

page 11 } The Court: You kind of confused me with the facts of this particular case and I'm trying to arrive at the issue as a general principle of law.

Mr. Radin: Excuse me—general principle I think you're correct.

The Court: As a general principle of law he can be convicted both of burglary and possession, can't he?

Mr. Radin: Yes, sir. I'll wait further when the facts come out as to what the possession was. It was just that the previous case the owner of the weapon who, owner of the burglarious tool, he's here today, he could be called as a witness now if the Court would take on evidentiary matter now as to this point. He testified previously in this court.

The Court: In other words you're saying the tool belonged to the victim?

Mr. Radin: Yes, sir.

The Court: Of the burglary?

Mr. Radin: Yes, sir.

The Court: I'm going to take the motion under
page 12 } advisement unless Mr. Jenkins has anything he wants to argue right now, and I'm going to hear

the evidence. I don't see as just a pure principle of law that I can rule on it at this point.

Mr. Radin: Yes, sir, Your Honor.

The Court: Is that satisfactory to you, Mr. Jenkins?

Mr. Jenkins: All right, sir.

Opening Statements by Both Attorneys.

THOMAS L. HUGHES, a witness for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Jenkins:

Q. You're Special Agent Thomas L. Hughes?

A. That's correct.

Q. All right, you work with the Federal Bureau of Investigation?

A. Yes, sir, I do.

Q. And in what capacity?

A. I'm assigned to the FBI laboratory in Washington, D.C.

page 13 } Q. And in that capacity do you make examinations of mortar and brick and substances such as that?

A. Yes, sir. I'm assigned to what we call the Mineralogical Unit in the Laboratory, and in this Unit we make comparisons of material of a mineral nature which would include brick and mortar.

Q. Have you testified in courts of record as an expert witness?

A. Yes, sir, I have.

Mr. Radin: I'll stipulate to the gentleman's qualifications.

The Court: All right, sir.

Mr. Jenkins: Your Honor, I'd like to have this marked Commonwealth's Exhibit C-1 for identification. I'd like to ask that be marked C-2.

The Court: Mark these C-1 and C-2 for identification, these two brown paper bags.

Mr. Jenkins: And I'd like to ask this be marked C-3.

The Court: I'll mark the metal chisel—

Mr. Jenkins: That's a prybar.

The Court: All right, prybar, whatever it is, as Exhibit C-3.

Thomas L. Hughes

page 14 } By Mr. Jenkins:

Q. Directing your attention to Commonwealth's Exhibit marked C-1, C-2, and C-3 for identification, Agent Hughes, did you have occasion to receive these at the FBI Lab in Washington, D. C.?

A. Yes, sir, I did.

Q. Will you tell us approximately when you received them, sir?

A. It was in December of 1967 I believe.

Q. All right, sir, now did you examine the crowbar with relation to the—which is C-3—with relation to the contents in C-1 and C-2?

A. Yes, sir, I did.

Q. All right, tell us the results of your comparison in regard to that.

A. Yes, sir. I examined Commonwealth's Exhibit C-1 and C-2 and determined that the items in these exhibits consisted of several fragments of brick and also fragments of mortar. I also examined Commonwealth's Exhibit C-3, the blade end of a bar, and found on this fragments or smears, I should say, smears of brick and cement. The smears of brick and cement were similar in physical and microscopic characteristics to the mortar in C-1 and C-2 and also to one fragment of the brick in item C-1.

Q. And you found the items of C-1 and C-2 I
page 15 } believe to be similar in nature and quality, is that right, sir?

A. Yes, sir, they were. There was some difference in the brick, not all of the brick was alike in physical and microscopic characteristics.

Q. And you also found some of this mortar similar in quality to be on C-3, is that correct, sir?

A. Yes, sir, I did.

Q. And was there any of the brick found on C-3?

A. Yes, sir. I found some smears of brick, brick smears which again had the same or similar physical and microscopic characteristics to the brick, specifically a brick in C-1.

Mr. Jenkins: Your Honor, I'd like to have this marked Commonwealth's Exhibit C-4.

The Court: All right, I'll mark this, tag this clothing as C-4 for identification.

By Mr. Jenkins:

Q. All right, sir, did you also make a comparison of Com-

monwealth's Exhibit C-4 with any of the items in Commonwealth's Exhibits C-1 and C-2?

A. Yes, sir, I did.

Q. And what did your investigation, what did
page 16 } your tests show on this, sir?

A. I also found some mortar particles and brick particles which were again similar in physical and microscopic properties to the brick and mortar in C-1 and C-2.

Mr. Jenkins: Answer any questions that Mr. Radin may have, sir.

CROSS EXAMINATION

By Mr. Radin:

Q. Mr. Hughes, how did you receive these—in what condition were these items of the Commonwealth when you received them? Were they packaged?

A. Yes, sir. I received them in a box and they were all packaged, all wrapped.

Q. Each one individually?

A. Each one was wrapped individually when I received them as I remember, yes, sir.

Q. There's no way that you can tell how long these items of mortar and brick had been in, on this man's clothes or on the chisel, can you?

A. Not as far as any specific time. They did not have an appearance of being old or dirty. Something like this—in other words, they had a fresh enough appearance.

Q. You're speaking of the particles?

page 17 } A. Yes, sir.

Q. But had they not been left out in the open or something they could have remained that way for several months, couldn't they?

A. That would depend on many variables.

Q. They could have?

A. Yes, sir, it could.

Q. Now, you've referred to the items of brick and mortar as being similar, and one time you said same. You meant similar?

A. By similar I mean I could find no differences in the examinations that I conducted.

Q. Well, you stated, but you said—in other words, the particles, though, were similar each time you made your examination?

A. Yes, sir, I did.

Thomas L. Hughes

Q. And your actual conclusion would be then that these particles could have come from the same place?

A. Yes, sir. I would, my opinion would be that they could have based upon the examinations that I did make, they could have come from this the wall represented by C-1 and C-2.

Mr. Radin: I have no further questions.

page 18 } By the Court:

Q. But you cannot say positively that they are the same, it's not like fingerprints?

A. I cannot say positively that the smears that I found on the blade came from the wall represented by C-1 and C-2.

Q. Well, is there apt to be much difference in different walls? I mean are they like fingerprints, no two alike?

A. No, sir, I would not say that, could say that no two are alike but there are many variations and differences among bricks and among different mortars, cement, etc. from different sources.

Q. But it is possible to have different walls but to have the same composition insofar as you're able to test it, that's possible, isn't it?

A. Yes, sir, it is.

Q. So it's not really like fingerprints?

A. No, sir, I would not say it's like fingerprints.

Q. It's not that strong?

A. No, sir.

Q. Similarity is not that identical.

Mr. Jenkins: I have one question.

page 19 } REDIRECT EXAMINATION

By Mr. Jenkins:

Q. When the box came to you was it boxed up and packaged, was it closed?

A. Yes, sir, it was.

Mr. Jenkins: All right, that's all I have. I'd like to ask that he be excused.

Mr. Radin: I have no other questions.

The Court: You're excused. I understand you have to return to Washington.

Detective F. A. McCartney

DETECTIVE F. A. McCARTNEY, a witness for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Jenkins:
Q. You're Detective F. A. McCartney?
A. Yes, sir, I am.
Q. And by whom are you employed, sir?
A. Norfolk Police Division.
Q. And in what capacity?
A. I'm now a Homicide detective.
page 20 } Q. All right. Directing your attention to December, 1967, were you with the Burglary Squad?
A. Yes, sir, I was.
Q. All right, directing your attention to December 14, 1967, approximately 9:30 P.M., where did you find yourself?
A. I was on 23rd Street and Granby Street headed north on Granby Street.
Q. All right, and did you, in response to a report on your radio, did you have occasion to go to Norfolk Brass and Copper?
A. Yes, sir, I did.
Q. All right, and where is Norfolk Brass and Copper located?
A. It's at 626 West 23rd Street.
Q. Is that in the City of Norfolk?
A. Yes, sir, it is.
Q. Tell the Court what you saw when you arrived there, and I would ask you to describe the premises and just exactly how they face the street and so forth.
Q. Yes, sir. On information I went to 626 West 23rd Street, the Norfolk Brass and Copper Company. I was traveling—

By the Court:
Q. What time was this?
A. This was between 9:30 and 9:45, it was
page 21 } around 9:45.
Q. In the evening, on what date?
A. P.M. on the 14th of December, 1967. I was traveling west on 23rd Street, unmarked police vehicle. When I arrived at the Norfolk Brass and Copper Company there was a large dumpster, that's a trash dumpster, located by the building. As I arrived I had my bright headlights on, I was traveling right fast, I saw the defendant hunkered down by the dump-

ster. I stopped, backed up, got out of the police vehicle, went over, asked him, the man what he was doing there. At this time he raised up, stated he had to relieve himself and went there to use the toilet. At this time I asked the man for some identification and as he stepped out, and he had on a pair of leather work gloves. He took them off, I taken them from him, asked him for some identification. He gave me a driver's license. As he stepped out I saw beneath him a crowbar which I believe to be approximately five and a half or six feet long. I put the man in my police vehicle and called for a car to take this man to the detective bureau. In the meantime I had looked at the side of the building and saw where some bricks had been pried away from the door facing of one of the large doors that face the railroad tracks, or would face south. After that the man was taken to the detective bureau. I sent word to the owner of the business to come down, which he did and from whom I made an attempted burglary report.

page 22 } By Mr. Jenkins:

Q. All right, did you gather anything from the immediate vicinity of the building?

A. Yes, sir, I did.

Q. Tell us what that was.

A. There was bricks and cement from the ground beneath the hold in the brick wall. There was wood chips taken from the door frame where a crowbar was used to pry—

Mr. Radin: I object as to this witness saying what was used to pry or anything unless he saw it.

The Court: Well, I think that's a conclusion and I'll sustain the objection to that extent. Just testify to what you picked up.

A. There was brick and cement taken from the wall where the hole was started—

Mr. Radin: I'd like to make an inquiry. I don't mean to interrupt but I see the witness is reading instead of testifying. I'd like to—

A. It's a list of articles that I taken.

page 23 } By Mr. Radin:

Q. Who typed that up?

A. My secretary in the office where we—

Mr. Radin: I object to him using this. This is not his rendition of past events. This is something typed by someone else, as such it's hearsay for him to read from.

Detective F. A. McCartney

The Court: I'll permit you to examine it, but I'm going to let him testify from it as a memorandum to refresh his memory. I'm not going to let you read from it, Detective, you can look at it and then testify.

Mr. Radin: Note my exception.

A. In all I gathered brick from the wall of the building; there was brick and wood particles taken from the ground, gathered by me at the scene.

By Mr. Jenkins:

Q. What did you do with these items?

A. These items were taken to the detective bureau and bagged and sent to the FBI Lab in Washington.

Q. All right, I show you Commonwealth's Exhibits C-1 and C-2 and ask if you can identify those two
page 24 } items?

A. Yes, sir. This is some of the brick and material I gathered from the scene of the break in.

By the Court:

Q. Which was that, particles from the wall or from the ground?

Mr. Radin: Your Honor, I object. He has to refer to a written typed paper to tell you that. He can't tell by his own examination.

The Court: I'm going to permit him to do it; I'm sure he can't just look at the bag.

Mr. Radin: Looking into the bag is what I'm speaking of.

A. I can't tell you whether it came from the wall or ground, but all of it came from the same place.

By the Court:

Q. You mean C-1 and C-2 are the same?

A. One was picked up off of the ground, the other was taken from the wall itself.

Q. You can't say which is which?

page 25 } A. I can by looking at the notes and the marking.

Q. I'll let you look at the notes.

A. K-1, it's my K-1—

Q. Don't tell me your number.

A. It's brick and mortar taken from the ground.

Q. Which exhibit, C-1 or C-2?

A. There's so much writing on it—this would be C-2.

Detective F. A. McCartney

Q. C-2 which is the Court's exhibit number, is taken from the ground?
A. Yes, sir.

By Mr. Jenkins:
Q. Now where does C-1 come from, sir?
A. This is the brick and mortar that came from the wall around the hold itself.
Q. All right, sir. I show you Commonwealth's Exhibit marked C-3 for identification and ask you what that is?
A. That's the type of crowbar that I recovered at the scene of this attempted break in that was underneath the defendant.
Q. All right, sir.

Mr. Jenkins: Your Honor, I'd like to have this
page 26 } marked Commonwealth's Exhibit either C-5 or C-3A.

By the Court:
Q. Let me ask you this, Detective: how did these two pieces come into separate pieces?
A. This tip was sent to Washington, Your Honor; rather than send the whole thing we sent the working end of it so we wouldn't have to pay the express charges.
Q. In other words, you cut it off?
A. Yes, sir.
Q. How about the other piece?
A. It's part of it, too.
Q. In other words, three pieces were all of one piece?
A. Yes, sir.

The Court: ll right, I'll mark that as C-3A, for identification.

By Mr. Jenkins:
Q. All right, I show you Commonwealth's Exhibit, two pieces of pipe marked C-3A for identification and ask you can you identify these?
A. Yes, sir.
Q. What is it?
page 27 } A. It's the crowbar that was recovered at the scene by me at this attempted break in.
Q. All right, now has this been in the hands of the police authorities since that time?

A. Yes, sir, up until the other trial where it was admitted into evidence in court.

Mr. Jenkins: All right, sir, I offer C-3A in evidence at this time.
The Court: Received in evidence as Exhibit C-3A.

By Mr. Jenkins:
Q. All right, sir, I show you Commonwealth's Exhibit C-4 for identification and ask you if you can identify these trousers?
A. Yes, sir. These are the pants that the defendant had at the time he was arrested.
Q. Where were they sent?
A. They were sent to the FBI Lab also.
Q. All right, I show you Commonwealth's Exhibit C-1 through C-4 and ask you if they were sent to the FBI Lab?
A. Yes, sir, they were.

page 28 } The Court: Have you offered those, Mr. Jenkins?
Mr. Jenkins: I am right now. I'm going to offer them in evidence.
The Court: All right, C-1, 2, 3, and 4?
Mr. Jenkins: Yes, sir.
The Court: Mr. Radin?
Mr. Radin: I have no objection.
The Court: All right, they're received in evidence.
Mr. Jenkins: Now, Your Honor, I ask that these be marked C-5.
The Court: I'll mark on them C-5.

By Mr. Jenkins:
Q. I show you C-5, Detective McCartney, and ask if you can identify those?
A. Yes, sir. These are the leather gloves that I taken from the defendant at the scene when he was arrested.
Q. All right, and then these were sent to the FBI Lab, too, were they not?
A. Yes, sir, they were.
Q. Did they come back negative?

page 29 } Mr. Radin: I object, Your Honor, this would be hearsay.
Mr. Jenkins: I just want the Court to know that I am not

trying to hide anything from the defendant, and it's in your favor.

Mr. Radin: I understand that, but I still think it would be hearsay.

Mr. Jenkins: Very well, I withdraw the question.

The Court: I'll sustain the objection and I'll rephrase the question.

By the Court:

Q. There was nothing further done about the gloves, was it?

A. No, sir.

Mr. Jenkins: All right, sir, I offer C-5 into evidence at this time, Your Honor.

The Court: Received.

By Mr. Jenkins:

Q. All right, Detective McCartney, will you describe, tell us how far the defendant was from the alleged attempted break in, the spot where the alleged attempted break in had occurred at the time you first came upon him.

page 30 } A. It was, in my opinion it was between 20 to 30 feet.

Q. Within 20 or 30 feet, is that correct, sir?

A. Yes, sir.

Q. All right, and why did you go over there to begin with?

A. I was sent on information.

Q. Was this over your radio?

A. Yes, sir.

Q. How many bricks had been knocked out, could you say approximately?

A. There was quite a few. I don't recall well enough to give you a number; there were quite a few, the hole was right good size.

By the Court:

Q. Well, how big was the hole? Big enough to put your head in?

A. Yes, sir, I would imagine all together there was probably 6, 8, 10 bricks taken out.

Q. Show me how big the hole was.

A. The hole was higher, probably this high and probably this wide.

Q. Say 18 inches by 18 inches?

A. Something like that, yes, sir. It was jagged,

page 31 } really no way of telling, it was a jagged hole.

Detective F. A. McCartney

Q. And there were about how many bricks out?
A. I was guessing, Judge; I think probably 6, 8, 10, somewhere along there.

Mr. Jenkins: Answer Mr. Radin's questions.

CROSS EXAMINATION

By Mr. Radin:
Q. Mr. McCartney, you're familiar with the premises where this alleged act took place, were you not?
A. Am I familiar?
Q. Yes.
A. Yes, sir, I went through the building, yes, sir.
Q. You were familiar with these premises before you went there that night?
A. No, sir.
Q. You had never been there before?
A. I've checked the building in my nightly patrol.
Q. You knew where Norfolk Brass and Copper was; if I told you to go there you could go there without checking house numbers?
A. Yes, sir, I knew where it was.
Q. While I'm questioning you I'd like to see page 32 } your slip of paper.
A. Which one?
Q. The one you've been referring to.
A. All right.
Q. And yet when you arrived you knew where you were going that night, didn't you? You knew you were going to Norfolk Brass?
A. Yes, sir.
Q. When you were going there you passed the place, you were going fast and passed it?
A. I came upon the back side of the building.
Q. Didn't you pass it up, back up and around?
A. No, sir, I did not go past it.

By the Court:
Q. Which is the back?
A. I would consider the 23rd Street side, back up against the railroad tracks, takes up a whole block, goes over to 24th Street.
Q. How far is it east of Colley Avenue?
A. One block. It's in the 6—7 hundred block adjoins Colley Avenue.

Detective F. A. McCartney

Q. Well, to get to it you'd have to go north of the railroad tracks at either Colley or Colonial, wouldn't you?
A. Yes, sir.
page 33 } Q. And it's in between the two?
A. Yes, sir.
Q. It would be about Manteo Street, wouldn't it?
A. I believe that's the side street, yes, sir, it takes up a whole block.

By Mr. Radin':
Q. Well, you had passed the dumpster itself, though?
A. Yes, sir.
Q. And you passed it and you got out and went back and you saw this man?
A. I backed up, I didn't get out.
Q. You did back your car up?
A. Yes, sir.
Q. Did you see the man in your bright lights?
A. Yes, sir.
Q. And when you first saw him what position was he in?
A. Squatted down to the ground.
Q. Now you used the word "hunkered" before. Do you use the word hunkered in your language?
A. Yes, sir, that's my word.
Q. And it means sem-squat?
A. Yes, sir.
page 34 } Q. Did he rise before you approached him?
A. After I backed up and got out of the car I had gotten nearly to him and he raised up.
Q. Do you have a flashlight?
A. Yes, sir.
Q. Was your flashlight on?
A. Yes, sir.
Q. Was it shining on him?
A. Yes, sir, it was.
Q. Before he rose?
A. I don't recall before he arose, when I got to the back of the car I shined it in his direction.
Q. As soon as it hit him he stood up?
A. Yes, sir.
Q. You didn't have your siren on?
A. No, sir.
Q. And when you got there this man was not in the building?
A. No, sir, he was not.

Detective F. A. McCartney

Q. And he was approximately 20 to 30 feet from the site of the alleged break in?

A. About that, yes, sir.

Q. And after you went into the premises and looked around, you were there with the owner of the building, is that right?

page 35 } A. Yes, sir.

Q. And you learned from him regardless of what you may have known before, there was a silent burglar alarm system?

A. Yes, sir.

Q. So whether or not, and it appeared to you that the burglar alarm system had been broken, is that right?

A. Yes, sir.

The Court: What do you mean by broken?

Mr. Radin: Excuse me, set off. Contact had been made.

The Court: All right.

By Mr. Radin:

Q. And there'd be no way for this man or anybody to have known that the contact had been made, would there?

A. There's no alarm bell that goes off at the scene, no, sir.

Q. O.K. And prior to your arriving at the scene—when I say prior I mean several blocks before—your lights covered it, gave you a clear view of the dumpster and where this man was, is that correct?

page 36 } A. It's not a clear view where he was. There were several I think big paint cans, maybe tar cans, five or ten gallon tar cans. You could see the dumpster, you couldn't see him unless you were parallel.

Q. Did you have a clear view of the site of the attempted break in?

A. Yes, sir.

Q. And the full time you had lights on in that vicinity you never saw anybody leave the site of the break in itself?

A. No, sir, I had to travel six blocks with the bright lights.

Q. At the time you saw it you could not see anybody leaving the place where the break in had occurred? I'm speaking of where the bricks were broken.

A. I saw no one on the street until I arrived and saw him; there was no one on the street that I saw.

Q. I don't mean on the street, I'm asking you about the place on the building.

A. That's a street right beside of it.

Detective F. A. McCartney

Q. And you didn't see anybody there?
A. There was no one there, no.
Q. All right. Now when you say the street, what street is right adjacent to where the break in occurred?
A. 23rd Street.
page 37 } Q. Was he—and he was near the side street himself or what?
A. There's a, he would be—if you were going west on 23rd Street the building covers the entire block along with the fenced in compound they have, it starts at a street that dead ends there, he would be at the very beginning of the building.
Q. In other words, he would be at the eastern edge of the building?
A. He would be at the eastern edge of the building.
Q. So you would have seen him leave from the place of the break in to the place he was crouched if he had left during the time you had your lights on the building, isn't that true?

Mr. Jenkins: Could that question be rephrased? I mean asked again?
The Court: I'll ask you to rephrase that question.

By Mr. Radin:
Q. During the period that you had your, that building in your view and your headlights were shining in that direction, if the defendant today had left the place
page 38 } where the bricks had been dislodged to go to the position where you found him upon your arrival, you would have seen him?
A. Not necessarily.
Q. Why not?
A. Because there are other businesses along there, they have trucks parked up against the side of the building, he could have seen my lights before I could have seen him if that's what you mean.
Q. I'm asking you what distance did you have the particular point on the building where the bricks were dislodged in your sight?

The Court: I don't understand that question, Mr. Radin. What you're trying to say is for what distance when he got from the building did he have in view the place where the bricks had been dislodged?
Mr. Radin: Yes, sir.

Detective F. A. McCartney

A. You would have to be as close as from here to the back of the courtroom to see anyone due to the dumpster and the way the street is close to the buildings, you couldn't see beyond that.

By Mr. Radin:

page 39 } Q. In other words, the dumpster was blocking your view?

A. The dumpster is as high as where the attempted break in occurred, and he could—due to the traffic, the trucks and different pieces of machinery, box cars, that are parked along there, there's a railroad track with a siding—and he could have seen, the person could have seen my lights and got out of there before I could have seen them.

Q. But the siding is not right next to the building is it right there?

A. Not next to the building, no, but the way it runs I had to travel six blocks, if I couldn't see—I would say this, I don't believe I could have seen the break in from a block away.

Q. All right. When did you collect these items from the building?

A. Shortly after the owner came down and made the report.

Q. Now the owner, when the owner came down was Mr. Plummer there at that time?

A. No, sir, he was not.

Q. So you made the collection of these items after Mr. Plummer had been taken to the precinct?

A. That's right.

page 40 } Q. Was Mr. Plummer touching the bar when you saw him?

A. It was between his legs; like I said, he was squatted down. Or hunkered, I'll say hunkered again for you. He was hunkered down and the bar was between his legs.

Q. You didn't see the bar itself, though, until he arose?

A. Until he got up.

Q. And when you—when he rose he got up and then walked towards you, did he not?

A. That's correct.

Q. And it wasn't until after he walked away that you saw the bar?

A. It wasn't until he came from where he was at I saw the bar; the minute he stepped out I saw the bar.

Q. So it's merely conjecture on your part whether or not he was squatted directly over it with it between his feet?

Detective F. A. McCartney

Mr. Jenkins: That's asking the witness to draw a conclusion. He stated he stepped out and when he stepped out he stepped over the bar. He was crouched down and it's inconceivable the bar itself—

The Court: Cross examination, I'll permit him
page 41 } to ask it.

By Mr. Radin:

Q. You never saw the bar while he was squatted, did you?

A. I couldn't, he was directly over it.

Q. And it wasn't until he moved that you then saw the bar?

A. That's correct.

Q. And the bar itself in its original condition had you ever seen that on the premises before?

A. No, sir.

Q. But the owner told you that it was his bar, didn't he, the owner of the building?

A. He said he had one similar.

Mr. Jenkins: Your Honor, that's hearsay. The owner is here and he would be the best evidence.

The Court: Sustained.

Mr. Radin: Your Honor, I submit this was their witness, this is their case—

The Court: I don't care whose witness he is, what somebody told him is hearsay.

Mr. Radin: All right.

page 42 } By Mr. Radin:

Q. Have you received any information from anyone as to the ownership of this bar?

A. Yes, sir.

Q. From whom have you received such information?

A. The owner of the place of business.

Q. The place of business, Norfolk Brass and Copper?

A. That's correct, yes, sir.

Q. Have you made any other investigation on your own or to your knowledge has any other investigation been made to ascertain if somebody else owned that bar?

A. No, sir, there has not been any other investigation made concerning the bar.

Q. When you came to the site of the alleged crime you stated that you came on information that you received over your radio, is that correct?

A. Yes, sir, that's correct.
Q. And you were on Granby Street at the time?
A. Granby and 23rd.
Q. How did you reach the scene of the alleged crime?
A. I made a left on 23rd Street headed west.
Q. There were no barricades whatsoever on 23rd?
A. No, sir, it was straight through, you can go all the way through.

page 43 } By the Court:
Q. How far is 23rd Street from the railroad tracks?
A. The track on Granby Street, Your Honor, you make an immediate left after you cross it, left; 23rd Street parallels the railroad track all the way to Colley Avenue.
Q. How far is it from the railroad tracks?
A. As a matter of fact, the railroad tracks take up part of the street.
Q. 23rd Street runs along the northern edge of the Norfolk and Western tracks, runs along it?
A. Yes, sir.
Q. No buildings between 23rd Street and the Norfolk and Western tracks?
A. No, sir.

By Mr. Radin:
Q. How long did it take you to reach the scene after you received your information?
A. Be an estimate—I'd say anywhere from 45 seconds up to a minute. I went straight right down the line, I didn't fool around getting there.

Mr. Radin: All right, no further questions.

Court adjourned until 10:00 A.M., September 19.

page 44 } ROBERT D. KEEFE, a witness for the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Jenkins:
Q. You are Robert D. Keefe?
A. That's correct.
Q. Mr. Keefe, where do you live?

Robert D. Keefe

A. 1414 Buckingham Avenue, Norfolk.
Q. All right, sir, and is your place of business the Norfolk Brass and Copper Works located on 23rd Street?
A. That's correct.
Q. And more particularly what address on 23rd Street?
A. 626 West 23rd.
Q. 626 West 23rd Street. All right, sir, directing your attention to 1967 did the defendant, Joseph Plummer, was he employed there?
A. No, sir.
Q. In 1967?
A. Oh, I thought you meant today. Yes, he was—I'm sorry.
Q. All right, and when did he cease being employed there?
A. I believe it was around September, October.

page 45 } By the Court:
Q. September when?
A. 1967.
Q. He was employed there up until that date?
A. I believe so; I don't know the exact date.

By Mr. Jenkins:
Q. And was he fired from this job?

Mr. Radin: Object, Your Honor. That's irrelevant to the proceeding.
The Court: Sustained unless you show any relevancy.
Mr. Jenkins: I'm going to show a set of facts that he was familiar with the place and that he worked there, and the fact—
The Court: You've already shown that. The reason for his leaving this employment has got nothing to do with his knowledge of the place.

By Mr. Jenkins:
Q. All right, sir, directing your attention to the 14th day of December, 1967, a Thursday, did you have occasion to secure your building that evening?
page 46 } A. Yes, sir.
Q. Did you give the defendant, Joseph Plummer, permission to be on your premises?

Mr. Radin: I object, Your Honor, to the last two questions, both leading.
The Court: Overruled.
Mr. Radin: Except.

Robert D. Keefe

By Mr. Jenkins:

Q. Did you give the defendant, Joseph Plummer, permission to be on your premises at 9:45 P.M. that evening?

A. No, sir.

Q. I show you Commonwealth's Exhibit marked C-3 and C-3A and ask you if this prybar is similar to one that you had at your place?

A. That's correct.

Q. And did you miss a prybar of this nature?

A. Well, I really don't know. I mean—

Q. All right, sir.

Mr. Jenkins: Answer any questions Mr. Radin may have.

page 47 } CROSS EXAMINATION

By Mr. Radin:

Q. Mr. Keefe, previously I believe you may have stated that Mr. Plummer worked in your place until November or December. Isn't it possible he worked as late as that of 1967 with you?

A. Tell you the truth I don't know the exact dates that he did leave.

Q. He worked for several months, though, didn't he?

A. He did.

Q. And did you have occasion to see Mr. Plummer on the evening in question, December 17th—or 14th?

A. No, I did not see him.

Q. You did not see him on the 14th of December so you don't know where he was at 9:30 or 9:45 P.M. that day?

A. No.

Q. And upon seeing—when did you first see the prybar?

A. In court.

Q. You mean the previous court hearing on the 26th of March, 1968?

A. Well, I don't know the date but whenever they submitted it as evidence is when I saw it.

Q. Was it in the courtroom next door to this one?

A. Yes.

page 48 } Q. And do you—you have several bars similar to that at your place of business?

A. Yes.

Q. About how many do you have?

A. We had a total of three. Want me to go on?

Q. If you have anything else to add.

A. We had a total of three.
Q. Does that look like the ones you use?
A. Yes.
Q. Do you think it is yours?
A. Yes.

Mr. Radin: No further questions of this witness.

By the Court:
Q. Well, now, those prybars are kept inside, aren't they?
A. We have a yard next to our building and, which is fenced in, and sometimes we keep them in the yard. We use them primarily in breaking away pallets from the railway cars that we carry them wherever it's most successful for the men to work in the cars.
Q. So in other words, this could be one of your bars and someone could have used it outside without hav-
page 49 } ing gotten inside of the building, is that right?
A. It's possible, yes.
Q. Because sometimes one or two of them are left outside, is that correct?
A. That's correct, it's in the fenced area.
Q. Well, how high is the fence?
A. Five, six feet, maybe eight feet. It's taller than I am; I'd say about eight feet.
Q. Well it wouldn't be any great problem for someone to go over the fence and get one of those prybars, would it?
A. No.
Q. You say that's similar to your prybars, it looks like one but you can't say positively that it is one of yours?
A. No, I couldn't say positively.
Q. How far is the area from where the prybars are kept inside of the fence from the place where the wall was damaged?
A. I'd say 75 feet, 75 to 80 feet.
Q. And it would be on the outside of the fence—
A. Where the—
Q. Wall was damaged?
A. Yes, yes, it was.
Q. That would be on the outside, that's an open area?
A. Yes, sir.
page 50 } Q. Would there be any reason for a prybar to have been left or used over there where the dumpster was?
A. No, sir.

Robert D. Keefe

Mr. Radin: I have a couple more questions, Your Honor.

By Mr. Radin:

Q. At your building there's a railroad siding in front of the building?

A. Yes.

Q. Now the siding is across 23rd Street from your building, though, it it not?

A. That's correct.

Q. And so the street separates your building from the railroad siding?

A. That's right.

Q. And you get merchandise out of this, off of this siding?

A. Right.

Q. And wouldn't they use, sometimes wouldn't a man possibly carry one of these prybars with him to the railroad car?

A. Oh, he'd have to to use it.

page 51 } Q. So then they would use it almost, they would use the prybar in an open area across from where the building was damaged or attempted entrance was attempted, is that correct?

A. The prybar you mean would be used where the car would be placed?

Q. Which could be right in front of where the damage to your building occurred?

A. No, because they place the cars in front of the fence and that's to the left.

Q. Well, your building which shares the block, the entire block with another building, is that correct?

A. There are two other buildings.

Q. Or two other buildings, and your building is on the westernmost part of the block?

A. Correct.

Q. And your building itself is how wide, do you know?

A. Seventy-five feet.

Q. On—

A. 23rd Street.

Q. 23rd Street, and how far from the westernmost edge of your building was the entry attempted, or the damage?

A. I'd say 65 feet.

Q. Well now, is this the easternmost door?

A. It's the easternmost door.

page 52 } Q. It isn't the center door?

A. Oh, no.

Q. It's the easternmost door, and how wide is that door?

Robert D. Keefe

A. I'd say 8 to 10 feet.

Q. And the entrance to the yard which is next to the building is in the middle of the fenced area, is it not?

A. Correct.

Q. So before you get to the end of the block you have a fenced area after your entrance?

A. Yes, uh huh.

Q. Now do you know how much space on 23rd Street your building and yard occupy?

A. A hundred and fifty.

Q. All right, sir, you've got a hundred and fifty feet and about how far from the edge of it, from the westernmost edge of the block is the entrance?

A. Half of 75, 37 and a half feet, and take whatever space there is in between.

Q. How far from the easternmost edge of the building is this entrance to the building how far is it from this to where the entry was attempted?

A. That's about 10 feet.

Q. So we've got 10 and 37 and a half, be 47 and a
page 53 } half. You've got a hundred two and a half feet
from the place of the entry to the end of the entrance, is that correct?

A. You mean from where the building was damaged?

Q. Yes.

A. To where the entrance to the yard is?

Q. The end of the entrance.

A. To the end of the entrance?

Q. Yes.

A. I don't know exactly what you mean. I know where the fenced in part is.

Q. That's what I mean, the fenced in part. Let me ask you this: How wide is the entrance to—

A. A hundred and two feet.

Q. How wide is the entrance to the fenced in area?

A. Ten feet I guess.

Q. Just 10 feet? Isn't it a double fence?

A. Double gate.

Q. And isn't each gate about 10 feet wide, each half of the gate?

A. I wouldn't think it would be that wide, it might be. It might be 16, I don't know, I never have measured it.

Q. You have large trucks coming in there, don't you?

A. Um huh. It's wide enough for a tractor
page 54 } trailer to back in but that's about all.

Q. Have you ever had more than one railroad car at the siding at a time?

A. Very seldom.
Q. But you do have sometimes?
A. It would be an unusual situation.
Q. But you do have sometimes, that's the question I'm asking you?
A. Yes.
Q. And if two railroad cars were there the entrance to the second box car would be at least opposite to your entrance to where the attempted entry was made, would it not?
A. It would except for one thing. The box car, the only time we'd have two would be one with asphalt and one with roofing. The one with asphalt does not come on pallets so that would not.
Q. But the one with roofing does?
A. Oh, yes.
Q. So if the roofing were the second box car it would be there?
A. Yes, but you wouldn't unload it there.
Q. When was the last time you all checked the number of bars you have in your place?
A. It would be December 31st of this year.
page 55 } Q. Of this past year you mean. How many, do you know how many you had on that day?
A. Oh, heavens no.
Q. You don't know whether you had three or four?
A. I don't know now; I'd have to go back to my inventory.
Q. And the last time you'd check before that time would be December 31st of the previous year?
A. Physical count, yes, I mean that I could prove to you.
Q. So if at any time the bar was left outside at the second box car you wouldn't know about it until the 31st of that year?
A. Right.
Q. And as far as you know you don't know, you couldn't say that day whether or not a bar had been left in front of where that second box car would have been, is that correct?
A. No, I couldn't tell you that.

Mr. Radin: No further questions.

(Witness excused)

page 56 } OFFICER DONALD H. FOWLER, having been first duly sworn, was examined and testified as follows:

Officer Donald H. Fowler

DIRECT EXAMINATION

By Mr. Jenkins:

Q. You are David H. Fowler?

A. No, sir Donald H.

Q. Donald H., excuse me. You're with the Norfolk Police Division?

A. That's correct, sir.

Q. Directing your attention to December 14, 1967, Thursday evening, were you on duty that evening?

A. Yes, sir, I was walking a beat.

Q. And where were you walking a beat?

A. Along Colley Avenue, sir.

Q. And did you have occasion to go to Norfolk Brass and Copper Corporation?

A. Yes, sir. 1

Q. All right, tell us what you saw and observed on your way there.

Q. Approximately 9:40 I was in the vicinity of 22nd and Colley Avenue checking windows, and approximately 9:44, 45, the radio message came out over the air that the burglar alarm at Norfolk Brass and Copper had just went off. I immediately went to the N and W railroad tracks

page 57 } and turned right to go east—

Mr. Radin: I object to one thing, Your Honor, as to the information. My client was speaking to me and I didn't catch it.

The Court: You better listen to the witness.

Mr. Radin: I believe Officer Fowler stated something he heard as to a burglar alarm, he got a message. I would move to strike as hearsay as to any information. He can state what he did but not what he heard over his radio.

Mr. Jenkins: Your Honor, I guess it is hearsay—no, I don't think it is hearsay. He just made the statement not for the proof of it but he made the statement that it came out over his radio and it's hearsay but it is acceptable hearsay. He can say anything he wants that came out over that radio, he's not going to try to prove the truth and veracity of what was said. That's why he went to the Norfolk Brass and Copper, and the fact it was uttered he can

page 58 } testify, makes no difference at all. He's not proving the truth and veracity of the statement that came over his squawk box.

The Court: I'm going to overrule the objection.

Mr. Radin: The same question was offered at the previous trial, was not permitted.

The Court: Well, I don't see how it makes a whole lot of difference. He received a call over his radio to go to a certain place because there was a burglar alarm.

Mr. Radin: Note my exception, please.

The Court: I see no harm in that.

By Mr. Jenkins:

Q. Continue after you turned.

A. I turned east on 23rd Street and the N and W tracks, they run parallel together there. At the time that I arrived at Norfolk Brass and Copper Company, Officer McCartney was there already in an automobile. He had Joseph Plummer in custody.

Q. All right, Officer, as you walked down 23rd Street over to Colley Avenue, what did you see, if anything, coming from Norfolk Brass and Copper?

page 59 } A. I seen an automobile setting there with two headlights burning.

Q. And did you see anybody run out of there?

A. No, sir.

Q. All right—

A. It was only a matter of about a minute and a half, two minutes before I arrived at Norfolk Brass.

Q. All right, answer any questions that Mr. Radin or the Court may have.

CROSS EXAMINATION

By Mr. Radin:

Q. While you were walking along Colley towards—you were walking in a northerly direction, I believe?

A. That's right.

Q. You didn't hear any noise indicating a break in anywhere, did you?

A. No, sir.

Q. And where was Mr. Plummer when you first saw him?

A. Officer McCartney was telling him to—

Q. I didn't ask what he was telling him; where was he?

A. He was behind a Dempster dumpster.

Q. Where was the Dempster dumpster?

page 60 } A. Sitting on the east side of the door on the south side of Norfolk Brass and Copper Company.

Q. And—

A. It's one of these big bay doors.

Officer Donald H. Fowler

Q. Were there any other doors in front of Norfolk Brass and Copper?
A. Well, there's a—two other companies right beside of them.
Q. I mean Norfolk Brass and Copper building, were there any other doors opening on 23rd Street?
A. No, sir, I don't believe so except for the little, I'd say, a front door more or less.
Q. Would that front door be to the right or left of the big bay door?
A. It would be on the west side of the big bay door.
Q. Did you see anything else there at that time?
A. Yes, sir.
Q. What else did you see?
A. I see a, about approximately a five to six foot crowbar.
Q. Where was that?
A. Laying down on the ground behind the Dempster dumpster.
Q. Who pointed that out to you?
page 61 } A. Officer McCartney.
Q. And that was behind the dumpster, right?
A. Yes, sir.

Mr. Radin: No further questions.

By the Court:
Q. Now Officer—what was your last name?
A. Fowler.
Q. Fowler?
A. Yes, sir.
Q. Now you said that as you approached this place you saw a car with headlights burning?
A. Yes, sir.
Q. Whose car was that?
A. City of Norfolk, sir.
Q. I mean that was McCartney's car, wasn't it?
A. Yes, sir, police car.
Q. And how far were you from Colley Avenue or from the company when you first saw those headlights?
A. I was approximately 200 feet.
Q. 200 feet from which?
A. From the Norfolk Brass and Copper Company.
Q. In other words, when you got about half way there off of Colley Avenue you saw the headlights up
page 62 } ahead?

Officer Donald H. Fowler

A. No, sir, when I turned on 23rd Street and the N and W railroad tracks, that's when I seen them.

Q. In other words, as soon as you turned onto 23rd you saw the headlights?

A. Yes, sir. That block in there, Your Honor, is approximately 200 feet long.

Q. Is that all? So McCartney was already there?

A. Yes, sir.

Q. As you approached. Now when you got there, in answer to Mr. Radin's question you said—where was the defendant when you first saw him?

A. Yes, sir.

Q. Where was he?

A. He was standing behind the Dempster dumpster.

Q. He was still behind the dumpster?

A. Yes, sir.

Q. Where was Officer McCartney when you first got there?

A. He was standing up behind the Dempster dumpster, too, sir.

Q. They were both back there?

A. Yes, sir.

Q. How far was the crowbar or the prybar from the defendant when you first saw it?

A. Right at his feet, sir.

page 63 } Q. Now when you got the call you were on Colley Avenue; at what intersecting street were you?

A. I was between 22nd Street and the N and W railroad.

Q. You were south of the railroad tracks headed north?

A. Yes, sir.

Q. You saw no other person?

A. I seen no other person, sir.

The Court: All right.

By Mr. Radin:

Q. You referred to Officer McCartney and the defendant and the bar as it all being behind the dumpster. Where behind, I mean how was the dumpster situated? Was it parallel to the street or—

A. It was sitting on an angle.

Q. All right, which way was it angled; in other words, it was diagonal to 23rd Street?

A. Right, sir.

Q. All right, was the part of the dumpster that was nearest —that was going away from 23rd Street, was that going

Officer Donald H. Fowler

towards the Norfolk Brass and Copper, or toward the building next to it?

page 64 } A. Would you mind explaining that?

Q. There's a diagonal, I don't know which way the westernmost tip—where was the westernmost edge of the dumpster?

A. The westernmost edge of the dumpster was approximately three feet away from the door, the bay door, on the east side.

Q. And he would have been behind, would he have been on the other side of the dumpster when you say behind?

A. On the north side or east side, sir.

Q. Would he have been east of the dumpster or north of the dumpster?

A. He was on the north side of the dumpster.

Q. So he was between the dumpster and the building?

A. Right, sir.

Q. Now the dumpster itself was not on the property of Norfolk Brass and Copper, though, was it?

A. I don't know, sir. 23rd Street runs through there and I couldn't say where the property line is.

Q. But there's another building next to it, isn't there?

A. Yes, sir.

Mr. Jenkins: Your Honor, he's testified he

page 65 } doesn't know whether the dumpster was on the property or not. I don't see how we can explore—

The Court: I think the last question was is there a building next to it. I'll let him answer that.

By Mr. Radin:

Q. And the dumpster was actually in front of the building next door to Norfolk Brass and Copper, wasn't it?

A. That I couldn't say, sir.

Q. But you can say it was three feet away from the door of Norfolk Brass and Copper?

A. Yes, sir, approximately.

Q. Is there more than three feet from the door of Norfolk Brass and Copper to the next building?

A. Sir, those buildings are linked together.

Q. Well do you know where one building stops and another begins?

A. No, sir, I don't.

By the Court:

Q. Officer, let me ask you this: the dumpster was on what side of the building?

A. On the south side of the building.

Q. Towards the railroad tracks?

page 66 } A. Yes, sir.

Q. And on what side of the building was the damaged wall?

A. On the south side of the building.

Q. East or west of where the dumpster was?

A. It would be west of where the dumpster was.

Q. In other words, down towards the direction from which you were coming?

A. Right, sir.

Q. How far was the damaged wall from the end of the dumpster, the closest end of the dumpster?

A. I would roughly say, sir, approximately 15 feet at the most.

Q. Fifteen feet.

A. Yes, sir. That would be the whole length of the bay door and approximately three feet afterward.

Q. In other words, the damage was to the west end of the bay door?

A. To the west end of the—

Q. Wall at the west end of the bay door?

A. Yes, sir.

Q. And the dumpster was three feet to the east of the bay door?

A. Yes, sir.

Q. How wide is the door?

page 67 } A. I'd say roughly about nine feet, sir, nine or ten feet.

The Court: All right.

Mr. Radin: No further questions, Your Honor.

Mr. Jenkins: Your Honor, the Commonwealth, at this point, rests.

Mr. Radin: Defense has a motion, Your Honor.

The Court: All right.

Mr. Radin: This defendant has already been convicted of attempt to commit statutory burglary—

Mr. Jenkins: Your Honor, at this time I would ask what type of motion Mr. Radin was making?

Mr. Radin: Excuse me. I'm making a motion—

The Court: I think you had better direct to the Courts attention what you're driving at.

page 68 } Mr. Radin: I'm making a motion to strike.

Mr. Jenkins: Motion to strike, then I would

ask that nothing be said, I don't think anything can be said about the prior conviction.

Mr. Radin: And I would also like to add the evidence to the motion to quash the indictment and dismiss which I previously presented.

The Court: I'm going to ask you to argue first your motion to strike without going into any other convictions or any other evidence in any case other than this one, and then we'll come to the motion to quash.

Mr. Radin: Your Honor, the charge today, of course, is possession of burglarious tools, is a violation of statute providing against the possession of the burglarious tools. And it's not denied that such a tool could be used for burglary because the statute is, merely restricts the use of a tool that could be used for burglarious purposes. But the statute requires possession of such tool and possession with an intent to commit a burglary. The possession is just as important as the intent. Possession is not synonymous
page 69 } with custody. It is not synonymous with use. Possession means holding under a claim of right or holding it. I don't mean that the holding has to be actual; constructive holding would be sufficient. It was under his command—

The Court: If it was in the trunk of his car or in his home; you don't have to have your hand on it.

Mr. Radin: It would be under his command at that time, but there has to be a possession. Similar matters have come up in regard to possession of alcohol or illegal, or in Virginia possession of more alcohol than permitted by statute, or possession of narcotics. Now, I direct primarily at this time at possession of alcohol. I find in Black's law dictionary the word "possession" and they have certain references and they refer to the possession of liquor. Possession of liquor which is made unlawful is possession under some claim of right, control, or dominion, with knowledge of facts. I submit that that would be similar to possession of a bur-
page 70 } glarious toll because you would have to have an intent to use it in a burglary just like you would have to have knowledge what the liquor is. Now, to go further, taking a drink of intoxicating liquor on invitation of the owner does not constitute criminal possession. The use of this bar is all that can possibly be shown to have been done by this defendant. The bar is presented before the Court, it's a large item, it's not something that was carried.

The Court: Did I understand you to say that the evidence could show use of the bar by the defendant?

Mr. Radin: At best that's the only thing they can possibly show.

The Court: On a motion to strike the Court looks at it at best, doesn't it?

Mr. Radin: Yes, sir, Your Honor, but use is not possession. A person caught in the crime of burglary into a building and using a tool to effect his entrance is not possessing the item. He's using the item. Now to show that he possessed, and possessed burglarious tools with an intent, you've got to show something more than he was just using.

page 71 } If he walks into a building, or walks up to a building and a crowbar is laying there and he takes the crowbar and uses it on the building, then we have no possession. He hasn't taken it away from the owner, the owner possesses it. The witness here for the Commonwealth who owned the building says it's similar to ones he has.

The Court: In other words you're saying that if this tool, assuming the evidence proves that the defendant did use this tool in the damage to the wall, you're saying that he did not have possession of it, that Norfolk Brass and Copper had possession because they owned it?

Mr. Radin: That's right, Your Honor.

The Court: And possession is ownership?

Mr. Radin: No, I don't say possession is ownership. I say you have to possess it, if you have stolen it from the next person you don't own it but you would possess it if you've taken it. You have unlawful title to it.

The Court: Do I understand you to say that Norfolk Brass in this case possessed the crowbar?

Mr. Radin: Yes, sir, someone other than this

page 72 } man. The possession, which is essential here, has not been shown. Now, it was a case of *Burnette* v. *the Commonwealth* 194 Virginia page 785. In that case I believe in the city of Tappahannock, two men found riding around in a car late in the evening, with overcoats on with hats in the back seat. Upon stopping the car and finding that there was certain tools and weapons in the vehicle, police apprised them they were charged with possession of burglarious tools with the intent to commit burglary. The Court said that the statutory crime with which defendant is charged consisted of the two essential elements, possession of burglarious tools and an intent to commit robbery or larceny. The burden was upon the Commonwealth to prove possession of such tools by the defendant beyond a reasonable doubt. There is nothing in the evidence today that will indicate that this man had possession of that tool. No one ever saw him with the tool in his hand. No one ever saw him touching the tool. The mere evidence is that certain articles

of his clothing had substance on them which could have come from the building, nothing more. Certain
page 73 } articles were taken from him and tested but no reference was made to those. As to whether or not they showed—and one of the articles taken from him were gloves that he had on, according to the police officer, and this was a tool that had to be used with the hand. If the tool had been laying in the grass, or laying on the ground and the police officer came up the evidence would be—and came up and saw this man standing next to it, the evidence would be no stronger than it is today. The further evidence, further inquiry should be made as to the intent to commit a crime. There has been no proof today of an intent to commit a crime. The only evidence is that the building was secured at 5:30, and at 9:45 this man was found near an attempted, what appears to have been an attempted break in and there was a crowbar there. I don't know what dislodged the bricks. It could have been a car, it could have been anything going into it, could have been a cannon ball, but it's 9:45. The evidence, there is no evidence as to when this burglar alarm *wnet* off. The possession of burglarious tools or
page 74 } his presence at it, you have to show there's an intent to commit, has to be reason. Now this is four hours later—

The Court: Four hours later than what?

Mr. Radin: From when the building was secured. There is no other evidence as to the time of a break in because from 5:30 to 9:45 and that's it. This building could have been broken into at 5:31 in the afternoon, and this man walks by. For that reason I say that the best that they, the best that the Commonwealth could show is that this weapon was used, they could have alleged that the weapon was used, they could even allege that the defendant used it, but the only connecting evidence they have is the fact that there was some articles that could have been on each of the two items. I say that the evidence falls short of the, connecting him with the act of the crime. So if you can't connect him, number one, he cannot be connected with the alleged attempt to commit burglary. He has never been shown to have possessed this item. And for that reason I say that, relying on the basis of that, there is no proof that this man possessed a burglarious tool and the evidence should be
page 75 } struck.

The Court: Motion overruled.

Mr. Radin: I would not my exception.

The Court: As to the motion to quash, I still don't think this is the proper time, I think that should be argued at the end of the case.

Mr. Radin: Would be the plea of double jeopardy—

The Court: That's your motion.

Mr. Radin: 19.1-259 which is different. Double jeopardy relates to the offense so if the Legislature wants to draw up 10 different offenses—but 19.1-259 relates to the act itself.

The Court: Well, I have before me a motion to quash and dismiss. I thought that was based on double jeopardy.

Mr. Radin: Excuse me, maybe it was typed over—I see on the second part of the page my secretary has left out part of it, retyped 59 on the second line of the second page, relates to the act—19.1-259.

The Court: You want me to add that in there? All right, section 19.1-259, is that correct?

Mr. Radin: I believe that's the proper Code.

page 76 } Our statute says if the same act be a violation of one or more statutes, or one statute and one ordinance and so forth, it doesn't relate to it. The crucial element is the act, not the offense.

The Court: Isn't that double jeopardy?

Mr. Radin: No, sir. I'd like to explain the difference. In the annotation to 19.1-259 I believe the first annotation refers, says that this statute was enacted to avoid the injustice or inequity of *Arrington* v. *Commonwealth*. *Arrington* v. *Commonwealth* was a case involving the sale of liquor on Sunday. I believe it was a lady, and that sale of liquor was made by this lady on Sunday to a juvenile. For selling the same single bottle of liquor the lady was convicted of two separate offenses. In that case the Court went into an extensive—

The Court: What were the two separate offenses?

Mr. Radin: Selling whiskey or liquor on Sunday, and selling to a minor, but it was only one bottle. She sold the single bottle once and the Court referred to a

page 77 } Massachusetts case, I believe, *Morey* v. *the Commonwealth*, in that matter and stated that the provisions against double jeopardy related to the offense. It says a man shall be tried, in effect no one shall be tried twice or put in jeopardy—

The Court: On the same charges. In other words, you're distinguishing this from double jeopardy applies to the same charge, this applies to separate charges on the same act?

Mr. Radin: Yes, sir.

The Court: Do you have any case that applies to burglary and possession of tools?

Mr. Radin: I can find nothing one way or the other, Your Honor, because normally, Your Honor, the burglary case, I find no case in the records of the Supreme Court of Appeals

of Virginia which charges a man, which finds him convicted of possession of burglarious tools, or burglarious tools at the same time when the burglary was committed and he's convicted of both, because here we have a charge of possession of burglarious tools with the intent to commit burglary. You can't convict a person of the intent to
page 78 } do something and also of doing it, and this has happened. Now for instance—

The Court: He is not being charged with intent to commit burglary, he's being charged with possession of burglarious tools.

Mr. Radin: With the intent to commit a—

The Court: There's a little difference there. I can't follow you on that.

Mr. Radin: Well, Your Honor—

The Court: He's been convicted of attempted burglary, now he's charged with possession of tools with intent to commit burglary.

Mr. Radin: That's the same burglary with the intent he has been convicted of. In other words, the intent, he's being convicted of possession of something with the intent after he's already done it.

The Court: Can a man commit burglary with intent to commit robbery, and then be convicted of a robbery, too?

Mr. Radin: I don't believe so, Your Honor.

The Court: Man breaks in the house with intent to commit robbery and he's convicted of burglary with in-
page 79 } tent to commit robbery, and once he gets inside there is a robbery. Now you say that he cannot be convicted of both?

Mr. Radin: Excuse me, I shouldn't say cannot be. I believe the case of *Jones* v. *the Commonwealth* this year stated that such could happen, but it was reversed.

The Court: I'm saying is that double jeopardy?

Mr. Radin: No, sir, but in this situation it would be because you have the same, the burglary statute—there are two burglary statutes at least. One of them has an offense if you commit burglary with the intent to commit rape, robbery, or murder, and that has a life sentence. Then you have the next burglary statute which says if you intend to break in, any other felony or larceny. Now, and that's a lesser offense. Now to say the situation would be this, Your Honor, could the man be convicted under both statutes, and I say he couldn't. And that is the exact same thing we have here.

The Court: All right, suppose he's been caught at one end of the parking lot and the crowbar was at
page 80 } the other end of the parking lot. He was not in the proximity or in the possession of the prybar.

Could he then be convicted of possession?

Mr. Radin: Well, Your Honor has overruled my motion to strike, there was no proof of possession. I think he can be convicted of possession except from the act of burglary itself.

The Court: Say that again.

Mr. Radin: I think that he could be convicted of a possession but except from that of the burglary; if he's convicted of the burglary then that ends it. He's convicted of burglary right there, it's the same actual—

The Court: Just a minute. I understood you to say he can be convicted of burglary except from the possession of burglarious tools?

Mr. Radin: Yes, sir, and that would end the burglarious possession, that would be a bar to the prosecution for the possession of the burglarious tools.

The Court: Mr. Radin, I tell you, maybe we're on a different frequency, but I just understood you to say he can be convicted of the burglary except from the possession of burglarious tools?

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Mr. Radin: Your Honor, I did. I didn't mean to mislead. What I meant to say was that he certainly can be convicted but in the sense that we're speaking I included that what effect would that have.

The Court: You don't mean it's a separate offense?

Mr. Radin: Yes, sir.

The Court: You're trying to say he could be convicted of burglary even though he doesn't have a burglarious tool?

Mr. Radin: Yes, sir.

The Court: My point is, can he be convicted of two separate offenses, burglary and possession of burglarious tools?

Mr. Radin: If he's caught at the scene of the burglary. Possessing the tool in Timbuktu, or catch him 10 miles away, or a mile or five miles and he's possessing a tool, that's something else. If it was the man's tool, if it was Norfolk Brass's and I took the tool, it would be larceny. The thing is, he's caught in effect in the act according to the Commonwealth's position, in the act of attempt to commit statutory burglary.

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The Court: Do you admit that he could be convicted of burglary and then be caught a mile away with the tool in his car and then be convicted of possession of burglarious tools?

Mr. Radin: Yes, sir, I believe that's what that statute is for, to convict somebody of illegal possession of tools.

The Court: How far away do you have to get before it becomes a separate offense?

Mr. Radin: When he has left the act of committing the burglary.

The Court: How about a hundred yards?

Mr. Radin: If he's left the act and is walking away with his weapon in his satchel, or just walking away like he has nothing to do with it.

The Court: How about if he was a block away? Would that make a separate offense?

Mr. Radin: If he possesses a tool that is his tool that he carries for the purpose of breaking and entering, page 83 } or that he may use for breaking and entering, he has the intent, I don't think it matters where he's really at, but this tool I think in this situation he has to do something with it other than use it.

The Court: Suppose he were a block away, walking away with the tool, is that a separate offense?

Mr. Radin: With that tool?

The Court: Yes, sir, or with any tool.

Mr. Jadin: Well—

The Court: Suppose he's a hundred yards away?

Mr. Radin: If he has left the act of committing the burglary that's—

The Court: Suppose he's 20 feet away?

Mr. Radin: If he has left the act of committing the burglary. And in the present case there is no proof that he did it or that he had left. He was there. And the evidence is that he may, that this item may have been used.

The Court: Suppose the Court believes from the evidence that he had left the hole in the wall and had gone page 84 } with his tool 20 feet away to hide behind the dumpster, isn't that leaving the spot where the burglary was taking place? Doesn't it make a separate offense?

Mr. Radin: Well, I didn't use the word leaving. Suppose I used the word leave it, O.K. When you're hiding on the immediate premises, premises where the act occurred, and you're merely hiding from the police, I don't feel that you have left the act of burglary.

The Court: All right, let's get right down to the main point in the thing. Suppose he's caught right at the hole in the wall with the tool in his hand and he's in the act of, actually caught red handed in the act of breaking through the wall and he's got the tool in his hand. Can he be convicted of both burglary and possession?

Mr. Radin: I don't think he should be convicted, I don't feel the cases would hold. I find no case permitting but I don't find any case not permitting.

The Court: You're the one presenting this theory, I'm just asking you under that situation can a man be convicted in the light of double jeopardy and section 259? Can page 85 } he be convicted of both?

Mr. Radin: No, sir.

The Court: Why?

Mr. Radin: Why because you can't. He's charged with breaking into a building. He can't break in without something to break in with. So anything he would use outside of his finger is a burglary tool, and when a modern day which we have to consider this is a modern day, although that statute has been on the books since 1874 or 78, you're going to break in, you have got to use something to break in with. If a man commits an armed robbery can you convict him on two charges, two counts of robbery, one for robbery and one for using the gun? Same thing here. He's convicted of burglary—

The Court: Can he be convicted of robbery with a pistol and carrying a concealed weapon?

Mr. Radin: I think so, but you can't get convicted of carrying a concealed weapon if you're holding a gun out and you're using it, it's not concealed.

The Court: Say he pulls it out of his pocket page 86 } when he enters the bank?

Mr. Radin: There's no proof it was ever concealed, just as I say in this case, there is no proof it was ever possessed, nothing more than used.

The Court: How about a man that commits a robbery and shoots his victim, can he be convicted of robbery and malicious wounding?

Mr. Radin: I *din't* even read the annotation on that, but I would think he could. Robbery is an act of taking by violence, if you commit murder or malicious wounding—I remember reading an annotation what happens if you're convicted of robbery and the victim dies after you've been convicted. I should think he could then be convicted of murder.

The Court: All right.

Mr. Radin: Your Honor, I would like to point this out as well, that since this is the basis of the act and I would like to also point two points out. Number one, many cases involving double jeopardy are seen in the Federal case reports where the Federal first or second, or U. S. Supreme Court cases, in the Federal provisions there in no pro- page 87 } vision such as our 19.1-259; some of the other states have but not the Federal. In fact at least several Federal cases I have read which today hold exactly the same as *Arrington* v. *the Commonwealth* which is now

affected by that particular statute. The reason I mention that is because, as I say sometimes loss of the fact of what is double jeopardy as opposed to statutory interpretation. Statutory interpretation relates to the act. If the act violates 15 different offenses, 15 different statute provisions, there is no double jeopardy unless it is shown this is merely a dissecting of the offenses and putting it in various categories. But if it is a separate, distinct offense, that is a double jeopardy and this statute, all we have to worry about is whether it's the same act.

The Court: I understand. I understand your distinction between double jeopardy and Section 259.

Mr. Radin: If Your Honor please, the final thing is the only evidence presented today is the exact same evidence that was presented to convict this man of attempt to commit burglary. They have, the Commonwealth has had to
page 88 } prove the exact same evidence today and that would make it a violation of double jeopardy. There is no—the exact same witnesses have testified, the exact same evidence has been elicited and it's necessary today to prove the exact same facts that had to be proved at the previous trial. They had to prove that there was burglary, they had to prove that this man was in the vicinity, they had to prove that that tool was there and they had to prove that he was near the tool and that some of the matter could have come from both. So the exact same evidence has been presented and, even under the double jeopardy, if it takes the exact same evidence it's the same offense.

The Court: I have already overruled the motion to strike. Mr. Jenkins, you might just direct yourself to the motion to quash.

Mr. Jenkins: Very well, sir. I think that Mr. Radin has said on his motion to quash, and more importantly I think he's directed it to the double jeopardy provisions in 19.1-259. I think the law is well settled you cannot be con-
page 89 } victed—tried for the same offense twice. He has not been tried for the same offense twice, and most important do we have the necessary elements, ones necessary to prove the other and I say not. Attempt statutory burglary has five elements: breaking and entering of a storehouse in the nighttime with intent to commit felony or whatever the statutory burglary, the elements are which are almost the same as common law except it's not a dwelling house. What are the elements for possessing burglarious tools? Merely one; the possession creates the presumption; and we have also showed the use to which the tool had been intended. I think that down the hall here, approximately a year ago

when the case involving the Berlin's, I forget the name of the defendant—*Commonwealth* v. *Rust.* In that particular case the man was charged with a multitude of offenses arising out of a series of transactions and occurrences at the same time. He was charged with common law burglary, he was charged with I believe attempt murder, and malicious wounding. Now in the first case the jury found him not guilty of common law burglary. They came right back and tried him on a count of malicious wounding and
page 90 } the same argument was made by Mr. Bashara that it was double jeopardy. Well it's not because the elements of malicious wounding are different from the elements of common law burglary, and I submit attempted statutory burglary and possession are two separate and distinct offenses. For that reason, Your Honor, I would think that the evidence has been stated and anything else I can say is redundant. That's a point I do want to bring across to you, the elements of one will not convict of the elements of the other, different elements entirely. For attempted statutory burglary you don't have to possess burglarious tools. To possess the burglarious tool you've got to possess the tool.

The Court: Suppose the tool was used to knock one brick out, would that be burglary?

Mr. Jenkins: It would be attempt burglary.

The Court: Wouldn't be a completed burglary?

Mr. Jenkins: Not unless he got in, no, sir.

page 91 } The Court: You've got to complete the break in?

Mr. Jenkins: You've got to do all the elements, the breaking and entering of a dwelling house or storehouse at nighttime with intent to commit a felony. He breaks, he intends to commit the felony, it's a storehouse, he doesn't enter so you've got one of the elements left out so you can't have a complete statutory burglary; or if it's a dwelling house you can't have a common law burglary without proving all of those offenses. I submit if he got up there and took the tool, bang, crash, and knocked out two bricks, he's attempting to break into that building and I don't think you're going to have any problem proving the elements. Conversely, possessing that tool is a separate offense, and you don't have to prove all five elements, breaking and entering a dwelling house or storehouse, nighttime with intent to commit a felony, or daytime of a dwelling house. You don't have to prove those five elements to prove possession of burglarious tools. They're two separate, entirely distinct offenses. True they happen close in
page 92 } time with each other but that does not stop and does not bar any prosecution on the charge.

Mr. Radin: May I make one further observation, Your Honor?

The Court: All right, sir.

Mr. Radin: The final thing is the conviction was attempt to commit, and an attempt requires a breaking with an intent to commit the burglary. When it isn't completed you've got to show the intent, that there is an intent to commit the burglary. In the instant situation you again have the attempt because there hasn't been a completed act according to the conviction. It was an intent to commit. Again here he's convicted of his intent to commit, twice. Once on attempted burglary, to commit statutory burglary, and once on possession of the tools with intent. Each time we have the same intent.

The Court: Isn't intent important in every burglary whether it's attempted or completed You've still got to show what the purpose of the break and enter is.

page 93 } Mr. Radin: I'm saying the intent definitely is important, but the intent would merge into the completed act if it were complete. Now the only completed act here was the intent coupled with an attempt. So the intent was the exact same item that is part of the offense; the intent to commit the felony is just as cruical as the possession itself. Again, the breaking in the building, or dislodging the stone, was no entry, it was just as important but no more so than the intent to commit the felony. So for this same part of the crime is the intent to commit the larceny which has never been done. So for the same intent he's convicted twice, that's the same act, the same act of intent for which he's convicted twice. And it would seem that that violates double jeopardy as well as the statute provisions of 19.1-259.

The Court: Well, I don't agree with you on that point at all, and the motion to quash is overruled.

Mr. Radin: I'd like to note an exception. I wonder if I could have a five minute recess to talk to my client?

The Court: All right, the Court will take a five minute recess.

page 94 } (Reconvene)

Mr. Radin: Your Honor, I'm going to call the defendant as a witness now, and I would like to have him questioned as to, either I'll question him or the Court can, that he knows the importance of his taking the stand.

The Court: Do you want to proceed? You can go ahead, or I'll do it.

Mr. Radin: I prefer the Court to do it.

By the Court:
Q. What is your name?
A. Joseph Plummer.
Q. Now I asked you some questions yesterday regarding representation of you by Mr. Radin.
A. Yes, sir.
Q. And you stated that you were satisfied with his representation?
A. Yes, sir.
Q. Now do you understand that you do not have to take the stand?
A. Yes, sir.
Q. Do you understand that if you do not take
page 95 } the stand that no comment can be made on it by the Commonwealth's Attorney, and that it will not be used to your prejudice, do you understand that?
A. Yes, sir.
Q. And do you understand that if you do decide to take the stand in your own defense that you can be cross examined?
A. Yes, sir.
Q. By the Commonwealth's Attorney and by the Court?
A. Yes, sir.
Q. Do you understand me?
A. Yes, sir.
Q. Now, is there anything you want to ask me about your decision whether you should take the stand on your rights?
A. No, sir. I would like to take the stand and try to get a couple of things straight.
Q. You would like to take the stand. All right.

(Defendant sworn by the clerk)

page 96 } JOSEPH PLUMMER, the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Radin:
Q. State your name, please.
A. Joseph Plummer.
Q. And you're the defendant in this proceeding, Mr. Plummer?

Joseph Plummer

A. Yes.
Q. How old are you, Mr. Plummer?
A. Thirty-five.
Q. I direct your attention to the 14th day of December, 1967, just past, and on that date were you employed?
A. That date, no, sir; self employed.
Q. Excuse me?
A. Self employed.
Q. What was your occupation?
A. Painter.
Q. Painter?
A. Yes, sir.
Q. Had you been employed by a company, or a firm, or a person prior to that date?
A. Yes, sir.
Q. Have you ever been, tell me if you had ever
page 97 } been employed by the Norfolk Brass and Copper Company?
A. I have.
Q. And what was the last date you worked there?
A. The first day of December I believe.
Q. Of what year?
A. 1967.
Q. And what was your job there, what did you do?
A. I was a truck driver and I got up the orders for the delivery.

By the Court:
Q. You worked there until did you say September or December?
A. No, sir, I started in, I think I started in August until December. I think it was the first of December was the last day I worked, they told me things were slow and didn't need me.
Q. December 1st?
A. Yes, sir.

Mr. Jenkins: I move that the last part of his answer be stricken. I wasn't allowed to go into it with Mr. Keefe on the stand. I've let Mr. Keefe go and I can't rebut—
The Court: I agree. I'll strike the last part
page 98 } part of the answer as to why he left. I was simply trying to get the date straight.
Mr. Jenkins: Yes, sir.

Joseph Plummer

By Mr. Radin:

Q. Were you familiar with any sort of mechanism or devices that the Norfolk Brass and Copper had to guard against break ins into this company?

A. Yes, sir.

Mr. Jenkins: Your Honor, I submit this is not relevant to the proceeding at hand. We're trying one case and one case only, and it's the possession of that tool. I think—I don't think it's got anything to do with burglar alarm systems in Norfolk Brass and Copper, it's his witness.

The Court: What is your relevancy of that, Mr. Radin?

Mr. Radin: Your Honor, the testimony is that somebody broke into an area protected by a silent burglar alarm system, and I submit that someone who is familiar with this would not do it.

The Court: Maybe he's become familiar with
page 99 } it since the break in on December 18th—

Mr. Radin: Well, I would like his testimony to come out.

The Court: I'm going to let you put it in. I have my doubts about it but I'll overrule the objection.

By Mr. Radin:

Q. How did you become familiar with this burglar alarm system?

A. Well, the center door there it's a draw door and it cut off the burglar alarm wire and I fixed the burglar alarm wire—

Q. The wire—w i r e?

A. Yes, sir.

Q. And did the wire protect, to your knowledge did it protect anything other than the door itself?

A. Protects it all, the doors, the windows and the roof.

Q. What about the area adjacent to the door, it break or—

A. No, the wires run all the way around the wall to each wall, to each window, to the doors.

Q. What type of signal did this burglar alarm give off, do you know?

page 100 } A. No signal.

Q. It gave off no signal?

A. No, sir.

Q. By that you mean it was silent?

A. Yes, sir.

Joseph Plummer

Q. Now you've been present here, and the other testimony has indicated you were within 20 to 30 feet of that bay door, that center door, about 9:45 P.M. on December 14, 1967.
A. Yes, sir.
Q. Were you there?
A. Yes, sir.
Q. At that time?
A. Yes.
Q. What were you doing there?
A. I was relieving myself behind the dumpster.
Q. You mean like using the bathroom?
A. Yes, sir.
Q. In which direction were you walking—were you in a car or on foot?
A. I was on foot.
Q. Were you alone or with someone?
A. Alone.
Q. From where had you been walking?
A. I had came from 23rd Street, the building on the corner, and I was going east.
page 101 } Q. 21st and what?
A. 23rd and the building on the corner—23rd and Colley.
Q. 23rd and Colley, and you were walking east?
A. Yes, sir.
Q. I'm going to show you this bar, parts of this bar. It has been offered in evidence by the Commonwealth, part of it as Commonwealth's exhibit 3-A, I believe the rest is C-3 possibly. Is this your bar?
A. No, sir.
Q. Before you arrived at the property owned by Norfolk Brass and Copper Company on the evening of December 14, 1967 did you have that bar in your possession?
A. No, sir.
Q. Did you ever have that bar in your possession on December 14th?
A. No, sir.
Q. Did you ever use that bar on December 14th?
A. No.
Q. Have you ever seen a bar similar to that bar?
A. I've seen one.
Q. Where did you see one like that?
A. Norfolk Brass and Copper, I worked with them.
Q. Did you see it while you were working for them?
A. I saw one like that while I was working.

Joseph Plummer

page 102 } Q. Did you see it that evening before the police officer came?

A. No, sir.

Q. Do you know where that bar was kept while you were employed by Norfolk Brass and Copper?

A. Yes.

Q. Where was it kept?

A. In the back room in the yard.

Q. In a back room in the yard. Is that where it was kept all the time?

A. Yes.

Q. Who had access to that room, do you know? Let me rephrase that. Who had opportunity to use that bar?

A. Everybody around there.

Q. Was it always returned in the evening?

A. No.

Q. Can you tell if you ever saw it and where you saw it in the evening when it was not returned?

A. We've been looking for it, it's been lost a few times; we've gone looking for it sometimes at the railroad tracks, sometimes it's used for knocking holes in the roofing out there in the yard.

Q. When you say roofing you mean sheets of roofing? You don't mean the roofing of the building?

A. No, roofing paper, you know, they got
page 103 } stacked in the yard out there.

Q. On the evening of December 14, 1967 did you have the intent to commit a felony?

A. No, sir.

Q. Did you commit a felony?

A. No, sir.

Q. Did you break into a building?

A. No, sir.

Q. Did you attempt to break into a building?

A. No, sir.

Q. Do you know what was kept behind the bay door in the Norfolk Brass and Copper while you worked there?

A. Yes.

Q. What was kept there?

A. Had brass, copper.

Q. You mean pipes or what?

A. Pipes, had rolls of copper, sheets of copper.

Q. How heavy were these sheets of copper, do you have any idea?

A. The sheets approximately 3 x 6 feet, I guess they weigh

about 40 pounds; 6 x 8, something like that, rolls weight over a hundred and some pounds.

Q. In your presence has Officer Fowler, who testified here today, stated where you were when he first arrived at the scene of the alleged attempted break in?

page 104 } A. Yes.

Q. Where did he say you were?

A. Today?

Q. In his previous testimony.

A. He said I was standing beside the car, the police car.

Q. Beside the police car. Today he said you were behind the dumpster when he arrived, is that correct?

A. Yes, sir.

Mr. Radin: Your Honor, I would like to offer in evidence the statement of Officer Fowler at the previous trial before this Court. The actual copy, the original of the transcript in the matter, that's on appeal. The original copy has been certified by Judge Bullock as an accurate transcript of the proceedings. The transcript states—

The Court: Just a minute. You want to use the transcript?

Mr. Jenkins: Your Honor, Mr. Radin wants to do indirectly what he can't do by direct examination. I don't think that transcript can come in here. That might be a copy of the original transcript, I don't deny that, but

page 105 } I still think to get that transcript he's got to have the lady that transcribed it. Furthermore, the purpose for which he's using it is to rebut the testimony and contradict the testimony of Officer Fowler; that testimony today went unchallenged. Now the way that we challenge testimony, we tell people we're going to rebut their testimony is when, we tell them we're going to show it by some other means, by such and such—

The Court: Lay a foundation.

Mr. Jenkins: And in this case Officer Fowler stayed on that stand and the foundation was not laid. I say this testimony and what he's attempting to do is inadmissible. He can call for Officer Fowler, put him on the stand and make him his own witness and claim he's taken by surprise.

Mr. Radin: I submit I'm not, I'm trying to contradict a witness by a written statement, previous testimony, by previously oral statement he made. I want to direct the Court's attention—

The Court: Anything this witness says that

page 106 } Officer Fowler says is hearsay, isn't it?

Joseph Plummer

Mr. Radin: Well, he's the prosecution, he's the other part, the Commonwealth is the party—

The Court: Let's get several things straight. You admit you laid no foundation with Officer Fowler when he was on the stand?

Mr. Radin: Right.

The Court: And that's one of the exceptions to the hearsay rule. Anything this witness says about what somebody else said is hearsay, isn't it?

Mr. Radin: Well, that would be one of the, part of the prosecution. The Police Department is actually prosecuting witness, the prosecuting party here. The Commonwealth is not present, the police officer—

The Court: I don't understand your answer.

Mr. Radin: I'm saying if a—

The Court: Anyway the objection is sustained and I'm not going to let you use that transcript without proper foundation.

Mr. Radin: Yes, Your Honor. Answer Mr. Jenkins' questions.

page 107 } CROSS EXAMINATION

By Mr. Jenkins:

Q. Have you ever been convicted of a felony, Mr. Plummer?

A. No, sir.

Mr. Radin: Objection; his character hasn't been brought in.

Mr. Jenkins: He's taken the stand, Your Honor, and I can use it.

Mr. Radin: Objection withdrawn.

By Mr. Jenkins:

Q. Have you ever been convicted of a felony?

A. No.

Q. On the 26th day of March, 1968, weren't you convicted for attempted statutory burglary?

The Court: Just a minute. All right, Mr. Radin, what's your objection?

Mr. Radin: An appeal has been noted in this matter, an appeal is still pending. An appeal was filed within the statutory time and he certainly can't be questioned as to veracity of a crime.

page 108 } The Court: He was asked the simple question of has he ever been convicted of a felony and his answer was no. I'm going to permit the Commonwealth's Attorney to clarify it. Now if the witness wants to explain it he can, but I'm going to let the Commonwealth's Attorney pursue it on cross examination.

Mr. Radin: Let me finish, Your Honor, and point this out: if he were convicted the conviction if it is appealed is not a conviction as yet. There is no firm determination. If this man were free on bail and—

The Court: I don't know whether he's been convicted of something other than this case that you refer to that Judge Bullock tried.

Mr. Jenkins: That's the only one, Your Honor. That's the only one I'm referring to and I maintain I have a right to pursue it.

Mr. Radin: Exception.

By Mr. Jenkins:

page 109 } Q. On the 26th day of March, 1968, in the Corporation Court of the City of Norfolk, courtroom 103 in the next courtroom up here, were you not convicted of attempt statutory burglary by a jury of your peers and sentenced to four years in the Virginia State Penitentiary?

A. Well, if you put it that way, yes. Reason why I phrased it as that way was because like Mr. Radin stated, I didn't figure that as a conviction as of yet.

Q. You have been convicted of a felony?

A. No, sir—what I mean is—

Mr. Jenkins: I think the witness has drawn his legal conclusion, Your Honor, he's not entitled to draw.

The Court: I'm going to let him explain.

A. What I meant was I didn't know he was talking about this one. I thought he was talking about before. I'm not talking about what ever happened now, I'm talking about before.

Q. I'm talking about the 26th day of March.

A. If you want to put it that way, fine, all right, I was convicted if that's the way you want to put it.

page 110 } Q. Where had you been —directing your attention to the 14th day of December, 1967, that morning, what had you been doing?

Joseph Plummer

Mr. Radin: Objection, Your Honor.

Mr. Jenkins: I've got the man on cross examination.

The Court: Just a minute.

Mr. Radin: He's charged with the possession of burglarious tools at 9:45 P.M. What he did that morning is irrelevant to that.

The Court: Well I don't know whether it is not, but he's got him on cross examination and he can test his credibility.

Mr. Radin: Exception.

By Mr. Jenkins:

Q. What did you do that morning?

A. I got brushes together, my equipment, and carried it to a woman's house for to paint a house, a room.

Q. You painted a house?

A. I did not paint, I carried the stuff there.

Q. Did you work that day?

A. No, I did not work that day.

Q. What did you do after you took the paint brushes out there?

page 111 } A. I went to the employment office, a friend of mine went over to Ward's TV and told me that I could come back tomorrow and get a job driving a truck over there the next day.

Q. About six o'clock that evening what did you do that evening prior to 9:45?

A. I was round my sister's house.

Q. Where does she live?

A. Roberts Park.

Q. When did you leave your sister's house?

A. About six something.

Q. All right, about six; what did you do then?

A. I came home.

Q. Where do you live?

A. I live 757 Lincoln Street.

Q. Where?

A. 757 Lincoln Street, Norfolk.

Q. How long did you stay home?

A. I don't know, you know, nobody can tell how long you stay home, around in the neighborhood.

Q. When did you leave to come over in the 21st Street area?

A. I don't know. I was in the street and just caught the bus and went on over there.

Q. Caught the bus?

Joseph Plummer

A. Yes.
page 112 } Q. One bus take you there?
A. One bus, Church Street bus.
Q. Church Street bus takes you to where?
A. All the way up to Colley Avenue and 21st Street, Colley Avenue.
Q. You got off at Colley and 21st Street. What time of night was this?
A. Six-thirty I guess.
Q. All right, what did you do in that area between 6:30 and 9:30?
A. I went to 2300 Colley Avenue, Atlas Awning.
Q. Um huh, what did you do there?
A. Nothing but talked. I asked the guy did he have any jobs because I do painting.
Q. Were they working at that time of night?
A. Yes, it was.
Q. How long did you stay there?
A. I stayed there for quite sometime, hour or so.
Q. What?
A. I stayed there hours or so.
Q. Hours or so?
A. Hours.
Q. Where did you go from the Atlas Awning place?
A. I went around on 25th Street to get something.
Q. To get what?
page 113 } A. To get something.
Q. What did you get?
A. I went to get some whiskey if that's what you want.
Q. Were you successful?
A. No.
Q. What time of night was this?
A. I don't know, I don't have no watch.
Q. Huh?
A. I don't know exactly.
Q. How long was it before you got arrested?
A. About less than 10 minutes.
Q. Less than 10 minutes before you were arrested?
A. No, afterward, after I left from there less than 10 minutes I was arrested.
Q. How long did you stay trying to get whiskey and where were you trying to get whiskey?
A. Do I have to answer that?

The Court: Yes, you've got to answer.

Joseph Plummer

A. I went to 25th and Gosnold.

By Mr. Jenkins:

Q. 25th and Gosnold?

page 114 } A. Yes.

Q. How long was that after you left—did you go from the Atlas Awning to 25th and Gosnold?

A. Yes.

Q. How long did it take you to ascertain whether you could get any whiskey?

A. About just a few minutes, just as soon as I could get there and come back, nobody answered.

Q. Where did you go from 25th and Gosnold?

A. I came back to Atlas.

Q. Came back to Atlas Awning?

A. That's right.

Q. How long did you stay this time?

A. I didn't stay, nobody was there.

Q. And you had been there approximately what, 15 minutes prior?

A. Fifteen, yes.

The Court: What was this now?

A. I don't know exactly, sir.

The Court: What time have we got to now, day or night?

Mr. Radin: It's probably 10 minutes before he

page 115 } was arrested, according to what he stated.

By Mr. Jenkins:

Q. Where did you go from Atlas?

A. I started on back home, started back down 23rd Street.

Q. 23rd Street?

A. Yes.

Q. And you walked—23rd Street abuts to the railroad tracks, right?

A. What?

Q. It abuts the railroad tracks, it's right next to the railroad tracks?

A. 23rd and Colley.

Q. Why didn't you walk down one of the other streets?

A. What do you mean why didn't I walk down one of the other streets?

Joseph Plummer

Q. Why didn't you walk down a paved street instead of a dirt street?
A. All of them is paved, none of them's dirt.
Q. Why didn't you walk down another street?
A. I walked down 23rd Street, I was going home.
Q. Why didn't you walk down 24th or 25th
page 116 } Street?
A. 25th Street is going that way, I'm not going home if I go to 25th Street.
Q. You're not going home if you go to 25th. Atlas is where?
A. 23rd and Colley, right on the corner.
Q. 23rd and Colley?
A. Right.
Q. So Atlas is at 23rd and Colley?
A. Right on the corner.
Q. And the Church Street bus goes down Colley Avenue, doen't it?
A. No.
Q. Goes down what street?
A. Goes down 21st Street.
Q. Why didn't you walk from Atlas Awning to 21st Street rather than go down 23rd Street?
A. I was going to catch the bus.
Q. What bus were you going to catch?
A. Neither one.
Q. You were going to walk?
A. I didn't say I was going to walk home. I was going to stop.
Q. Where were you going to stop?
A. Down to the joints, I mean the places—
Q. What joints?
page 117 } A. There's a place down the street, I forget the name of it.
Q. All right, what's the name of it?
A. I don't know, it's on the corner of Debree or something.
Q. Debree and what?
A. I don't know, I don't exactly know what it is. Debree or Llewellyn, it's a small place, it's a new restaurant that's just opened up.
Q. Debree and Llewellyn and what?
A. I don't know, Debree and Llewellyn. It's a restaurant that was opened down there, haven't been long opened where I eats at.
Q. Where was it?

Joseph Plummer

A. I told you I don't know the street, it's on the corner of one of those streets.

Q. It's either on Debree or Llewellyn, is that right?

A. Somewhere along the way—

Q. It's on Debree and Llewellyn going along what, north and south?

A. I don't know which way they run. I don't know which way Debree runs. I said I didn't know which one it was.

Q. Was it close 25th Street, 19th Street, or
page 118 } 15th Street?

A. It's close to—I don't know which way each one of them runs—it's closer to 24th Street.

Q. All right, why didn't you walk down 24th Street?

A. Why should I when I'm right on the corner of 23rd Street?

Q. I'm asking why you didn't walk down 24th Street?

A. I don't know. You don't just go around out of your way like that.

Q. You don't know, do you? What were you doing at Norfolk Brass and Copper?

A. I was relieving myself.

Q. Why didn't you relieve yourself at Atlas? Didn't they have a bathroom?

A. I told you nobody was there.

Q. Well, you had just been there 15 minutes before that.

A. You sure—

Q. Why couldn't you wait until you got to this restaurant where you ate?

A. Because I had to relieve myself and I went on and did it; I'd been doing it all the time.

Q. You'd been doing it all the time?

A. Yeah.

Q. You're in a habit of doing this?

A. Not all the time, at this time I had to go to
page 119 } the bathroom and I stopped.

Q. You couldn't wait 20 minutes?

A. Why should I?

Q. If you'd waited 20 minutes you might not be in this predicament this morning.

A. That's what I know now.

Q. Why did you crouch down and hid behind the Dempster dumpster?

Mr. Radin: Objection.

The Court: Overruled.

Mr. Radin: Exception.

Joseph Plummer

By Mr. Jenkins:
Q. Why did you hid behind the Dempster dumpster?
A. If I were with my pants down as I supposed to let a car see me?
Q. Why were you hiding over this—
A. I was not hiding.
Q. This tool right here?
A. I was not hiding.
Q. You were not hiding?
A. No.

Mr. Radin: The answer was he was not hiding
page 120 } over it.
Mr. Jenkins: But the question was why were you hiding over this bar and he said he was not.

By Mr. Jenkins:
Q. Was this bar not between your legs?
A. No, sir.
Q. Where was the bar?
A. I never seen the bar.
Q. Are you trying to tell the Court that Detective McCartney put it between your legs?
A. It was never between my legs.

Mr. Radin: Objection. This man has never stated that Detective McCartney put that between his legs. He never said that.

By Mr. Jenkins:
Q. Would you have this Court believing that Detective McCartney put that tool between your legs?

Mr. Radin: Objection, there's no evidence Detective McCartney did that.
The Court: Just a minute. Detective McCart-
page 121 } ney did what, said it or did it?
Mr. Radin: Did it, that's what Mr. Jenkins is asking. There's a conflict in the testimony if Dectective McCartney says the bar, that he saw the bar after the man came forward and it was in the space where, it was in the area where this man was squatting over there, so therefore Detective McCartney stated he was hunkered over, or squatting.
The Court: What's the matter with the question, that's all

I want to know. Don't tell me what all the evidence was, just tell me what the objection is.

Mr. Radin: To ask this man whether or not Detective McCartney put it between this man's legs. There's never been any evidence or accusation to that effect.

The Court: All he's doing is asking him. McCartney said it was is my recollection of the evidence.

Mr. Radin: He did say it was, we don't deny that, but asking him whether or not Detective McCartney put it between his legs.

The Court: Objection overruled.

Mr. Radin: Exception.

page 122 } By Mr. Jenkins:

Q. Would you have this Court believe that Detective McCartney put that prybar between your legs?

A. I never seen the crowbar.

Q. You never seen it. When was the first time you saw it?

A. First time I seen that crowbar was in the Court over there, Judge Bullock's court.

Q. You never saw it there beside you that night?

A. I never seen that crowbar that night.

Q. You were bending over it, weren't you?

A. That crowbar was not there underneath me.

Q. It was not underneath you?

A. No, sir.

Q. How did it get the bricks and mortar on it?

A. I do not know.

Q. How did the bricks get knocked out of that wall?

A. I wouldn't know that.

Q. You don't know?

A. I wouldn't know that.

Q. And yet you don't know the name of the restaurant you're going to either, do you?

A. No, I don't know the name of it.

Q. You don't?

A. No, I just get off work and stopped by page 123 } there to eat sometime.

Q. You say you eat there, how often do you eat there?

A. Once in awhile, I'm not even there once in awhile. If I'm around the place and 12 o'clock comes I run down and get a bite to eat.

Q. At this particular time you were unemployed, weren't you?

Joseph Plummer

A. I told you self employed, working for myself painting.
Q. What wages were you making about that time weekly?
A. I make my own prices if I choose to.
Q. What did you average weekly around that period of time?
A. It wasn't actually weekly; I wasn't, you know, employed at that time.
Q. I said what did you average weekly doing this type of work?
A. I mean actually it wasn't weekly, I wasn't unemployed that long. I make enough if I work every day I suppose I make $80 or $90 if you get the work.
Q. During that time how many days a week were you averaging working?
A. I could work every day of the week if I
page 124 } want.
Q. I asked you during that period of time, December 1967, approaching the Christmas Season, how many days a week did you average working?
A. I work every day.
Q. You worked every day during that period of time, is that correct?
A. You mean of during the Christmas Holidays?
Q. Not during the Christmas Holidays, the week of the 14th of December?
A. No, I didn't work every day. I said I could have worked every day.
Q. I'm asking you how many days a week did you work during that period of time?
A. I don't know, maybe six, I don't know.

Mr. Jenkins: Answer any questions the Court has; he's not responsive.

By the Court:
Q. Had you had anything to drink that day?
A. Yes, sir, that night when the fellows had a bottle around there that night.
Q. How much had you had that night?
A. Well, it was about four—let's see—about five guys there, so didn't have but a pint of whiskey so
page 125 } you know it couldn't be very much, maybe a drink like that.
Q. What time was that you were drinking with these other men?

Joseph Plummer

A. That was about, I guess about eight.

Q. About an hour, little over an hour before you were caught there?

A. Yes, sir.

Q. Well, about an hour and a half.

A. I was going to get some more, that's why—

Q. Did you ever get anything to eat?

A. No, sir.

Q. You went to this place, it was closed, isn't that what you said?

A. Yes, sir. This was not a restaurant that I went to. I say I was going to get something, I was going to get some whiskey. That's where I was on the way to and the people was not home. I comes back up, the people have come from Portsmouth where they were working and they had left.

Q. You came back to the place called—the awning—

A. Atlas Awning.

Q. What's that?

A. They builds awnings, you know, that goes over porches.

Q. But anyway, you had nothing to eat?

A. During that time, no, sir.

page 126 } Q. Well, had you worked that day?

A. No, sir, only I helped my friend carry some coal to his aunt's and I went to the employment office. I got my equipment ready for to go to work.

Q. How do you explain the mortar and the brick particles that were in the pants that were introduced in evidence as Exhibit C-4?

A. Officer McCartney when he came up I was putting on my pants. He took me from the dumpster, gun pointed to me, put me against the wall to frisk me and tha's how I got the mortar on my pants.

Q. Just by leaning up against the wall?

A. Leaning up against the wall.

Q. Where did he put you up against the wall?

A. By the hole. He had his lights flashing and put me up against the wall by the hole.

Q. By what hole?

A. By the hole that was by the door.

Q. The hole by the door?

A. Yes, sir.

Q. Took you then from behind the dumpster directly to the hole, is that right?

A. Yes. He was flashing his lights over there and he, I guess—

Joseph Plummer

Q. How long were you up against the wall
page 127 } where the hole was?
A. Long enough for him to frish me.
Q. How long did that take?
A. I guess a few seconds, I suppose.
Q. And then what happened?
A. And then he asked me for my identification card and two of us, he brought me to the car, put me in the car, I gave him my identification and he wrote it down, and then this Officer Fowler, or whatever his name was, come up.
Q. You mean the officer didn't get there until then?
A. No, sir. Nobody there but just the two of us. That's one reason why I was wondering what kind of statement was he making.
Q. Now you say you never saw that crowbar or pyrbar until the day you went to Court?
A. No, sir.
Q. Didn't you see Detective McCartney pick it up?
A. No, sir, *ne* never picked the crowbar up.
Q. He never commented on it?
A. He never said anything. He came to the—when he sent me by some more police officers in another car here he came about 45 minutes later, or 50 minutes, and then he tells me, say you're charged with burglary.
Q. Did he have the crowbar then?
page 128 } A. He never had the crowbar then.
Q. Did he ever say anything about it?
A. No, he never say anything about the crowbar. The only time I knew anything about a crowbar is when he issued me the warrant and right away I called Mr. Keefe up at that time.

The Court: All right, any other questions, gentlemen?
Mr. Radin: No, sir, Your Honor.
Mr. Jenkins: I have none.
Mr. Radin: That's the entire case of the defense, Your Honor.
The Court: All right, sir. Now, anything by way of argument?
Mr. Radin: I would like to renew my motion to strike the evidence. Again the only evidence presented here today is that this man was in the vicinity, some substances could have come from the brick, and that a robbery, that an attempted burglary occurred sometime between 5:30 and 9:45.

No other evidence. If he was there, he says he went—he was walking down the street from 23rd and Colley,
page 129 } he walked down the street on 23rd and he went behind the dumpster to relieve himself. In view of that I don't feel that the Commonwealth's evidence has been proved beyond a reasonable doubt. This attempted break in could have occurred at anytime after 5:31, or at anytime after 5:30 that afternoon, the last time there is any evidence the building had not been entered. For that reason I say that this man should be, the indictments against him should be dismissed.

The Court: As far as the motion to strike, I'm going to overrule it. Now, do you have any argument as to the merits?

Mr. Radin: Yes, sir.

(Closing statements by both counsel)

The Court: Joseph Plummer—

Defendant: Yes, sir.

The Court: This case boils down to somewhat the question of credibility, and I resolve every question of credibility against you and in favor of the Commonwealth. I find that, as a matter of fact, you did have possession of
page 130 } the crowbar; that it was not only in your immediate presence, that you were on top of it. This, together with the other evidence of the break in, the mortar on the tool, on your pants being similar to the type in the wall where the break in occurred, and your immediate proximity, and at an unusual hour and hiding behind a dumpster, all of this adds up, in my mind, to prove your guilt beyond all reasonable doubt. I therefore find you guilty of possessing burglarious tools.

Mr. Radin: Your Honor, I wouldn't—I'm not asking for a probation report but I would ask that the sentence you impose could run concurrent with the one he's previously received.

The Court: What sentence did he receive?

Mr. Radin: Four years for the attempt.

The Court: Was that a jury case?

Mr. Radin: Yes, sir.

The Court: Did you try that case?

Mr. Radin: No, sir, Your Honor, I did not.

The Court: Who tried it?

page 131 } Mr. Radin: He had a private attorney at that time.

Mr. Jenkins: I have no objection, sir.

The Court: Do you have any position?

Mr. Jenkins: As far as the concurrent time goes, sir?

The Court: That's right.

Joseph Plummer

Mr. Jenkins: That's perfectly agreeable with me.

The Court: All right, do you have any recommendation?

Mr. Jenkins: No, sir, none that I have discussed with Mr. Radin.

The Court: All right. I fix your punishment at two years in the Virginia State Penitentiary, and I will direct that it run concurrently with the sentence which you received in the other case in Corporation Court.

The Clerk: Joseph Plummer, you stand convicted of possession of burglarious tools as charged in the indictment and your punishment fixed at confinement in the penitentiary of this Commonwealth for a term of two years. Is there anything you have to know or say why the Court page 132 } should not here and now proceed to pronounce judgment against you according to law?

(No answer from the defendant.)

The Court: I sentence you to two years in the Virginia State Penitentiary for possession of burglarious tools, and I direct that this sentence will run concurrently with the other sentence which you received in Corporation Court of the City of Norfolk for attempt burglary—attempt statutory burglary. I don't know the exact date—

Mr. Radin: It was March 26th, Your Honor. We would like to note an appeal, Your Honor. I would ask if the Court would appoint me or any other attorney to represent Mr. Plummer on this appeal. Excuse me—Mr. Jenkins suggested making a motion to set aside the verdict, but my understanding it's not necessary in a trial by the Court. I will make the motion. I move to set aside the verdict—

The Court: Motion overruled.

Mr. Radin: And I would like to note an appeal. I am presently representing Mr. Plummer on the appeal page 133 } from the first conviction.

(Defendant sworn)

By the Court:

Q. Do I understand that you wish to note an appeal from this case?

A. Yes, sir.

Q. Do you have any funds with which to employ a lawyer?

A. No, sir.

Q. Do you own an automobile?

A. No, sir.

Q. Do you own any furniture?

Joseph Plummer

A. No, sir.
Q. Television set?
A. Repossessed it.
Q. Where do you live?
A. 757 Lincoln Street.
Q. Where?
A. 757 Lincoln Street. Norfolk.
Q. Do you have any family?
A. Yes, sir. Mother, and my father is dead.
Q. You have a mother, sisters and brothers and persons like that and you live with them?
page 134 } A. Yes, sir, my mother.
Q. Did you own any property?
A. I owned a stereo and TV, but it's been repossessed.
Q. You don't own anything now?
A. No, sir.
Q. Do you have any money with which to employ a lawyer?
A. No, sir.
Q. Do you wish the Court to appoint a lawyer for you?
A. Yes, sir.
Q. To prosecute this appeal, is that right?
A. Yes, sir.

The Court: All right, Mr. Radin, I appoint you to represent him in this case. You have tried it at this level and I think you're better qualified than anyone else to proceed with the appeal. You're familiar with the case. Obtain from the defendant the usual affidavit of poverty, and I suggest that you do this within the next day or two. As soon as it's done and you file that with my clerk, an order will
page 135 } be entered appointing you as the attorney to prosecute his appeal, to request a writ, and ordering the preparation of the record.
Mr. Radin: Yes, sir.

Court adjourned.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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