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Record No. 7419

In the
Supreme Court of Appeals of Virginia
at Richmond

EDWARD LEWIS COSBY

v.

COMMONWEALTH OF VIRGINIA

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND

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. 7419

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 19th day of January, 1970.

EDWARD LEWIS COSBY, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Hustings Court of the City of Richmond
W. Moscoe Huntley, Judge

Upon the petition of Edward Lewis Cosby a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 16th day of March, 1967, in a prosecution by the Commonwealth against the said petitioner for a felony; but said *supersedeas* is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

This writ of error, however, is limited to consideration of assignment of error No. 2, which reads as follows: "The Court erred in refusing to suppress the evidence seized under the search warrant and incident to arrest inasmuch as said arrest for vagrancy was a sham and devised to obtain evidence prior to placing a formal charge of breaking and entering against the defendant."

On further consideration whereof, (1) leave is granted the plaintiff in error until February 16, 1970, to file an amended designation of the parts of the record to be printed

and leave is granted the defendant in error until March 2, 1970, to file an additional designation of the parts of the record to be printed, such designations to be limited to those parts of the record germane to the consideration of assignment of error No. 2, and (2) the parties shall file briefs as provided in Rule 5:12, § 4 (a) where the petition for appeal is not adopted as the opening brief.

CERTIFICATE OF TRIAL COURT

This day came the defendant in the captioned matter, by counsel, and filed his Affidavit pursuant to the provisions of Section 19.1-289, and upon investigation of the matter by the Court and it appearing proper so to do, it is

Ordered that the plaintiff in error in the captioned appeal is unable to pay or secure to be paid the cost of printing the record in his case and that he be permitted to proceed further *in forma pauperis* as provided by law.

Enter: 3/11/70.

Samuel B. Witt, Jr.
Samuel B. Witt, Jr., Judge

* * * * *

Recd 3-11-70 A.L.L.

AFFIDAVIT

To the Honorable Samuel B. Witt, Jr., Judge

Comes now Edward Lewis Cosby and pursuant to the provisions of Section 19.1-289 Virginia Code makes oath that on March 16, 1967, he was convicted in the Hustings Court of the City of Richmond from which conviction he has appealed to the Supreme Court of Appeals; that on January 29, 1970, a writ of error and *supersedeas* was awarded in the case; that pursuant to the provisions of Section 19.1-289 Virginia Code annotated (1950) he is unable to pay or secure to be paid the cost of printing the record in the case and prays that this Court and/or the Supreme Court of Appeals determine that he is an indigent and direct that the cost of printing be paid as provided by law.

Edward Lewis Cosby
Edward L. Cosby

State of Virginia,

City of Richmond, to-wit:

This day appeared before me, M. L. Woodson, a Notary Public in and for the City and State aforesaid, Edward Lewis Cosby, whose name is signed to the foregoing Affidavit, and acknowledged same as being true to the best of his knowledge, information and belief.

Given under my hand this 6th day of March, 1970.

M. L. Woodson
Notary Public

My Commission Expires October 14, 1973.

Recd 3-11-70 A.L.L.

RECORD

* * * * *

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* * * * *

And at another Hustings Court held for the City of Richmond, at the Courthouse, on the 16th day of March, 1967, the following order was entered:

* * * * *

The said defendant was this day again led to the bar in the custody of the Sergeant of this City and was represented by Attorney Robert G. Cabell, Jr., and J. R. Davila, Jr., represented the Commonwealth. And being arraigned, the defendant pleaded not guilty to Statutory Burglary as charged, after consultation with counsel. And the Sergeant of this City having returned the writs of *venire facias* heretofore issued by order of this Court, with the names of the persons summoned in pursuance thereof, and of the veniremen so summoned and attending, a panel of twenty qualified jurors, free from exception for the trial of the defendant was made up and completed. And the Attorney for the Commonwealth and the Attorney for the accused having alternately, beginning with the Attorney for the Commonwealth, each stricken the names of four of the said veniremen, the remaining twelve constituted the jury for the trial of the accused, to-wit: Harry W. Saunders, Chas. W. Saunders, G. Oscar Ames, Paul Denby, Gordon B. English, Louis D. Junes, Theodore A. Sammis, Jr., Herman H. Sandridge, Frank H. Anderson, Howard Allen, Branard G. Sanford and John Anderson, who were sworn the truth of and upon the premises to speak. And the witnesses having been sworn and having heard the evidence for the Commonwealth, the said defendant by counsel moved the Court to strike the evi-

dence of the Commonwealth as being insufficient for the finding of a verdict of guilty, which motion the Court doth overrule and the defendant notes an exception. And having heard all of the evidence and arguments of counsel, the jurors retired to their room in the custody of the Sergeant of this City to decide upon a verdict. And after some time the jurors returned into Court and presented a verdict in the following words, to-wit: "We the Jury find the accused guilty of statutory burglary as charged in the indictment and fix his punishment at ten years in penitentiary." T. A. Sammis, Jr., Foreman.

And thereupon the said defendant by counsel moved the Court to set aside the verdict of the jury as being contrary to the law and to the evidence and grant him a new trial, which motion the Court doth overrule and to which action of the Court in overruling his said motion the said defendant notes an exception and time is allowed him not to exceed sixty days in which to filed his bills of exception.

page 9 } Whereupon it being demanded of the said defendant if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay thereof, it is the judgment of this Court that the said Edward Lewis Cosby be confined in the State Penitentiary for a term of ten years, this being the period by the jury ascertained. And it is ordered that the Sergeant of this City do, when required so to do, deliver the said defendant from the jail of this City to the Superintendent of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law; said term to be credited by the time spent in jail awaiting trial.

The said defendant then moved the Court to suspend the execution of the said sentence to allow him to appeal his case to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas,* which motion the Court doth grant and the execution of the said sentence is suspended to May 16, 1967, and the Court doth appoint Robert G. Cabell, Jr., a competent attorney practicing before this Court, to asssist the defendant in perfecting his appeal to the Supreme Court of Appeals. And in lieu of posting bond, the said defendant is remanded to jail.

* * * * *

page 21 }

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ASSIGNMENTS OF ERROR

The petitioner makes the following assignments of error:

* * * * *

2. The Court erred in refusing to suppress the evidence seized under the search warrant and incident to arrest inasmuch as said arrest for vagrancy was a sham and devised to obtain evidence prior to placing a formal charge of breaking and entering against the defendant.

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page 22 }

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Edward Lewis Cosby

By Robert G. Cabell, Jr.

* * * * *

Received & Filed
May 2-1967
Hustings Court Clerk's Office
WMB, Deputy Clerk

* * * * *

Transcript of the evidence and other incidents of the above when heard on February 27, 1967 before the Honorable W. Moscoe Huntley, Judge, and on March 16, 1967, before the Honorable Samuel B. Witt, Jr., Judge.

APPEARANCES:

Roland B. Kelley, Esq.
Attorney for the Commonwealth

J. R. Davila, Jr., Esq.
Attorney for the Commonwealth

Robert G. Cabell, Jr., Esq.
Attorney for the Defendant

* * * * *

page 3 } Note: Hearing on February 27th, 1967, before the Honorable W. Moscoe Huntley, Judge, on preliminary motion to *surpress* evidence.

PRESENT:

Roland B. Kelley, Esq.
Attorney for the Commonwealth

J. R. Davila, Jr., Esq.
Attorney for the Commonwealth

Robert G. Cabell, Jr., Esq.
Attorney for the Defendant

Willie C. Wood and Edward
L. Cosby, the defendants,
in person and by counsel.

The Clerk: The case of the *Commonwealth* v. *Edward Lewis Cosby* and *Willie Carter Wood, Jr.* before the Court on indictments for statutory burglary. A hearing this 27th day of February, 1967, on a motion to *surpress* the evidence. Counsel for the Commonwealth, Mr. Kelley and Mr. Davila; Counsel for the defense, Mr. Robert Cabell, Jr., and page 4 } both of the accused are present.

Mr. Cabell: If Your Honor please, at the outset, I'd like to note that there have been individual motions filed in both the Cosby and the Wood case and I ask that the evidence that is produced before the Court be considered in both of those cases and incorporated in both of those cases.

The Court: Very well.

Note: At this time, the witnesses were sworn.

E. R. MARRIN, introduced on behalf of the defendant, being first duly sworn, testified as follows:

E. R. Marrin

DIRECT EXAMINATION

By Mr. Cabell:

Q. Would you please state your name.

page 5 } A. E. R. Marrin.

Q. And you are employed by the Richmond City Police Department, I believe, is that correct?

A. Yes, sir.

Q. What is your present assignment?

A. Detective.

Q. And were you so assigned on December the 27th of 1966?

A. Yes, sir, I was.

Q. And were you likewise so assigned on December the 23rd or 22nd, 1966?

A. Yes, I was.

Q. Did you have occasion to investigate a breaking and entering of Limited Food Company?

A. No, sir, I didn't investigate the case, it wasn't assigned to me.

Q. Did you investigate a break-in at 18 West Baker Street?

A. No, sir, I did not, it was not assigned to me.

Q. All right, I ask you to direct your attention to December the 27th, 1966, did you have occasion to file an affidavit or affidavits with the Justice of the Peace of the City of Richmond preparatory to search 2068 Creighton

page 6 } Road?

A. Yes, I did.

Q. Did you file an affidavit for the search of a 1957 Ford automobile bearing Pennsylvania License No. 4 A 924 A?

A. Yes, I did.

Q. And to search the dwelling house at eleven hundred St. James Street?

A. Yes, I did.

Q. All right. On December the 26th, did you have occasion to arrest either or both of the defendants, Edward L. Cosby or Willie Wood?

A. Yes, sir, I did.

Q. What was the date on that?

A. I don't have it right with me at the present time, I think the other Officer has it with him.

Q. All right, it was prior to the time that you secured or filed the affidavit though, I believe, is that correct?

A. It was prior—no, we had the affidavit before we searched the house.

C. S. Rutherford

Q. It was—was it prior to the arrest of these parties or subsequent to the arrest of the parties?

A. That we had the affidavit?

page 7 } Q. Yes?

A. It was prior to.

Q. Do you know the date that the breaking and entering was reported on 18 West Baker Street?

A. No, sir, I don't have that, the investigating officer has that.

Q. All right, sir.

Mr. Cabell: If Your Honor please, may I suspend the examination of this witness and put Mr. Rutherford on so we can develop it logically.

Witness Stood Aside.

C. S. RUTHERFORD, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Cabell:

Q. Would you please state your name and occu-

page 8 } pation, please?

A. C. S. Rutherford, assigned to the Detective Division, Richmond Bureau of Police.

Q. Were you so assigned on December 27, 1966?

A. I was.

Q. Did you have occasion to investigate a breaking and entering at 18 West Baker Street in the City of Richmond?

A. No, I didn't.

Q. Did you have occasion to make the arrest of Edward L. Cosby and Willie Wood?

A. Yes, sir, I did.

Q. When did you make the arrest?

A. December the 27th.

Q. And where did you make the arrest?

A. Had the arrest at Headquarters.

Q. Made the arrest at Headquarters?

A. Yes, sir, on the breaking and entering charge.

Q. Had you made any previous arrests on these parties?

A. Yes, sir, I did.

Q. When was that?

page 9 } A. On the same day.

C. S. Rutherford

Q. And where was that?

A. At Fairfield Avenue and Kane Street.

Q. And what was the charge on which they were arrested?

A. Charged both of them with being vagrants.

Q. Was there any other party besides Cosby and Wood arrested at that time?

A. No, sir.

Q. Now, would you tell His Honor what led up to your arrest in placing the charge of vagrancy against Cosby and Wood?

A. His vagrancy?

Q. Uh, huh?

A. Well, about two months prior to this vagrancy charge, I had been investigating Willie Cosby and Wood in reference to B and E's. I knew that neither one of these two subjects worked, that they had been hanging around, most of the time, around Adams and Broad Street around Vic's Grill, the Pool Hall on Broad Street and around Wiley's Restaurant. I received information that they had been selling hot merchandise, watches and so forth, around that area.

Q. All right, had you had either Cosby or Wood
page 10 } under surveillance prior to December the 27th?

A. Under surveillance—we had them under surveillance that day.

Q. All right, at what time on that day did you put—did you commence the surveillance?

A. Around two-thirty or three P.M.

Q. And where was it that you started the surveillance?

A. 2068 Creighton Road.

Q. Was this the place of the arrest

A. No, sir.

Q. Which is 2068 Creighton?

A. That is where Willie Wood's wife lived.

Q. Does he live there?

A. No, sir, not as I know of, he said he didn't.

Q. Do you have any reason to believe that he did live there on that day?

A. Have reason to believe he was staying there, but not living there.

Q. You say his wife lives there?

A. Yes, sir.

Q. Anybody else in his family live there?

page 11 } A. I don't—I think a couple of children, I don't know how many.

Q. He and his wife divorced or separated?

C. S. Rutherford

A. I couldn't tell you, I believe they are separated, I believe she was living over in Center Project.

Q. Do you know of any other address that he had that he was living at that time?

A. 1100 St. James where his mother lives and he stated to us he lived there. We talked with his mother and we have also talked with his wife and both of them denied that he lived at either place.

Q. But he did occasionally spend time at both places?

A. He'd come and go.

Q. Did he keep his belongings at either of these places?

A. Not as I know of, I don't know.

Q. He didn't have any of his belongings at those places?

A. Well, he might have had some over at his wife's home, I don't know.

Q. All right, what time did you make the arrest for vagrancy?

A. 3:30 P.M., December 27th.

page 12 } Q. And I believe that the two parties were in a motor vehicle at that time?

A. That's correct.

Q. Anybody else in the car?

A. Yes, sir.

Q. Who was that?

A. A man by the name of Robert L. Butcher.

Q. Was he charged with vagrancy?

A. No, sir.

Q. Who owned the car?

A. Robert L. Butcher.

Q. Is he a resident of the City of Richmond?

A. No, sir.

Q. Had you known him prior to this day?

A. No, sir.

Q. You'd never seen him before that day?

A. No, sir.

Q. How did you make the arrest on the vagrancy, did you stop the motor vehicle or what happened?

A. We stopped the car at Kane and Fairfield Avenue and went up to the car and advised—asked them their names and one of them say he was Willie Carter Wood

page 13 } and one of them said he was Willie Cosby and I stated that both of them were under arrest for being vagrants.

Q. Did you advise them of any rights?

A. I didn't ask them anything.

C. S. Rutherford

Q. All right, did you ask them any information for identification or anything of that sort?
A. Yes, sir.
Q. What did you ask them?
A. Asked them to show me some identification.
Q. Did they do so?
A. Yes, sir.
Q. What identification was shown to you?
A. I couldn't tell you right off hand what they did show me, they showed me something with their names on it, but I don't know what it was.
Q. Did it satisfy you at that time that they were the parties that the credentials indicated?
A. Yes, sir, since I already had pictures on them and knew them anyway from arrest records.
Q. Who was with you when you made the arrest?
A. Detective Marrin.
Q. All right, both of you all assigned to the
page 14 } Detective Bureau at that time?
A. That's correct.
Q. Is it the usual business of the Detective Bureau to make arrests on vagrancy?
A. Yes, sir.
Q. All right, at the time of the arrest for vagrancy, did you search the people that you arrested?
A. After I had put them under arrest, I did, yes, sir.
Q. Well, what did you find?
A. I found two checks in Woods' pocket, money order service checks and a key.
Q. Where were these checks, just loose in his pocket?
A. It was in his coat pocket.
Q. Was this an overcoat pocket?
A. I believe it was, raincoat or something like that?
Q. Did you find anything else?
A. Not as I know of.
Q. Did you search Cosby?
A. Yes, sir.
Q. Did you find anything on him?
A. No, sir.
page 15 } Q. Did you search Butcher?
A. No, sir—yes, sir, we searched Butcher.
Q. Well, Butcher wasn't under arrest though, was he?
A. No, sir.
Q. Well, how did you search him?
A. He gave us permission to.

C. S. Rutherford

Q. Did you find anything on Butcher?
A. No, sir.
Q. This was Butcher's car?
A. Yes, sir.
Q. All right, after you placed him under arrest what did you do then?
A. Called for a wagon, called for a Juvenile Unit to come over to the car, he had a little baby with him.
Q. Who had it?
A. Huh?
Q. Who had the baby?
A. Wood.
Q. Wood had the baby?
A. To take the child over to his mother's house and the wagon to take him down to City Jail.

page 16 } Q. I believe this was on a Sunday, wasn't it?
A. I don't remember.

Q. How far was this from the—from Wood's home or where his wife lived, a few blocks?
A. About six blocks.
Q. Uh, huh, and he just left his wife's home, I believe?
A. Yes, sir, he had just left his wife's home.
Q. All right, do you know anything about Baker—oh, excuse me, Butcher, about his background or anything?
A. As far as I know—

Mr. Davila: Judge, we are discussing the case of Cosby and Wood, not Butcher.
The Court: Butcher, not him.
Mr. Cabell: I mean, if the Commonwealth doesn't feel that the associates involved in this arrest are relevant—
The Court: I don't think Butcher has anything to do with it, it's a question of *surpressing* the evidence as far as these two parties are concerned.

page 17 } Mr. Cabell: I think one of the basis for an arrest for vagrancy is that they are consorting with criminials who are known thieves and I just wanted to know if this man Butcher was a thief or—
The Court: All right, go ahead and ask the question.

Q. Do you know anything about Butcher, his past?
A. As far as I know, he has no record.
Q. All right, now you say that the wagon came and took them down to jail, is that right?
A. That's correct.

C. S. Rutherford

Q. All right, what was done with the car?
A. What was done with the automobile, it was parked at the corner on Fairfield Avenue
Q. Ah—
A. and locked up.
Q. What about Butcher, where did he go?
A. He went with us.
Q. Went with you, where did you all go?
A. Went back to 2068 Creighton Road and executed the search warrant.

page 18 } Q. This was Detective Marrin and you and Butcher?
A. That's correct.
Q. All right, now at the time that you made the arrest for vagrancy, you had in your possession a search warrant for this residence?
A. That's correct.
Q. Did you have in your pocket at this time a search warrant for the 1957 Ford automobile?
A. Yes, we did.
Q. Did you have in your possession at that time a search warrant for 1100 St. James Street?
A. No, we didn't.
Q. Did you subsequently get a search warrant for 1100 St. James Street?
A. Yes, sir, we did.
Q. All right, you went and searched the premises on Creighton Road, is that right?
A. That's correct.
Q. Who was there?
A. No one.
Q. No one was there?
A. No, sir.

page 19 } Q. Was a copy of the search warrant served on the defendant before he was taken to the lock-up?
A. No, wasn't any served on him, because it wasn't his house.
Q. He didn't live there?
A. No, sir.
Q. Anything you found in there didn't belong to him as far as you knew?

Mr. Kelley: Now, Your Honor—
Mr. Cabell: I withdraw that.

C. S. Rutherford

Q. How did you gain entrance to 2068 Creighton?
A. With a key.
Q. Did you have the key?
A. Yes, sir.
Q. And that was the key that you had taken out of Wood's pocket, I believe?
A. That is correct.
Q. And the key fit the door?
A. Yes, sir.
Q. Did you ask him what the key was for?
A. Yes, sir.
Q. And he told you?
A. Yea, 2068 Creighton Road.

page 20 } Q. And you did not search—serve him with a search warrant then, even though you got a key to go into the place from him, you didn't give him a search warrant?

A. No, sir, he went on to the lockup, we searched the house and left a copy of the search warrant in the room.
Q. Left it where?
A. Left it in the living room.
Q. In the living room. What did you find at 2068 Creighton Road?
A. We found one lost of checks, merchant money order checks, found a wrist watch, found a gold pocket watch, found—
Q. Is this listed on the back of the search warrant?
A. Yes, sir, I believe it is.
Q. And you are satisfied that everything that was found at 2068 is included on the list, that is, on the back of the search warrant?
A. I don't know, we found—I think it was around twenty-one merchant money orders and eighteen A. L. Realty Company checks out of 2068 Creighton Road.
Q. And did you find—you say you found a watch?

page 21 } A. We found a pocket watch and some other jewelry and a medal with Robert Freeman and some stamps, a couple of other miscellaneous jewelry along with twenty-one merchant money order checks and eighteen A. L. Realty Company checks out of 2068 *Crieghton* Road.

Q. You didn't exe—you didn't pull out the return on this search warrant, did you, I believe Detective Marrin did that?
A. I believe so.
Q. So he would be incorrect when he stated that there were

twenty—just the twenty-one money orders and eighteen A & L Realty checks found?

A. I wouldn't say he was incorrect because I believe the rest—

Q. There were more?

A. That was true there, but I think the rest was identified later after the search warrant had already been turned in.

Q. But you actually seized other material than the checks and the money orders?

A. Yea, we (word unintelligible) all at the same time.

Q. Did Butcher accompany you when you went into the premises?

A. Yes, sir.

page 22 } Q. All right, after you finished the search, where did you go then?

A. Went down to the Headquarters.

Q. Did you search the car?

A. Yes, sir.

Q. When was that, before you went to Creighton Road?

A. Yes, sir.

Q. And what did you find in the car?

A. Found one check writing machine.

Q. And did you—who did you serve the warrant on—search warrant on?

A. To the owner of the automobile.

Q. That's Butcher?

A. That's correct.

Q. All right, you say you went down to the lockup then?

A. No, went to Headquarters.

Q. What did you do at the Police Department?

A. We obtained another search warrant and got felony warrants out for breaking and entering against Wood and Cosby.

page 23 } Q. All right, now, where did you get the information on what you base your affidavit for searching 1100 St. James Street, did the defendant tell you he lived there?

A. Yes, sir.

Q. When did he tell you that, at the time of the arrest?

A. When I made the arrest sheet out,

Q. That was down at Police—

A. No, that's when I locked him up for being a vagrant, he told me he lived at 1100 St. James, take his, have his daughter sent there where his mother lived?

Q. Uh, huh?

C. S. Rutherford

A. so we obtained a search warrant to search there also after finding this.

Q. So at the time that you made the arrest for this vagrancy, you had in your pockets the search warrants and you were in the process of investigating the breaking and entering of 18 West Baker, is that correct?

A. Yes, sir.

Q. All right. What time did you serve the felony warrants on the two defendants?

A. About 5:30 P.M. the same date, December the 27th.

Q. And this was after you had searched the car, Creighton Road and 1100 St. James Street?

page 24 } A. No, sir.

Q. You had not searched St. James Street?

A. No, sir.

Q. All right, when did you search St. James Street, 1100 St. James Street?

A. After we had executed the warrants of arrest on him and identified the merchandise.

Q. Who identified the merchandise, the party who owned the place that was broken into?

A. That's correct, in our reports we have—

Q. Was there any identification of these parties by anybody in a lineup or anything of that sort?

A. No, sir, they wasn't seen.

Q. All right, what did you find, if anything, at 1100 St. James Street?

A. We found one lady's gold ring with—I think it was about six or eight little pearls on top of it.

Q. Did you find anything else?

A. No, sir.

Q. Is that listed on the back of the search for the St. James Street?

A. I don't know, you'll have to ask Detective Marrin.

Q. You say one yellow gold ring with three

page 25 } pearls?

A. It had about six or eight little pearls on it.

Q. Was there anything else?

A. That's all I remember.

Q. Did Butcher accompany you to St. James Street?

A. No, sir, he didn't.

Q. What was the purpose of taking Butcher with you to 2058 Creighton?

A. What was the purpose?

C. S. Rutherford

Q. He wasn't under arrest, was he, you hadn't charged him with vagrancy you've already testified?

A. No, I hadn't charged him with vagrancy.

Q. All right, he wasn't under arrest, was he?

A. Yes, sir.

Q. What was he under arrest for?

A. Passing a stolen check.

Q. Uh, huh, what time did you arrest him,

A. Let me check back my file.

page 26 } Q. at the time you served the search warrant on him?

A. No, sir, we arrested him before then.

Q. He was arrested before you served the search warrant?

A. Yes, sir.

Q. On that same day?

A. Yes, sir.

Q. Was he arrested before these two parties got in the car with him?

Mr. Kelley: Your Honor, I think he's gone a little far now, the arrest of Butcher, I can't see, has any possible bearing on the validity of the search warrant.

The Court: I don't see it.

Mr. Kelley: what I think this proceeding is about.

Mr. Cabell: Except to show, Your Honor—

The Court: You've already shown that in the record, haven't you?

Mr. Cabell: Sir?

The Court: You've already shown that in the record as far as the vagrancy charge is concerned.

page 27 } Mr. Cabell: Yes, sir, but this adds weight to to what I'm going to try to urge on the Court—

The Court: This is a combination motion you are making now, isn't it, discovery and—

Mr. Cabell: No, sir, my—my motion is that a vagrancy warrant was used as a sham to obtain a on-the-spot search of these persons and to have them locked up and then to go and search different premises that they might find out that they occupied.

Mr. Kelley: Well, Your Honor, that in itself comes as a surprise because the motion to *surpress* evidence, the way I read it, doesn't say anything about a sham being perpetrated—is that correct—I believe this is a motion to *surpress*—

Mr. Cabell: It states in there that the arrest is void, I haven't got the warrant—the motion right here, but I am sure that—

Mr. Kelley: This refers only to search warrants.

page 28 } Mr. Cabell: That's right, and the basis of the information on what the search warrant and the evidence will contain was information that was obtained at the time these people were arrested for vagrancy.

Mr. Kelley: Well, Judge, the way I read this thing it says, paragraph two, which is the first paragraph pertaining to it, prior to said indictment certain tangible evidence was seized from premises occupied by the defendant without a valid search warrant, without consent of the defendant, said search warrant was issued invalidly and was and is void. This refers to search warrant, as no probable cause existed therefor, and so forth, and resulted from information obtained from an unlawful arrest of the defendant prior thereto. It doesn't refer to any arrest of any third party at all, we permitted him to go into the record of this third party because we felt that he was correct in saying that it related to his associates, based on whether or not he was a vagrant, but certainly the arrest of this third party can have no bearing on this proceeding at all.

page 29 } Mr. Cabell: Except to show this, Your Honor, that at the time that they arrested this third party that they knew they were going to arrest these men for breaking and entering and they knew that that's what they were investigating.

The Court: They had already arrested them—

Mr. Cabell: For vagrancy, yes, sir, and—

The Court: They had already lodged the B and E warrant against them.

Mr. Cabell: Sir?

The Court: Hadn't they already been arrested on the B and E charge?

Mr. Cabell: No, sir, they weren't arrested and charged on B and E until after they got down to Headquarters and after two of the three places were searched. They arrested them initially on vagrancy, got the checks out of their pockets, got the identification, got him to make a statement, no, I don't live at Creighton, I live on St. James Street, took them down and held them on the vagrancy charge,

page 30 } searched the Creighton place, searched the car and they searched the other address that they obtained from him, and then it's only—only after they had

searched two of the three places that they placed the B and E warrants against them, and he's testified that they had the search warrants in his pockets at the time that they made the arrest and charged them with vagrancy.

Mr. Kelley: They had the search warrant for the automobile and a search warrant for Creighton Road, but not for St. James.

Mr. Cabell: Right.

Mr. Kelley: But, Your Honor, if that's Mr. Cabell's position, we can short-cut this thing a whole lot because then the only question is whether or not an officer that observed a misdemeanor committed in his presence is precluded from making that arrest because he suspects the defendant is involved in a felony, that's the question Mr. Cabell has presented to the Court and I submit—

Mr. Cabell: Not exactly that way.

Mr. Kelley: Well, please state—re-state it another way.

Mr. Cabell: All right, the way that I'm—the page 31 } way that I prefer to state it is that they were investigating a breaking and entering charge, they had search warrants in their pockets incident to the investigation of the breaking and entering charge. For some unknown reason they chose to stop these men, arrest them for vagrancy, affect a search without any warrant, which wasn't necessary incident to a lawful arrest, search their pockets, they found a check or several checks, I forget what it was he said, they got this man to say no, I don't live at Creighton Road, I live over on some other address, which they subsequently searched, and then they send them on down to Headquarters, search the Creighton Road property, their car, and the whole thing was a sham, arresting and holding them for a vagrancy charge, when all along, what they were after is the breaking and entering charge, and that the way to do it was to go on and serve them—if they were going to bring a charge on breaking and entering, serve them, advise them of their rights, and lock them up and then go on page 32 } search the premises. Now, I don't know why they chose to get a vagrancy warrant, but they did, and it's our position that this was a void arrest and abuses the due process that these men are entitled to and I will give the Court authority after the evidence is concluded on this point.

Mr. Kelley: Well, Judge, it looks like to me the only thing the Court would have to decide is whether or not the officer had reasonable cause to believe that these men were vagrants.

C. S. Rutherford

This is a misdemeanor and if he has reasonable cause to believe that these men are vagrants he was perfectly at liberty to arrest them, regardless of what else he may have suspected of at any time, sir. In fact, I'm surprised that that's the position that this motion is made on. I suspected that Mr. Cabell would attack the validity of the search warrants from this motion to *surpress,* but certainly I don't think there can be any contention but what if the Officer sees a misdemeanor violation in his presence, even though he suspects them other charges, felonies or otherwise, but what he is precluded from making the arrest for va-
page 33 } grancy. I think the only question this Court has to determine on that basis is whether the Officer had reason to believe they were vagrants, and I think we should confine the evidence to that—certainly, the arrest of this third party has no bearing on that.

The Court: None whatever.

Mr. Cabell: If Your Honor please, one thing, I—it may or may not be a proper remark and I don't mean to contradict Mr. Kelley, but I've talked with two Commonwealth Attorneys about my particular grounds on this thing before coming into Court, I talked to Mr. Turner and to Mr. Davila and both of them were fully advised of what my position was on this. I filed a written motion, which I grant you is not as specific as a detailed narrative might be, but I do feel that the Commonwealth certainly had advanced notice of the grounds of my motion. I think that the evidence that I'm trying to adduce right now when considered in light of the case law on it would lead, or could lead the Court to conclude that there was error in the procedure filed by the
page 34 } Police on this thing, that the evidence should be *surpressed,* and I'd like to, with the Court's permission, proceed to go on and get the evidence in and then let the Court decide whether or not the whole package is good or bad.

Mr. Kelley: Your Honor, we don't object to the evidence coming in as long as it's relevant to this case, but he's going on now to the arrest of a third party that has no bearing on this whatsoever, I can't see the reason for it. Now, we admitted his—the man's criminal record or whether or not he had a criminal record, because that had a bearing on vagrancy, but what bearing does his arrest and being taken somewhere have on these cases—

Mr. Cabell: May I ask—

The Court: Well, I'll let Mr. Cabell go ahead just to get it out of the way, go ahead, sir.

C. S. Rutherford

Mr. Cabell: There will be just one further question.

Q. Did your arrest and charge against Butcher have anything to do with the breaking and entering of the Baker Street property?

page 35 } A. Yes, sir, it did.

Q. It did?

A. Yes, sir.

Q. And you had, I believe you stated, arrested him prior to the time that you arrested these two men on the vagrancy charge

A. Yes.

Q. on a check that was stolen from this Baker Street property?

A. That is correct.

Mr. Cabell: Now, Your Honor, I submit there is the relevancy, they had already gone—

The Court: All right, sir, you made your point.

Mr. Cabell: All right, sir.

Q. That's all the question I have, Mr. Rutherford.

CROSS EXAMINATION

By Mr. Davila:

Q. Detective *Rutherfor,* you testified that you knew that neither one of *theses* parties, Wood or Cosby, had a job?

A. That is correct.

page 36 } Q. Do you know whether they had any visible means of support?

A. My investigation showed that neither one of them did.

Q. All right, sir, and I believe you testified to the extent that they were considered to be idlers, that is, hanging around on street corners?

A. That's right, most of my knowledge says they hang around up at Adams and Broad Street most of the day and night, around Vic's, around the pool hall, around Wiley's.

Q. Were you familiar with their past criminal history?

A. Yes, sir.

Q. Were you familiar with the fact that they had been convicted of felonies?

A. Yes, sir.

Q. Did you have any addresses at all as to where they lived?

C. S. Rutherford

A. No, sir, I couldn't find out where either one of them lived, in fact, the truth was known about it—

Q. You tell us the truth, Detective Rutherford?

page 37 } A. I had been looking for these parties for over a month and I—with reference to another break-in, and they knew I was looking for them.

Q. So when you had the warrant sworn out with respect to vagrancy against them, you had an honest belief in your own mind that they were, in fact, vagrants, did you not?

A. Yes, sir.

Q. That's all. I believe you also testified that you had possession of the search warrants prior to the arrest as far as vagrancy was concerned, did you not?

A. Yes, sir.

Q. What was the basis of your search warrant for the car, did you have permission of the owner?

A. Yes, sir.

Q. All right, sir, that's all.

REDIRECT EXAMINATION

By Mr. Cabell:

Q. You did have a search warrant for the car though, didn't you?

A. Yes, sir.

Q. And you had filed—Mr. Marrin had filed an

page 38 } affidavit prior to the car being searched?

A. We also had permission from the owner to search it, too.

Q. Well, he was under arrest at that time, I believe, wasn't he?

A. Yes, sir.

Q. Why didn't you send him down to Headquarters with the other two when you searched the Creighton property?

Mr. Kelley: Your Honor, I think that's immaterial to this, completely.

Mr. Cabell: Your Honor, again I think it's part of the picture that they are holding these—arresting and holding these men on vagrancy when all this time they are talking about breaking and entering.

Mr. Kelley: What relation does that have to Butcher?

The Court: They made the arrest.

Mr. Cabell: What they are doing with Butcher has a lot to do with what they are doing with these two.

C. S. Rutherford

Mr. Kelley: No, but your motion goes to the
page 39 } validity of search warrants and now verbally
you've expanded it to the arrest of these parties for vagrancy, what does that do with why—what they did with Butcher after he was arrested?

Mr. Cabell: Because they knew that these parties were with Butcher, they knew Butcher had information about these parties and they were all in the same group, they had already charged Butcher with a bad check charge from the same property.

Mr. Kelley: But Your Honor, I submit that has nothing to do with what the question at hand before the Court. It may during the trial of the case, but it certainly doesn't on this motion.

The Court: It doesn't at this stage.

Q. You said in answer to his question you had an honest belief that these men were vagrants?

A. Yes, sir.

Q. This matter was *nol prossed* in the Police Court, I believe?

A. Yes, sir, it was *nol prossed.*

Q. I believe you stated that these men didn't have jobs?

A. Yes, sir.

page 40 } Q. Neither one of them had jobs?

A. As far as I know neither one of them did.

Q. As far as you know?

A. Yes, sir, as far as I know—

Q. But you only had them under surveillance for this one particular day, December 27th?

A. No, sir, I believe I stated—

The Court: He said he had been looking for them for a month.

A. I had been keeping contact with these people, and receiving information and looking for them and getting information on them for two months prior to this. I had them under surveillance this particular day, yes, sir, but—

Q. And you had not really had them under surveillance, you weren't watching them any other time?

A. I couldn't find them.

Q. They had money in their pocket, when you arrested them, I believe, didn't they—some cash?

A. I don't know how much they had, to tell you the truth.

C. S. Rutherford

Q. All right, you stated that they—how many of them had —had both of them been convicted of felonies?

page 41 } A. Yes, sir.

Q. All right, that's all.

RECROSS EXAMINATION

By Mr. Davila:

Q. Detective Rutherford, the decision to *nol prosse* the cases against these two gentlemen for vagrancy was not yours, was it, it was the Commonwealth's Attorney's, wasn't it?

A. That is correct, the Commonwealth Attorney's.

Q. That's all.

RE-REDIRECT EXAMINATION

By Mr. Cabell:

Q. It was your suggestion, though, I believe?

Mr. Davila: Now, he's already answered that question, Judge, I don't know—

Mr. Cabell: The decision was that of the Commonwealth's Attorney, but the suggestion may or may not have come from the Police Officer, I'm asking that question now.

page 42 } A. It—you want me to answer it?

The Court: Go ahead and do it.

A. It came from the Commonwealth's Attorney after these two subjects had been certified.

Q. Were you consulted on it, did the Commonwealth's Attorney ask you anything about whether or not you have any objection or anything of that sort—

The Court: I don't think you can go into that, Mr. Cabell, the Commonwealth's Attorney makes his own decision,

Mr. Cabell: I understand that.

The Court: whether to prosecute or *nol presequi.*

Mr. Cabell: But he has testified that he had an honest belief that these two men were vagrants and I—

The Court: Well, he satisfied me about that and I'm sure he satisfied you.

Mr. Cabell: Yes, sir, and I wanted to know whether or not—

The Court: That's the Commonwealth Attorney's decision, whether to *nol prosse* the case or not.

page 43 } Mr. Cabell: All right, sir. That's all I have.

Witness Stood Aside

E. R. MARRIN, being recalled, testified as follows:

DIRECT EXAMINATION

By Mr. Cabell:

Q. Mr. Marrin, you've already begun your testimony and I won't repeat that, but you did secure three—or file three affidavits, I believe, on December the 27th, 1966, with reference to the arrest or investigation of Edward L. Cosby and Willie Wood?

A. Yes, sir.

Q. These are copies, I believe, of the affidavits?

A. Yes, sir.

page 44 } Mr. Cabell: I ask that these be introduced as Defendant's Exhibits 1, 2 and 3 and then I'd like to have them back, if I may.

Q. Were all of these filed at the same time?

A. No, sir.

Q. Would you tell the Court how they were filed, when they were filed?

A. For the residence and the car was one time and then for the house on St. James was the other.

Q. All right, you had gotten the search warrant on December the 27th, I believe, is that right?

A. On the date so stated on there, yes, sir.

Q. All right, you and Mr. Rutherford were doing what when you—were you and Mr. Rutherford assigned to keep these parties under surveillance or to investigate this particular case?

A. No, we were not.

Q. How did you happen to be with Mr. Rutherford at this particular location?

A. I was asked to assist him and I did.

Q. You were asked to assist him?

A. Yea.

page 45 } Q. How long had you been assisting him on this particular case that day?

A. Early that morning.

Q. Uh, huh. Do you know anything about the background of either Edward Lewis Cosby or Willie Wood?

A. No, I don't know anything about the background of either one of them.

Q. All right. Did you serve the search warrant or did Mr. Rutherford serve the search warrant?

A. I think Mr. Rutherford served the search warrant.

Q. You were present when it was served?

A. Yes, sir.

Q. Were you present when Butcher was arrested?

A. Yes, sir.

Q. And approximately when was that?

A. That was the morning of that date.

Q. And he was formally charged at that time?

A. Yes, sir.

Q. Was he committed to bail, do you know?

A. That I don't know. I couldn't answer that.

page 46 } Q. He was there on the street that afternoon?

A. (no audible reply)

Q. Where was he arrested?

Mr. Davila: Judge, I'm going to interpose the same objection with respect to Butcher.

Mr. Cabell: If Your Honor please, I think the Court ought to hear, I mean if a man is arrested in the morning and yet he's out on the street at 2:00 o'clock in the afternoon driving his car around, I think that that certainly raises a question

The Court: Out on bail, wasn't he?

Mr. Cabell: Sir?

The Court: I said—

Mr. Cabell: to determine, but I want to find out about this automobile and after all there was a—

The Court: What's the use of going into all of this about Burton?

Mr. Cabell: Sir—about Butcher?

The Court: Butcher, I mean.

page 47 } Mr. Cabell: Well, Your Honor, now as I said before—

The Court: I think you covered that in previous testimony about Butcher. I let you go right far then. You are just going over the same grounds now.

Mr. Cabell: I did not know the circumstances, we didn't hear the circumstances of what happened to Butcher before

this second arrest and I—that's what I'm trying to develop right now.

Mr. Davila: Well, what—

Mr. Cabell: All right.

Mr. Davila: ... contention what happened to him or what didn't happen to him—

Mr. Cabell: My theory is that Butcher was arrested, that they obtained some information or something from Butcher, turned him back out on the street, put these two guys in the car, did not arrest Butcher a second time, but arrested these two men on a vagrancy charge,

Mr. Davila: Oh,—

page 48 } Mr. Cabell: took them, had gotten the search warrant for them in the meantime, took them down and held them on a vagrancy charge, searched the premises and then, and only then, did they get a warrant for the breaking and entering.

Mr. Davila: Well, Judge, that may be the facts, but we are on Cosby and Wood, now as far as any merit to their—to the seizure and search of material that they had in their possession may have a bearing on this case, what Butcher did whether he was committed to bail or where he may have gone has nothing to do with it.

The Court: I don't see where it has anything to do with it, but go ahead Mr. Cabell,—

Q. You actually made the return on the search warrant for the 1100 St. James Street and the 2068 Creighton Road?

A. I think I did, yes, sir.

Q. All right, and the items listed on the back of that are all the items that were seized?

A. I'd have to read it to see it, sir.

Q. All right.

A. It's a watch in that, a man's watch and a wrist watch.

page 49 } Q. Well, the record will show that those are additional items seized, all right. Now, directing your attention to the affidavit filed on the Creighton Road search, who is "Sack", do you have a nickname for any of these people known as "Sack" or an alias?

A. Not to my knowlege.

Q. Would you look at this to refresh your memory?

A. Sack is informer that we have.

Q. So Sack doesn't refer to either one of these persons?

A. Not to my knowlege.

Q. Was Sack a suspect in this case?

E. R. Marrin

A. No.
Q. He wasn't?
A. Not to my knowledge.
Q. Well, now if I read this correctly, it says information from a reliable informer that the suspect known as Sack and Key, it looks like, or Keg, is it Keg or Key?
A. Keg.
Q. Keg, Sack and Keg, is that two different people?
A. That's one of them.
Q. One of them, but Sack is not one of them?
page 50 } A. Not to my knowlege, no.
Q. Which one is Keg?
A. I couldn't tell you. Judge, may I see that search warrant again?

The Court: Yes, sir.

A. For the Sack and Keg—let me see that a minute, let me see how I worded that (pause). I have a correction I'd like to make, Sack and Keg are both of them.
Q. Uh, huh. Now your testimony would be substantially the same as Mr. Rutherford with regard to the search of the car and the search of Creighton Road, 2068 Creighton Road?
A. Yes, sir.
Q. Did Mr. Rutherford search these two or did you search them?
A. Mr. Rutherford searched those two.
Q. All right. That's all.

CROSS EXAMINATION

By Mr. Davila:
Q. Detective Marrin, did you assist in the swearing out of the warrant for vagrancy, did you assist Detective Rutherford?
A. Yes, sir.
page 51 } Q. Are you familiar with—I believe you testified that you were not familiar—
A. I'm not familiar with the two.
Q. You are not?
A. No, sir.
Q. Now, I believe you stated also on direct examination that you—that the two search warrants with respect to Creighton Road and the Ford automobile were in existence prior to the warrants for vagrancy,
A. Yes, sir.

Q. is that correct, and this is on information received by you all,

A. Yes, sir.

Q. and permission from the owner of the car, too, is that correct?

A. Yes, sir, the owner had to give us permission to search the vehicle.

Q. Thank you, sir.

REDIRECT EXAMINATION

By Mr. Cabell:

Q. He was under arrest at the time?

A. Yes, sir.

Q. Did you secure a search warrant for his car
page 52 } after you placed him under arrest—

The Court: You've been over this about ten times, Mr. Cabell.

Mr. Cabell: I don't think I've asked him when he got the search warrant for the search of the car, Your Honor.

The Court: I'm quite sure you have, but go ahead.

Q. Was it before you arrested Butcher or after you arrested him?

A. We searched his car after we arrested him.

Q. No, I said, the search warrant was obtained before you arrested Butcher or after you arrested Butcher?

A. I believe it was after we arrested—

Q. All right, where did you arrest him?

A. Officer Whatchacallum arrested him.

Q. You weren't there with him?

A. I was in the building, yes, but he arrested him, I was in the building, Welfare Building.

Q. All right, was he in his car at that time, or did you take his car

A. No.

page 53 } Q. to the police station?

A. No, sir.

Q. Did you, of your own knowledge, know where his car was at that time?

A. No, sir, I did not.

Q. All right. All right, that's all.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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