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Clerk, Supreme Court of Appeals

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Record No. 7461

In the
Supreme Court of Appeals of Virginia
at Richmond

GEORGE DABNEY CEPHAS

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. 7461

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 22nd day of April, 1970.

GEORGE DABNEY CEPHAS, Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Hustings Court of the City of Richmond
Samuel B. Witt, Jr., Judge

Upon the petition of George Dabney Cephas a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 15th day of May, 1969, 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 OF TRIAL COURT

THIS DAY came George D. Cephas and filed an Affidavit pursuant to Section 19.1-289 of the Code of Virginia.

Upon representation of Counsel, and appearing proper so to do, it is ORDERED that the costs of printing of the record in this case be paid as provided by law and that George D. Cephas be allowed to proceed *in forma pauperis.*

ENTER: 5/13/70
Samuel B. Witt, Jr.
Judge

* * * * *

Recd. 5-13-70. A.L.L.

* * * * *

AFFIDAVIT OF POVERTY

To The Honorable Samuel B. Witt, Jr., Judge of the Hustings Court of the City of Richmond:

Comes now, George D. Cephas, and pursuant to Section 19.1-289 of the Code of Virginia, makes oath that on May 15, 1969, he was convicted of statutory burglary. He appealed his conviction to the Supreme Court of Appeals of Virginia and on April 22, 1970, was granted a Writ of Error and *Supersedeas.*

Pursuant to Section 19.1-289 of the Code of Virginia, he makes oath that he cannot pay or secure to be paid the costs of the printing of the record in this case and prays that this court and/or the Supreme Court of Appeals of Virginia determine that he is an indigent and direct that costs of printing be paid as provided by law.

George D. Cephas

Signed, Subscribed and Sworn to before me this 8th day of May, 1970, in the County of Powhatan, Virginia.

My commission expires: 11/5/73

G. H. Melton
Notary Public

Recd. 5-13-70. A.L.L.

* * * * *

RECORD

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And at the same Hustings Court held for the City of Richmond, at the Courthouse, on the 15th day of May, 1969, 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 George W. R. Glass and Thomas N. Nance represented the Commonwealth. And the defendant having been on May 14, 1969, found guilty of Statutory Burglary as charged and this case having been continued to this day, the Court doth now ascertain his term of confinement in the Penitentiary at two years.

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 being offered or alleged in delay thereof, it is the judgment of this Court that the said George Dabney Cephas be confined in the State Penitentiary for a term of two years, this being the period by the Court 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.

And thereupon the said George Dabney Cephas is remanded to jail.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Hustings Court of the City of Richmond, Thomas R. Miller, City Hall, Richmond, Virginia:

Notice is hereby given that George D. Cephas, the appellant, appeals from a final judgment rendered by this Court on the 15th day of May, 1969, and announces his intention of applying for Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENT OF ERROR

1. The Trial Court erred in overruling the appellant's motion to strike the Commonwealth's evidence.
2. The Trial Court erred in overruling the appellant's motion to set aside the verdict as being contrary to the law and evidence of the case.

Given under my hand this 14th day of August, 1969.

George D. Cephas

By George W. R. Glass
Of Counsel

Received & Filed Aug 15 1969 Hustings Court Clerk's Office.

..... Deputy Clerk

* * * * *

Transcript of the evidence and other incidents of the above when heard on May 14, 1969 and on May 15, 1969, before the Honorable Samuel B. Witt, Jr., Judge.

APPEARANCES:

Thomas N. Nance, Jr., Esq.
Attorney for the Commonwealth

George W. R. Glass, Esq.
Attorney for the Defendant

* * * * *

page 3 } Hearing on May 14, 1969, before the Honorable Samuel B. Witt, Jr., Judge.

PRESENT: Thomas N. Nance, Jr., Esq. Attorney for the Commonwealth

George W. R. Glass, Esq.
Attorney for the defendant

George D. Cephas, the defendant, in person and by counsel.

The Clerk: *Commonwealth* v. *George Dabney Cephas.* (The witnesses were called.) Mr. Glass, do you have any witnesses for the defendant?

Mr. Glass: Yes, sir.

The Clerk: In the Hustings Court on this Wednesday, the 14th day of May, 1969, in the case of the *Commonwealth* v. *George Dabney Cephas,* an indictment for statutory burglary. The defendant is present in Court and the
page 4 } defendant is represented by Mr. Glass, Mr. Glass, is the defense prepared to proceed?

Mr. Glass: He is.

The Clerk: And the Commonwealth is represented by Mr. Nance, Mr. Nance, is the Commonwealth prepared to proceed?

Mr. Nance: We are ready.

The Clerk: George Dabney Cephas, you stand indicted that on the 11th day of March, 1969, in the said City and within the jurisdiction of the Hustings Court of the City of Richmond, in a certain storehouse of High's Ice Cream Company, Incorporated, there situated as No. 424 North Second Street, and the said storehouse not there adjoining to or occupied with a dwelling house, that you unlawfully, feloniously and burglariously did break and enter with the intent then and there unlawfully and feloniously and burglariously to commit larceny therein against the peace and dignity of the Commonwealth of Virginia, how do you plead to this indictment?

The Defendant: Not guilty.

The Clerk: And on your plea of not guilty, do you wish to be tried by His Honor, the Judge, or a jury?

page 5 } The Defendant: His Honor, the Judge.

The Clerk: Does the Commonwealth consent?

Mr. Nance: The Commonwealth consents.

The Clerk: Answer His Honor's questions.

The Defendant: Yes, sir.

By the Court:
Q. Your name is George Dabney Cephas, that is your name?
A. Yes, sir.
Q. What is your age, sir?
A. Twenty-six.
Q. And you are the person who's charged with having committed this offense,
A. Yes, sir.
Q. you are that person? You fully understand that you are entitled to have a jury try your case, if you so desire,
A. Yes, sir.
Q. you understand that, sir?
A. Yes, sir.
page 6 } Q. And you voluntarily, willingly waive that right and you understand that the Court tries you,
A. Yes, sir.
Q. you understand that?
A. Yes, sir.
Q. Mr. Cephas, you've discussed your case carefully with your Counsel, Mr. Glass?
A. Yes, sir.

The Court: And are you now ready for trial, Mr. Glass?
Mr. Glass: Yes, Your Honor, I would make one motion before we proceed.
The Court: All right, well, I—all right, you are ready, then,
Mr. Glass: We are.
The Court: for trial? All right, have a seat.
Mr. Glass: I would make a motion, Your Honor, to separate the witnesses.
The Court: All right, who do you wish to remain?
Mr. Nance: Keep Merlenbach.
The Court: Merlenbach—will all other witnesses retire to the corridor.
page 7 } Mr. Nance: We might keep Mr. Engard here and I'll call him as my first witness.
The Court: Mr. Engard, you'll be the first witness.

JAMES B. ENGARD, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

James B. Engard

DIRECT EXAMINATION

By Mr. Nance:

Q. Mr. Engard, state your name and occupation, please?

A. My name—excuse me—my name is James B. Engard, I'm the Office Manager of High's Ice Cream, or High's of Richmond, Incorporated, is the official name.

Q. All right, are you affiliated in any way with the store on North Second Street?

A. Only in my capacity as Office Manager.

Q. You are the Office Manager

page 8 } A. Yes, sir.

Q. of that store?

A. Yes, sir, well, I'm Office Manager of High's, Incorporated.

Q. All right, did—did High's have—have an entry in their store sometime on the date of March 11, 1969?

A. This was reported to me, that—

Mr. Glass: Objection, Your Honor.

The Court: Well, now, if you don't know anything about it, why you can't testify as to it. As the result of information received, what did you do?

A. It was not—this particular thing was not reported by me, sir, Mr. Hodges, who was—

The Court: Well, you can't testify to it.

A. Yes, sir.

Q. Mr. Engard, did you ever view the premises over there after you were informed that something had occurred?

A. No, sir.

Mr. Nance: Judge,—

The Court: You are not prepared?

page 9 } Mr. Nance: No, I'm not, Mr. Hodges was summonsed,

The Court: Yes, sir.

Mr. Nance: we had a confusion this morning, one of the officers checked—

The Court: Well, you can *nol prosse,* if you want to or—

Mr. Nance: Well, I—I'd like to just pass it by a few minutes and we'll get somebody, if that's proper.

Mr. Glass: I would have to object on behalf of my client, Your Honor.

The Court: All right, I'll give you a reasonable length of time to get him here, who is Hodges, what is he—

Q. Who is Mr. Hodges?

James B. Engard

A. Mr. Hodges is one of our store supervisors, sir, he is at the present time out of town, I do not know whether the summons was served on him, he went out of town, Mr. Morrison, our Executive Vice President who was in on this—

(The Court mumbles and the transcriber is unable to determine what he is saying)

Mr. Nance: Judge, give me—if I might, if I
page 10 } could have just about two minutes,
The Court: All right.
Mr. Nance: I'll decide what to do.
The Court: All right, O. K., we'll take a recess.

NOTE: At this time, a short recess was had, after which:

Q. All right, Mr. Engard, I believe you previously stated that you are Manager of High's, Incorporated?
A. I'm the Office Manager, yes, sir.
Q. Yes, sir, and that includes the office manager of the store on Second Street?
A. Well, being Office Manager of High's, I keep all the records of all of the stores.
Q. Yes, sir?
A. I mean—
Q. Now, where is this store on Second Street?
page 11 } A. 424 North Second Street.
Q. Is that in the City of Richmond?
A. Yes, sir.
Q. All right, do you—are you acquainted with George Dabney Cephas, this defendant?
A. No, sir.
Q. You don't know him. Has your company ever given him permission to go in that store after closing hours?
A. No, sir.
Q. What time does your store close or what time did you close on this day, March the 11th?
A. Either ten p. m. or 10:45 p. m.,
Q. All right?
A. I am not positive in my own mind, sir, as to whether we had gone on our summer schedule at that time or not.
Q. All right, but it was either ten
A. Ten or 10:45.
Q. or 10:45 p. m.?
A. P. m.

Q. O. K.

Mr. Nance: Cross examine.
page 12 } Mr. Glass: No questions.

Witness stood aside.

B. A. ROWE, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Nance:
Q. State your name and occupation, please?
A. Bert A. Rowe, Patrolman, Richmond Police Department.
Q. Did you have an occasion to be in the area of 424 North Second Street on March 11, 1969?
A. Yes, sir, I did.
Q. All right, approximately what time was this?
page 13 } A. It was approximately 3:10 a. m., sir.
Q. 3:10 a. m.?
A. Yes, sir, yes.
Q. All right, at that time what were you, walking or driving?
A. I was patrolling my beat in Unit 616.
Q. All right, you were driving?
A. Yes, sir, I was.
Q. All right, in which direction were you traveling?
A. I was westbound on Clay Street.
Q. What did you observe?
A. Sir, I observed as I was patrolling, approached Second Street, Second and Clay, I observed a man standing under the *foyer,* the front door of the High's Ice Cream Store. I passed by him slowly and proceeded westbound on Clay Street.
Q. Now, where is—where is High's Ice Cream Store located?
A. On the corner of Second and Clay.
Q. Which corner?
A. Be on the south—southwest corner.
Q. All right, now, which is—where is the front door, is it on Clay Street or Second Street?
page 14 } A. On Second Street, sir.
Q. All right, and you say it is right on the corner?

B. A. Rowe

A. Yes, sir.
Q. Opens onto Second Street?
A. Yes, sir.
Q. You were westbound, go ahead?
A. As I proceeded past the individual standing under the foyer, I slowed down so I could check the side door of the High's Ice Cream Store, which is on Clay Street.
Q. All right?
A. I threw my spotlight on the door and I proceeded past it to the back window and a little alleyway.
Q. Does that alleyway run directly behind this building?
A. Yes, sir, it does, goes all the way down to the rest—down to the *reataurant* and beauty shop and so on.
Q. Is it an open alley all the way through the block?
A. Yes, sir, it's a open alley up to a restaurant, it goes up —it's a little dead end type thing, but it goes all the way to the back, runs alongside of a house and it dead
page 15 } ends there and it—it ends up where, I believe there's a restaurant, that door faces into the alley also, it's a little catway type of thing,
Q. All right,
A. passageway.
Q. now, where is the house that you are talking about in relation—
A. The house would be next door to High's Ice Cream Store.
Q. South of High's Ice Cream
A. It would be west of there.
Q. or west?
A. West.
Q. Across the alley?
A. This little catway, yes, sir,
Q. Yea?
A. a little passageway, if you wish it. I threw my spotlight on the window and I backed up to the side of High's Ice Cream Store and I looked in the door again, and that's what called my attention to it, I noticed the door was ajar. I sat parked at the corner with my spotlight on the door and notified radio at approximately 3:14 a. m., that the burglary was in process, I noticed the door move on me about two or three times and then popped wide open and two
page 16 } individuals come out. They froze in the doorway. One of the defendants blocking the view of the other, there was one person here and the other person was right behind the—the other defendant stood right in my view

of my spotlight, I then proceeded—well, when they came out, they froze, framed to my spotlight, one subject ran west on Clay Street, the other subject broke and ran east on Clay Street. As I was already westbound, I started chasing one defendant by automobile westbound on Clay and all the time notifying radio of the burglary, chase and description of the individuals. Now, on the tape that is present down at the Police Department, I notified a description of the person I was chasing and also a person who was standing in front of the door, the front door of High's Ice Cream Store, and I stated that the party was a colored male, wearing a brown topcoat.

Q. That was the man standing in the foyer in front of High's?

A. Yes, sir.

Q. O. K., he was wearing a brown—colored male wearing a brown topcoat?

A. Yes, sir.

Q. Did you ever see this man again or

A. Yes, sir, I did.

Q. identify him at a later date?

page 17 } A. Yes, sir, I did.

Q. And who was the man with the brown topcoat?

A. The defendant, sir.

Q. All right, and he was the one standing on the foyer in the front of High's?

A. Yes, sir, he was apprehended and brought back by Sergeant Saunders.

Q. Yes, sir, all right, now, what did you do, I mean you say you pursued the man westbound on Clay Street, did you apprehend that man?

A. No, sir, midway down Clay Street is a parking lot that Standard Drug Company has. The defendant I was pursuing ran into this parking lot and I went in after him, I figured I had him. There is a iron type of railing in the parking lot which you can't drive past, he jumped this iron —this knee high type fence and darted between two buildings and I lost him, by the time I could get back on First Street I had already lost that subject I was chasing.

Q. All right, was the other man that came out, was he apprehended?

A. No, sir, to my knowledge he has not been apprehended yet.

B. A. Rowe

Q. What did you do after this, what did
page 18 } you do?

A. Went back to the High's Ice Cream Store to safeguard the building as it was insecure. When the other units started arriving I got out of the car, I noticed that the side door had been kicked in, looked like they had just put their foot to the door, could see wood—woodchips and shavings all over the place and the imprint of footprints on the green door, the base and midway of the green door.

Q. You could see these?

A. Yes, sir, you could.

Q. And you say there was woodchips and so forth?

A. Yes, sir, there was, and you could also see where the jamb had been broken. I then went inside the building to check it out to make sure there was nobody else in there. I noticed the safe had been chopped, the dial and the top of it had been chopped, you could see the shavings and the metal and a portion of the safe was on the floor.

Q. A portion of the safe was on the floor?

A. Yes, sir, the top—the dial portion.

Q. The dial was on the floor?

A. It was the—a round rib-type thing that I
page 19 } believe was on the floor, possibly the top of the dial itself, the cover.

Q. And where was the next time you saw this defendant?

A. When the defendant was brought back by Sergeant Saunders. At that time, I had already gone through the building to make sure there was nobody else in, I came back out and Sergeant Saunders then had the man, the whole—the whole time element was approximately, I would estimate, five —five to ten minutes.

Q. How much time?

A. Approximately five to ten minutes,

Q. All right?

A. I wasn't really looking at my watch.

Q. And you stated that you did identify this man as the one

A. Yes, sir.

Q. being in the foyer, O. K.? Were you present when this man was searched?

A. Yes, sir, I was.

Q. Do you know what was found—

A. Yes, sir, (the witness did not give counsel time to complete his questions) there was a High's Ice Cream bag found underneath his jacket.

page 20 } Q. All right. See if you can identify that?
A. Yes, sir, 'cause Sergeant Saunders' initials,
Q. All right?
A. when we opened it up you could see the High's mark on it.

Mr. Nance: Ask that that be introduced in evidence.

Q. Is High's Ice Cream at this location, is it in the City of Richmond?
A. Yes, sir, it is.
Q. What was this man wearing when you saw him the next time?
A. You mean after he was brought back to me?
Q. Uh, huh?
A. Well, he still had his brown overcoat, dark hat, he had his coat off, he was wearing a red shirt and blue pair of pants.
Q. You say he had his coat off?
A. Yes, sir, he did.

Mr. Nance: Cross examine.

page 21 } CROSS EXAMINATION

By Mr. Glass:
Q. Officer Rowe, now, you stated you were proceeding west on Clay and you looked in the foyer of High's Ice Cream?
A. Yes, sir, I did.
Q. And you say that is where you first saw this man?
A. Yes, sir.
Q. Is that what you said, you thought you saw him? Now, you stated it was 3:10 in the morning,
A. Yes, sir.
Q. and so it was evidently dark, but what were you shining in the foyer?
A. I wasn't shining anything in the foyer, I was just under normal patrol, but there are street lights on Second and Clay and the area is not dark, it is lit.
Q. Where is the street lights on the street?
A. I believe there's one on the corner, I know there's—
Q. Corner of what?
A. I believe there's one on the corner of Second and Clay.
I know there's one on Clay Street right next to
page 22 } the ABC store, I believe there's also street lights

B. A. Rowe

on corners (witness is mumbling) of Clay Street, that is a lit area,

Q. But you were—

A. the exact location I mean I can't pinpoint for you.

Q. But you were actually not shining your spotlight or flashlight

A. No, but I—

Q. in the doorway?

A. No, but I have high beam headlights and that's normally what I drive with at night.

Q. But the doorway, of course, is perpendicular to the street, so your high beam lights would have been pointed down Clay Street, west on Clay Street?

A. Right.

Q. Now, you've also stated that when you looked in the foyer, you saw two men—that's not what you stated?

A. No.

Q. All right, where is—where did you see this particular person that you think is defendant, where was the foyer?

page 23 } A. Right in the front of the High's Ice Cream Store there's a little stoop, with a little roof over it, it's a foyer, the defendant or the person I believe (the witness is mumbling) was standing on the—this stoop under the overhang near the door. As I went past him very slowly I looked at him just casually and proceeded west.

Q. This foyer would actually be on Second Street?

A. No, sir, it would be on—I would say it would be on Clay Street, sir.

Q. Well, it—

A. It would be a toss-up if you want to say one part's on Clay and the other part's on Second.

Q. In other words, the person that you think was the defendant you saw under a foyer which is—would be east on —on Clay of the actual door that you say you saw two men coming out of?

A. Yes.

Q. Uh, huh, now, you stated that this particular person that you saw had on a brown topcoat?

A. Yes.

Q. Isn't it true, Officer Rowe, that when this man was brought back and they—the other officers asked you do you identify this man, didn't you say at that time that you were

page 24 } not certain, that you could not be certain that this was the actual man whom you saw under the foyer, were you not uncertain at that time?

B. A. Rowe

A. The only thing I could identify on that person was the clothing he was wearing. As I have stated before, I could not identify him by face, but by the clothing he was wearing at that time, was the same clothing he was wearing when he was brought back to me.

Q. And the clothing that you say that you identified on the man under the foyer was a brown topcoat?

A. Yes, sir.

Q. Is that the only real similarity between the man in the foyer and the defendant who was brought back later, is that the similarity

A. General—

Q. with which you decided that he was—

A. general height—say, general height, if he had been, say, seven feet tall, no, but I'm saying just general height, just a casual look as I went past him, but the thing that stood out was the coat and the hat and the coat and the hat—

The Court: The coat and the what?

A. The coat and the hat, the hat he was wearing. These are things that normally stand out and you pick one point and, of course, these were the things I picked,

page 25 } Q. But it was—

A. as I said, I gradually, I just casually looked at him as I passed by.

Q. And it was, as you say, fairly dark and you casually looked and that's what you saw, the brown coat and the hat?

A. It wasn't fairly dark, it was dark, but it was a *red area,* and again driving at the curb level is approximately five to seven feet so when you just grad—as you casually look at a person you can pick out points of similarity.

Q. All right, and you say that when this defendant was brought back later that he had on a brown topcoat?

A. He had the brown—yes, sir.

Q. Was the topcoat long or short?

A. Ah—

Q. Now, I'm speaking, now, of when you first saw the person standing under the foyer, was his topcoat long or short?

A. I would say it was about what, three-quarter *lenth* one of those—one of those type things.

Q. So you say it would be a shorter topcoat than—

A. Yes, sir, than a regular—

page 26 } Q. than a regular topcoat? And when this de-

B. A. Rowe

fendant was brought back, did he have on, then, a short three-quarters brown topcoat?

A. Yes, sir, he had the same type of topcoat.

Q. All right, now, you stated also that High's Ice Cream bag was found—or you stated it was found on this man,

A. Yes, sir.

Q. did you actually see, or did you actually personally find the High's Ice Cream bag on the defendant or had it supposedly been found on him previously and this is just what you were told?

A. No, sir, when he was brought back, Sergeant Saunders opened his coat up and the bag came out.

Q. In other words, you say that the bag was found, not before the time when he was brought back

A. In my—in my presence is when I saw—

Q. but in your presence, it was the first time that anyone had seen it?

A. As far as I know it was the first time I had seen it.

Q. All right, where was the ice cream bag on
page 27 } him?

A. I believe when he opened up the jacket, the coat, the—when he opened up the coat and the bag came out, I believe it was underneath the jacket.

Q. You believe,

A. Yes, sir.

Q. but you are not sure exactly where it was?

A. As far as I—no, sir—

Q. When you—

A. no, sir, at this time I do not remember, I do remember the bag being produced from under his coat, so if it was inside of a pocket, or just tucked inside, I do not know, all I know is when the coat was opened the bag came tumbling out.

Q. At any time did the defendant attempt to run or try to get away, did he seem excited?

A. After he was brought back to me?

Q. When you saw him, that what I asked?

A. Which time, sir, when

Q. Well,—

A. I passed him or after he had been brought back by Sergeant Saunders?

page 28 } Q. No, I'm talking about when he was brought back

A. No, sir, he—

Q. by Sergeant Saunders?

A. he had no alternative to run.
Q. But did he seem excited or nervous?
A. Normal type nervousness, yes, sir.
Q. Is it any way possible that you could be mistaken as to his identity?
A. No, sir.
Q. I mean you—you don't think you could be mistaken because all you know is that there was a brown topcoat with a hat,—I mean could another man have been wearing a brown topcoat and a hat that night?
A. Well, yes, sir, it's possible.
Q. O. K. Well, you have testified that you were called to the scene on your radio, however, you were called?
A. I was not called, sir, I was patrolling.
Q. You were patrolling?
A. Yes, sir.
Q. So you didn't actually know there was any breaking and entering yourself, except you were just pa-
page 29 } trolling the area
A. Correct, sir.
Q. and you saw two men coming out of High's Ice Cream?
A. That's correct. After I parked in front of the door with the spotlight on it, then watched the door (the witness is mumbling and is unintelligible at this point) a couple of times.

Mr. Glass: That's all I have.

REDIRECT EXAMINATION

By Mr. Nance:
Q. How many units responded over there, Officer Rowe?
A. That's a good question, sir. Sergeant Saunders, Detective Merlenbach—oh, I don't know, I'd say probably half a dozen, I mean when you put in a call like that everybody comes, so I mean it's hard to say how many cars was there.
Q. That's all.

RECROSS EXAMINATION

By Mr. Glass:
Q. Officer Rowe,
page 30 } A. Yes, sir.
Q. when you first saw the man who you think is the defendant under the foyer on Clay Street, when you

passed him and you looked over there casually, did he run or make any—did you see him run and try to get away or not?

A. No, sir, he just sorta looked at me and I looked at him, just one of those type of things and I just kept proceeding (again the witness mumbles and he is unintelligible for several words) I mean at that time there was nothing for me to be suspicious of really, except the idle curiosity of, you know, what's a man doing here at three o'clock in the morning, just one of those things that registered, but the door—the glass door wasn't kicked in, nothing of that sort, so—but you pick out something and it's just curiosity that goes with the job of why was he here and then you dismiss it and keep right on going (witness mumbles continually).

Q. That's all.

By the Court:

Q. Let me ask you, Officer,

A. Yes, sir.

Q. the door that you saw these two men come out of with respect to where this defendant was standing, is that west of where he was standing?

page 31 } A. Where he was standing at, sir, would be east of the side door, being that is a corner the door, say, would be (witness mumbles) at the end of this desk, the side door—

Q. Well, I mean, for instance, was the side door on Second Street?

A. No, sir, the side door was on Clay Street.

Q. Well, that's what I'm talking about, and he was standing —this man, according to you, was standing in the foyer which was near the corner of Second and Clay,

A. Yes, sir.

Q. is that right?

A. Yes, sir.

Q. Now, where was the side door these people came out of?

A. On Clay Street itself.

Q. West of—

A. Yes, sir, yes, sir, west of (witness again mumbles)

Q. All right.

By Mr. Nance:

Q. Officer Rowe, the front of High's Ice Cream, there where the foyer is, what is the construction, is it completely closed in or is it glass front?

page 32 }

A. It's a complete glass front, sir.

Q. A complete glass front
A. Yes, sir.
Q. door? All right, that's all.

The Court: All right, step down.

Witness stood aside.

J. C. SAUNDERS, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Nance:

Q. Sergeant Saunders, state your name and occupation, please?

A. My name is Sergeant J. E. Saunders, Patrol
page 33 } —Patrol Sergeant, Bureau of Police, Richmond,
Virginia.

Q. All right, did you have occasion to be in the vicinity of High's Ice Cream on Second Street on the night of March 11, 1969?

A. Yes, I did, I was in that vicinity.

Q. All right, tell the Court what you found at that time?

A. Well, I was responding to—assist an officer on a burglary call at High's Ice Cream at Second and Clay, and I came down Marshall Street—

Q. Sergeant, I'll have to ask you to speak up just a little (counsel mumbles).

A. I came down Marshall Street and I come down through Standard parking lot, turned off left on Marshall into Standard's parking lot, the lot extends from Marshall to Clay, goes all the way through from Marshall Street to Clay Street, I had my bright lights on, and after I had cross—it's an alley that runs between Leigh and Clay coming in from First Street which would be the west—the east side of First Street is the alley come in between Clay and Marshall. I came in through that lot, I had my bright lights on, I saw a man standing at a back door, I later found out that this address was 119 East Clay Street. I got out of my police car
and I called him and he came over towards me and
page 34 } he was identified as the defendant, George
Cephas, I asked him what was he doing at the back door of this *resident* and he said that he was going to urinate. So I told him I believed that he was involved in this

breaking and entering and I escorted him around to the High's Ice Cream Store at Second and Clay through the Clay Street—well, the Clay Street entrance to the parking lot and went right to the High's Store. At the High's Store we searched him and he had a bag in his pocket, High's Ice Cream bag, it was folded, the bag had never been used.

Q. All right, I ask you if you can identify this?

A. (pause) Yes, sir, this is the bag.

Q. All right, in at least that good a condition when you saw it?

A. Well, it was better condition than this, because it hadn't been fold and no writing was on it or anything and it was a new bag in my estimation.

Q. It was a new—how was it folded?

A. It was folded like this and he had this bag in his right hip pocket

Q. Uh, huh?

A. under his overcoat, he had on a brown overcoat, and this bag was under his overcoat in his pocket.

Q. All right, do you know what kind of shirt
page 35 } he had on?

A. He had on a sport shirt, I don't recall the color of the shirt, but it was a sport shirt.

Q. Did he have a hat, was he wearing a hat or not?

A. Yes, sir, he had a hat on.

Q. Uh, huh, now, Sergeant Saunders, what was this man doing when you saw him, you stated what he told you he was doing, what was he actually doing?

A. He was standing at the back door of this house, trying to go in the back door so I—that's why I called him, asked him did he live there, and he said no, said that he come up in this part of the alley to urinate. Actually he wasn't in the alley, he was on private property at the back door of a resident.

Q. Well, what was this back door, is it a porch or is it just a door or can you describe this a little more?

A. Well, this door has—there are three—two steps leading to the back door, the back door is almost adjacent to the house, with a frame something like that door there, the marble sticking out, but there was a solid wooden door, the door was locked, and had a little shed over the door, not too much.

Q. You say you actually saw him trying to
page 36 } A. Yes, sir.

Q. get in? Do you know who lives there?

A. No, sir, I don't.

J. C. Saunders

Q. And you say he does not know who lives there?
A. He say he didn't know who lived there.
Q. Was he injured in any manner when you saw him?
A. Yes, sir, on his hand was a cut place on his hand, some blood was on it, not very much, looked like it was a raggedy mark if you attempt to grab something and it slips out of your hand and the skin was abrased, it didn't require medical attention, it was blood coming from (it is thought the witness pronounces the word superficial) wound on his hand.
Q. Did you find any other blood around there?
A. Yes, sir, we searched the area in the immediate vicinity of the store, there is a five and a half foot fence in the rear of the resident there which would be around 111 East Clay Street. At the top of the fence, the fence is an anchor fence, chain type fence with some of the chains are sticking up like this, with sharp edges, and on top of that fence was blood on the top of that fence.

page 37

Q. Where is that in regard—or in relation to the location of High's Ice Cream Store?
A. Oh, lemme see, that would be three houses, two houses, three houses from the High's Ice Cream Store and going westwardly on Clay Street the High's Store is on the southwest corner of Clay Street.
Q. Uh, huh?
A. I'm sorry, it would be south—yea, southwest corner of Clay Street.
Q. All right, would the fence be—if you—if you were on Second Street would the fence be between High's—the front of High's Ice Cream and where you apprehended this man?
A. If you are on Second Street?
Q. Yes?
A. Would the fence be where, sir?
Q. Would it be between High's Ice—the front of High's Ice Cream, if you were going to travel from the front of High's Ice Cream Store to where you apprehended this man, would the fence have been in there, in between there?
A. Yes and no, sir, it would—yes, it would be between where I apprehend the man, but it would be in the rear, it would be some twenty-five feet in the rear which would be bordering on that little alleyway that comes up to a blind alley, the alley's there for trash purposes, it would be in that vicinity, it would be in that complex.

page 38

Q. All right, now, you stated a while ago that this man when you saw him would have been on private property?
A. Yes, sir.

J. C. Saunders

Q. Is there any designation as to where the property—the parking lot and this property that goes with this house starts and stops?

A. Yes, sir, it's an iron fence there, a railing, and it marks off the parking lot and—to keep cars from parking into this lot, into these people's property on the yard there, is the fence, well, you would have to go over that to go up to the back door, you—in the alleyway there is no fence, you can walk right up from the alley, right up to the back door, but from the parking lot area it is a fence that separates.

Mr. Nance: Cross examine.

page 39 } CROSS EXAMINATION

By Mr. Glass:

Q. Sergeant Saunders, do you have any evidence at all that this defendant to get to this point behind this house, would have come from around either in front or from the side of High's Ice Cream Store?

A. State that again, sir.

Q. Do you have any evidence at all of your own personal knowledge that this defendant when you found him behind this particular house, that he had actually come from around, either from the front or the side of High's Ice Cream Store, in other words, that he had come down Clay Street west and had ducked into this alley or had come down Clay Street west and had ducked into the parking lot to get around to the back of this house?

A. I think he came down Clay Street west and went behind the—

Q. Well, you think, but I mean you don't have any reason for that thought, I mean for that belief?

A. I don't have any idea how he got there.

Q. Right?

A. No, sir.

page 40 } Q. In other words, when you came into this parking lot and saw the defendant behind this house, you had in fact come from Marshall Street,

A. That's right.

Q. which is the street parallel to Clay Street south of Clay Street?

A. Right.

Q. So all that you can testify to is that you saw the defendant behind this house, which is near a parking lot off of Clay Street?

A. Correct.

Q. All right, now, are you positively certain that the defendant was trying to break into this house or did you just see him near the house or can you absolutely testify that he was breaking into this house or trying to get into this house?

A. I don't believe I said he was trying to break into the house,

Q. Well, what—

A. he was trying to open the back door by turning the knob, it's a knob there on the back door and the—

Q. Did you see him try to turn that knob?

A. Sure, I had my headlights on him, it was three o'clock in the morning, I had bright lights, I had all four
page 41 } beams burning—burning, and I was coming just like this going directly to Clay Street heading north on—through the parking lot and he was right on my right and the headlights all 'cross there, I could see.

Q. I know you want to tell the truth, Sergeant Saunders, I'm not trying to get you to say something you didn't see but could you have been mistaken, could he have perhaps just been in the backyard and perhaps you thought that he was just turning this door knob?

A. No, he was at the door of this house.

Q. When you found—when you actually came to the defendant and told him that you were a police officer and so forth, did he try to run, or when you pulled in the back and saw him up at the store, did he try to run or did he try to get away from you?

A. No, sir, he didn't try to run.

Q. Well, what did he do?

A. I called him and he saw me coming towards him so he walked towards me, he met me about half way.

Q. So when you saw him and you identified yourself, he walked towards you?

A. Yes, sir.

Q. He made no attempt to run or get away?

A. No.

page 42 } Q. Did he act nervous or excited or was he calm?

A. He was a little nervous.

Q. But would you say that he was fairly calm for a person who you think had just been a principal in the second degree to a breaking and entering?

A. He wasn't calm, I mean he was nervous but he wasn't —he didn't have the jitters or anything.

J. C. Saunders

Q. But would you say he was no more nervous than anyone who a police officer might have come down with his high beams on and said, "I'm a police officer, come here"?

A. Well, I imagine you could say that.

Q. All right, then what happened after you identified yourself and told him that you were a police officer, where did you take him then?

A. We walked to the High's Store, went around, out the parking lot, and headed east on Clay Street, walked back to the High Store where two other officers were.

Q. Now, at this time what clothes did the defendant have on?

A. He had on a brown overcoat, cashmere type overcoat, and a dark hat and dark trousers.

Q. Could the overcoat have been black?

page 43 } A. No, sir, it was not black.

Q. What was the length of the overcoat?

A. It was a regular overcoat.

Q. But was it a three-quarters overcoat or was it fairly regular type overcoat, that is, you know, fairly long?

A. It was a regular overcoat like the—it was a new coat, coat like people are wearing now, it was in style,

Q. Yea?

A. it's in style.

Q. But you wouldn't say that it was a short coat?

A. No, it was an overcoat.

Q. All right, now, during the time that you had brought him back to High's Ice Cream and you, I believe you say took him inside of the store and then started to talk to him and interrogate him, I would imagine, which you usually do, did you, during this time, leave the defendant by himself in the store to go talk with the other police officers and detectives, was he alone in the store at any time?

A. No, he was never alone in the store.

Q. You did not leave him by himself

A. No, sir.

page 44 } Q. and go off to talk about the case and then come back?

A. No, sir.

Q. He was—someone was with him at all times?

A. At all times, yes, sir.

Q. Well, during this time did he try to get away or to escape?

A. No, he didn't try to get away, didn't try to escape.

Q. Now, where—I believe you were there, when this High's Ice Cream bag was found on him?

A. Yes, sir.

Q. Where was the High's Ice Cream bag?

A. In his pocket, pants pocket.

Q. What pocket?

A. I don't know, Mr.—it was either in his left or his right, it was in his pants pocket, in his hip pocket.

Q. In his pocket?

A. Yes, sir.

Q. So when he opened his coat, is that when you saw the bag or when—or was it after that

A. When we—

page 45 } Q. or when did you actually see—

A. well, when we searched him for weapons or anything that he might have had on him and we found the bag in his pocket.

Q. So it actually wasn't when the coat was opened, it was more or less when you searched him later on you found the bag in his pocket?

A. Yes.

Q. Now, is it true that when the defendant was brought back to High's Ice Cream and you had brought him back and Officer Rowe was there,

A. Yea.

Q. and isn't it true that you asked Officer Rowe, did you not ask him, "isn't this the man?" or "is this the man that you saw under the foyer when you passed the store?" Did you not ask him if he was the man or if he could identify this man?

A. I didn't ask him was this the man, I asked him could he identify him.

Q. Right, and was Officer Rowe at that time, at the first time that you asked him if—to identify him, was not Officer Rowe uncertain as to the identity of the man?

A. Yes, he was uncertain.

page 46 } Q. All right, then later on, I believe, now, is this right, you then took the defendant back to the parking lot where you had found him, is that right?

A. Yes, we went back up to the parking lot—

Q. You took him back there?

A. Oh, he went through the yard there, it's a alleyway in back of the High's Store and we walked up there and—

Q. All right, but you took him back to where you had found him?

J. C. Saunders

A. Yes, sir.

Q. Then is it not true that you then brought him back to High's Ice Cream and after a discussion with Officer Rowe, did you not say—are you—isn't this the man, I mean can't you positively identify him now

A. No.

Q. or didn't he then say yes,—yes, that's the man?

A. No.

Q. Well, when did Officer Rowe positively identify this man, this person that he saw?

A. I don't know when he positively identified him, as I said now, I wasn't the only officer there and the page 47 } detective was handling the case, we were just there assisting them, and when the description came over the air, at first, it was a man wearing dark clothing and dark hat, so naturally that's who we were looking for, persons wearing dark clothing and dark hat, and whether Officer Rowe could identify him or not, I don't know.

Q. But you do know for a fact that when you first asked him to identify him, he was not certain that that was the man?

A. He was not certain.

Q. But during all this time, would you say that the defendant did cooperate with you fully?

A. Yea.

Q. All right, that's all.

REDIRECT EXAMINATION

By Mr. Nance:

Q. Sergeant Saunders, when you took this man back up there, did Officer Rowe make any comments about . . . (counsel mumbled and the transcriber cannot hear it)

A. Not to my knowledge, Mr. Nance, he said he had on the dark clothing, that's all he would say, it was a dark coat, and he couldn't state specifically that he was the person that he saw coming out the store, he never said that page 48 } in my presence, I don't know what else he said but not in my presence he didn't identify (the witness is also mumbling and the last word or two is unintelligible. No attempt has been made by anyone to get these speakers in closer proximity with microphones as they mumble).

Q. When you pulled into this block and you say you had all

four beams on this man, how far were you from him at that time?

A. Oh, I would say about twenty—twenty feet.

Q. Just a little more than a car length away from him with all four beams on him?

A. Yes, sir.

Q. O. K.

A. I didn't see him until I got up—the closer I got I could see him and then I saw this whole figure there with the lights on him. I immediately jumped out the car and told him to come—well, I didn't have to identify myself, I was in uniform like I am now, and I jumped out the car and I told him it was police officer and he walked (the witness is mumbling unintelligibly) and I told him to come here.

Mr. Nance: Any further cross?

page 49 } RECROSS EXAMINATION

By Mr. Glass:

Q. Officer Saunders, now, when you were coming down this parking lot with your high beams on, now, you, as you stated, came from Marshall Street, so it must be a fairly long parking lot which goes all the way through to Clay Street?

A. It's a block, three hundred and fifty feet.

Q. It's a long parking lot, is it not?

A. It runs from Marshall to Clay, yes,

Q. And

A. the entire part.

Q. when your high beams actually picked up the defendant, was it not a fairly good distance from the house so that if this person had actually been, say, guilty of a crime or was nervous or excited or was a someone trying—to flee from something that he was afraid would he not have had time to—

Mr. Nance: I object, Judge, he's

Mr. Glass: Well—

Mr. Nance: talking about the ultimate issue, he's asking for an opinion, he can testify as to distance, time and place.

The Court: It's a matter of argument (the
page 50 } Court mumbles)

Mr. Glass: Well, it's a matter—all right, let me rephrase the question.

The Court: All right, sir.

G. R. Merlenbach

Q. Officer Saunders, how far—well, let's say how far were you away when your headlights first picked up the defendant, about how far were you away from him?

A. When my headlights first picked him up?

Q. Yes?

A. I imagine about thirty feet, the nearer I got, the plainer he became.

Q. Right, but I'm not talking about when you first saw him, I'm talking about when would your headlights first have been shining on the defendant coming through that parking lot so that a person who was at the back door would have seen a car with high beams coming towards him which you say you were?

The Court: Well, that's a matter that asks for an opinion, they can't do that, he can tell you very frankly when he first picked him up, but that's all he can say. But as to whether —I might be in this automobile and seen him a
page 51 } block away, somebody else may not have seen him until he was a half a block, that's just a human —matter of human judgment and all he can testify is the facts of what he—actual distance he picked him up.

Mr. Glass: All right, let me just ask one more question.

The Court: All right.

Q. Not as to what you actually saw, but Sergeant Saunders, how far is it from—or about how far from the house to the end of the parking lot where you came into it, I mean is it a block long parking lot?

A. Yes.

Q. Is it a clear parking lot, I mean unobstructed?

A. Yes, he could have seen the car coming in from Marshall Street.

Q. O. K.

Mr. Glass: That's all.

Witness stood aside.

page 52 } NOTE: At this time, a short recess was had, after which:

G. R. MERLENBACH, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

G. R. Merlenbach

DIRECT EXAMINATION

By Mr. Nance:

Q. Officer Merlenbach, state your name and occupation, please?

A. G. R. Merlenbach, I'm assigned to the Detective Division, Richmond Bureau of Police.

Q. Were you assigned to investigate this alleged statutory burglary at High's Ice Cream Store occurring on March the 11th, 1969?

A. I was the investigating officer that responded to the scene at that time.

Q. You did respond to the scene?

A. Right.

page 53 } Q. What did you find when you arrived there (counsel mumbles and the last part of his question the transcriber cannot hear)

A. On my arrival there they were—I found that the back door of High's Ice Cream Store had been kicked in and that the safe had been tampered with, an attempt had been made on the safe to open it by knocking the dial off and chopping on it with a sharp instrument such as a hatchet or something of that nature.

Q. Did you find a hatchet?

A. We found a—a hatchet was given to me that was found just outside the door on the sidewalk, on the brick walkway.

Q. Did you notice any damage about the side door?

A. Yes, the door jamb on the inside had been cracked all to pieces, the door had been cracked around the lock mechanism of it.

Q. All right, did you see the defendant at that time?

A. They had apprehended the defendant and brought him on around to the scene

Q. All right,

A. at the time of my arrival.

page 54 } Q. did you have an occasion to talk to the defendant about this alleged attempt?

A. Yes, I talked to him shortly after I had advised him of his rights at the scene. The extent of my conversation with him then was the fact I asked him what he was doing back there in the alley at the time and he told me he had went—

Q. Had you advised him of any Constitutional rights?

A. I had prior to this.

Q. And how did you advise him prior to this?

A. I read it from the card in my pocket.

G. R. Merlenbach

Q. Read the card.

A. (reading) The law requires that you be advised that you have been charged with the following crime, breaking and entering of the High's Ice Cream Store; that you have the absolute right to remain silent, your silence will be guarded by the police; that anything you say may be used against you in a Court of law; that you have the right to the presence of an attorney during this and any future interview, and if you cannot afford an attorney one will be appointed for you prior to any questioning, if you so desire. Now, if you fully understand these rights—rights which I have explained to you they may be waived and

page 55 } you can, if you so desire, make a statement to me.

Q. Did he indicate that he understood?

A. Yes, he did.

Q. Did he appear to you to have understood?

A. Yes, he did.

Q. All right, go ahead?

A. At that time, I questioned him as to why he was in the alley where he was apprehended and at that particular time he said to me that he had went around there, he was waiting to catch a bus and had went around there to take a leak, in his words, to urinate. So I asked him to step back on around in this particular alley and show me, he told me he had half way urinated in the alley, and I asked him to step on around there with me and show me where this exactly was, so he and myself and Sergeant Saunders went around there and we could find no wet areas where anybody had urinated and —we just couldn't find any, he showed us several places where he *though* it would be, he was a little excited at the time and nervous,

Mr. Glass: Your Honor,

A. and—

Mr. Glass: may I intervene here and ask him

page 56 } if this statement is being presented in evidence, are you going to present this in evidence or not, what's—

The Court: Well, he said—

A. This is what he told me at the store,

Mr. Glass: Yea, but I—

A. I'm not reading this from my statement,

Mr. Glass: No—

A. that he gave me later.

The Court: It's not from—

G. R. Merlenbach

Mr. Glass: I mean, do you have a statement or notes that you are reading from or is this from memory?

A. No, this is from memory, but I talked to him at the store. And anyway, we went around to the alley with Sergeant Saunders and the defendant and we could find no wet areas where anyone had urinated.

Q. All right, while you were at the scene, did you observe any injuries sustained to this—

A. Yes, he had an injury to his hand and we also went around there, he was with us at the time, we went back to the alley and looked good and upon this large high cyclone fence, I call it, it's a chain-link fence, on the inside

page 57 } of the fence was a—not a large spot of blood, but just a small spot of blood that had not coagulated yet, and was still in the wet condition, hadn't dried at all.

Q. All right, sir, did you subsequently talk to this man again, did you continue the conversation?

A. Yes, after that we carried them down to Headquarters and there I talked to him in length after advising him of his Constitutional rights again.

Q. Did you tape this conversation with him at that time?

A. Yes, I did.

Q. Do you have a transcript of that tape?

A. Yes, I have.

Q. Have you checked with that statement as to its accuracy with the tape itself?

A. Yes, the tapes are typed by typists in the office.

Q. All right, would you state, please, what time you talked to him and where?

A. This was on March the 11th—no, wait a minute, I beg your pardon, I have the wrong one here, I have it for Redd, I have the original on—the time of this was at 4:30 a. m. on March the 11, 1969.

page 58 } Q. All right, and where was it?

A. This interview took place at Police Headquarters in an interview room at the Detective Division.

Q. All right, and this was on the same, 4:30 a. m. on the same day of the alleged offense?

A. Right.

Q. All right, would you read the statement please, what you advised this man first?

A. (reading) I am Detective G. R. Merlenbach of the Richmond, Virginia, Bureau of Police. You are being interviewed in connection with the alleged commission of the crime of

breaking and entering a business. You have an absolute right to remain silent and make no statement to me and your silence will be guarded by the police. Any statement you make with or without counsel can be used as evidence against you. You have right to the presence of an attorney during this or any future interview the police might have with you; the attorney may be one of your own choosing which you retain or if you are without funds to employ counsel, the Court will appoint one for you. Do you understand the rights that have been explained to you?

Cephas: Yes, sir.

And I said: You may voluntarily waive the above rights that have been explained to you and make a statement if you so desire, do you wish to make a statement?

page 59

He stated yes, sir.

I then went on and said, "All right, George, just tell me about this thing, from start to finish, in your own words and speak clearly, we will try and go through this from the time you met up with these two guys on that corner to the time you were apprehended in the alley in the rear of 109 East Clay Street, now, let's take it from right there when you showed up on the scene".

He stated: I came off of Broad Street and I had been in the bus station, I came out of the bus station and I came down Second Street, I looked for the Ginter Park bus, but I didn't see it and I thought about going to the pool room instead—poolroom, instead I waited on the corner of Second and Clay. I was standing there waiting for the Ginter Park bus, which runs every hour on the hour, going across the north side where I live at.

He has: Some were standing in front of High's Ice Cream Store on the corner, called across the street—some—it's supposed to be some fellow.

I said, a fellow, what fellow?

Cephas: I know him as Earl standing across there on the corner, I saw him standing across the street. I said, hey, Earl, and he said, hey, Dino. I waved and he said, hey, do me a favor, I said, what, he said, if you see a police car coming, let me know. I asked him what for, and he started laughing, he said, when you see one come, just warn me, and I stood there looking for the Ginter Park Bus, I didn't see it coming, I looked down Clay Street and I saw a police car coming, but evidently he saw

page 60

it the same time and I walked away from the corner, and I started to bust out laughing and he walked across the street toward the liquor store.

I said, who walked across the street?

Earl walked across the street.

I said, walked?

It's right across Second Street the police car was around —now, this is him talking, Cephas, was around Fourth and Clay between Third and Fourth and evidently he saw it the same time I did because I started laughing. I started up Second Street and he walked across the street diagonally where the parking lot is by the liquor store.

I said, did you say walk or was he running?

He was walking, he was walking fast, when I looked back, he started directly across the street, he wasn't running then, he walked diagonally across like he was in the parking lot beside the liquor store. I walked up Second Street half way and I went in the alley there behind the grocery store walking beside the parking lot. He came across the street

page 61 } diagonally.

What about Billy?

When I came there he was on the side of the High's Ice Cream Store, on the side where the door is broken into.

I said, on the side where the door is broken into?

Cephas then said, yes, sir, and then he disappeared. There is also an alley back there and he disappeared. Now, I didn't have any idea that he was going to do anything in High's Ice Cream Store because, like I said, I have a girl that works in there and I know he doesn't keep any money in there because he would take it home with him. I figured if they were doing anything wrong it would probably be going to one of the other stores. The alley runs all the way through and I just looked and laughed and like I said, Billy has crossed me before with my girlfriend, we don't speak. He just disappeared just as I was about to go out the alleyway, Billy walked directly across the street, I walked up Second Street and across the street asking what am I walking away from. This is what I was thinking. I went in the alleyway—way —I went in the alleyway, up the alley and I pulled down my, unloosed my trousers to urinate and I was standing there. I heard a lot of police cars coming down the street, I came back to the street first when they started speeding down, this blue car saw me standing there.

When you came back to the street did you see

page 62 } Billy or this Earl running anywhere?

G. R. Merlenbach

No, I heard him when he said hey, wait a minute. Earl was out of sight and I didn't see Billy at all.

Which way was Earl going?

Earl as far as I could see him when the police car was at Third—between Third and Fourth Street, he started across the street diagonally. The liquor store is on the corner of Second and Clay, I know that the white Cadillac in which he drives is parked over in the parking lot.

What parking lot?

Behind the liquor store.

Behind the liquor store across from High's?

He said, yes, sir.

At Second and Clay I stated?

Cephas said, yes, sir, '62 or '63 white Cadillac.

I said, is it a convertible, he said, no, it's a hard top four-door.

I said, a four-door hard top?

He said, yes, sir.

Does he park it on the street at all down there on Second Street?

Cephas said, no, he usually parks it on the parking lot all the time. He started for his car over there and I walked up Second Street and I *though* why run. I went across page 63 } the street in the alley and I heard a policeman say, hey, I heard that and I came back to the street and like I said it was a joke to me, I started laughing and I was still laughing. I saw a police car speeding down the street, a blue car came past me with a policeman in it. They looked at me and slowed down, they kept going, I went back up in the alleyway and when I went in the alleyway, I said I'm going back out there again, that's when I looked across the street, I could see all the way to First Street, and it was a police car coming down First Street off Marshall, it started up in Sam's Parking lot and being around the area I know how I picked out the—I know how I picked out the accused but that's when I got on the fence. I could have went across, I got to the top of it, but I didn't go across, I came back down instead of going in the yard. In the yard I would have been caught in there, that's when I ripped my hand, that's when my hand was over, I came back down there, and I said I'm not going to run anywhere because I haven't done anything. I started out to the lot and a guy came up in there and shined a light in my face. I said, hey—he said, hey, (word unintelligible) come here a minute, and that's when I walked to the car. He said where are you just now coming from? I said,

G. R. Merlenbach

I'm coming from off of Broad Street and I am—I'm going to catch the bus over there. He said that there was a break—

page 64 } he said that there was a break-in at the High's Ice Cream Store and that's when he brought me around here. I had plenty of chance to run, because I saw him. I said look, five minutes before he even knew I was out of there.

And you didn't see anybody else out there on that corner besides Billy Redd and this Earl?

That's the only one I saw right then, Earl was standing on the corner, Billy Redd was on the side, he disappeared.

And as far as—I'm speaking again—as far as you know that's the only two that were there besides you?

The defendant said: As far as I know I wasn't on the side of High's Ice Cream Store, I was across the street where the bus stopped, and I said, "Well, where would that be, on the —" I didn't finish.

He said right hand side of the street of Second and Clay.

I then said directly in front of High's Ice Cream which would be and I didn't finish again.

He said yes, directly in front of it.

Then I said the right—right across the street would be the southeast corner then?

Yes, sir.

On the opposite corner from High's, the liquor store, I was

page 65 } on one corner, the liquor store is on the other corner, Harrison's Hotel is directly on the right-hand side going down Clay Street.

I said right, you were on the southeast corner?

He said yes, sir, and I—like I said I had no idea they were breaking into High's because I had a girl named Carolyn worked there before and I have waited there at night to go with her home. She lives at 2100 Fourth Avenue, I've seen her count the money, put it in her bag and she was taking the money home with her. Then said you never heard any pounding or hammering or anything of that nature where you were standing while you—where you were standing there and after they asked you to watch out.

He said no, sir, so they must have already been in there at the time because I couldn't hear across the street, I never did go on the other side of the street.

You couldn't see in the store, I asked him?

He stated: from what I could see I didn't see anyone in the store standing there—anyone in the store standing there looking real hard, standing on this side of the street you

can't, I don't believe you can see, I didn't see anyone moving around in the store, that's why I said I didn't think he was in High's. I said if he was doing anything wrong he wanted me to watch, the first thing came into mind—my mind when he said watch, I figured that they were moving or
page 66 } transferring some narcotics, because usually when the fellows do this, if they see one of us they say watch and figure he was up in the alley. When he went in the alley I figure he was moving that and he wanted to look for the cops, and I knew I wasn't going to get involved in that, that's why I bust out and start laughing when I saw police coming, because I've had guys before down there when they move narcotics come and say Dino, watch out and see if the man is coming. I'd say what's up, I gotta move my stash, that's when I walked on, I don't want nothing to do with it, I didn't have any idea they were breaking in, that's the honest-to-God truth and if he was doing it there's Sonny's Celebrity Shop, there's a beauty parlor, there's a restaurant there and there's a grocery store on the corner, and I said I didn't have any idea about High's because I know I have seen there before and the girl has counted the money and carried it home with her, and she said so many robberies and things going on another lady go with us home and we carry this money at night and we both leave out here when.

What were you doing out in that neighborhood that time of night, I asked him?

He said, I was *waitng* on the corner to catch the Ginter Park bus.

I said, well, where had you been?

I had been over in Church Hill, 2521 "Q" Street.
page 67 } I said well, did—I didn't finish.
I catch the bus on the corner of Leigh at times I hadn't been.

Is that the only corner you can catch it on?

He said no, he can—he came, picked me up from—she didn't get it all on the tape.

I said O. K., did you catch it at Broad Street?

Cephas: Yes, sir, I was going there, I had just about going to the pool room but I had just come out of—Coastal, he has here—why go back down on *Sumpter* Street again, I thought about that also because the man rides through there at night when everybody just come out,—I don't know what he was talking about when he stated that.

They didn't tell me to stay off of Second Street but it is a place they out of—it is out of ill repute, or something of

that nature—it was so jumbled the girl couldn't make it out, and Second Street is one of them and if you are seen down there, you are accused of being just as the other trash is down there. At first I thought about walking down to the pool room, just to see who was down there, then I said no, it would just be my luck because the police ride down there.

And when you were down there, where did you first see Billy and Earl?

Earl was standing on the corner.

page 68 } Standing on the corner by High's Store?

He said in front of the ice cream store.

I said right, where was Billy at this time?

Back down the street.

I said, on the side?

He said where the alley would be.

I said right, that would be where the door was busted in the back?

He said yes, sir, that's where he was, and that's when he disappeared, I figured he went into the alley.

You thought he went into the alley?

Yes, sir, but evidently he must have gone into High's.

Well, then where did whatchamacallit go, all right and then Earl?

He said, Earl?

I said, Earl, where did Earl go after he asked you to watch out?

He stood right there on the corner.

But why—I said but why did he need another lookout?

He then said that's what I don't know, he asked me if you see a police car coming, let me know, I'm going to look up

Clay Street and you catch Second Street, that's

page 69 } what he said and he was standing right there on

the corner by that, you know, that post that comes down.

I said, uh, huh.

He then said he was standing right there and I happened to look up Clay Street and saw a police car coming between Third and Fourth Street.

I said, coming down?

He said yes, coming down towards Clay Street and I think he saw it at the same time because I said coming down towards Second?

He said towards Second Street, right coming Clay Street, I think he saw it at the same time because being that that's when he, I looked at it and I walked up and he cut directly

diagonally across where his Cadillac was parked at, in the parking lot,—he was talking about this Earl at the time.

He didn't get into the Cadillac, did he—that was my statement?

He said I didn't even look back to see.

All right, then I—end of the interview at 4:50 a. m.

And then he made one last statement after that: I only put something on record when it's the honest truth, you believe it or not, I did not involve myself with any breaking and entering at all, because when you go into these
page 70 } places you never know what's in them and they can add so much time on you and as far as the High's Ice Cream Store, no, sir, because I like I say as far as my knowledge of going—

And then I broke in and said but they definitely told you to watch out for them?

They asked me to watch, Earl asked me to watch. (rattling of paper)

Q. All right, now, where—where was the location that he pointed out that he had urinated?

A. Well, it was just slightly west of this chain link fence where we found the spot of blood and that he stated to me that he had cut his hand on trying to get over it.

Q. And was that between Second and First?

A. That would be between Second and First, yes, sir.

Q. Now, in his statement he stated that he was waiting for the bus and where is the bus stop at Second and Clay?

A. My own knowledge I do not know where the bus stop is at Second and Clay just to—he told me that he usually caught the Ginter Park bus there at Second and Clay, that would be the southeast corner.

page 71 } Q. And you say that he was with you when you found the blood on the fence?

A. Yes, he was in the alley with me.

Q. O. K., and the fence is between Second and First?

A. Right.

Mr. Nance: Cross examine.

CROSS EXAMINATION

By Mr. Glass:

Q. Officer Merlenbach, now, when did you first see the defendant?

A. When I arrived on the scene.

Q. Was this at the time that Sergeant Saunders had brought the defendant around to the front of High's Ice Cream or to the side of High's Ice Cream?

A. More than likely it was, I talked to the defendant inside the—well, it's like a little store where the door was broken into, inside that little store at High's (the witness mumbles)

Q. Well, did the defendant seem nervous or excited at that time?

A. Yes, he was nervous (rest of answer unintelligible)

page 72 } Q. Would you say more nervous than a person who is traditionally when they are put under arrest or brought in on an offense, arrested or brought in by the police?

A. No, I wouldn't say he was more nervous.

Q. During the time that he was with you, did he ever try to escape,

A. No,

Q. try to get away?

A. he didn't, I've known the defendant for two or three years.

Q. Now, the statement that you just read to us, of course, would the gist of that statement be that Earl yelled across the street and said, is that you, Dino, and would you keep a lookout for me, and that the defendant laughed and at that time the Police car came down Clay Street and at that time Earl turned around and walked away, would that be more or less the gist as far—

A. This is what he told me.

Q. That's what he told you?

A. Right.

Q. All right, do you know personally whether the defendant aided in any way in this crime or attempted to encourage it or agree to it?

page 73 } Mr. Nance: Judge, I object to that, he's—

The Court: Well, he can ask him if he knows it.

Mr. Glass: Of his own personal knowledge.

Mr. Nance: Judge, he's calling for the (word unintelligible) issue in this case.

The Court: Well, he's asking for a fact if he knows it as a fact, why he can testify, if he doesn't, why he can't.

A. Nothing other than what he gave me in the statement.

G. R. Merlenbach

Q. But that statement doesn't do anything more than just say that Earl yelled across the street to him but not that the defendant said anything to Earl—

The Court: Well, now, that's a matter of record—

Q. All right, Officer Earlenbach—I mean Merlenbach, now, when you went back to the place where defendant had been apprehended by Sergeant Saunders, what was the type of surface that the urination was supposed to have been on, was it dirt or—

A. Well, gravel, dirt, grass along the fence.

page 74 } Q. Was it dry that night, and had been draining or anything—

A. No, it was dry.

Q. It was dry. About how long would this have been after you first saw the defendant that you went back to this spot?

A. Oh, it couldn't have been from the time that the officer witnessed the break-in, it couldn't have been more than ten or fifteen minutes on the outside.

Q. In other words, the defendant had been brought back in front of High's, you talked with him there,

A. Right.

Q. then you—in fact, you took him into High's into the store itself

A. Right,

Q. and talked to him?

A. yes.

Q. Then after you talked to him there you went back out to the spot

A. Yes.

Q. where he had been found and this took no longer than fifteen minutes?

page 75 } A. About fifteen minutes, didn't take too long, 'cause it was just a short walk around this little alley.

Q. When you got to the spot where Sergeant Saunders said he had found the defendant, isn't it true that there is a fence about eight feet tall over there between the parking lot and the particular house that Sergeant Saunders testified he found the defendant on the porch of?

A. Yea, that fence runs out to this alleyway, but that is just a fenced in portion of a house that is situated east of the actual stairway or stoop where Sergeant Saunders first seen him and apprehended him.

G. R. Merlenbach

Q. Well, now, isn't the fence there more or less to protect the property of the people who own that house where he was apprehended?

A. Right.

Q. And so if he was supposedly up on the stoop trying to get in the door, would this fence, in fact, have hidden him from the view, if it was eight feet high?

A. Not from—I wouldn't say from the Sergeant's view, no, because that would still be east, the fence would be east of where the defendant was and still east of where Sergeant Saunders had come into the light.

page 76 } Q. Well, isn't there also a fence on the west of the house, in other words, isn't each yard of each house there

A. Right there is another fence—

Q. fenced in?

A. There is another low fence on the other side of that

Q. You mean—

A. bordering—a partial fence bordering the yard.

Q. You mean on the west side there is a fence, the west side?

A. No, all the fences would be east of the area where he was seen at the door.

Q. But you just stated that there was—that these yards are enclosed by fences?

A. They are not, this was the only yard that was completely enclosed, the yard with the six foot chain link fence on it. The yard next to that had another fence, maybe three foot, three and a half foot high, but it just ran to the alley, it was not—the back of the yard was not enclosed.

Q. So the house when you went to, that Sergeant Saunders said he had been apprehended,

page 77 } A. Uh, huh.

Q. was it in the parking—off of the parking lot off of Clay Street or was it near the parking lot off of Marshall Street?

A. It was off of the parking lot, off—well, between—the parking lot sits between Marshall and Clay,

Q. Uh, huh,

A. but the back yard of the premises that he was apprehended on backed up to the parking lot.

Q. all right, isn't there a fence there across the parking lot, wouldn't it have—it would have been impossible for Sergeant Saunders to have driven through in his car from Marshall Street to Clay Street, is that right, through the parking lots?

G. R. Merlenbach

A. Yea, he could have went on through out to the Clay Street.

Q. Through this parking lot?

A. Not at the particular location where he was apprehended, no, because that building's there,

Q. Right?

A. but he could come from Marshall Street and go through the parking lot and hit Clay between First and Second.

page 78 } Q. You mean he could come off of Marshall through the—completely through the parking lot and go—and—

A. As well as I remember, I believe he can, because there's an entrance to that parking lot off of Clay and also an entrance off Marshall.

Q. But in fact, this house where the defendant was apprehended is not on Clay Street, but would be probably, assuming we have Marshall Street and Clay Street running parallel and you have First Street running perpendicular to each,

A. Right.

Q. and we are talking about a parking lot that goes from Marshall to Clay, which you would say, then, I gather, that the house where he was apprehended would not be on Clay Street but would be, say, in this full length parking lot on or about in the middle of the block between Marshall and Clay?

A. No, sir, the house that he was apprehended behind faces Clay Street and has got a Clay Street address.

Q. But even though it faces Clay Street, isn't there a tremendous parking lot there in front of it before you get to Clay Street?

page 79 } A. Yes—on the other side the street, on the other side of Clay

Q. I mean—

A. Street.

Q. I mean on this side on the—

A. No, sir, it would be in the back of it.

Q. Are you—are you saying—

A. The parking is in the back of this residence where he was apprehended, he was apprehended at the back door of the residence, it was a Clay Street residence.

Q. And you are saying that the front door of this residence was right on Clay Street?

A. Why, I don't know that it sits right on Clay Street, but it carries a Clay Street address, in other words, it faces Clay Street.

Q. But it's possible that in fact in front of the house, even though it's Clay Street, there's a parking lot in front of the house, so it would be fairly far back?

A. No, there is no parking lot in front of the house.

Mr. Glass: Could I have one second, please.

Q. All right, let me ask you this, Officer Merlen-
page 80 } bach, would you say that the point where defendant was apprehended would be closer to Marshall Street than it would be to Clay Street?

A. No, it's closer to Clay Street.

Q. Can you give the Court an idea of how far, in terms of First Street, since it runs along the parking lot, how far back would he have been apprehended from Clay Street?

A. From Clay Street, now, what do you want—

Q. In terms of fractional parts of a block?

A. Well, I—I'd say it was, the house that he was apprehended behind, now, this is just an opinion, is approximately half way between First and Second on Clay.

Q. All right, but now—but what about between Marshall and Clay—half way between Marshall and Clay?

A. No.

Q. A fourth or what?

A. No, no,

Q. Can you give—

A. not even a fourth of the way, I would say, well, maybe a fourth, but no more.

Q. Now, you say you found some blood on a
page 81 } fence, where was the fence?

A. This fence was—you have a series of stores, you have High's Ice Cream Store on the corner, then you have a series of stores that run up part way in the block that would be on Second Street. Now, there is a gangway or an area that you can—that the back doors of these establishments or business places on Second Street have an access area in the back where they put trash and trash cans and everything, it's just a narrow gangway, and this chain-link fence where the blood was found on is immediately in the rear of these rows of stores on Second Street, if you can visualize stores, and there's an alley that goes back off of Second that runs toward First, and then that chain link fence sits right there, this is as well as I can remember the scene.

Q. So isn't it true that if the defendant had gone, say, in front of High's Ice Cream Store and then back around to

the point where he was apprehended, that first of all he would have had to have gone further south, towards Marshall Street, to have gotten blood on this fence and then come back towards High's Ice Cream Store to where he was apprehended?

A. No, no—no, no, where the blood was was in between the point, let's say, after you leave—if you'd walk up along these stores on Second Street, then you'd head in a wes-
page 82 } terly direction up the alley, then you'd come to the chain link cyclone fence, and then a little further on, I think it's two doors or three doors, this is where he was apprehended. It would be—where the blood was found would be between the actual place he was apprehended and the street, Second Street.

Q. You are saying that the house where he was apprehended was right near this fence?

A. Yes, yes, they are narrow, narrow homes—

Q. Well, if you've got to walk down—south on Second Street about five stores down, then turn up an alley and come to this fence where you say he cut himself, then, in fact, if this is where the house was, this house can't be right on Clay Street, it would have to be about five stores down from Clay Street except in back of these stores?

A. The property of the house runs the full length of all those stores, you understand, the actual property of the home, the home doesn't run all the way back, the home only, I would say, maybe the home is thirty-five, forty feet long from Clay Street, and then you have the back yard area that runs back to that alley.

Q. Well, in fact, you are saying that assuming what he's told you is true, that he was *waitng* for the
page 83 } bus on Second and Clay, that to get to this fence it's very possible that he could have walked down Second Street, not in front of High's, around High's in the alley, but down Second Street, and after going about half way down Second Street to turn right through the alley and up to this fence?

A. That's right.

Q. Well, do you have any evidence the blood on the fence was blood of the defendant?

A. No, we don't, I had what blood we found analyzed and what blood came off of the fence was human blood but it was not enough to type.

Q. Uh, huh, so as far as you know it might not have been his blood, but also it's not—what you said it's not inconsis-

tent with the fact that he could have walked down Second Street and up to the alley and gotten to the point where he was found and not have gone around in front of High's and all of this—

A. Well, no, he can very easily have went that way,

Q. He could?

A. up Second and down that alley—

Q. But you really don't know how it got there?

A. I don't know how it got there.

page 84 } Q. That's all.

Mr. Nance: That's all.

Witness stood aside.

Mr. Nance: If Your Honor please, that's the Commonwealth's case.

The Court: All right.

Mr. Glass: Your Honor, I would move to strike the Commonwealth's evidence on the basis that he has not proved the fact that defendant was either a principal in the first degree or a principal in the second degree beyond a reasonable doubt, and as a basis for this motion, I would say to the Court that first of all they have not shown that the defendant consented in any way the crime being committed nor that he contributed to its execution, nor have they shown that he was guilty of any overt act or that he shared any criminal intent with the parties involved. On the contrary the defendant in a statement which Officer Mer-
page 85 } lenbach just read to the Court, he stated that he had a girl who worked in High's Ice Cream and he knew that there was no money in the place, that they took it home every night because of robberies they had had, so certainly he wouldn't have had any criminal intent or for one to break into a place that first—that he knew had no money.

Officer Rowe testified that he saw a person standing under the foyer, but, of course, he wasn't certain, he said they were wearing a brown coat and a hat, which, of course, any person could be wearing and in fact, later on, Sergeant Saunders stated that he was not certain of the identification of the man standing in the foyer and it could have been anyone.

The Court: Well, doesn't he—doesn't his statement take care of that, he doesn't deny that he wasn't there?

Mr. Glass: Yes, Your Honor, he does—well, he denies that he was under the foyer next to the store, his statement

says that he was across the street on the corner of Second and Clay waiting for the bus, he doesn't deny
page 86 } waiting for the bus, but not that he was on the same side as the store, then—so Officer Rowe was very uncertain as to the identity and, of course, Officer Rowe had no testimony that he knew that—that he was helping or encouraging this particular crime. Also Officer Rowe stated that when he passed the defendant did not run—or not the defendant, or whoever he saw in the foyer, I don't know whether he saw the defendant standing on the corner and was talking about him or this particular person under the foyer. If he did see the defendant standing on the bus corner, the defendant did not run there, or if he saw someone—

The Court: When you are waiting for a bus, would you run too, or was it any necessity for running

Mr. Glass: No,

The Court: when the bus comes right by there?

Mr. Glass: that's the point I'm trying to make, Your Honor—

The Court: Well, I say then, what merit to the fact that he didn't run have—

page 87 } Mr. Glass: Because it—excuse me, Your Honor.

The Court: Go ahead.

Mr. Glass: Well, just the fact that if he had been guilty of being a lookout or being involved in the crime he certainly would have been very nervous and be looking out for the police, and if he saw a policeman ride by, I don't believe a guilty party would just stand there and look at the policeman and let the policeman look back at him.

The Court: Well, of course, we don't know (the Court is mumbling and it is unintelligible)

Mr. Glass: Right, but this is not the conduct of a guilty person

The Court: All right.

Mr. Glass: in my estimation.

Then, of course, Officer Saunders testified that the person who they brought back had a long coat and Officer Rowe first of all said the person he saw in the foyer had on a short coat and later he testified when he brought the defendant back he had on a short coat, so there certainly is
page 88 } discrepancy here of how long the coat was or whether the defendant actually, in fact, had on a short coat, and according to Sergeant Saunders he had on a long coat, which would go against Rowe's testimony.

Also—well, as I stated, Sergeant Saunders stated there was no positive identification and also the discrepancy as to

this bag. Now, they introduced a High's Ice Cream bag and Sergeant Rowe said that they found it on him when he opened his coat, and the bag fell out, and Sergeant Saunders says no, not when he opened his coat, but later on when they searched him they found the bag in his back pocket. Well, I mean, certainly there's discrepancy here about the bag or where it was or what it was—had just fallen out, it was in his pocket, but then Officer Merlenbach testified that—of course, all three of them testified that this defendant was not particularly more nervous than any person who was brought to, you know, the alleged scene of a crime and was being asked questions, but Officer Merlenbach said that the—gist of the statement was that Earl or this man known as

page 89 } Earl yelled across the street to the defendant, "Dino, is that you", and defendant said, "Yes, it's me", and Earl said, "Will you look down Second Street and see if there's a policeman coming", and this—and the further statement is that the defendant then laughed, and at that time, the police car came down the street and the—Earl, the person who is said to be Earl, walked away. Well, certainly that doesn't show that the defendant in any way aided or abetted. He answered a question and then the man, other man who asked him the question turned around and walked away, so certainly it doesn't show that he aided or abetted this man in any way by standing there and saying yes, it's me and then laughing.

So really, out of all three of the Commonwealth's—or four of the Commonwealth's witnesses, there's no evidence that the defendant aided and abetted in this crime in any way.

Then as to the flight of the accused or to the fact that he was found behind a house, of course, flight is not—does not raise a presumption of guilt, it is a circumstance, but he was merely found behind this house, and of course, he

page 90 } stated that he'd been waiting for the bus and he didn't want to be caught, you know, in that area where there was a crime going on, he didn't want to be associated with it so he was walking away to go catch another bus, and I would cite in support of this *Jones* v. *Commonwealth* which is 208 Va. 370, and, of course, there, a woman named Mrs. Brown had information that her house was going to be robbed, so she called the police and the police came to her house, are you familiar with the facts, Your Honor?

The Court: The man was on the front porch.

Mr. Glass: Right, Flood came on the front porch and attacked Mrs. Brown and Jones then turned around and fled down the street and, of course, they apprehended him subsequently and they had positively identified him as being

the man on the porch. Of course, the lower Court convicted him of being a principal in the second degree and the Supreme Court overruled it, Justice Eggleston saying that, it is,

page 91 } of course, well setted that mere presence and consent are not sufficient to constitute one an aider and abettor in the commission of a crime. There must be something done or said by him showing (a) his consent to the felonious purpose, and (b) his contribution to this execution. To make him an aider or abettor he must be shown to have procured, encouraged, countenanced or approved the commission of the crime. To constitute one an aider and abettor it is essential that he share the criminal intent of the principal or party who committed the offense.

Certainly there's no evidence here that he in any way contributed to the offense or that he shared any criminal intent, but merely that he was in the area, that he was present, but that is as far as it goes, as far as any contribution he made to this crime.

Justice Eggleston went on to say, it was said in *Triplett* v. *Commonwealth,* 141 Va. 577, page 586, 127 S. E. 486, at page 489:

page 92 } To constitute one an aider and abettor he must be guilty of some overt act or he must share the criminal intent of the principal or party who commits the crime, but certainly the Commonwealth has not shown that the defendant has done any overt act besides answer a question across the street and then walk away and later be found behind a house. So it certainly is no showing of any overt act to help contribute to the crime.

Then the Justice goes on to say in this particular case, the only evidence they had against Jones was, of course, that he was on the porch, he was there. The only evidence we have against defendant is that he was in the area and that he was present.

And Justice says, but as we have frequently said, mere presence of a (party) when a crime is committed is not sufficient to constitute one an aider and abettor in the commission of a crime. Then the Court went on to say: At the trial below and on appeal the Commonwealth stressed the fact that Jones fled the scene when he observed that the police officer had interrupted Flood's attack on Mrs. Brown. It is true that we have said that evidence of flight to avoid arrest is admissible

page 93 } as tending to show consciousness of guilt on the part of the accused and then cites cases, but as we point out in *Jenkins* v. *Commonwealth,* 172 Va. 692, at page 696, 111 S. E. 101, the flight of an accused does not raise presumption of guilt but is only circumstance to be con-

sidered by the jury or fact-finding Court along with other facts and circumstances tending to establish the guilt of the accused.

The evidence in this—for the Jones case—the evidence on behalf of the Commonwealth amounts to this: Jones came to the Brown house in company with Flood. Defendant was in the area and admittedly said yes, I'm Dino to this man Earl, the actual perpetrator of the crime was present during the offenses and fled the scene in order to escape arrest. Well, of course, here I don't think it's strong case because there's no evidence that the defendant that was fleeing to escape arrest, but by, of course, his own statement he said he was going to get out of the area because he saw the police cars coming, just didn't want to be involved. Says while these related circumstances create a strong suspicion that Jones was

page 94 } an aider and abettor in the commission of offenses they do not support such a conclusion beyond a reasonable doubt. See *United States* v. *Page,* Fourth Circuit, 324 Fed. 2d, 31, page 32, where it was held that mere presence at the perpetration of a crime and flight from the scene are not sufficient to prove *particeps criminis* beyond a reasonable doubt.

So, Your Honor, in conclusion I would say that in substantiating my theory of this case that the Commonwealth has not proved a case beyond a reasonable doubt, first of all, by the defendant's statement and by all the evidence so far there's been nothing shown that he aided and abetted in this crime, but merely that he was standing on the corner waiting for a bus. There's no showing of overt acts or any consent to this crime whatsoever.

Two, the Commonwealth has shown that the defendant had a High's Ice Cream bag on him. Well, there's a discrepancy as to where the bag was and where they found it, but by the defendant's own statement that's been introduced in evidence, his girlfriend had worked in this store, it's very

page 95 } possible that he could have had a High's Ice Cream bag on him, but even if he were aiding and abetting this crime, it seems incredible to me as a practical matter that this man would have had a High's Ice Cream bag on him, I mean what do you need a High's Ice Cream bag—

The Court: Put the money in the bag.

Mr. Glass: Well—all right, but if you were aiding and abetting or being a lookout, you wouldn't be putting any money in the bag, the person in the store would be putting the money in the bag, so why would someone outside the store, on the corner, or under the foyer have a bag to put money in.

The Court: (The Court mumbles and it is completely unintelligible)

Mr. Glass: So—I mean it seems high incredible to me and certainly this is a circumstance of the case and I don't deny it.

Then, further, third, they show that he was trying to get in a house, open the door. Well, I think as a practical matter if a person is in the area where he's seen police cars and he knows something's wrong and he's back in the alley and

page 96 } he sees this car come down with high beams, it's very likely to be that he might be trying to get away, I mean you get scared, it's nighttime, you see the high beams coming down, you get afraid, and you run.

Now, in the Jones case, certainly there it would seem stronger to me because the man was on the porch and as soon as they caught Flood, Jones turned around and ran away.

Here there was no evidence that the defendant was anywhere—I mean connected with the crime, he was, of course, standing in the area, but when he was going away there's certainly no evidence that he was trying to escape. By his own testimony he said that he—he had seen things like this happen, shoving narcotics and so forth, and he just didn't want to be in the area when these people were apprehended, because it would be very possible, of course, he would be a suspect, so it's very likely that if he saw the high beams he might be trying—be scared and trying to get away, but I do think that in Jones the Court said that mere flight certainly does not raise the presumption of guilt and I certainly don't

page 97 } think that this case is worse than Jones, I think there Jones was on the porch and he ran away and I can see more evidence of guilt there than I can here, but I would just say, Your Honor, that if you just—if you take the fact that—there's no evidence that he aided or abetted but was merely present, you take the fact that he did, he was leaving the area, so you have the point of flight. Of the Jones case this is not enough, so will the fact that he had a High's Ice Cream bag on him be enough to prove him guilty beyond a reasonable doubt and my contention is, Your Honor, that a man should not be convicted of a crime beyond a reasonable doubt because he had an ice—High's Ice Cream bag on him which, as he said before, his girlfriend worked in the place, he could have had one, and as I said, it's incredible to me as a lookout he had one on him anyway, so I don't see how it would be enough circumstantial evidence to go with everything else to say that he would be guilty beyond a reasonable doubt.

The Court: Thank you, sir, do you wish to say anything?

Mr. Nance: No, sir.

page 98 } The Court: Mr. Glass, first I want to compliment you on the care and attention you've given to this case, I want to compliment you, you have, but the Court does not agree with your conclusion as to the applicability of the Jones case to this situation. I think that there are very important differences in the factual basis, and in statements that the defendant has made, and, of course, in all cases if you take unimpeached and un—statements or evidence of one party alone without consideration why it is very effective, I realize that, but I don't feel that under the circumstances the evidence justifies striking the Commonwealth's evidence, so I'll overrule your motion.

Mr. Glass: Your Honor, I would respectfully except to your—

The Court: Certainly.

Mr. Glass: ruling and ask the Court to note my exception.

The Court: All right, do you wish to put on any evidence?

Mr. Glass: Your Honor, the defense rests.

page 99 } The Court: All right, stand up, Mr. Cephas: The Court will find you guilty as charged. Do you wish a pre-sentence report on this man?

Mr. Glass: Your Honor, I first would—could I make a motion first?

The Court: Yes.

Mr. Glass: I make a motion, first to set aside the verdict as being contrary to the law and the evidence.

The Court: All right, sir, and I'll overrule that motion.

Mr. Glass: And I would ask the Court to respectfully note my exception.

The Court: Certainly.

Mr. Glass: And second of all, I would ask the Court that Mr. Cephas be sentenced today.

The Court: All right, sir. I'm not going to sentence him today, I'd like to consider it until tomorrow morning, if that's satisfactory to you.

Mr. Glass: Be back here tomorrow morning at

page 100 } 9:30.

The Court: At nine o'clock.

Mr. Glass: Nine o'clock.

The Court: All right.

Hearing concluded.

Hearing on May 15, 1969, before the Honorable Samuel B. Witt, Jr., Judge.

PRESENT: Thomas N. Nance, Jr., Esq. Attorney for the Commonwealth

George W. R. Glass, Esq. Attorney for the defendant

George D. Cephas, the defendant, in person and by counsel.

The Clerk: In the Hustings Court on this Thursday, the 15th day of May, 1969, in the case of the *Common-*
page 101 } *wealth* v. *George Dabney Cephas,* this is a proceeding wherein the defendant was found guilty of statutory burglary on May the 14th, 1969, and it was continued to this date for sentencing.

The Court: All right, sir, do you wish to say anything further?

Mr. Glass: I'd like to say a few words,

The Court: All right.

Mr. Glass: if you don't mind.

The Court: Certainly.

Mr. Glass: Judge, the reason I asked that the defendant be sentenced so soon was because I didn't want to have any more delay, he's been in jail since March the 11th,

The Court: Well, he'll get credit for it.

Mr. Glass: and he—of course, that's been over three months,

The Court: Yes.

Mr. Glass: but I do feel that he—while he was in there he had written to the Air Force, and had written a
page 102 } letter to Senator Byrd, really in a sincere attempt, I feel, to get in the Air Force, but because of the present circumstances I feel it's unlikely that they will take him, but I have talked with Sergeant *Bivey,* at the Marine Corps Recruiter's Office, and explained the circumstances to him and he said that even under these circumstances that he felt that—he would not say that the defendant would not be taken in the Marine Corps, he said it would take about three months for him to be processed out, but I would like to say on the defendant's behalf that he has been to almost three years of training school previously, about 1961 and '62, he's been to teletype school and Morse code school and also where you work on telephone lines, climbing poles and—I don't know exactly what kind of school that is, but he is very well-trained in communications type work, and in the Marine Corps, I mean you refer to it as your *MOS,* and he, I think, has tremendous potential in this particular area, but I would say that I feel like that the evidence in his case was weak and most circumstantial, and I would respect-

fully suggest to the Court that he receive a sus-
page 103 } pended sentence.

The Court: Well, Mr. Glass, under the conditions that exist in the matter, I, of course, don't deny, I mean I accept your statement, but if you want consideration you should ask for a pre-sentence report. Now, I don't know—I understand, but I'm certainly not taking that into consideration in imposing it, I understand he's got some previous record, which I have nothing to do with, so the circumstances as presented to the Court at the present time do not, in my judgment, entitle him to any further consideration, however, I'll pass on any evidence that's presented to me, I think that it was an entirely circumstantial case, I agree with you, and as I complimented you, I think you have exhausted every avenue of fair tactics for your client and properly so, but in the judgment of the Court, as you know, person present and if they believe he's aiding and abetting that that is as guilty as the others. However, I take into consideration the facts in the case in addition to that. Thank you, sir.

Stand up:

The Court having previously found you guilty,
page 104 } now sentences you to serve two years in the State Penitentiary. All right, sir.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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