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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 77-1305

FRANK L. HINTON,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

JOINT APPENDIX

O.L. Gilbert
RABINOWITZ, RAFAL & SWARTZ
309 W. Bute Street
Norfolk, Virginia 23510
Counsel for Appellant

Robert H. Anderson, III
Asst. Attorney General
Commonwealth of Virginia
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Richmond, Virginia 23219
Counsel for Appellee

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

Commonwealth of Virginia	)	Indictment for: MALICIOUS
	)	
vs.	)	WOUNDING
	)	
FRANK L. HINTON	)	

December 1, 1976

The Grand Jury charges that: On or about September 18, 1975, in the City of Norfolk, FRANK L. HINTON, maliciously did stab and wound and cause bodily injury to Lamar Marshall, with intent to maim, disfigure, disable or kill.

Va. Code Section 18.2-51; 18.2-10

Witness:
Inv. P.M. Pritchard - D.B.

(X) A True Bill
( ) Not A True Bill

(Foreman of Grand Jury)

DEPUTY SHERIFF: All rise.

(Buzzer sounded from jury room at 4:03 P.M., and Court reconvened).

THE COURT: Gentlemen, I understand and the Sheriff has indicated to me, that the jury has a question; I propose to have them come in and hear what their question is, and if I can answer it, I'll tell them what they want to know.

Bring the defendant forward, Mr. Sheriff, and then bring the jury in.

DEPUTY SHERIFF: Yes, Your Honor.

(The Deputy Sheriff escorted the defendant to Counsel Table, and Mr. Swartz conferred with him.)

(The jury returned to the Courtroom, at 4:05 P.M.)

THE COURT: Mr. Sheriff, please hand me that pad on the Clerk's desk.

DEPUTY SHERIFF: Yes, Your Honor (handing pad to the Court from the Deputy Clerk's desk.)

THE COURT: Members of the jury the Deputy Sheriff has informed me that you have a question; I'll ask your Foreman or Forewoman to stand at this time, and state what that question might be.

JURY FOREMAN: (standing) Your Honor, the question was brought up about what part of a sentence a person would have to serve before being parolled.

THE COURT: The answer that the Court is required to give you, is not going to be satisfactory; but we operate under instructions imposed by the Supreme Court of Virginia, and

in case I answer your question wrong, it might cause this whole trial to be in vain.

The answer that I understand I am required to give you, is that while there is a system for the early release of prisoners, that it is within the province of the Correctional System of this State and is not the concern of the Court, nor is it the concern of the jury.

Your jury function, is to resolve the facts and determine guilt or innocence and to fix any punishment, if that be the case; and once that decision has been made by a jury, the Court then has the function to impose that decision upon the defendant, and the jury is to look no further into the verdict or determine what, if anything else, it wants to do or should do with their verdict, as it is then up to the Correctional System to determine when an individual is to be released from custody.

Sometime people never serve their entire sentence and get off with good behavior or for becoming disciplined or rehabilitated in confinement, and never serve their entire sentence, but are considered for early release at some point when they are in confinement; and when that is, is a matter that is entirely up to the Parole Board and is not for the Court or jury to be concerned about.

I would like to answer you further, but I'm restricted from doing that and I don't want to trespass on the prerogatives set by the Supreme Court instructions;

I would like to advise you about the possibility of early release, but I'm not allowed to tell you what it is in order that you may take it into consideration when you fix punishment, if you decide punishment is to be imposed in this case.

JURY FOREMAN: Thank you, sir. (The jury retired for deliberation the second time, at 4:10 P.M.)

THE COURT: Does Counsel wish to take issue or exception to my statement to the jury, in response to their question put to the Court regarding parole?

MR. SWARTZ: For the purpose of the record, Your Honor, I would take exception to Your Honor's comments in answer to the jury question.

THE COURT: Concerning my explanation, that no further action would be required on their part?

MR. SWARTZ: That's correct, sir.

THE COURT: All right.

My statement has been made now, and would your position be that I should call them back and make some further explanation; or don't you think that would correct the situation now?

MR. SWARTZ: Your Honor, I think it would have been sufficient to have said that the defendant may not have to serve a total term.

THE COURT: Are you suggesting that by what I have told the jury, in clarifying my answer to their question, that I did not stay within the bounds of propriety and guide-

lines provided by the Supreme Court of Virginia?

MR. SWARTZ: Actually, Your Honor, I just think that there's a further Instruction that the Court could have given the jury within the guidelines of the Virginia Supreme Court; and as far as any further comment on the part of the Court, it may be proper, I just don't know, sir.

THE COURT: Well, I don't think I'm allowed to indicate that this man could be parolled after serving a quarter of his time, and ---

MR. SWARTZ: No, Your Honor; I don't think the Court, is allowed to do that.

THE COURT: --- so I didn't comment on that aspect; and since it was not for me to say, there was nothing else the Court could do.

MR. SWARTZ: Well, Your Honor, for the record, I would take exception to the Court's comments.

THE COURT: All right, sir.

Do you wish to make any further comment at this time, bearing upon my comments to the jury, Mr. Swartz?

MR. SWARTZ: No, Your Honor.

THE COURT: Very well.

I would prefer to be allowed to further answer their question and explain to the jury just how our system of parole works, for their benefit in establishing a term of punishment; but you and I know that the Supreme Court says that it's not within the Court's province to tell a jury, and in other words, it's none of their business.

MR. SWARTZ: I suspect, Your Honor, that I should make a Motion for a Mistrial on this basis; and on behalf of the defendant, Your Honor, I'm willing to do that now for the record.

THE COURT: All right, sir.

I feel that I have stayed within the guidelines of the Virginia Supreme Court as proposed, and I don't know any other way to have answered their question.

It's not a satisfactory or a happy situation that I put the jury in, not being able to tell them about our parole system, but I feel like I have stayed within the guidelines and I feel like the jury understands now that it's not within their provice to do anything about parole.

I therefore overrule your Motion for a Mistrial, Mr. Swartz, to which your exception is noted for the record, and I will allow the jury to continue deliberating.

MR. SWARTZ: All right, Your Honor.

(Buzzer sounded from jury room, at 4:15 P.M. and Court reconvened.)

THE COURT: Gentlemen, the Sheriff has now informed me that "the jury has a verdict".

If you will, Mr. Sheriff, bring the defendant forward and then bring the jury back in.

DEPUTY SHERIFF: Yes, Your Honor. (The Deputy Sheriff escorted the defendant to Counsel Table, and Mr. Swartz conferred with him.)

(The jury returned to the Courtroom at 4:15 P.M., and

papers were handed to the Court by the Deputy Sheriff.)

THE COURT: (looking through papers)

The Court did not note for the record, that when the jury returned or came in with their question a few minutes ago, that the defendant was present in the Courtroom along with Counsel, during that procedure;

And the Court now notes for record, that the defendant is present at this time with Counsel.

Members of the jury, is this your verdict as noted:

"We, the jury, find the accused guilty of Malicious Wounding as charged in the Indictment, and fix his punishment at twenty (20) years in the Penitentiary. John Jezerski, Foreman"?

JURY FOREMAN: (standing) Yes, Your Honor; it is.

THE COURT: Very well.

Then your verdict, reads as follows:

"We, the jury, find the accused guilty of Malicious Wounding as charged in the Indictment, and fix his punishment at twenty (20) years in the Penitentiary. John Jezerski, Foreman".

Is that your verdict?

JURY FOREMAN: Yes, Your Honor; it is.

Virginia:

In the Circuit Court of the City of Norfolk, on the 11th *day of* April *, in the year 19* 77.

COMMONWEALTH vs Frank L. Hinton

Attorney for the Commonwealth: Gregory Welsh
Attorney for the victim: William P. Williams

Attorney for the accused: Franklin A. Swartz
(X) Heretofore appointed by the Court
Attorney for the accused: Oscar L. Gilbert
At request of F.P. Swartz

FELONY TRIAL ORDER - JURY TRIAL

This day came the Attorney for the Commonwealth and the attorneys for the accused, and the attorney representing the victim in this case, as aforesaid, and the accused, who stands Indicted for Malicious wounding, was led to the bar in the custody of the Sheriff of the City of Norfolk.

Thereupon the accused by counsel, moved the Court to allow testimony of defense witness Larry Walker to be read from the transcript of a former trial in this case, based on the grounds of unavailability of said witness, which motion, having been fully heard and determined by the Court, is sustained, and exception of the Attorney for the Commonwealth noted.

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Circuit Court
Norfolk, Virginia

Whereupon the accused was arraigned and after private consultation with and being advised by his counsel, tendered in person his plea of Not Guilty to the said indictment and demanded a trial by jury. Thereupon the Court then impanelled twenty qualified jurors, free from exceptions, having been obtained from the Venire Facias, duly directed and issued in accordance with the statute in such cases made and provided, and summoned by the Sheriff of the City of Norfolk, from which panel the Commonwealth and the accused alternately struck four, and the remaining twelve jurors, constituting the jury for the trial of the accused, were duly sworn.

Whereupon after opening statements, the Commonwealth commenced to present evidence on its behalf, and at its conclusion, the accused by counsel, moved the Court to strike the Commonwealth's evidence, which motion, having been fully heard and determined by the Court, is overruled, and exception noted. And having heard the evidence in part, at 12:30 P.M., the jury was adjourned until 1:30 P.M.; whereupon the jury was sworn by the Court not to communicate with any outside person, nor permit any outside person to communicate with them relative to this case, not to read any newspaper accounts, and not to listen to nor view any radio or television broadcasts relative to this trial, but to return into Court pursuant to said adjournment and resume the consideration of this case in which it now is; and at 1:30 P.M., pursuant to the adjournment order, the accused was again led to the bar in the custody of the Sheriff of the City of Norfolk, and again came the attorneys as aforesaid, and again came the jury heretofore sworn. Whereupon the accused commenced to present evidence on his own behalf, and after

his testimony, the Court read from the transcript the previous testimony of the defendant's witness, Larry Walker. At the conclusion of the defense testimony, the accused by counsel, renewed his motion to strike the Commonwealth's evidence, which motion, having been fully heard, is overruled, and exception noted. And having heard all the evidence, the instructions of the Court and closing statements of counsel, the jurors were sent to their jury room to consider their verdict. And during deliberation the jurors returned into open court with a question, which the Court gave them instructions in answer, whereupon, the accused by counsel, moved the Court for a mistrial, based on prejudicial instruction, which motion, having been fully heard and determined by the Court, is overruled, and exception noted. And at a later time the jury subsequently returned their verdict in open court, reading: "We, the jury, find

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(Case of Frank L. Hinton)

the accused guilty of Malicious Wounding as charged in the Indictment and fix his punishment at 20 years in the penitentiary. John Jezerski Foreman." Thereupon the Court polled the jury as to their verdict, to which poll the aforesaid jurors each replied that the verdict as herein recorded was his/her verdict. Thereupon the jury was discharged. Whereupon the defendant by counsel, moved the Court to set aside the verdict as contrary to the law and evidence, which motion was overruled and exception noted. Thereupon on motion of the defendant by counsel, the whole matter is referred to the Probation Officer of this Court for a Pre-Sentence Report, the hearing on which will be heard at 9:00 A.M., the 19th day of May, 1977. A court reporter recorded the evidence and incidents of this trial.

And the defendant was remanded to jail.

John W. Winston

JOHN W. WINSTON, Judge

(Court reporter - Kay Becknell)

(Case of Frank L. Hinton)

Virginia:

In the Circuit Court of the City of Norfolk, on the 19th *day of* May *, in the year 1977.*

COMMONWEALTH vs Frank L. Hinton (F571-77)

Attorney for the Commonwealth: Gregory Welsh

Attorney for the defendant: A. O. Gilbert
(X) At request of Franklin P. Swartz, court-appointed in this case

FELONY SENTENCING ORDER

This day again came the Attorney for the Commonwealth and the attorney for the defendant, as aforesaid, and the defendant, who stands convicted of Malicious wounding on Indictment #1, by a jury which fixed his punishment at 20 years in the penitentiary, was led to the bar in the custody of the Sheriff of the City of Norfolk.

Thereupon, Newton S. Fink, Jr., a Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, a copy of which has been delivered to counsel for the defendant. Whereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case. Whereupon the Court, taking into consideration all of the evidence in this case, the report of the Probation Officer and such additional facts and state-

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ments as were presented by the defendant, asked the defendant whether he desired to make any further statement or to advance any reason why judgment should not now be pronounced against him; and nothing being offered or alleged in delay of judgment, it is accordingly the sentence of this Court, pursuant to the verdict of the jury, that the defendant be and he is hereby sentenced to confinement in the penitentiary of this Commonwealth for the term of Twenty (20) Years for Malicious wounding of Lamar Marshall and causing bodily injury with intent to maim, disfigure, disable or kill, as charged in Indictment #1.

Whereupon the defendant by counsel noted his intention to appeal the aforesaid judgment, whereupon the Court having made further inquiry and being of the opinion that the defendant is indigent, does allow the defendant to proceed in forma pauperis in this matter; does appoint A.O. Gilbert, a competent and able attorney to perfect the said appeal; and does order that the transcript, when received, be made a part of the record in this case.

It is ordered that the defendant be allowed 212 days credit for time spent in jail while awaiting trial, and that as soon as practicable after the entry of this Order, the defendant be removed from the jail of this Court, and safely conveyed, to such penal facility as is designated by the Director, Department of Corrections, therein to be kept, confined and treated in the manner provided by law. A court reporter recorded the evidence and incidents of this trial.

The Court does allow Franklin A. Swartz, court-appointed to represent the defendant in this matter, the sum of $200.00, attorney fee. It is adjudged that the Commonwealth of Virginia do recover against the said defendant the sum of $738.50, its costs in this behalf expended, plus the costs of the transcript, when submitted.

And the prisoner was remanded to jail to await transfer to a designated penal facility.

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John W. Winston
JOHN W. WINSTON, Judge

(Court reporter - Doris Derieux)

(Frank Lathan Hinton, B/M, DOB 7-21-57 SSN 228-86-7682 F571-77)

ERROR ASSIGNED

That the Court erred in commenting to the jury with respect to the questions raised by the jury during its deliberations.