223 Va 680

SUPREME COURT OF VIRGINIA
RECEIVED
JAN 26 1982
RICHMOND, VIRGINIA

4

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 811421

JERRY LEE GRANT,

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

JOINT APPENDIX

John H. Herbig
HARRIS, TUCK & FREASIER
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

Counsel for Appellant

Richard B. Smith
Assistant Attorney General
101 North Eighth Street
6th Floor
Richmond, Virginia 23219

Counsel for Appellee

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

	Page
ORDER (September 28, 1976)	1-2
ORDER (July 26, 1978)	3
SHOW CAUSE ORDER (May 11, 1981)	4-5
ORDER SENTENCING DEFENDANT ON NEW CHARGES (June 2, 1981)	6-7
ORDER REVOKING SUSPENDED IMPOSITION OF SENTENCE (June 2, 1981)	8-9
MOTION TO SET ASIDE REVOCATION ORDER OR ALTERNATIVELY TO SUSPEND EXECUTION OF SENTENCE AND APPOINT COUNSEL TO PERFECT AN APPEAL	10
MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE REVOCATION ORDER OR ALTERNATIVELY TO SUSPEND EXECUTION OF SENTENCE AND APPOINT COUNSEL TO PERFECT AN APPEAL	11-15
ORDER (June 17, 1981)	16
ORDER (June 24, 1981)	17
LETTER (January 6, 1982)	18
ASSIGNMENTS OF ERROR	19
SHOW CAUSE HEARING ARGUMENT TRANSCRIPT [Pages 2-6]	20-22
ARGUMENT ON WRITTEN MOTION TRANSCRIPT [Pages 10-36]	23-29
RULING ON WRITTEN MOTION TRANSCRIPT [Page 39] . .	30

ORDER

The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City, and was represented by Attorney John H. Herbig, appointed counsel, the Commonwealth was represented by Stacy F. Garrett, III, and the Probation Officer was also present.

And the Court having this day heard evidence and arguments of counsel on the defendant's written motion to set aside the judgment entered herein on August 19, 1976, doth this day deny said motion.

And the defendant having been on August 19, 1976, found guilty of receiving stolen property as charged in the Indictment, and this case having been referred to the Probation Department for a presentence investigation and report, and said report having this day been filed in open Court and the defendant advised as to the contents thereof and given the privilege of cross-examining the reporting officer thereon, and evidence and arguments of counsel having been heard, the Court doth now, on motion of the defendant, suspend the imposition of sentence in this case conditioned upon the following: that the defendant keep the peace and be of good behavior; that he be placed on supervised probation; that he obtain a GED certificate; that he seek employment part-time while obtaining a GED certificate; that he live with his mother unless his Probation Officer permits otherwise; that he pay $50.00 of the cost of Court in this case by 4:30

o'clock p.m. this day; and he is declared a pauper as to the remainder of the costs of Court. And the defendant this day paid to the Clerk said $50.00.

And having been advised of his appellate rights, the defendant is released.

September 28, 1976 ENTER: /s/ J. Randolph Tucker, Jr.
J. Randolph Tucker, Jr.
Judge

ORDER

This day, Joseph E. Lee, State Probation and Parole Officer, having represented to the Court that the said defendant, Jerry Lee Grant, who was on September 28, 1976, placed on probation under supervision of this Officer, has satisfactorily complied with all conditions of probation, it is hereby ordered that the said defendant be released from supervised probation.

July 26, 1978

ENTER: /s/ J. Randolph Tucker, Jr.
J. Randolph Tucker, Jr.
Judge

SHOW CAUSE ORDER

This day came the Attorney for the Commonwealth who represented to the Court that the defendant, Jerry Lee Grant, was convicted in this Court on August 19, 1976, on a charge of receiving stolen property and on September 28, 1976, he received a suspended imposition of sentence.

The Attorney for the Commonwealth further represented to the Court that pursuant to a letter dated April 27, 1981, from the defendant's probation officer, Donald Schalla, it appears that the defendant has violated the terms of the suspended sentence as follows: on April 22, 1981, in this Court, the defendant was found guilty of two charges of possession of preludin and one charge of possession of marijuana (misdemeanor) and the Court ordered a presentence report, returnable on June 2, 1981.

NOW, THEREFORE, it is ORDERED that the Sheriff of the City of Richmond, is directed to bring forward Jerry Lee Grant from the Richmond City Jail, 1701 Fairfield Way, Richmond, Virginia 23223, before this Court in its Courtroom, John Marshall Courts Building, 800 East Marshall Street, Room 301, Richmond, Virginia 23219, on the 2nd day of June, 1981, at 9:00 o'clock a.m., and show cause, if any he can, why his suspended sentence should not be revoked for his failure to comply with the terms and conditions of the judgment of this Court.

May 11, 1981

ENTER: /s/ Thomas N. Nance
Thomas N. Nance
Judge

I ask for this:

/s/ James C. Wicker, Jr.
James C. Wicker, Jr.
Chief Deputy Commonwealth's Attorney

ORDER

The said defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by Attorney L. Neil Steverson, appointed counsel, the Commonwealth was represented by James C. Wicker, Jr., and the Probation Officer was also present.

The defendant having been on April 22, 1981, found guilty of distribution of phenmetrazine (preludin), a Schedule II controlled substance, as charged in Indictments F-81-293 and F-81-294; and guilty of unlawful distribution of marijuana, a Schedule I controlled drug, as charged in the Misdemeanor Indictment M-8306, and these cases having been referred to the Probation Department for a presentence investigation and report, and said report having this day been filed in open Court and the defendant advised as to the contents thereof and given the privilege of cross-examining the reporting officer thereon, and evidence and arguments of counsel having been heard, the Court doth now suspend the imposition of sentence during the defendant's good behavior in the cases of F-81-294 and M-8306. In the case of F-81-293, the Court doth ascertain the defendant's term of confinement in the State Penitentiary at Six 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 Jerry Lee Grant be confined in the State Penitentiary for a term of Six Years, this being the period ascertained by the Court in the case of F-81-293. The defendant is declared insolvent as to his costs of Court in each of the said cases. It is ordered that the drugs seized in connection with these cases be destroyed in accordance with the law after the time for the appeal of these cases has expired.

It is ordered that the Sheriff of the City do, when required so to do, deliver the said defendant from the jail of this City to the Warden 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.

Thereupon the defendant was remanded to jail.

DOB: 10/5/57

June 2, 1981

ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

ORDER

The said defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by Attorney John Herbig, appointed counsel, the Commonwealth was represented by James C. Wicker, Jr., and the Probation Officer was also present.

The defendant, by counsel, moved the Court to dismiss the show cause order previously entered in this case, which motion the Court denied. Evidence and arguments of counsel having this day been presented as to the matter of possible revocation of the suspended imposition of sentence entered herein on September 28, 1976, pursuant to the said show cause order previously entered, for reasons satisfactory to the Court, the said suspended imposition of sentence is this day revoked, and the Court doth ascertain the defendant's term of confinement in the State 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 Jerry Lee Grant be confined in the State Penitentiary for a term of Two Years, this being the period ascertained by the Court.

It is ordered that the Sheriff of this City do, when required so to do, deliver the said defendant from the jail

of this City to the Warden of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law; said term to be credited by the time spent in jail awaiting trial.

The defendant is declared insolvent as to the balance of his Court costs.

Thereupon the defendant was remanded to jail.

DOB: 10/6/57

June 2, 1981

ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

MOTION TO SET ASIDE REVOCATION ORDER
OR ALTERNATIVELY TO SUSPEND EXECUTION OF
SENTENCE AND APPOINT COUNSEL TO
PERFECT AN APPEAL

Comes now the defendant, Jerry Lee Grant, by counsel, and moves this Honorable Court to set aside its Order revoking defendant's suspended sentence and sentencing him to two years in the penitentiary, or in the alternative, to suspend execution of said sentence and appoint counsel to perfect an appeal to the Supreme Court of Virginia, and respectfully sets forth his grounds in the attached Memorandum.

JERRY LEE GRANT

By /s/ John H. Herbig
Counsel

John H. Herbig
HARRIS, TUCK & FREASIER
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

Filed June 15, 1981

MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE REVOCATION ORDER
OR ALTERNATIVELY TO SUSPEND EXECUTION OF
SENTENCE AND APPOINT COUNSEL
TO PERFECT AN APPEAL

Statement of Facts

On August 19, 1976, Jerry Lee Grant was convicted in the Circuit Court of the City of Richmond, Division I, of receiving stolen property. On September 28, 1976, Mr. Grant was sentenced, at which time the Court entered an Order which contained the following language:

> And the defendant having been on August 19, 1976, found guilty of receiving stolen property as charged in the indictment, and this case having been referred to the Probation Department for a presentence investigation and report, and said report having this day been filed in open Court and the defendant advised as to the contents thereof and given the privilege of cross-examining the reporting officer thereon, and evidence and arguments of counsel having been heard, the Court doth now, on motion of the defendant, suspend the imposition of sentence in this case conditioned upon the following: that the defendant keep the peace and be of good behavior; that he be placed on supervised probation; that he obtain a GED certificate; that he seek employment part-time while obtaining a GED certificate; that he live with his mother unless his Probation Officer permits otherwise; that he pay $50.00 of the cost of Court in this case by 4:30 o'clock p.m. this day; and he is declared a pauper as to the remainder of the costs of Court. And the defendant this day paid to the Clerk said $50.00.

On July 26, 1978, the defendant Jerry Lee Grant was released from supervised probation by Order of the Court, which contained the following language:

> This day, Joseph E. Lee, State Probation and Parole Officer, having represented to the Court that the said defendant, Jerry Lee Grant, who was on September 28, 1976, placed on probation under supervision of this Officer, has satisfactorily complied with all conditions of probation, it is hereby ordered that the said defendant be released from supervised probation.

Jerry Lee Grant was convicted in the Circuit Court of the City of Richmond, Division I, on April 22, 1981, of two charges of distribution of Preludin and one charge of distribution of marijuana. As a result, a Show Cause Order was issued requiring the defendant to appear on June 2, 1981, and show cause why his suspended sentence should not be revoked as a result of being convicted of the additional charges. On that day the defendant, Jerry Lee Grant, appeared personally and by counsel, and counsel moved the Court to dismiss the Show Cause Order on the grounds that the Court was without jurisdiction to revoke defendant's suspended sentence based on the previous Orders entered in this matter. The Court overruled the said Motion, revoked the suspension of sentence, and sentenced the defendant to two years in the state penitentiary.

Argument I

Under the provisions of §19.2-306, the Court is without authority to revoke the suspended sentence of Mr. Grant under the aforesaid facts. This code section provides in pertinent part as follows:

> The Court may, for any cause deemed by it sufficient which occurred at any time within the probation period, <u>or if none</u> within the

> period of suspension fixed by the Court, or if neither within the maximum period for which the defendant might originally have been sentenced to be imprisoned, revoke the suspension of sentence and any probation, if the defendant be on probation, and cause the defendant to be arrested and brought before the Court at any time within one year after the probation period, or if no period has been prescribed then within one year after the period of suspension fixed by the Court, or if neither a probation period nor period of suspension has been prescribed then within one year after the maximum period for which the defendant might originally have been sentenced to be imprisoned... (emphasis added)

The language of the statute is clear and indicates that if there is a probation period, then the time within which the defendant can be brought back is not the period of suspension or the maximum period for which he might have been sentenced, but is limited to the probation period. Under the facts set forth above, the defendant had a probation period, which period was ended by Order of the Court on July 26, 1978. Since the defendant had not been brought back before the Court nor any Show Cause Order issued within that time, or within one year following termination of the probation period, this Court, under the clear language of §19.2-306, is without authority to revoke the defendant's suspended sentence. It is clear from the statutory language that the only time the Court can look at the maximum period for which the defendant might originally have been sentenced is when there is neither a probation period nor a period of suspension.

The language in §19.2-306 was adopted from §53-275 of the Code of Virginia which was repealed in 1975. The language in these sections is identical with the exception of the last sentence in which the words "and Corporation Court" were removed. The cases decided under §53-275 clearly indicate the above interpretation is correct. For example, in Vick v. Commonwealth, 201 Va. 474 (1960), the defendant was sentenced to one year in the penitentiary, which sentence was suspended, and the defendant was placed on probation for a period of one year. In Vick, the Supreme Court of Virginia held that after the passage of one year, the defendant could not be brought back notwithstanding the maximum term of the sentence exceeded one year to show cause why his suspended sentence should be [sic] revoked. The Supreme Court held that the trial court had no power to revoke his probation and commit him to the penitentiary after the passage of one year.

Likewise, the Court may extend or reduce a probation period. See §19.2-304 Va. Code Annex.[sic] In the case of Cook v. Commonwealth, 211 Va. 290, 176 S.E.2d 815 (1970), it was held that an extension of the probation period has the effect of extending the time during which revocation may occur. Similarly, it should be obvious that if the period of probation is reduced, or if the period of time becomes fixed by a subsequent Order of the Court, then that would also have the effect of reducing or ending the period during which revocation may occur under §19.2-306.

For the above reasons, it is respectfully submitted that this Court does not have the power to revoke the suspended sentence imposed on Jerry Lee Grant on September 28, 1976. Therefore, the defendant, by counsel, respectfully moves this Court to vacate its Order entered on June 2, 1981.

Argument II

If the Court is not inclined to vacate its Order of June 2, 1981, sentencing the defendant to two years in the penitentiary, the defendant respectfully moves the Court to suspend execution of this two-year sentence pursuant to the provisions of §19.2-319 of the Code of Virginia, and appoint as counsel John H. Herbig to perfect an appeal to the Supreme Court of Virginia.

JERRY LEE GRANT

By /s/ John H. Herbig
Counsel

John H. Herbig
HARRIS, TUCK & FREASIER
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230

Filed June 15, 1981

ORDER

The said defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by Attorney John Herbig, appointed counsel, and the Commonwealth was represented by James C. Wicker, Jr.

Evidence and arguments of counsel having this day been presented on the defendant's written motion previously filed with the Court to set aside the judgment of this Court entered herein on June 2, 1981, doth take this motion under advisement, and this case is continued generally.

Thereupon the defendant was remanded to jail.

June 17, 1981 ENTER: /s/Thomas N. Nance
Thomas N. Nance, Judge

ORDER

The said defendant was this day led to the bar in the custody of the Sheriff of this City. He was represented by Attorney John H. Herbig, appointed counsel, and the Commonwealth was represented by James C. Wicker, Jr.

The Court having previously heard arguments of counsel on the defendant's written motion previously filed with the Court to set aside the revocation order entered herein on June 2, 1981, or in the alternative to suspend execution of the sentence imposed on June 2, 1981, and to appoint counsel to perfect an appeal, and the Court having maturely considered the memorandum of law filed by the defendant in support of said motion, and having on June 17, 1981, taken this case under advisement, the Court this day denies said motion as to setting aside the revocation order and suspending execution of the sentence imposed herein on June 2, 1981.

The defendant having this day noted an appeal in this case, the Court appoints Attorney John H. Herbig to assist the defendant in perfecting said appeal to the Supreme Court of Virginia.

Thereupon the defendant was remanded to jail.

June 24, 1981 ENTER: /s/ Thomas N. Nance
Thomas N. Nance, Judge

January 6, 1982

Mr. Richard B. Smith
Assistant Attorney General
101 N. 8th Street
Richmond, Virginia 23219

Dear Mr. Smith:

In reference to the case of Jerry Lee Grant on the charges of two counts of distribution of preludin and one of distribution of marijuana tried befor this court on April 22, 1981, and sentenced June 2, 1981, as far as our records show, as of this date none of these cases have been appealed to the Supreme Court of Virginia.

Sincerely yours,

/s/ Valerie A. Williams

Valerie A. Williams
Deputy Clerk

VAW

ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that it had jurisdiction to revoke the suspended imposition of sentence after the defendant has been removed from supervised probation.

2. The trial court erred in overruling the defendant's motion to set aside its order revoking the suspended imposition of sentence.

3. The trial court erred in its refusing to suspend execution of the sentence and admit the defendant to bail pending application to this Court for an appeal.

SHOW CAUSE HEARING

ARGUMENT

[2]

MR. WICKER: Your Honor, if it please the Court, we will take up the revocation.

Your Honor, there is a correction in the show cause. He was convicted on August 19, 1976, of receiving stolen property, and on September 26, 1976, he received a suspended imposition of sentence. The next paragraph we'd like to correct. That says, on April 22, 1981, the defendant was found guilty of two charges. There it says "possession." It should be distribution of Preludin and one charge of distribution of marijuana. That's the reason for the Court having a show cause.

THE COURT: All right. Are you familiar with this?

* * *

[2]

MR. HERBIG: Yes. Your Honor, I represented Mr. Grant back in '76. I have a preliminary matter that I'd like to address before I argue the merits, so to speak.

I submit to the Court that in the Court's file as it is reflected -- I assume the Court has the original '76 file -- as I interpret the Revocation Section, it states that "the Court may, for any cause deemed by it sufficient which occurred at any time within the probation period, or if none--" then it goes on.

[3-4]

I submit to the Court, and the Court file will reflect, on September 28, 1976, Mr. Grant did receive suspended imposition of sentence. He was placed on supervised probation. There is a further Court Order around July 26, 1978, of removing him from probation.

I submit to the Court that under the code section, that the probation period was fixed by that Court Order of July 26, 1978, and that therefore the probation period expired as of that time. So I would move the Court to dismiss the show cause as a matter of law.

THE COURT: He has not been back since?

MR. HERBIG: Since the original sentencing in September, that's correct, Judge. That was the first notice I received, and I represented him back then when he was brought back before the Court.

THE COURT: Well, they suspended the imposition of sentence on the condition that he be of good behavior and put him on supervised probation and because he obtained his GED.

MR. HERBIG: I understand that. I believe July 24, 1978, reflects he made satisfactory progress and has been removed from probation.

THE COURT: I'm well aware of that. July 24, 1978, is the date of the letter, and Judge Tucker signed it on July 26, two days later.

SHOW CAUSE HEARING

ARGUMENT

[4]

MR. HERBIG: What I'm putting forth is the statute concerning the probation that was fixed by the Court Order three years ago. And the statute says, "or if none". I submit to the Court there is one in his case.

THE COURT: I'm going to interpret the condition to be on good behavior to run through the maximum time period for which he originally could have been sentenced.

MR. HERBIG: The statute says you use that as a time period where there is neither probation nor a period of suspension. But there is one.

THE COURT: I understand your argument.

MR. HERBIG: I take it the Court overrules my motion?

THE COURT: Yes.

* * *

[6]

THE COURT: Glancing back through the presentence report on this, he has received a suspended imposition of sentence. Since that time, he has been convicted of interfering with a police officer and also of disorderly conduct, and on August 5, his suspended sentence was not revoked. The possession of marijuana on April 22, 1981, is getting close to this time.

It seems that these are empty promises when they are made.

ARGUMENT ON WRITTEN MOTION

* * *

[10-11]

THE CLERK: The matter of the hearing upon a motion filed in writing in the case of the Commonwealth versus Jerry Lee Grant, File Number F-6448.

The defendant is present in court and represented by Mr. John Herbig. Mr. Herbig, are you prepared to proceed?

MR. HERBIG: Yes, ma'am.

THE CLERK: The Commonwealth is represented by Mr. James C. Wicker, Jr. Mr. Wicker, are you prepared to proceed?

MR. WICKER: Yes, ma'am.

MR. HERBIG: Good morning, Your Honor. May it please the Court, Mr. Wicker, I would like to give a little background information as I was originally appointed to represent Mr. Grant back in 1976 on a charge of receiving stolen property. The record, of course, in this case shows in September of 1976, Mr. Grant was convicted on a charge of receiving stolen property, at which time the Court entered an Order on the 28th day of September, 1976, which is part of the record, suspending imposition of sentence of the matter and placing him on supervised probation. The Court at that time quite frankly as well imposed certain other conditions, such as he keep the peace and be of good behavior; that he obtain a GED certificate; that he seek employment part time; and that he live with his mother unless his probation officer permits otherwise; and that he pay $50 in court costs, and he was declared a pauper.

ARGUMENT ON WRITTEN MOTION

[11-12]

On July 26, 1978, the Court entered an Order pursuant to representation made by the probation officer which Mr. Grant was assigned to that he had complied with all conditions of probation. At the time, the Court ordered that this defendant be released from supervised probation.

On April 22, 1981, Mr. Grant was charged with some additional charges, and I believe that the charges occurred prior to that. As a result, the Commonwealth's Attorney for the City of Richmond brought a show-cause, which came to be heard on June 2, 1981. First of all, because I had been Court appointed originally, of course I appeared at this time. I filed I guess an alternative motion in this matter requesting the Court to reconsider the argument which was made on the memorandum that was filed in this matter as to the Court's jurisdiction to revoke the suspended sentence as expressed in the language of 19.2-306, which was adopted from 53-275 of the Code of Virginia. There are cases decided under 19.2-306 or 53-275, which according to my research indicates that as it stood prior to it being transferred to Title 53, to Title 19, the language is identical, except for the last sentence, where the words "and corporation court" were removed. I think many of the cases applying to the revocation section were decided under 53-275, and while there are cases under 19.2-306, I think it is fortunate that the two statutes were identical in language, as far as pertinency of the language.

ARGUMENT ON WRITTEN MOTION

[12]

Under 19.2-306, the statute says: (Reading) The Court may, for any cause deemed by it sufficient which occurred at any time within the probation period, or if none within the period of suspension fixed by the Court, or if neither within the maximum period for which the defendant might originally have been sentenced to be imprisoned, revoke the suspension of sentence and any probation. It is my interpretation that the proper interpretation of that Code section is that it sets up alternatives for the Court; however, by the language of "or if none" and "or if neither," it means if one of the former elements exists, that is the time frame which the Court has jurisdiction -- the first being the probation period.

* * *

[24-25]

I submit that it is error to bring this defendant back on this show-cause for two reasons: the first of which is 19.2-306 says "within the probation period, or if none," and it does not say the period fixed under the original order. Secondly, under 19.2-304, the Court could extend or shorten at a subsequent time that probation period, the supervised probationary period. The Supreme Court in Cook versus the Commonwealth said if you can extend it, it would have extended that period of revocation and you cannot just look at the original probation here that you sentenced him to. If you extend it in a timely fashion in the appropriate order, under 19.2-304 or 53-273, the forerunner of 19.2-304,

[25]

that extends the period. If the Court has the authority under that section to extend or to shorten or terminate, isn't that clearly indicating you do not just look at the original order; you look at all the orders entered in the case so far? The problem from that case is the Supreme Court set aside the order extending, because the Court said that it was a void order; therefore, since the year had run, irrespective of the maximum sentence --

* * *

[27]

MR. HERBIG: The order is part of the record in this case, and there is no question there was no original time limit. He was to be placed on supervised probation; that he obtain a GED certificate (reading).

* * *

[32]

Unfortunately, the Court's jurisdiction is limited. It is not the discretionary, general area. You have a statute that says when you can do it, and the Court is limited to that time frame.

THE COURT: Mr. Herbig, as a practical matter, this is what happens if there is a suspended imposition of sentence period. We may add onto that that he get a GED, or sometimes that he get a job, or this and that and he be placed on supervised probation. Well, after a while, if they have done well, then the probation officer brings him back and says, he

has done all right; he has done very well and we want to get him out of our office; we don't feel like we can help him anymore, so we ask you to enter an order taking him off of supervised probation. That is what happens. And I can't believe that Judge Tucker would enter that order allowing the probation department to determine what his length of suspended sentence would be or the period for which the sentence was not imposed. I can't believe he would allow the probation and parole office to decide that.

Suppose he found Mr. Grant guilty of grand larceny and suspended any imposition of sentence on the condition he be on supervised probation. He goes out to the probation and parole office and he does very well and next week they say, well, he's done all right; we want to remove him from supervised probation and the judge enters an order. In other words, the net result is he has labored under a suspended imposition of sentence for a week, and that time period was in fact decided by the probation and parole officer, when they asked him to take him off supervised probation.

MR. HERBIG: Do you want me to respond? I do not necessarily disagree with that fact. For all intents and purposes, that may or not have been, but the problem with this case, I submit to the Court, is that when the jurisdiction of a court to revoke is granted by the legislature, and that is the only authority that the Court has, and when the legislature clearly says "during the probationary period,

or if none, the suspension period," and in this case there was no suspension period, I concede that, "or if neither," of course has to fit. And the maximum period, the Supreme Court is saying if there is a one-year or two-year probation in the original order, it doesn't matter about the maximum. It doesn't matter if there was a suspension period. That is what the statute says, and the only question before this Court properly is does that statute limit that probationary period within the meaning of 19.2-306, to what it says in the original order. And as I stated before, I submit not, in view of the fact that the Supreme Court has said, if you properly extend that probationary period, you extend the period of time you can bring him back. And secondly, because it says probationary period --

* * *

[35]

I submit to the Court that might not have been the court's and other judges' intention to accomplish that result, but since we are dealing with the Criminal Code, it is strictly construed against the Commonwealth in any resolution in doubt and must be resolved in favor of the defendant.

I would ask the Court to set aside the revoking of the defendant's sentence and the imposition of the suspended of two years on the hearing on June 2, 1981, or as an

alternative to, first of all, appoint me to effect an appeal on Mr. Grant's behalf, and secondly, I know he has other time. I would request the Court, pursuant to provisions in 19.2 -- I would ask the Court to withhold the imposition of sentence on the revocation pending the appeal.

THE COURT: I will reread Vick and Cook and let you know in a few days. I can tell you now I do not know how I will rule. I think I know, but I certainly have not made up my mind.

I have a problem with not imposing sentence while perfecting an appeal. I am ninety-nine percent sure I am not going to do that.

MR. HERBIG: As I understand it, I believe that is mandatory.

* * *

RULING ON WRITTEN MOTION

[39]

June 24, 1981

NOTE: The case is called at 9:10 A.M., viz:

THE CLERK: Case of Commonwealth versus Jerry Lee Grant. File Number F-6448. The defendant is present in court and is represented by Mr. John Herbig.

Mr. Herbig, are you prepared for the defense?

MR. HERBIG: Yes.

THE CLERK: The Commonwealth is represented by Mr. James C. Wicker. Mr. Wicker, are you prepared for the Commonwealth?

MR. WICKER: Yes.

NOTE: At this point the Court Reporter is being sworn.

THE COURT: Mr. Herbig, instead of writing you regarding my decision on your motion, I had you come back today since I felt we had to have Mr. Grant back on the habitual offender, anyway.

I have reread the cases, reread the statutes and reread your brief, and I overrule your motion to set aside the revocation order and suspending execution of the sentence imposed by this Court on June 2, 1981.

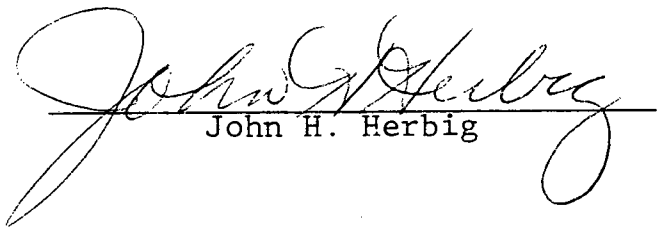
We appoint you to represent Mr. Grant on appeal.

CERTIFICATE

I hereby certify that I have this the 26th day of January, 1982, fully complied with Rule 5:35 of the Rules of the Supreme Court of Virginia by

(a) Filing twenty (20) copies of this appendix in the Office of the Clerk of the Supreme Court of Virginia, at Richmond, and

(b) Delivering three (3) copies of this appendix to Richard B. Smith, Assistant Attorney General, 101 North Eighth Street, 6th Floor, Richmond, Virginia 23219, prior to the filing of this appendix with the Clerk of the Supreme Court of Virginia, at Richmond.



John H. Herbig

John H. Herbig
HARRIS, TUCK & FREASIER
Professional Associates, Inc.
3805 Cutshaw Avenue
Richmond, Virginia 23230