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Record No. 6777

In the Supreme Court of Appeals of Virginia at Richmond

BERNARD RIEVES FOSTER, ALIAS, ETC.

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.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6777

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of October, 1967.

BERNARD RIEVES FOSTER, ALIAS, ETC.,
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 Bernard Rieves Foster, alias Bernard Rease, a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 2nd day of December, 1966, 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.

RECORD

* * * * *

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* * * * *

And at the same Hustings Court held for the City of Richmond, at the Courthouse, on the 2nd day of December, 1966, 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 John Ritchie, Jr., and James B. Wilkinson represented the Commonwealth and also came the jurors sworn on December 1, 1966, for the trial of this case, according to their adjournment. And having this day heard all of the evidence for the Commonwealth, the said defendant, by counsel, moved the Court to strike the evidence of the Commonwealth as being insufficient for the finding of a verdict of guilty, which motion the Court doth overrule and the defendant notes an exception. And thereupon the said defendant moved the Court to allow the Jury to view the scene of the alleged crime, which motion the Court doth grant. And the jurors having been duly instructed by the Court that they were to view the scene only and not discuss this matter with anyone, the Sergeant of this City was then duly sworn that he would take the said jury and the said defendant in his custody to the scene and then return them to this Court after said view had been taken. And the said view having been taken in the presence of the Court, the said jurors and said defendant were returned to this Court by the Sergeant in accordance with instructions earlier given by the Court. And the jurors having heard all of the evidence, the said defendant, by counsel, renewed his motion to strike the evidence of the Commonwealth, which motion the Court doth also overrule, and exception noted. And having heard the arguments of counsel, the jurors retired to their room in the custody of the Sergeant of this City and after some time, returned a verdict in the following words and figures, to-wit: "We, the jury, find the accused guilty of statutory burglary as charged in the indictment and fix his punishment by confinement in the penitentiary for ten years." Byron B. Nelson, Jr., Foreman

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

Whereupon it being demanded of the said defendant if anything for himself he had or knew to say why the Court should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay thereof, it is the judgment of this Court that the said Bernard Rieves Foster alias Bernard Rease be confined in the State Penitentiary for a term of ten years, page 15 } this being the period by the jury ascertained. And it is ordered that the Sergeant of this City do, when required so to do, deliver the said defendant from the jail of this City to the Superintendent of the Penitentiary, in said Penitentiary to be confined and treated in the manner prescribed by law; said term to be credited by the time spent in jail awaiting trial.

And thereupon the said Bernard Rieves Foster alias Bernard Rease is remanded to jail.

* * * * *

page 16 } INSTRUCTION NO. 1

The Court instructs the jury that the failure of the accused to testify creates no presumption against him; and in considering his guilt or innocence his failure to testify is not a circumstance which the jury is entitled to consider.

G. S. B. W., JR.

page 17 } INSTRUCTION NO. 2

The Court instructs the jury that the credibility of witnesses is a question exclusively for the jury, and in determining the weight to be given to the testimony of the different witnesses in this case, they are authorized to consider the relationship of the witnesses to the parties, if the same is proven; their interest, if any, in the result of the trial; their temper, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence; and their means of information; and to give such credit to the testimony of

such witnesses as under all the circumstances such witnesses seem to be entitled to.

G. S. B. W., JR.

page 18 } INSTRUCTION NO. 3

The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the accused is guilty of statutory burglary as charged in the indictment, you should say so and fix his punishment by confinement in the penitentiary for not less than one year nor more than twenty years, or confinement in jail not exceeding twelve months or fine not exceeding $1000.00, either or both.

The Court further instructs the jury that the form of verdicts in this case are as follows:

1. GUILTY

We, the jury, find the accused guilty of statutory burglarly as charged in the indictment and fix his punishment at .....

.....

.....
Foreman

2. NOT GUILTY

We, the jury, find the accused not guilty.

.....
Foreman

G. S. B. W., JR.

page 19 } INSTRUCTION NO. W

When the Commonwealth relies upon circumstantial evidence in order to secure a conviction, it is the duty of the jury to scan such evidence with great care and caution; and unless the circumstances proven are of such a character and tendency as to produce in the mind of the jury a moral conviction of guilt of the defendant beyond a reasonable doubt, then you must find the defendant not guilty.

G. S. B. W., JR.

page 20 } INSTRUCTION NO. X

The defendant is presumed to be innocent of the offense with which he is charged and this presumption of innocence goes with him through the entire case and applies at every stage thereof and is sufficient to require you to find the defendant not guilty unless and until the Commonwealth upon whom the burden rests, proves his guilt beyond a reasonable doubt, and the Court further tells you that it is not sufficient that facts and circumstances proved be consistent with the guilt of the defendant, but they must be inconsistent with every reasonable hypothesis consistent with the innocence of the defendant.

G. S. B. W., JR.

page 21 } INSTRUCTION Y

The burden is upon the Commonwealth to prove by the evidence beyond a reasonable doubt every material and necessary element of the offense charged against the defendant. It is not sufficient that the jury may believe his guilt probable, or more probable than his innocence. Suspicion or probability of guilt, however strong, will not authorize a conviction, but the evidence must prove his guilt beyond a reasonable doubt. The Jury shall not speculate or go outside of the evidence to consider what they think might have taken place, but you are to confine your consideration to the evidence introduced by the Commonwealth and unless you believe, upon a consideration of all the evidence before you, that guilt of the defendant has been proved beyond a reasonable doubt as to every material and necessary element of the offense charged against him, then you shall find the defendant not guilty.

The burden resting upon the Commonwealth to prove guilt of the defendant beyond a reasonable doubt does not require that such guilt be proven beyond every imaginable, conceivable or possible doubt, but only beyond a reasonable doubt. The jury must limit its consideration to the evidence introduced, and you are not to go outside the evidence to hunt up doubts, nor must you entertain doubts which are speculative or conjectural. And if, upon a consideration of all the evidence you are satisfied of the guilt of the defendant beyond a reasonable doubt, then you shall find him guilty.

G. S. B. W., JR.

page 22 } INSTRUCTION NO. Z

The evidence introduced by the defendant that the time available was not sufficient to have permitted him to commit the alleged crime need not be such as to establish this as a fact in order to entitle him to an acquittal; but if it is such as to create and leave in the mind of the jury a reasonable doubt of his ability to create the crime within this time, then you shall find the defendant not guilty.

R. S. B. W., JR.

* * * * *

page 25 } AFFIDAVIT

I, Bernard R. Foster, hereby certify this 8 day of December, 1966 that I am financially unable to bear the expense of a copy of the transcript of the evidence in this case for an appeal.

BERNARD R. FOSTER

Subscribed and sworn to this 8 day of December, 1966 in the City of Richmond, State of Virginia before me the undersigned, a notary public in and for said city and state as witness my hand.

L. A. PARKER
Notary Public

Commission expires Aug. 26, 1970.

* * * * *

page 26 }

* * * * *

ASSIGNMENT OF ERRORS

The defendant, Bernard R. Foster, by counsel, assigns the following errors:

1. The defendant was denied a proper preliminary hearing in that one witness whom he had subpoenaed in proper time (although the subpoena had not been served) was not present; and, further, the defendant was not permitted to examine all the witnesses whom he had subpoenaed who were present.

2. The trial court erred in refusing to grant the defendant's

motion for a change of venue because of the television, radio and newspaper publicity in the Richmond area concerning "rooftop burglaries" and the defendant's arrest.

3. The trial court erred in refusing to reimburse the defendant, who is an indigent, for the cost of a court reporter at the defendant's preliminary hearing.

4. The defendant was not advised of his right to an attorney in timely fashion or furnished an attorney at the time that he requested one, thus being deprived of his constitutional right to counsel.

page 27 } 5. The defendant's clothing was unlawfully seized from him by the Richmond City Police in violation of his constitutional rights.

6. The trial court erred in refusing to order the Richmond City Police to make the defendant's clothing and any particles found in it available to the defendant for examination and chemical analysis by an expert of the defendant's choice to be compensated by the Commonwealth.

7. The trial court erred in admitting the hearsay testimony of Sergeant H. A. Conner that he was directed to go to the scene of the defendant's arrest because a third party had reported hearing noises in an ABC Store at the scene.

8. The trial court erred in not granting defendant's motion for a mistrial because of the Commonwealth Attorney's use of the word "ballistics" in describing the marks left on a door allegedly broken open by the defendant.

9. The trial court erred in refusing to permit the defendant's expert to testify as to the method in which the door to the ABC Store was broken open.

10. The use by the Commonwealth Attorney in his closing argument of the term "professional" to describe the break-in of the ABC Store with which the defendant was charged was highly prejudicial to the defendant and prevented his obtaining a fair trial.

11. The trial court erred in approving an excessive bond under which the defendant was held prior to trial in violation of his constitutional rights.

page 28 } 12. The trial court erred in denying the following instruction which the defendant requested:

The evidence introduced by the defendant that the time available was not sufficient to have permitted him to commit the alleged crime need not be such as to establish this as a fact in order to entitle him to an acquittal; but if it is such as to create and leave in the mind of the jury a reasonable doubt of his ability to create the crime within this time, then you shall find the defendant not guilty.

13. The trial court erred in overruling the defendant's motion to set aside the jury's verdict as contrary to the law and the evidence.

The defendant further states the following errors which he has specifically requested his counsel to include in this Assignment of Errors:

1. I was subject to a hostile examination, which is a violation of my constitutional rights.
2. I was placed in an illegal and/or unlawful line-up.
3. Trial by TV, radio, newspaper, before and during my trial.

BERNARD R. FOSTER
By JOHN RITCHIE, JR.

John Ritchie, Jr., Counsel
for the defendant appointed
by the Court
1208 Electric Building
Richmond, Virginia

Received & Filed Hustings Court Clerk's Office Jan. 31, 1967.

W. M. B., Deputy Clerk

* * * * *

page 31 }

* * * * *

ORDER

This day came the defendant, Bernard R. Foster, by counsel, and moved the Court to:

1. Order transcribed the evidence presented at the hearing on November 21, 1966 of Raymond L. Wiltshire and to order all costs therefor paid by the Commonwealth and to provide the defendant with a copy of the transcript because the defendant is unable to bear the expense of a copy of the transcript of the evidence for an appeal.
2. Order the exhibits presented by Raymond L. Wiltshire at this hearing to be included in the exhibits forwarded to the Supreme Court of Appeals for the purposes of the defendant's appeal.

And, it appearing to the Court that there is no objection to this by the Commonwealth;
It is so ordered.

Dated: 3/20/67.

Enter this:

SAMUEL B. WITT, JR., Judge

Agreed: 3/20/67.

Received & Filed Hustings Court Clerk's Office Mar. 20, 1967.

W. M. B., Deputy Clerk

* * * * *

VIRGINIA:

IN THE HUSTINGS COURT OF THE
CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA
V.
BERNARD R. FOSTER

Transcript of the evidence and other incidents of the above when heard on November 21, 1966 before the Honorable W. Moscoe Huntley, Judge; and December 1, 1966 and December 2, 1966 before the Honorable Samuel B. Witt, Jr., Judge.

APPEARANCES:

JOHN RITCHIE, JR., ESQ.
Attorney for the Defendant

JAMES B. WILKINSON, ESQ.
Attorney for the Commonwealth

* * * * *

page 4 } BERNARD R. FOSTER, the defendant, being first duly sworn, testified as follows:

Bernard R. Foster

DIRECT EXAMINATION

By Mr. Ritchie:

* * * * *

Q. Speak loud enough for the Judge to hear you
page 5 } clearly. You were taken into custody by the police
on the morning of Sunday, October 9th?

A. That's correct.

Q. Would you describe what occurred that morning when you were taken into custody and to jail?

A. You mean from the time we were locked up?

Q. You can begin at the time that you were initially taken into custody by the police?

A. Well, we was taken into custody down at—on Main Street and was throwed on the floor down there and handcuffed and taken to the City Lockup, it would be on Marshall Street or Clay, whichever it is up here, and it was three of us and we were each separated and I was put in G Section and maybe ten or fifteen minutes after I was in there they came and taken me down to a room and taken my clothes away from me, and I asked them where they were taking my clothes and he said never mind, don't let it worry you where we are taking them, we just take them, and I asked him could we have an attorney there with us to go along with these clothes, he said we would get an attorney Monday morning. And during the day—Mr. Bowles, he got me some more clothes down there, his wife brought some and brought me some myself, and then all during the night they—different
shifts come on, they would get me up and tell me
page 6 } to stand up there and look at me, asked me was I
the roof-top burglar and the next morning they came in and took us down to—down the hall a ways—and was going to put us on the lineup again—not again, they were going to put us on lineup and I asked them was we going to get the attorney this morning to go along with the lineup and they said we would get it when the Court—when we went to Court right behind this lineup and they singled out all of us and put us out there on the lineup, asked us our name, and alias names and so forth, and then we went in front of the Lower Court Judge, I don't know who it was, it wasn't Mr. Maurice, I don't know—I don't know who the other Judge was—I believe it was Maurice that morning, though, and then later on—it was Judge Maurice that morning, that is who it was.

Bernard R. Foster

Q. Now, can you recall when, if at any time, you were advised of your rights by the police?

A. We were—I was advised of my rights probably, maybe one o'clock that evening, somewhere in that neighborhood. All this taken place that morning.

Q. Now, what was the first occasion when the police mentioned this to you?

A. They—after they taken my clothes.

Q. Are you able to fully recollect what you were told at that time or do—

page 7 } A. I didn't understand nothing he was talking about on the—the way he was reading—he was reading it from a piece of paper, I don't know what it was—

Q. Do you recall whether your—what the order was between arraignment for the Magistrate, being brought before the Magistrate, and the taking of your clothes, was that before or after you were brought before the Magistrate?

A. The clothes were taken before I went in front of the Magistrate.

Q. Do you recall who was present when your clothes were taken?

A. No, I don't, it was so many of them there, four or five of them there, I don't know none of them's names, I just know—I know maybe two on the Detective Force right now, maybe three.

Q. Are any of the persons who were present then present in Court now?

A. Mr. Brooks, he was out there, I think he was in the hall, he didn't take my clothes though.

Q. Now, what was—where were you when your clothes were taken?

A. I was in a small room that they had there, some lockup that they had there.

page 8 } Q. And how did they go about taking your clothes?

A. They told me to give them—give them my clothes and I asked them for what and he said we are going to use them as evidence, and I asked them well, how about having someone to go along with these clothes, a lawyer or something to go along with them. I don't want to give them up and he said, well, you either give them up or we will take them, so I give him the clothes and they gave me some blue clothes and they were torn or something. Anyway, I walked down the hall in my shorts.

Q. When did you first request a lawyer?

Bernard R. Foster

A. When he started to take the clothes.

Q. No further questions. Answer Mr. Wilkinson's questions.

A. All right.

CROSS EXAMINATION

By Mr. Wilkinson:

Q. What clothes did you have on when you were taken before the Magistrate?

A. What kind of clothes did I have on?

Q. Uh huh?

A. I think it was—I'm not sure now, it was either green or blue slacks and a plaid shirt and they taken a pair of

page 9 } Q. Were they the clothes you were arrested in?
A. Yes, sir.

Q. In other words the clothes you were arrested in are the ones you had on when you were taken before the Magistrate?

A. No, when the ones that they—taken in front of the Magistrate I had blue overalls on.

Q. Blue overalls?

A. Misdemeanor clothes at the jail, that's what they were.

Q. So you were taken before the Magistrate in jail clothes?

A. That's correct.

Q. What time, approximately, was that?

A. I think I went in front of the Magistrate, sir, about one o'clock, somewhere in that neighborhood—I don't know, now, I didn't have—my watch was mashed—it broke it.

Q. But you are sure that you had jail clothes on?

A. I had blue clothes on—but they were jail clothes.

Q. Pardon?

page 10 } A. Blue clothes that they gave me, if they were jail clothes, that's what they were, blue clothes.

Q. When they told you they wanted you to take your clothes off, you took your clothes off and gave them to them?

A. Yea, I took them off.

Q. That's all I have.

Mr. Ritchie: No further questions.

The Court: You may stand aside.

Witness stood aside.

J. A. Brooks

J. A. BROOKS, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ritchie:

Q. Will you state your name and occupation, sir?

page 11 } A. Joseph A. Brooks, Detective Sergeant, Richmond Police Department.

Q. Now, Sergeant Brooks, were you present at the arrest of Mr. Foster?

A. I was on the scene, but I was not exactly where he was arrested, I was one floor above it.

Q. Do you know who the officers were who made the arrest of Mr. Foster?

A. No, sir, I don't, I do know—I was told, rather, that it was uniformed officers.

Q. Do you know, of your personal knowledge, whether *Mr. Brooks* was advised at the time of his arrest of his rights and so forth?

A. You said Mr. Brooks, you meant Mr. Foster.

Q. I mean Mr. Foster, pardon me, right?

A. Whether he was advised of his rights?

Q. Of your personal knowledge?

A. No, sir, I do not.

Q. Now, were you present at any time while Mr. Foster was being booked and his clothes taken, and so forth in the Detention?

A. Yes, sir, I was in Detention — in the Detention Section.

page 12 } Q. Would you describe what you observed there?

A. Well, I don't remember seeing Mr. Foster take his clothes off and give them to the officer, although I was within a few feet of him, I was in that section of the Detention, however, I did stand there and talk to him a few minutes, he was squatting down on the floor and I was standing there talking to him while we were waiting for one of the other men to come away from the Magistrate. They were separated by a door, and he and I were just talking a general conversation, nothing about the break-in.

Q. Why was he squatting on the floor?

A. Just waiting for his turn to go before the Magistrate.

Q. Was he clothed at this time in his street clothes?

A. Yes, sir, he was, the clothes that he was arrested in.

If my memory serves me correctly it was a red or plaid shirt, I'm not sure of it.

Q. Do you know, of your personal knowledge, if he was advised of his rights at that time?

A. As far as I know, no, sir, I didn't—I didn't advise him of his rights, now what took place when the actual arrest was made down on the first floor of the building

page 13 } that I was in on the second, I have no idea.

Q. Do you know what officers were present at the Detention cell when he was being held there?

A. Well, there were quite a few, but I distinctly remember Lieutenant Clark, Detective E. R. Marrin and myself. There were others, I just don't remember who they were.

Q. No further questions.

Mr. Wilkinson: I have no questions, Sergeant.

The Court: You may stand aside.

Witness stood aside.

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

DIRECT EXAMINATION

By Mr. Ritchie:

Q. Would you state your name and occupation,

page 14 } sir?

A. Edward R. Marrin, Detective, Richmond Police Department.

Q. Were you present at the arrest of Mr. Foster on the morning of Sunday, October 9th?

A. Yes, sir, I was.

Q. Did you personally observe the arrest of Mr. Foster?

A. No, sir, I did not.

Q. Where were you at the time?

A. I was coming east on Main Street walking into the store that was under repairs at that time. I had—he was under my observation, but I wasn't present when the arrest was made.

Q. Do you recall who the detectives or officers were who made the arrest?

A. It wasn't any other detective right there at that time, it was two uniformed officers and Sergeant Connor, I don't know who the uniformed officers was.

E. R. Marrin

Q. Do you know, of your personal knowledge, whether Mr. Foster was advised of his rights at the time that he was first placed under arrest?

A. When they were putting the handcuffs on him down on the floor I told them not to ask him any ques-
page 15 } tions, not even to ask him the time of day. I advised all three of the officers that was there, and nothing was asked him. He and Mr. Bowles was down on the floor.

Q. So the officer didn't say anything to him at that time?

A. They didn't ask him anything. I stood right there 'til they put him in the wagon.

Q. Now, were you present in the Detention cell when Mr. Foster was brought in there?

A. In the cell?

Q. Well, the Detention Room, I'm speaking of the location where the clothes were removed and so forth?

A. Yes, I was there, but I don't remember who took the clothes from him.

Q. Could you tell us what you do recall of that?

A. Yes, sir, when he was brought to Detention—you want me to start from when he was brought in first to Detention or just

Q. Yes,

A. answer your question?

Q. right, start from the time he was brought—

A. Time we got him out the wagon, he was
page 16 } the third man out the wagon, I think, he was carried there and he was put in Section G-3, it's a separate section from Mr. Wiltshire, and stayed in there a short time. We brought him on out and carried him before a Magistrate. He was again advised of his rights in front of the Magistrate on tape. The Magistrate only got his name, that was all, address he refused to state.

By The Court:

Q. Mr. Marrin, you say he was advised of his rights, what rights did he receive?

A. He advised him—the Magistrate advised him that he could remain silent and make no statement. Any statement that he made could be used against him in a court of law; that he could employ an attorney of his own choosing, and if he was not financially able the Court would appoint one for him. And he declined to make any statement. He was advised that he could waive these rights if he so desired, but he did not waive them.

Q. All right.

By Mr. Ritchie:

Q. Did he request an attorney at that time?

A. No, sir, not at that time.

page 17 } Q. Was he in his prison clothes or street clothes at that—

A. He was in his street clothes when we carried him before the Magistrate. He didn't get his other clothes—it was sometime before his wife brought his other clothes, he had his jail clothes on for just a short time.

Q. When did he put his jail clothes on?

A. Well, I say jail clothes, they are blue denim overalls and shirt. He put them on right after he come out the Magistrate's office about ten minutes after—five or ten minutes after he come out the Magistrate's office and the clothes was given to me and I tagged them and bagged them for investigation. The time they was taken from him I have right on the tag right on the bag.

Q. Now, you specifically recall his putting the jail clothes on?

A. I recall him tak—yes, I recall it, due to the fact that his pants was too big for him and he said he wasn't going in Court with them pants on and I told him that we would see that he got his clothes if he would give us a number or allow us—allow him to make a telephone call. He did not want to make a telephone call and he did not want us to send for his clothes. He said he would get his own clothes.

Q. Well, how did he get his clothes, then?

page 18 } A. I'm not certain, a lady brought him some clothes and I think it was Mrs. Bowles, I'm not certain.

Q. Mrs. who?

A. Bowles. I think she brought him some clothes, I know she brought him some shoes, brought his shoes with James Bowles' clothes, I know that.

Q. Are you quite sure that he had on his—he immediately put on his prison clothes after he had taken off his clothes in which he was arrested?

A. Yes, sir, definitely sure. He was carried before the Magistrate approximately ten or fifteen minutes after he was placed in a cell, just as soon as we would process one, we got to another.

Q. What time was the arrest made?

E. R. Marrin

A. The arrest was made around 11:30 or 11:45, between that—between 11:30 and 11:45.
Q. Are those notes that you are—you made at the time?
A. Just rough, yes, sir.
Q. That you made at the time
A. Yes, sir.
Q. to refresh your recollection?
A. Yes, sir.
Q. Can I see those?
page 19 } A. Yes, sir, one side of them—the other information is on the other.

Mr. Ritchie: ... establish exactly what occurred and what the time elapsed during the arrest and confinement of the defendant, Your Honor.
Mr. Wilkinson: Judge, we are not relying on it and I frankly state to the Court we are not relying on the confession. I assume most of this is *Miranda* v. *Arizona,* we are not relying on a confession. We readily admit from the time of their arrest up to the present time they have been in confinement.

Q. Were you present at the time that Mr. Foster was brought before the Magistrate?
A. Yes, sir, I was.
Q. Could you tell us what occurred at that time?
A. I think I've told you that he was advised of his rights by the Magistrate, carried before there and the warrant was taken out for him for breaking and entering.
Q. And was that the first time that he had been advised of his rights?
A. That's the first time anyone asked him any questions, was then. They didn't ask him questions then, they
page 20 } just asked him his name and his address and he declined to give his address.
Q. No further questions.

CROSS EXAMINATION

By Mr. Wilkinson:
Q. His bond set? Did the Magistrate set the bond?
A. Yes, sir, the Magistrate set the bond.
Q. All right, that's all.

Witness stood aside.

The Court: Call your next witness, please.

Mr. Ritchie: That concludes the

The Court: Very well.

Mr. Ritchie: evidence, Your Honor.

page 21 } The Court: The Commonwealth have any evidence?

Mr. Wilkinson: No, sir.

The Court: Very well.

Mr. Ritchie: The first motion, Your Honor, that the defendant, Bernard Foster, would like to make is that the indictment against the defendant be dismissed and the case returned to Police Court for a new preliminary hearing because a certain witness, this is Lieutenant Clark, who had been properly subpoenaed by the defendant by his counsel at that time, Mr. Dorset was not present at the preliminary hearing and because other witnesses who were present were not allowed to testify so that the Judge did not examine on oath all the witnesses for and against the defendant who were or should have been readily available. When I say that the witnesses had been subpoenaed, the letter requesting a subpoena to him had been delivered, as I think Mr. Dorset explained, to the Clerk and through some procedure that I don't know about it never apparently gotten to Lieutenant Clark.

The Court: I believe there's a case in the last advance sheets on that very point—do you have the ad-

page 22 } vance sheets—do you have the advance sheets?

Mr. Wilkinson: We don't have them with us, Judge.

The Court: Sergeant, run back in my office and look for the last advance sheets of the Court of Appeals—advance sheets, a little pamphlet, the Supreme Court of Appeals, right on my desk.

Mr. Ritchie: Now, Sergeant Brooks testified today that Lieutenant Clark, Detective Marrian and himself were the three officers that he recalled being present at the time that Mr. Foster's clothes were removed and Sergeant Brooks had only a general recollection, he testified, of what occurred at that time, just as Detective Marrin did. Of the witnesses who were present in Court, only three testified and the only evidence at the preliminary hearing which connected Mr. Foster with the alleged crime was the testimony of the Detective. Have you got the transcript page? This is Detective Hastings, and this is his testimony. He was the man—he was the man who made the arrest of Mr. Wiltshire this morning. He says:

I asked him—my first words to him were how
page 23 } many more are with you? He stated two.
I asked him where they were. He said they had gone down the hall to give themselves up. I said what *hole* and he still had his back to me and he nodded his head back to the left.

I asked him were they armed and he said no, they were not, and of course, he was taken into custody there, and there are no steps from the third floor to the second floor in any of these buildings there and he was taken down the ladder. In the meantime two other men here, I understand, came out of the front of the building and gave themselves up to the other officers.

Do you know who arrested the other two?

No, sir, I do not.

Who were the other two?

Bernard Foster and James Russell Bowles.

Now, that is the entire testimony, at the preliminary hearing that relates—that connects Mr. Foster to the events that occurred on the ninth of October, on that Sunday morning, but there were present in Court at that time, as I say, eleven
witnesses, all the rest were police officers who
page 24 } were present at the time of the arrest of Mr.
Bowles and over the objection of the attorney for Mr. Bowles, the Court did not permit any of these other witnesses to be called to testify.

The Code, in the section relating to the preliminary hearing, states in mandatory language, in Section 19.1-101, that the Judge—I'm skipping a few words—before whom any person is brought for an offense shall, as soon as may be, in the presence of such person examine on oath the witnesses for and against him, and he may be assisted by counsel. It doesn't state that in the permissive may examine the witnesses, it states that he shall examine the witnesses for and against him. And it doesn't indicate that any witnesses who are present in Court can be excluded from this examination. The purpose of the preliminary hearing, as Mr.—as the Commonwealth's Attorney has cited before—the actual indictment before the Grand Jury brings the case into this Court and at that time it's only necessary for the Commonwealth to show sufficient cause to try the case. But at the preliminary hearing the defendant has the opportunity to
show that there's no probable cause for the charge
page 25 } to be placed against him and the defendant, accord-
ing to a number of text authorities, speaking now not—simply Virginia preliminary hearings, but of the preliminary hearings in Anglo Saxon jurisprudence, of its role, states

that it should be to permit the defendant to establish no probable cause and to permit the defendant to learn the foundation of the charge against him and the foundation of the prosecution's case against him, and it is—there is one of the few times that the defendant does have this opportunity because of the very limited discovery which is available to the criminal defendant. So that when the defendant, Mr. Foster, appeared and had only the opportunity to examine three of the eleven witnesses who were present in Court, he did not have a preliminary hearing in the manner and sense in which it is intended a Virginia accused should have a hearing. We would like to have this indictment dismissed and the charge referred again to the Police Court for a full preliminary hearing.

The Court: Well, I have just given this recent case of our Supreme Court of Appeals a cursory examination, because it just arrived this morning, but I recall the parts page 26 } of it. This is the case of *Peyton* v. *Ellyson,* 207 Va. 423, are you acquainted with that case?

Mr. Ritchie: No, sir, I am not.

The Court: In that case, on page 428, the Court of Appeals says this, quoting with approval several cases: In Virginia the preliminary hearing is procedural and not jurisdictional. See *Snyder* v. *Commonwealth,* 202 Va. 1009. Quoting further, the Court said, the preliminary hearing in Virginia is not a critical stage of the proceedings, and Vess was not prejudiced by the absence of counsel at this point since no substantive rights were forfeited. It further says Virginia does not permit the acceptance either plea of guilty or not guilty on a felony charge at a preliminary hearing. However, assuming that a plea of guilty were entered, such a plea would not be admissible as evidence at the trial itself. And over on page 429, a preliminary hearing is not a trial in its ordinary sense. The primary purpose of such hearing is to ascertain whether there is reasonable ground to believe that a crime has been committed and the person charged is the one who has committed it. That's what our Court has—so I don't see where the accused is prejudiced in any page 27 } way.

Mr. Ritchie: Then I understand that you overrule that.

The Court: Yes, sir.

Mr. Ritchie: I'll take exception.

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page 31 }

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Mr. Ritchie: We take exception also. The next motion is that the cost of the court reporter employed to transcribe the evidence at defendant's preliminary hearing be paid by the Commonwealth. Now, this cost, because of the urgency of the situation, and the expense of the court reporter, this cost was paid by the defendant, Mr. Foster, but the cost was a hundred dollars and forty cents, I believe, and as Your Honor can judge from the use of the record by Mr. Dorset and myself today, it has already proved to be a necessary expense and I would like to move the Court to compensate Mr. Foster for the expense of the court reporter at that preliminary hearing.

The Court: I will take that under advisement. Of course this proceeding is being transcribed today — being recorded.

page 32 } Mr. Wilkinson: Well, has he already paid for it?

Mr. Ritchie: Yes.

Mr. Wilkinson: Now, Judge, this is a motion to reimburse the defendant, it's already paid for. I understand he's already paid for it.

Mr. Ritchie: That's right.

Mr. Wilkinson: Now, you want—the motion is for the Commonwealth to reimburse Mr. Foster for the payment.

Mr. Ritchie: Well, to reimburse counsel, I suppose—

Mr. Wilkinson: Well, I don't understand, did counsel pay for it?

Mr. Ritchie: Counsel paid for it and has been reimbursed by Mr. Foster.

The Court: Well, that's the end of that. That is the end of that.

Mr. Wilkinson: He had funds to pay for it?

Mr. Ritchie: He had a hundred dollars. Do I understand that I have been overruled?

The Court: Yes, if he had the funds to pay for it, that's the end of it.

page 33 } Mr. Ritchie: We take exception to that one.

The Court: I mean come *in forma pauperis* is one thing, but if you have the money and you pay it, that's another.

Mr. Ritchie: The next is that the Court rule inadmissible any evidence obtained by the Richmond Police Department

from placing the defendant, Mr. Foster, in a lineup over his protest after he had requested counsel. I believe that was the motion that you took under advisement

The Court: Yes.

Mr. Ritchie: this morning.

The Court: I'll do the same in this case.

Mr. Ritchie: You said that you would—the one problem that that presents is that the information obtained from the lineup may be only the tree and the—that evidence, it may be that the fruit of that tree will appear in a different guise in the actual trial and will not be identifiable—

The Court: Well, I can rely upon your ability to take care of that.

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page 34 }

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Mr. Ritchie: The next motion is that the charges against the defendant be dismissed because—because members of the Police Department of the City of Richmond took from him, over his objection and after he had requested that counsel be present, his clothing for the purposes of having examinations made thereof, thus depriving defendant of the means of obtaining tests which might constitute evidence of his innocence or, if the foregoing motion is not granted, to rule inadmissible any evidence obtained from tests procured by the Richmond Police Department.

The Court: Deny that motion.

Mr. Ritchie: We take exception. The next is to require the Police Department of the City of Richmond to turn over to the defendant's counsel the said clothing for the purpose of obtaining chemical examination and that the cost thereof be paid by the Commonwealth.

The Court: Well, I think you already reviewed
page 35 } those examinations.

Mr. Ritchie: Yes, sir.

The Court: They were made available to you, so I don't think you have any basis for that motion now.

* * * * *

Mr. Ritchie: And the final motion is that the
page 36 } trial of the defendant be held at a Court outside

of the principal circulation of the Richmond Times Dispatch and the Richmond News Leader because the reports in these newspapers concerning the defendant's arrest prevent his obtaining a fair trial in the circulation area of these newspapers and we—

The Court: The Court will deny that motion.

Mr. Ritchie: We take exception.

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page 90 }

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

DIRECT EXAMINATION

By Mr. Wilkinson:

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page 91 }

* * * * *

Q. All right, upon your arrival what did you do, Sergeant Conner?

A. On my arrival I saw two other officers there in the block practically in front of the store.

Q. Who were they, sir?

A. Sergeant Schwartz, W. J. Ross and also mounted Officer Brinson was there.

Q. All right?

A. Three. And we had gone to investigate noises
page 92 } heard in that building.

Mr. Ritchie: I object—if this is testimony that he has—something that he has been told by someone else, then I think it's hearsay, and I would object to that.

The Court: I think—

Mr. Wilkinson: Well, Your Honor—

The Court: I think it's proper evidence to show why he was

there, without disclosing any act or anything of that character, but why he happened to be there,

Mr. Ritchie: All right, sir.

The Court: only for that purpose, however.

Q. Why were you there, sir, and what did you do?

A. We received a call on the police radio at about one minute past ten to investigate noises coming from the building in that block.

Q. Is that 10 A.M. or 10 P.M.?

A. Ten A.M.

Q. All right, sir. How long did it take you to get there?

A. It took me approximately two minutes, I

page 93 } was at Tenth and Marshall at the time.

Q. All right, sir, and what did you do when you arrived?

A. We went and looked into the whiskey store—

Q. Was the whiskey store open at this time?

A. No, sir, the whiskey store was closed at this time.

Q. And you looked into the whiskey store and what, if anything, did you see or happened at that time?

A. Well, when I first looked in it was—of course, it was light on the outside of the store and or rather it was darker on the inside and after my eyes became adjusted, I could see something hanging from the ceiling to the rear of the store and which it at first appeared to be a rope or something the size of a rope and then kept looking in and you could see a person's head and top part of his shoulders stick up from behind something back there, and then I looked again and I could see a pair of legs or feet disappearing into the ceiling from the same spot.

Q. All right, could you identify the person you saw?

A. No, sir, I could not.

page 94 } Q. Approximately how far would you say it was from where you were looking to the back of the store?

A. I would—I would have to guess, between seventy-five and a hundred feet, at least.

Q. All right, sir, after you saw this what did you do?

A. Well, when we saw this we immediately radioed for more help to surround the block, which also included the Fire Department.

Q. And what did you do then?

A. Well, I stayed in front of the house, me and one of the supervis—in front of the building, me and one of the super-

visors there, and when we finally got someone to respond to the ABC Store and open it, I went in with the other policemen and searched that building.

Q. All right, what did you find upon your entrance to the ABC Store?

A. Well, we saw that the—this safe had been tampered with, the dial knocked off and we then saw that it was a rope extending through the ceiling where there was a light panel, I guess the light panel must have been two by three feet, that had been knocked through and the—was hanging down by the electrical cord and the rope coming down through there, and then, of course, there were several tools lying around the safe and—

page 95 } Q. Now, just hold on there a minute, you said there were several tools lying around?

A. Yes, sir.

Q. (pause) I hand you some tools there, sir, could you identify those?

A. (pause) These were similar, I couldn't positively identify these as being the tools.

Q. Well, I hand you a picture, sir, can you identify this picture? (pause)

Mr. Ritchie: Do you know when the picture was taken?

Mr. Wilkinson: That morning.

Mr. Ritchie: You don't know what time?

Q. What time did you all get in the ABC Store?

A. That was taken approximately — I imagine between eleven and twelve o'clock—I imagine about an hour before we actually got in and got everything squared away.

Q. See if you can identify—can you identify the picture, sir?

A. Yes, sir, I can.

Q. Uh huh, what is that, sir?

page 96 } A. That is the safe sitting on a hand cart.

Mr. Wilkinson: Judge, we introduce—move to introduce this as Commonwealth's Exhibit No. 5.

The Court: All right, sir.

Q. Now, wait just a minute—well, let the Judge mark on that and I want to ask you some questions—I want to go over here in front of the Jury—

The Court: All right, Mr. Ritchie, you may have to go up with him if you care.

Q. All right, sir, would you come over in front of the Jury, please. Now, is that what it looked like when you went in that morning—

A. Well, this is—would be, we are placing in front of the store there—I came in through this way. Of course, when I looked in, I looked in over here—

Q. Can you identify what these two things are?

A. That—that is a chisel, or rather two chisels there.

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page 101 }

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Mr. Ritchie: Your Honor, I'm not sure that the record contains an exception to the ruling of the Court admitting the evi—the testimony of Sergeant Conner,

The Court: As to how he came down there—

page 102 } Mr. Ritchie: as to why he came—responded to the noises and so forth.

The Court: Well, let the record show your exceptions

Mr. Ritchie: Yes, sir.

The Court: to that statement—

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page 344 } WILLIAM NEWMAN, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Ritchie:

Q. Will you state your name, sir?

A. William Newman.

Q. And what is your profession, sir?

A. I'm an architect.

Q. Would you tell the Jury briefly your training and education, sir, for this profession?

A. I have a Bachelor of Architecture's Degree from the

William Newman

University of Virginia, which is a five-year course, and I was an apprentice architect for three years with a firm in Richmond, then I took the State Board Examination and became a registered architect in Virginia.

Q. What was the firm you were an apprentice with?

A. Marcellus Wright & Partners.

Q. Now, would you tell us what, if any, professional societies and organizations you are a member of?

A. I'm a member of the American Institute of Architects and the Construction and Specifications Institute.

page 345 } Q. Now, what buildings, sir—just some of the buildings that you have worked on?

A. When I was with Marcellus Wright I worked on the remodeling of the John Marshall Hotel, the Virginia Paper Company Office and Warehouse, a photographic laboratory for the Navy at Patuxant Naval Air Station, and with my own firm I have been—worked on an office and warehouse for Richmond Amusement Sales and residences and several other buildings.

Q. Are there any special features of this office and house for Richmond Amusement Sales?

A. The owner there did want a building which was burglar proof so we had to do, give that some thought when we designed the building.

Q. All right, sir, now, I wonder if—have you examined the building at 1205 and the building at 1209 East Main Street?

A. Yes.

Q. I wonder if you'd tell the Jury when you examined these and the length of your examination, sir?

A. Well, the first time I went there was a week ago last Wednesday, spent about an hour. The next time was last Monday and then again Wednesday and spent about three hours.

page 346 } Q. Now, the Jury has viewed the building at 1205, sir, so I won't ask you about that building. I will go directly to the building at 1209. sir, and ask you if you examined the small door illustrated in this photograph—this is the Commonwealth Exhibit No. 12?

A. Yes, I did.

Q. Could you describe, sir, the door and frame, that small door and frame?

A. May I look at my notes?

Mr. Wilkinson: Yes, sir, we have no objection, Your Honor.

The Court: All right, go ahead.

William Newman

A. The door is made up of a piece of three-quarter inch plywood that has heavy sheet metal covering on it, which is between an eighth and a sixteenth of an inch thick, that's screwed to the plywood, and it's—it's hinged with two hinges, the hinges are welded to the door frame and screwed to the door itself or, rather, bolted through the door and the bolts are welded to the sheet metal on the door. The frame is a metal channel which is a very—rather heavy piece of steel.

Q. (pause and wrattling of paper) I see, now, I wonder if you could identify this?

A. This is one of the hinges that held the door

page 347 } to the frame.

Q. All right, sir. Now, from your inspection of the door, were you able to determine the method that had been followed in opening it?

A. I think I can.

Q. All right, sir, would you describe to the Jury and explain your—the basis for your explanation?

Mr. Wilkinson: At what time are you talking about opening it, sir, excuse me—

A. Pardon me?

Mr. Wilkinson: When are you talking about opening it, the day that he was down there?

Mr. Ritchie: No, sir, I'm talking about the day it was broken open.

Mr. Wilkinson: Broken open?

Mr. Ritchie: Yes, sir.

Mr. Wilkinson: Judge, I object, that would be purely speculation on the part of the witness.

The Court: That's just his judgment and speculation, I don't think that—his answer is proper.

Mr. Ritchie: Well, Your Honor, he can—probably from the physical evidence that he can view and that then

page 348 } he will relate to the Jury the reasons for his explanation as to how the door was opened, I believe that the testimony would be quite apparent that this is not a difficult, at all, thing to do—

Mr. Wilkinson: Well, Judge, if it's so easy—

Mr. Ritchie: from the markings on the door.

Mr. Wilkinson: excuse me, Mr. Ritchie. If it's so easy, Your Honor, you would not need an expert to determine—the Jury can come to their own conclusions.

The Court: I think that's true.

William Newman

Mr. Wilkinson: I don't see where an architect would be an expert on how a door was opened.

The Court: You may put the hinges in evidence and he can describe how they were—from the appearance of the door, if he observed it, how the hinges were—describe how the hinges were attached as I understand it—to the frame.

Mr. Ritchie: Yes, sir.

The Court: And now you want him to testify
page 349 } or he is to explain in his judgment how they
got, the hinges got loose or the door got loose from the hinges.

Mr. Ritchie: Yes, sir, how it was done.

The Court: That's pure guess, I think, and conjecture—

Mr. Ritchie: Well, shouldn't the Jury be the judge—

The Court: Well, the Jury are the judge and will be the jury of it, that's the point I'm making, but you can put the—he described the door, he described the manner in which they are attached to the door, and you can put the hinges in evidence and the Jury can determine whether it was as easily done, as you have indicated, or whether it was difficult to do. I think that's properly a question for the Jury. It don't take an expert, particularly, in the Court's judgment to testify—

Mr. Ritchie: Well, Your Honor, I think it would require some knowledge of tools, such as crowbars and their use. I'm sure the Ladies on the Jury don't have that knowledge; also knowledge of the amount of time, that is the most relevant
thing that we are interested in establishing—
page 350 } The Court: Well, that's a matter that they can
determine from the evidence that's presented to them, they don't need any—I mean his is just entirely—an expert at breaking a door down might be able to do it in a much shorter time than somebody who was not an expert. I don't think it's a proper subject for him to express his opinion on.

Mr. Wilkinson: Judge, we also based our objection on the fact he's not an expert ballistics, he's an architect.

The Court: Well, I feel—

Mr. Ritchie: Now, what has ballistics got to do with this:

Mr. Wilkinson: Well, the hammer marks—

The Court: Well, I'm not—it's no use to have any argument about it, because I'm not—I think it's properly a question under the evidence that you may properly present for the Jury to determine, for whatever purpose you may—you are offering it, whether it can be easily—the doors can be easily done or not, but the—

William Newman

Mr. Ritchie: Well, I—could I speak to the Court out of the presence of the Jury.
The Court: All right, sir.

page 351 } NOTE: At this time, the Jury retired from the Courtroom.

The Court: You want him to stay in the Court—the expert?
Mr. Ritchie: Yes, sir, I do.
The Court: All right, sir.
Mr. Ritchie: Your Honor, first I'd like to, at this point, object to the mention of the term ballistics which certainly to a layman implies weapons—
The Court: Well, I'll tell them.
Mr. Ritchie: and move for a mistrial.
The Court: Well, I'll overrule your motion for a mistrial and I'll tell them that ballistics, so far as the evidence is concerned and on this case, thus far certainly has no place in the trial.
Mr. Ritchie: I'd like to note exception to that, sir.

page 352 } Mr. Wilkinson: Well, Judge, I'd like to add that, the word ballistic means also tool markers and marks of various tools—
The Court: Well, I'm going—
Mr. Wilkinson: now, we haven't said anything about any firearms.
The Court: Well, I'm going to tell them anyway to disregard the question of ballistics. All right, bring them—
Mr. Ritchie: Now, before they come back, Your Honor, may I ask Mr. Newman, then, to describe the marks that he found on the door?
The Court: Yes, you may do that.
Mr. Ritchie: All right.
The Court: Tell the Jury to come back.

NOTE: At this time the Jury returned into the Courtroom.

page 353 } The Court: Do you waive the poll of the Jury, Gentlemen?
Mr. Wilkinson: Yes, sir.
Mr. Ritchie: Yes, sir.
The Court: Gentlemen of the Jury, there was some mention of—in questions back and forth between counsel of ballistics. The ballistics referred to has nothing to do—does not

indicate any firearms, doesn't indicate—wasn't intended to indicate any firearms, so you may, if you received that suggestion you will not consider it, all right.

Q. Now, Mr. Newman, I wonder if you would describe the marks that you found on the door when you examined it, sir?

A. Well, the side which had the sheet metal covering, which would be the outside, the weather side, had nineteen or more marks on it that appeared to have been made by a crowbar because the marks were two to three inches away from the frame, which would indicate something had had a lever action on it.

Q. How was the door secured?

A. Well, of course, the hinges hold it on one side and the other side was held by a steel strap, which was

page 354 } about a quarter of an inch thick and about an inch and a half wide that hooks into a hasp on the door frame.

Q. What was the condition of this strap when you examined the door?

A. Well, it was slightly bent.

Q. By slight would you tell the Jury how much of a bend was in it in—measured in inches—the diameter of the bend?

A. I would say about two inches.

The Court: May I ask you, you want those hinges introduced in evidence?

Mr. Ritchie: Oh, excuse me, yes, sir, I would like to.

The Court: You any objection to it?

Mr. Wilkinson: No, sir.

Q. Before those are introduced, Mr. Newman, could you explain what these markings are at the top and bottom of the hinge, where it's broken?

A. Where the hinge was welded to the door frame.

Q. All right, sir. Now, do I understand—will you tell me how these screws were affixed into that hinge?

A. Well, there are no screws on the door frame because the hinge was welded there. On the door itself

page 355 } there were three bolts. The bolts—the bolt head on the outside which is where you would try to get to it if you wanted to unscrew it was welded. (pause)

The Court: Move along, Mr. Ritchie.

Mr. Ritchie: Yes, sir.

William Newman

Q. Can you identify these objects, Mr. Newman?
A. This is the plaster that we found in 1205.
Q. All right, sir. Now, can you tell us what the composition of that is?
A. I probably couldn't give you the chemical analysis. This is a brown coat of plaster which is the first coat that's applied to the wall or ceiling, which has horsehair in it, which indicates it was put up quite a few years ago, and then there's a white coat surface on it, which looks like it was done recently because it's not very thick.

The Court: Do you want to intro-
Mr. Ritchie: Yes, introduce this as Defendant's—
The Court: Any objection, Mr.—
Mr. Wilkinson: No, sir.
The Court: All right.

Q. Can you identify these now?
page 356 } A. That appears to be the brick that we found at 1205.

Mr. Ritchie: I'd like to introduce that, Your Honor.
The Court: All right.

Q. Now, directing your attention to the first floor of 1205, sir, what, if any, paints are there on that floor?
A. There's a light green paint on the wall.
Q. Now, what other paints are there, if any, throughout the building?
A. And on the frame of the elevator walls and doors there appears to be a green paint and there was—well, another part of the elevator frame there was green paint.
Q. I'd like to go back to the frame and the door that we spoke of earlier and ask you exactly how the door fitted into the frame there. If you would like to make a sketch to illustrate, that would be fine.
A. All right. (pause) Who would you like for me to explain this to?
Q. First, if we can show that to Mr. Wilkinson.

page 357 } Mr. Wilkinson: That's all right, Mr. Ritchie.

Q. All right, sir, well, then, if you will just show that to the Jury and—
A. All right, this would be a section through the wall, in other words, if you cut the door in half and looked down from the top you would see the wall here, which is concrete block

and then there's this heavy steel frame, and then the plywood door here with the metal facing on the outside of it. There's another little steel angle here which runs around three sides of the door so that the door opens back this way and when it shuts it on the other side closes against this angle and then there's a hasp on the other side that locks it in place when the door is shut. This angle is welded all the way around.

Q. Answer Mr. Wilkinson's questions.

Mr. Wilkinson: I really don't have any, Mr. Newman.

Witness stood aside.

page 358 } Mr. Ritchie: That concludes the defense's case, Your Honor.

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Mr. Ritchie: The defense would like to renew the motion to strike the evidence on—the evidence and the law not sufficient.

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

Mr. Ritchie: We would like to take exception.

The Court: Certainly. All right.

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page 360 }

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The Court:

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I have considered, Mr. Ritchie, your instruction that you offer on the question of the time available was not sufficient to have permitted him to commit the offense, I think that is an instruction on a partial view of the evidence, and I think that under instruction of reasonable doubt you may argue that, but I'm not going to give them that instruction, because that's a partial—on a partial view of the evidence. I'll mark that "Z" and refuse it.

page 361 } Mr. Ritchie: All right, sir, we take an exception there.

The Court: All right, sir, certainly. All right, you can bring the Jury in.

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page 363 }

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Mr. Wilkinson:

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page 375 }

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* * * You can see the method and entry of this building, of how they came down the stairs, took the pipe out, got down another floor, knocked the false ceiling out. The gloves, the tools and the radio, was not done by an amateur but was by a professional, and I submit to you that in your punishment you will be fair to the defendant and also fair
page 376 } with the other citizens of this Commonwealth.

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page 404 }

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The Clerk: Ladies and Gentlemen, you have reached a verdict?
page 405 } A Voice: We have.
The Clerk: And the verdict you have reached is unanimous, each and every one of you agree on this verdict?
A Voice: That's true.
The Clerk: The verdict reads as follows: We the Jury find the accused guilty of statutory burglary as charged in the indictment and fix his punishment by confinement in the Penitentiary for ten years.
The Court: Do you wish the Jury polled?
Mr. Ritchie: Yes, Your Honor.
The Court: All right.

NOTE: At this time the Clerk called the names of the Jurors, each named called answering "yes", after which the Jury was dismissed.

page 406 } The Court: All right, sir.

Mr. Ritchie: Your Honor, we would like to move to set aside the verdict as contrary to the law and the evidence.

The Court: I'll overrule your motion.

Mr. Ritchie: We will take exception.

The Court: All right, sir, stand up, sir.

In accordance with the verdict of the Jury the Court now sentences you to serve ten years in the State Penitentiary. All right.

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page 1 } VIRGINIA:

IN THE POLICE COURT
OF THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA
v.
RAYMOND LEROY WILTSHIRE,
BERNARD RIEVES FOSTER (Alias Bernard Rease),
JAMES WESLEY BOWLES

October 20, 1966

BEFORE:

HONORABLE LEMUEL E. DeBERRY, Judge

APPEARANCES:

MR. DAVID C. DORSET
Attorney for the defendants.

MR. JUNIE L. BRADSHAW

MR. JOSEPH A. SPINELLA

MR. JAMES B. WILKINSON
Commonwealth's Attorney

* * * * *

Police Court
10/20/66
page 3 } The Clerk: Raymond Wiltshire. Bernard Foster. James Wesley Bowles.

The Court: Are you going to try all three of these together?

Mr. Wilkinson: Yes, sir.

Mr. Dorset: If your Honor please, before we start on this: I have been appointed by the Court to represent all three of these men. This case involves—these men are charged with breaking in the ABC Store down on Main Street. There has been much publicity. I have been investigating this matter and have talked with these men. And it is my firm conviction that they should have separate counsel at this time.

I feel that it is desirable in this type of case to have the same counsel throughout the preliminary hearing and, if it is certified, in the Hustings Court. And I think due to the amount of work that would be required, and also certain conflicts of interest, that it is imperative to have separate counsel at this time appointed before the preliminary hearing begins. There might be even conflicts of interest in the presentation of evidence at the preliminary hearing.

Mr. Wilkinson: Well, he has talked to these men.

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page 4 } The Court: Certainly. I think your request is reasonable. Were you appointed by Judge Maurice?

Mr. Dorset: I was appointed by Judge Maurice to represent all three of them. Mr. Bradshaw can state his position.

Mr. Bradshaw: Your Honor, the family of Wiltshire and I are still discussing the possibility of me representing Raymond Wiltshire. And I would proceed this morning with the preliminary hearing with the Court's permission possibly to withdraw at a later date if that became the desire of the family.

Mr. Wilkinson: Judge, that is immaterial to the Commonwealth so long as he has counsel at the preliminary hearing.

The Court: So long as he has counsel, that is the only thing.

Mr. Dorset, did you give any thought to which one of these gentlemen you would represent?

Mr. Dorset: No, I haven't, your Honor. Any one that the Court requested me to represent.

The Court: I would think, then, Mr. Wilkinson, that it would be proper possibly—

Mr. Wilkinson: You are going to represent Mr. Wiltshire?

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Mr. Bradshaw: Yes.

page 5 } Mr. Wilkinson: We can assign him Mr. Wiltshire. What are the other two names?

The Court: Bowles and Foster, alias Rease.

Mr. Wilkinson: We might as well get it straight now, Judge.

The Court: Yes, I think we ought to get it straight which ones you are going to represent, Mr. Dorset.

Mr. Dorset: It doesn't make any difference to me, Judge. I will take Bowles, and you can appoint somebody else for Foster.

The Court: It is immaterial to me.

Mr. Wilkinson: They signed affidavits of being indigent?

Mr. Dorset: All three have, yes.

Mr. Wilkinson: We appoint Mr. Spinella.

The Court: Mr. Spinella, the Court appoints you to represent Bernard Rieves Foster.

Mr. Dorset will represent Mr. Bowles. Mr. Bradshaw will represent Mr. Wiltshire.

Now, that brings us back to Mr. Spinella. Obviously you wouldn't be prepared to go forward this morning.

Mr. Spinella: No, sir.

Police Court 10/20/66 page 6 } Mr. Wilkinson: Well, we will take two of them up, Judge. Maybe they can have a short recess and go over it. Of course, if this were a trial of the merits, it would be different. But it is a preliminary hearing.

Mr. Spinella: If your Honor please, I don't want to run the risk of being called incompetent by the Supreme Court.

The Court: We are certainly not going to force you to go forward this morning.

Mr. Spinella: Going over it with him a few minutes before the trial—I don't want to do it.

Mr. Wilkinson: We will pass it by for a few minutes and see if he can. If he can't, we will take the other two up. We want to be fair, your Honor. But we just can't keep on passing cases by on this calendar.

Mr. Dorset: This is the first time it has been set. The first preliminary hearing was the day after they were arrested.

The Court: It is certainly up to you what you want to do, Mr. Spinella. If you want to talk to him and go forward, or if you want a continuance—

Mr. Spinella: I haven't even met the man.

The Court: Do you want to proceed with two of them, Mr. Wilkinson?

Police Court 10/20/66 Mr. Wilkinson: Yes, sir, we will proceed with two of them.

page 7 } The Court: What day do you want it on?

NOTE: Discussion off the record with respect to the continuance.

The Court: Are we ready to proceed on the other two?

Mr. Spinella: If it would be all right with the Court, I would like for Mr. Foster to stay through the preliminary hearing of the other two if the Court has no objection.

Mr. Wilkinson: I have no objection.

The Court: The Court has no objection to it.

Mr. Bradshaw: I have another preliminary motion I would like to make.

The Court: All right, sir.

Mr. Bradshaw: These defendants have very little money. And I would like to make a motion to the Court that the Court furnish a court reporter at State expense. I think their rights would be waived if no record was made, possibly at a later time.

The Court: What is your position on that?

Mr. Wilkinson: Judge, I don't think you have any authority with the State's money.

Police Court 10/20/66 page 8 } The Court: I don't see that I do.

Mr. Wilkinson: If you make it in this case, your Honor, you will have to make it in all of them, until the Legislature acts and says there is a record to be made in the preliminary hearing.

Mr. Bradshaw: Well, the record of a preliminary hearing, I think, is very much a necessary part of any trial. And the law requires them to be recorded on felonies in the courts of record. Since this case will possibly be removed to the court of record, I would like to request that you furnish us a record at this point of the proceedings.

Mr. Wilkinson: Judge, we also have this point: Mr. Bradshaw is making a motion. His man is not indigent. The only position I have, your Honor, is the precedent it would set. If we do it in this case, then I think we have to do it in every other case. I know of no legislative enactment that would give the court the authority to spend that money.

Mr. Bradshaw: My only counterargument to that, your Honor, is that a record is furnished for not only the indigent but the accused with the highest paid counsel in the upper courts.

The Court: I just have no authority, Mr. Bradshaw. I have to overrule your motion.

Police Court 10/20/66 Mr. Dorset: Judge, I would like to join in that motion for the reasons that Mr. Bradshaw

page 9 } has set forth. And because of the peculiar facts of this case about which there has been a considerable amount of publicity, the defendants are at a distinct disadvantage in the preparation of the case. The police have already had the opportunity of investigating, hiring experts, and so forth. The defendants, being in jail and with a very high bond, have been unable to do these things, to have a real chance to defend themselves.

Accordingly, I think it is only fair that the defendants be provided with a copy of this transcript at this time so that they will be able to defend themselves in the proper way.

Mr. Wilkinson: Judge, my reply as to the court reporter is the same.

I understand from Mr. Spinella that he would like to pass this by to talk to his man before we go into it. So, we can pass it by for a minute after you rule on these other preliminary motions. Perhaps we might be able to dispose of it this morning in this court. I don't know. But he has asked to pass it by.

The Court: I am going to have to overrule your motion, gentlemen. I sympathize with you; but I have

Police Court 10/20/66 no authority to do that.

Mr. Dorset: I would like the record to show

page 10 } that we object and except to that ruling.

Mr. Bradshaw: We also except.

The Court: You want all three of them to go by?

Mr. Wilkinson: Yes.

NOTE: At this point the Court proceeded to hearing other cases while counsel conferred with the defendants.

The Court: Let's proceed with the case.

Mr. Bradshaw: Judge, what counsel for the three defendants have decided to do in this case is this: Judge Maurice originally appointed Mr. Dorset counsel for all three. So, at this point Mr. Spinella and I are withdrawing, and Mr. Dorset will be counsel for the preliminary hearing. And then if a conflict arises later or independent counsel is hired by the families later, they will come back into the case at a later stage.

Mr. Spinella: I would like to add on my behalf the Court asked me as Court-appointed counsel to enter into the case; but at the request of the client, it is his desire that Mr. Dorset continue with the preliminary hearing and that

Police Court 10/20/66 the hearing be held this morning. Consequently, I would ask to be relieved of the duty

page 11 } of representing Mr. Foster and permit Mr.

Dorset to continue with the preliminary hearing. If it later arises that there is a conflict, he will renew his motion.

The Court: That is all right with me. Is that all right with you, Mr. Dorset?

Mr. Dorset: Judge, let the record show that in the presence of the defendants that it is my understanding that they do want me to represent them at the preliminary hearing and will reserve the right at any time in the future if it is necessary to have separate attorneys appointed; but that I am agreeable on the basis that the clients want me to represent them. All three of them want me to represent them. So, I will go ahead.

The Court: You are prepared to go forward this morning with all three cases?

Mr. Dorset: Yes, sir.

The Court: All right. Fine.

Arraignment of LeRoy Wiltshire: You are charged that on the 9th day of October, 1966, you did unlawfully and feloniously break and enter in the daytime in the ABC Store situated at 1209 East Main Street with intent to commit larceny.

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Do you plead guilty or not guilty?

Mr. Wiltshire: Not guilty, your Honor.

The Court: Mr. Dorset is representing you?

Mr. Wiltshire: Yes, sir.

The Court: You are satisfied and prepared to go forward this morning?

Mr. Wiltshire: Very well, yes, sir.

The Court: All right, sir.

Bernard Rieves Foster, alias Bernard Rease. Is that you?

Mr. Rease: Yes, sir.

The Court: You are charged that on the 9th day of October, 1966 you did unlawfully and feloniously break and enter in the daytime a certain storehouse known as ABC Whisky Store situated at 1209 East Main Street, Richmond, Virginia, with the intent to commit larceny therefrom.

Are you guilty or not guilty?

Mr. Foster: Not guilty.

The Court: Mr. Dorset is representing you?

Mr. Foster: Yes, sir.

The Court: You are prepared and satisfied to go forward this morning?

Mr. Foster: Yes, sir.

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The Court: James Wesley Bowles. Is that you?

Mr. Bowles: Yes, sir.

page 13 } The Court: You are charged that on the 9th day of October, 1966 you did unlawfully and feloniously break and enter in the daytime a certain storehouse known as ABC Whisky Store situated at 1209 East Main Street, Richmond, Virginia, with the intent to commit larceny therefrom. Are you guilty or not guilty?

Mr. Bowles: Not guilty.

The Court: Mr. Dorset is representing you?

Mr. Bowles: Yes, sir.

The Court: You are satisfied to go forward this morning?

Mr. Bowles: Yes, sir.

The Court: Can all three of these matters be heard this morning?

Mr. Dorset: Yes, sir.

Judge, I have subpoenaed a number of witnesses in this case. I would like to be sure they are all here before we begin the testimony. I can read them.

Fred M. Block.

NOTE: The witness answered present.

E. R. Marrin.

NOTE: The witness answered present.

Police Court R. E. Kahn.

10/20/66 NOTE: The witness answered present.

page 14 } S. E. Seagrave.

NOTE: The witness answered present.

R. A. White.

NOTE: Mr. Dorset was informed the witness was on his way.

J. A. Brooks.

NOTE: The witness answered present.

H. A. Connor.

NOTE: The witness answered present.

P. E. Hastings.

NOTE: The witness answered present.

L. B. Adams.

NOTE: The witness answered present.

Lieutenant Clark.

Mr. Wilkinson: Lieutenant Clark is not here.
Voice: He is out of the city.
Mr. Dorset: I subpoenaed him.
Voice: He is out of the city.
Mr. Dorset: These subpoenaes were requested on October 14, 1966, Judge.

A. S. Holloway.

NOTE: The witness answered present.

Police Court H. W. Duke.

10/20/66 NOTE: The witness answered present.

page 15 } Mr. Dorset: Clark is the only one not here.
Mr. Wilkinson: Clark is the only one.

Mr. Dorset: Judge, I don't want to postpone this; but I certainly think I am entitled to have Mr. Clark here.

The Court: You subpoenaed him. I think you are entitled to have him here.

Mr. Wilkinson: Your Honor, let's get this case back in the proper perspective. This is only the preliminary hearing. The only evidence the Court is particularly involved with here is whether the Commonwealth has probable cause to certify it to the Grand Jury. No matter what witnesses would say anything, it is not your prerogative nor your duty in this stage of the proceeding to decide the truth or falsity of the question. It is only a preliminary hearing where the Commonwealth has to show probable cause to certify the case.

And I think, your Honor, that we have the witnesses here that would go to that. It is not a fishing expedition for the defendant, but only whether the Commonwealth has probable cause.

Mr. Dorset: Your Honor, Detective Clark,
Police Court or Policeman Clark, has been subpoenaed on

10/20/66 page 16 } behalf of the defendants. The defendants are entitled to have all of their witnesses here at the preliminary hearing.

Mr. Wilkinson: What would be his testimony? What is his purpose? It would probably be cumulative.

The Court: That may be, Mr. Wilkinson. I realize the problem you have got. But it bothers me tremendously if he has got the witness subpoenaed and he is not here. I mean I realize it is not a fishing expedition; but I can't sit up here and say what Mr. Dorset has and for what reason. I don't know.

Mr. Wilkinson: Judge, I would readily agree if this was a trial on the merits. This is purely a case of whether the Commonwealth has probable cause. In this hearing, you don't decide the truth or falsity of the witnesses. I think he has subpoenaed seven or eight police officers.

The Court: Obviously he has. But I mean I have no—I agree with everything you say about it being a hearing on probable cause. But I certainly think that they are entitled to their day here. And he has subpoenaed the witness.

Mr. Wilkinson: Well, that way, Judge, the Commonwealth never could get beyond a probable cause hearing. The defendants could have subpoenaed Joe Doakes from Timbuktu and said, "Well, I don't have the witness here."

Police Court 10/20/66 page 17 } Mr. Dorset: But this is a reasonable subpoena. It is a subpoena to a policeman. It was served, I imagine, right here in the same building. I think they certainly must show reasonable grounds why he is not here.

Mr. Wilkinson: Lieutenant Clark could certainly have no knowledge that these other officers don't have.

Mr. Dorset: That we don't know. I think we are entitled to find out.

Mr. Wilkinson: I don't think that you are entitled, Mr. Dorset, to go on a fishing expedition in this hearing.

Mr. Dorset: Mr. Wilkinson, there is no evidence that I am going on a fishing expedition in this hearing. That is an unwarranted assumption on your part.

The Court: Does anybody know why Lieutenant Clark isn't here.

Voice: Judge, I don't know whether he even received the summons as we did. I have been off. And he is working midnight. And it is just hearsay that he is out of town today. I was told this morning that he is out of town. I believe it was mentioned Winchester. I am not too sure.

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Mr. Wilkinson: What is the purpose of Lieutenant Clark being here?

Mr. Dorset: He is listed on the warrant of arrest as one of the arresting officers. And I think the defendants are entitled to hear testimony from everyone who was at the scene of the arrest.

Mr. Wilkinson: Lieutenant Clark apparently hasn't received it by the letter.

Voice: I didn't get it until 11:15 last night, along with Mr. Connor.

Mr. Wilkinson: It is not necessary for the Commonwealth to call its witnesses at this point. What does he expect to show by Lieutenant Clark? If it is cumulative, then certainly the Court can say, "Well, that is cumulative," even if it were a trial on the merits.

The Court: Somewhere here it shows whether we got service on Lieutenant Clark. Where is that.

Mr. Wilkinson: That is the letter.

NOTE: The letter was handed to the Court.

Mr. Dorset: Let the record show that this was handed to the Clerk of the Court on the 14th of October.

The Court: Apparently we don't have service on him, Mr. Dorset. Are you aware of that?

Mr. Dorset: Yes, sir.

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The Court: I am going to overrule you and go ahead.

Mr. Dorset: I would like to object and except to that ruling, your Honor.

The Court: Go ahead.

Mr. Dorset: I would like to move at this time to separate all the witnesses from the courtroom. I certainly believe I am entitled to that right.

Mr. Wilkinson: Your Honor, he summoned them. The Commonwealth doesn't have any witnesses. Why does he want to exclude his own witnesses?

Mr. Dorset: I don't know what witnesses the Commonwealth has, but I want to exclude all witnesses.

The Court: All right. Let's exclude the witnesses.

Mr. Wilkinson: To be perfectly frank and honest, we can't exclude all of these witnesses. Some of them have got to stay around in the courtroom.

Mr. Dorset: There is no reason for that that I can accept, Judge.

Mr. Wilkinson: I can't go into it right now. And I don't intend to. But we can't take them all out of here. We have to keep Mr. Hastings in here.

NOTE: At this point the witnesses were excluded from the courtroom.

Mr. Dorset: Judge, we have an absolute right to exclude witnesses.

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Mr. Wilkinson: Well, we have excluded everybody.

The Court: Are all the witnesses now excluded except for your first witness?

Mr. Wilkinson: I think so.

The Court: You are keeping Mr. Hastings in on the case as a Commonwealth representative?

Mr. Wilkinson: Yes, sir.

Mr. Dorset: Before we go ahead, my clients desire to make a number of motions. Motions 1 and 3 have already been dealt with. My clients request that these be filed with the papers in this matter.

Now, I would like to read each one of them. We will skip number 1, because it deals with separate attorneys. And that we have already discussed.

Number 2: That both the preliminary hearing and the trial, if any, of the defendants be held at courts outside of the circulation of the Richmond Times-Dispatch and Richmond News-Leader on the grounds that the reports in such newspapers concerning the defendants' arrests have been such that they cannot obtain a fair trial in the City of Richmond.

Judge, I have these newspaper clippings here if your Honor is not acquainted with them. The newspaper Richmond Times-Dispatch of Monday October 10, 1966 is the most complete coverage of the defendants' arrests. And the article, I think, speaks for itself.

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The Court: You have seen this, Mr. Wilkinson?

Mr. Wilkinson: Yes, sir, I have seen it.

The Court: You want to file this?

Mr. Dorset: There is no reason to file it. I would just like to show in the record that it was presented to the Court.

And I have the afternoon paper of the same day. There were articles in that paper. The point is that extensive publicity has been given this case. The newspapers have published pictures showing one of the defendants being taken down the ladder after he was arrested, and showing the search of the two defendants. The names of the defendants have been set forth. And various other statements by the police have been made in the newspapers, which have been circulated and read by people in the City of Richmond and the sur-

rounding areas. And it is the position of the defendants that they cannot obtain a fair trial in the Hustings Court. And for that reason, I think both the preliminary hearing and the trial should be shifted to other courts.

The Court: The only part I could rule on is as to the preliminary hearing. And I will overrule your motion as to that.

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Mr. Dorset: I would like to object and except to that ruling, your Honor.

Going down to Number 4: The charges against the defendants be *dismised* because members of the Police Department of the City of Richmond took from each of them over their objection after they had requested that counsel be present their clothing for the purpose of having examinations made thereof, thus depriving the defendants of obtaining tests which might constitute evidence of their innocence. Or if the foregoing motion is not granted, to rule as inadmissible any evidence obtained from tests procured by the said Richmond Police Department.

Judge, the evidence will be that the clothing of each one of the defendants was taken after they had requested counsel. And one of the defendants requested that the clothing be turned over to an attorney or to some person who is independent who could see that an independent examination would be made. The police forcibly took this clothing. And I don't know what they have done with it since then.

It is the defendant's position this is a denial of their constitutional rights, in that it has taken from them certain evidence which they could have adduced on their behalf to prove their innocence and has irreparably damaged their case for that reason.

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The Court: Mr. Dorset, of course, that would, I think, be a matter of the evidence as such. I think I am right on that. That would appear to be a matter of the evidence that comes out in the preliminary hearing. I will have to overrule that at this time.

Mr. Dorset: I object and except to that ruling of the Court.

Mr. Dorset: The next motion is to require the Police Department of the City of Richmond to turn over to Defendants' counsel the said clothing for the purpose of obtaining a chemical examination and that the costs thereof be paid by the Commonwealth.

Certainly if they are going to be able to use this clothing for examinations and tests, the Defendants should have the same right. And since they have filed an affidavit of indigency, they certainly should have the Commonwealth pay

for this. This is an advantage that the police have over the defendants. And I think that in the question of due process, the defendants deserve to have this right to have their clothing back and to have a right to make an examination of it.

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Mr. Wilkinson: Judge, that is evidence in this case. I don't think that the Court, unless you suppress the evidence, has the right to give back evidence in the Commonwealth's case—until the Court suppresses the evidence as such.

The Court: I will overrule the motion.

Mr. Dorset: I object and except to that ruling.

The next motion is that the Court permit the defendants' counsel to employ a professional engineer and photographer, the cost thereof to be paid by the Commonwealth, to examine the premises at 1205 East Main Street, Richmond, Virginia at which the defendants were arrested and the premises of the ABC Whisky Store at 1209 East Main Street, Richmond, Virginia which they are charged with breaking and entering so as to obtain evidence that will not be available in the future due to renovation now occurring at the said 1205 East Main Street.

Judge, I am particularly strong on this, because 1205 East Main Street is being renovated at this time. I imagine your Honor goes by there. But the evidence of the renovation is right here. I have watched this renovation carefully. It is proceeding at a rather rapid rate. And before long, it will be completed. And the nature of the building will be entirely different from what it is now.

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If this is postponed, any expert engineer that the defendants employ will not have the opportunity to examine the same building in the same condition that it was in on the day of their arrest. And I think it is imperative that they have this right to an expert engineer and photographer so that they can obtain evidence on their behalf.

I might add in this regard that the police have had a great advantage in examining these premises. And there will be a considerable amount of evidence concerning the location of these premises and the doors and windows and so forth. I think it is only a matter of fundamental fairness that is required by due process that the defendants be given this right.

Mr. Wilkinson: Judge, I think that is a matter for counsel. I think counsel was appointed the next day for them—the first day they came up in court. I know in Hustings Court, the Judge over there has certain rights to expend money on behalf of the defendant. But I don't know of any over here.

Perhaps if he made the motion in Hustings Court, they would allow it. It has been a practice that they make a motion prior to expending the money.

Mr. Dorset: Judge, the case is not in the Hustings Court yet. And the renovation is proceeding. In due time, any examination by a professional engineer and photographer is going to be completely worthless.

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The Court: I know of no authority that we have for it. Do you know of any authority that we have for it?

Mr. Wilkinson: No, sir.

Have you found any authority for it, Mr. Dorset?

Mr. Dorset: No. I think the facts of this particular case would warrant this. I think it will be clear from the evidence and from the newspaper clippings that the defendants were arrested in a building that was two doors down from the ABC Store. Therefore, the location of the building, its exits and entrances and windows and doors, is going to be necessary to the case. Much of that evidence is going to be destroyed unless the defendants have the right to a professional engineer at this time, and a photographer.

Now, I was appointed the day after they were arrested. I have been through this building. But I can't testify. So, whatever I find out from my observation of these buildings and accesses and so forth is not going to help the defendants in any way as far as the evidence is concerned.

The Court: Mr. Dorset, without any authority, I will have to overrule that motion.

Mr. Dorset: I would like to object and except to that ruling.

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The last written motion at this time is to rule as inadmissible any evidence obtained by the Richmond Police Department in placing the defendants in a lineup over their protest and after they had requested counsel.

The Court: That is a matter of evidence. I will overrule that at this time.

Mr. Dorset: I object and except to that ruling.

Now, I want to stress to the Court there are three other motions that the defendants wish me to make. And I will make them on their behalf at this time:

To quash the warrant of arrest as defective because the police have no evidence that the defendants broke and entered into the ABC Store.

The Court: Motion denied.

Mr. Dorset: I object and except to that ruling.

That their bail is excessive, preventing the defendants from being released so they can assist in the preparation of their defense both by investigation and by earning money that will permit them to employ expert witnesses.

The Court: What is your position?

Mr. Wilkinson: This is the first motion I have known of to reduce bail. It was set—if you want to go into that—

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Mr. Dorset: At the preliminary hearing, Judge, Defendant Bowles brought this up in informal fashion before Judge Maurice. Judge Maurice's answer was that it was set by the Hustings Court.

There has been no motion made up to now, because there has been no appropriate time to make it. The bail is set at $10,000, which I represent to the Court is excessive in light of the situation of the defendants. All of them are working men. They should have an opportunity to earn money to help themselves out.

The Court: What is your position with regard to that?

Mr. Wilkinson: Judge, we are perfectly willing to go forward on the bail hearing if he wants to reduce the bond. I mean if it is a motion to reduce the bond, we are willing to go forward on that.

Mr. Dorset: What I want the record to show is that the bond has been excessive, and the defendants object to it at this point, and move that the charge be dismissed against them because it has been unfair to them that the bond has not been lower so that they would have a chance to get out and help themselves and to earn money. And their case has been irreparably damaged because of this. That is the motion.

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Mr. Wilkinson: I don't think, Judge, that is a proper motion. He hasn't shown any prejudice. I imagine the motion is based on Section 8 of the constitution, that they were denied the right to get evidence in their own behalf. The bond was set. Probably in the first preliminary hearing there was some complaint made by Bowles. But Judge Maurice apparently said that the bond was set by the Judge in Hustings Court. There was no application ever made to the Hustings Court. So, bond was set. And they were taken forthwith before the magistrate upon their arrest. And the bond was set. I don't know of any ruling saying it was excessive. If they had gone up and petitioned the Court for reduction, perhaps the Court would have reduced it. Perhaps it might have increased it. I don't see where that comes in.

They have not been denied any right. They weren't held without their right to counsel. The next day counsel was appointed for them.

The Court: I am going to overrule that motion.

Mr. Dorset: I object and except to that ruling.

The last motion is that the police have mistreated the defendants by hostile interrogation and held them *incommunicado,* thus preventing them from communicating with people on the outside and infringing upon their rights by hostile interrogation. A part, but not all, of the hostile interrogation includes the taking of their clothing without their consent and over their protest and after they had requested counsel.

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The Court: I am going to overrule that motion.

Mr. Dorset: I object and except to that ruling.

Those are all the motions.

The Court: All right. Let's proceed.

Mr. Dorset: They are all the motions you want to make at this time?

Mr. Wiltshire: Yes, sir.

Mr. Dorset: Let the record show those are all the motions the defendants want to make at this time.

J. E. GIBBS was called as a witness, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:

Q. State your name and occupation to the Court?

A. J. E. Gibbs. Clerk.

Q. For whom do you clerk?

A. ABC Store No. 104.

Q. Where is that located?

A. 1209 East Main Street.

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Q. Did you work there on October 8, 1966?

A. Saturday?

Q. Yes, sir.

A. Yes, sir.

Q. When you left there—well, is there a safe in that store?

A. Yes, sir.

Q. When you left there, was that safe in good repair and in place and so forth?

A. Yes, sir.

J. E. Gibbs

Q. Were there any holes in the ceiling of the building at that time?

A. No, sir.

Q. I believe on October 9th you were called down to the ABC Store?

A. Yes, sir.

Q. Upon your arrival, what did you find, and what did you see?

A. Well, the ceiling had been broken into. Someone had come through the ceiling. And the dial was knocked off the safe.

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Q. Was anything taken out of the safe, or was it open?

A. It wasn't open.

Q. Did anyone have permission to go in there on Sunday?

A. No, sir.

Q. This is in the City of Richmond?

A. Yes, sir.

Mr. Wilkinson: Answer Mr. Dorset's questions.

CROSS EXAMINATION

By Mr. Dorset:

Q. What time did you arrive on October 9th?

A. Between 10:30 and 11:00 o'clock.

Q. Who called you?

A. Mr. L. S. George, my supervisor.

Q. What is the approximate distance between the front door of the ABC Store and the safe?

A. I would say approximately thirty to forty feet.

Q. Thirty to forty feet?

A. Yes, sir.

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Q. Can you see the safe from the front door?

A. No, sir.

Q. Now, is the safe in between the front door and the hole in the ceiling as you look back?

A. It is probably about fifty feet from where the hole was in the ceiling.

Q. As I understand it, it is fifty feet from the safe to the hole in the ceiling; is that right?

A. Approximately, yes, sir.

Q. As you are facing the store, which side is the hole in the ceiling on, the right side or the left side?

A. The right.
Q. On the right side?
A. Yes, sir.
Q. Is it near the back of the store?
A. Yes, sir, it is near the back.
Q. What type of lighting system do you have in the ABC Store?
A. Something similar to what we have here.
Q. Fluorescent lights?
A. Yes, sir.
Q. Were any of these fluorescent lights left on Saturday when you left the premises?
A. Yes, sir. Three, if I am not mistaken.

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Q. Three?
A. Yes, sir.
Q. Which lights were they from the standpoint of location? Say that you are looking into the ABC Store. Identify which lights were on—right left, front, or back?
A. They are in the middle. There are three rows of lights. The one near the front of the store was left on. One about thirty-five feet from the front near the top—over top of the safe. Then I believe the one near the back was left on.
Q. The one in the back, how close is that to the hole in the ceiling?
A. If I am not mistaken, we had two left on—one near the front and one over the safe. I don't think there was one left on in the back.
Q. There was no light in the back?
A. No, sir.
Q. So, there were just two lights?
A. Yes, sir. But we do have a light we leave on at the front on the outside.
Q. When you arrived at the scene, was there anything hanging down from the hole in the ceiling?
A. Yes, sir. One of these fluorescent lights was hanging down, the whole unit itself.

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Q. Was there a chain or rope or anything hanging down from the hole in the ceiling?
A. There was a rope.
Q. Did that rope belong there?
A. No, sir.
Q. Was it part of the inventory of the store, so to speak?
A. No, sir.
Q. It had been brought in evidently by somebody else; is that correct?
A. Yes, sir.

Q. How big a hole in the ceiling was it?
A. I would say approximately five by eight, approximately.
Q. Five feet by eight feet?
A. Yes, sir.
Q. Have you been employed at the store for some time?
A. I have been at this store since June.
Q. If you were standing at the front door looking back with only the two lights that you have on, would the area where the hole in the ceiling is be visible to you?
A. Yes, sir.
Q. It would be?
A. Yes, sir.

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Q. Did the ABC Board take an inventory of the store after you came down there?
A. Yes, sir.
Q. When was the inventory taken?
A. Some time after—some time around 12:00 or 1:00 o'clock. We left there about 4:30.
Q. On Sunday?
A. Yes, sir.
Q. The Sunday that this occurred?
A. Yes, sir.
Q. What did that inventory disclose as far as missing or damaged goods?
A. One broken bottle of Gordon's Gin, and one missing. Retail value of $3.55.
Q. Was the broken bottle in a case or outside of a case?
A. The broken bottle was in a case, I believe, yes, sir.
Q. In a case?
A. Yes, sir.
Q. Where was that case located?
A. It was near the back. It was under the hole that was made in the ceiling.

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Q. Were there any dents in the case that the broken bottle was in?
A. No, sir, I don't believe so.
Q. Is there any way you can tell from your observation how this bottle was broken?
A. I believe the broken bottle was laying on the floor.
Q. The broken bottle was laying on the floor?
A. Yes, sir.
Q. Did you say a bottle was missing?
A. Yes, sir.
Q. What type of bottle?
A. Fifth. Gordon's Gin.

Q. Has that bottle ever been found?
A. No, sir. Not to my knowledge.
Q. Now, tell the Court what doors there are to the ABC Store? I am talking about the building itself that the ABC Store is in.
A. There are two swinging doors in the front and one at the back coming through the basement.
Q. Is that on the first floor or below the first floor?
A. That is below the first floor.
Q. Was there any damage done to either of these doors?
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A. Not to my knowledge.
Q. Did you look at them?
A. I didn't examine them.
Q. You didn't examine them?
A. No, sir.
Q. Are you familiar with the second and third floors of the building?
A. No, sir---

Mr. Dorse ave no further questions.
The Court: All right.
Mr. Wilkinson: Thank you, Mr. Gibbs.

The witness stood aside

Mr. Wilkinson: Mr. Hastings.

P. E. HASTINGS was called as a witness, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Wilkinson:
Q. State your name and occupation to the Court.
A. P. E. Hastings, Detective Bureau, Richmond, Virginia.
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Q. Were you on duty on October 9, 1966?
A. Yes, sir, I was.
Q. Did you respond to the neighborhood of 1209 East Main Street, Richmond, Virginia?
A. Yes, sir.
Q. What is located there, sir?
A. The Virginia ABC Store.

P. E. Hastings

Q. All right, sir. Upon your arrival, what did you observe?

A. When I arrived on the scene, the Fire Department and numerous uniformed units and plainclothes units were already on the scene. Ladders were extended up from the sidewalk to some of the second story windows. The hook and ladder was extended from the fire truck up to the roof.

Detective Wright and I responded there together. Detective Wright stayed on the ground. I went up a ladder onto the second floor. I made my way up to the roof. After getting on the roof, Detective Holloway and Detective Duke were there. We discovered a small what I would call a trouble door located on the top floor there of the ABC Store.

Q. How many floors are there in that building?

A. Four.

Q. You were on the roof?

Police Court 10/20/66 page 40 } A. Yes, sir. Which had been pried open and entry had been gained into the ABC Store which was 1209 East Main Street. You could walk the entire block on the roofs. I went to 1205 East Main; and on top of the roof, there is a large top for the elevator shaft, which is enclosed with tin. This tin had been pried loose.

I called for a ladder. We opened up a skylight there on the roof of 1205 and went down into this building at 1205 East Main Street.

Q. Now, 1205, is that the one they are remodeling?

A. Yes, sir. That is the one that is being remodeled on the first floor.

Q. All right.

A. Sergeant Brooks and myself and Detective Duke and several other officers went down the ladder, as I say. And we began searching 1205, which all of the upper floors are vacant. When we got to the third floor, Sergeant Brooks stated, "Don't take any chances. Use caution with these men."

Upon saying that, I heard a voice come from the second floor stating, "I heard what you said. Don't shoot. I am giving up."

Q. Who was that?

Police Court 10/20/66 page 41 } A. Well, then when I proceeded to the second floor, it was Raymond Wiltshire, who was standing on the elevator there, which is an open, old-type freight elevator. He was standing there. When I approached him, he had his back to me with his hands up. Of course, like I stated before,

he said, "I heard what you said. Don't shoot. I am giving up."

My first words to him were—I asked him, "How many more are with you?" He stated, "Two." I asked him where they were. He said, "They have gone down through the hole to give themselves up." I said, "What hole?" And he still had his back to me. And he nodded his head back to the left.

I asked him were they armed? He said no they were not. And, of course, he was taken into custody there. And there are no steps from the third floor to the second floor on any of these buildings there. And he was taken down the ladder. In the meantime, two other men here, I understand, came out of the front of the building and gave themselves up to the other officers.

Q. Do you know who arrested the other two?

A. No, sir, I do not.

Q. Who were the other two?

A. Bernard Foster and James Wesley Bowles.

Q. Now, did you go into the building where the ABC Store is located?

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A. Yes, sir. After the men had been taken away in the wagon, I went to the ABC Store. And several detectives—Detective Adams, Detective Holloway, Wright, Sergeant Brooks—they were there with the uniformed officers. And the dial on the safe had been knocked off.

Q. Had the safe been moved from its normal place?

A. A cart had been placed—one of these dolly things had been slid under the safe. That was my observation when I arrived there.

Q. How about the roof of the ABC Store, or the ceiling in the store? I guess it wouldn't be the roof?

A. On the second floor of 1209 East Main Street, the ABC Store, a large piece of what appeared to be sewer pipe was located there. And this had been broken loose from the wall. And the boards had been removed from around that. Entry had been gained from the second floor to the main floor of the ABC Store through this hole.

Q. How about the third floor—or from the roof of the ABC Store down to the second floor—how about passage there?

A. Like I say, after this what appeared to be a trouble door with a metal—well, it was made of plywood, and it had metal covering on it—this had been pried off. And then after you get into that, these floors are vacant. And they have

Police Court 10/20/66 page 43 } steps. And you can go down the steps as far as the second floor. And, of course, all the main floors of these buildings have been remodeled and are business places.

Q. This was in the daytime?

A. Yes, sir. This was in the day time, in the morning.

Q. What is kept in an ABC store?

A. Alcoholic beverages.

Q. When we refer to an ABC store, we are talking about an Alcoholic Beverage Control Board store where they sell whisky, gin, wine?

The Court: The Court will take judicial notice of that.

The Witness: Yes, sir.

Q. (By Mr. Wilkinson) All of this happened in the City of Richmond?

A. Yes, sir.

Mr. Wilkinson: Answer Mr. Dorset's questions.

CROSS EXAMINATION

By Mr. Dorset:

Police Court 10/20/66 page 44 } Q. What time did the call arrive at the police station concerning this matter — the original call?

A. I am told that it was approximately 10:00 o'clock.

Q. Who made the call in?

A. I couldn't tell you that. Detective Wright and I were enroute here in Richmond bringing a prisoner back from Hanover Court House when Sergeant Connors, I believe, put an "all units" out that he wanted the block surrounded; that he had reason to believe that someone had gained entry to the ABC Store.

Q. Did Sergeant Connors receive the call?

A. I do not know.

Q. Would you state for the record what members of your Detective force were present at this arrest?

A. Well, now, as well as I remember, it was R. E. Kahn, L. B. Adams, A. S. Holloway, Sergeant Joseph Brooks, E. R. Marrin.

Q. Any others that you recall?

A. Read off who I called.

Q. Was S. E. Seagrave there?

A. Yes, sir. You said detectives. He is a uniformed officer.

Q. How about R. A. Wright, was he there?

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A. Yes, sir.

Q. H. A. Connors?

A. Sergeant Connors, yes, sir.

Q. P. E. Hastings.

A. That is me.

Q. And F. G. Clark, was he there?

A. I don't know if Lieutenant Clark was there at that time or whether he responded later. I don't know. I couldn't answer that.

Q. How about H. W. Duke?

A. Yes, sir, he was there.

Q. Can you think of the names of any other policemen or detectives who were there?

A. Well, there were numerous uniformed officers there. Their names I am not familiar with, due to the turnover that we have. Sergeant Schwartz was there. He is a uniformed officer.

Q. In making your investigation, did you find any automobiles belonging to any of the three defendants in the area?

A. No, not in the area.

Q. Did you look for any automobiles?

A. Yes, sir.

Q. Did any of your detectives—or to the best of your knowledge, did any policemen see any of the three detectives in the ABC Store?

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A. I can't answer that. I don't have that knowledge, whether it would be a positive identification or not.

Q. Did any of the detectives or any police officers see anyone, any person, in the ABC Store in the morning in question?

A. Of course, this would be hearsay. I understand that Sergeant Connors saw something in the ABC Store.

Q. Sergeant Conners?

A. That is correct.

Q. Did you thoroughly examine the premises of the ABC Store and the premises of 1205 East Main Street?

A. Yes, sir. I traveled the route myself the same way they did. Of course, I didn't use the ropes.

Q. Did you examine any other premises besides those two buildings?

A. Personally I did not. Like I stated, there were numerous officers there. I saw some of the uniformed men that came

onto the roofs from other buildings. I know they had been searching extensively due to the condition of their clothing. They were all very filthy.

Q. What was the condition of the door on the roof of the ABC Store?

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A. The door had been pried open.

Q. How big a door and what kind of door is it?

A. Well, I believe I stated before that it was a plywood door covered with metal.

Q. Covered with metal?

A. That is correct.

Q. Was it open when you arrived?

A. Yes, sir. When I arrived there, the door had been forced open and bent open.

Q. The door was bent?

A. Yes, sir.

Q. Was there evidence that some type of tools had been applied to it?

A. Yes, sir.

Q. In your investigation and the investigation of your detectives and your department, have you found any tools on the premises at all—of the ABC Store or 1205 East Main Street, or any of the other buildings?

A. I didn't find the tools personally. You would have to ask another detective. The burglary tools were found at the ABC Store.

Q. Burglary tools were found in the ABC Store?

A. That is correct.

Q. Who found those?

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A. I think they were found by several different officers.

Q. Could you give me the names of at least one of them?

A. Like I say, now, this could be wrong. But I believe Detective L. B. Adams located some of the tools.

Q. Did you find in your investigation—or did any members of your department find any communication devices known as walkie-talkies?

A. Yes, sir. It is my understanding they were found there right beside the safe—a walkie-talkie.

Q. Right beside the safe?

A. Yes, sir.

Q. Has that been taken into police custody?

A. Yes, sir.

Q. Is it available in Court this morning?
A. I would think so, yes, sir. I would think so.
Q. Who has the custody of it?
A. It is my understanding that it was marked as evidence for this Court, Police Court, Part I.
Q. Where is it now? Is it in this building?
A. I imagine the Court would have custody of it.

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The Clerk: Do you want it?
Mr. Dorset: I would like to see it if it is available.
I will go on and come back to that.
The Court: All right.

Q. (By Mr. Dorset) Did you or any detectives or police officers to your knowledge find the whisky that was said to have been missing?
A. No, sir. It was not found to my knowledge.
Q. In the building that the ABC Store is in, are there any entrances, doorways, or openings between the second and third floor walls and the adjacent building to the west?
A. Not to my knowledge. There is a trap door. After you go through your false ceiling onto your main second floor, there is a small trap door there, which is not—in other words, if you were on the second floor, you wouldn't be able to tell that this little trap door was there.
Q. Where does the trap door go to?
A. It goes into the ABC Store.
Q. But if someone were in the ABC Store, and they didn't go out of the front door or the basement door, is the only way to get out through the door at the top of the building?

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A. That is correct.
Q. That is the only way they could get out?
A. To my knowledge, yes.
Q. And are the rooftops level at that point?
A. No. Of course, you have your brickwork up there. They are not level, but you can go from—like I stated previously, you can go the entire block on the roofs without any effort. I think your biggest jump would be approximately two feet. And that wouldn't be across any gap. That would be down from one brickwork to a lower structure.
Q. You say you walked from the ABC Store to the premises at 1205?

A. Yes, sir.

Q. What did you say you found on the top of the roof of 1205? Tell the Court generally what is on the top of the roof at 1205?

A. Well, it is an old elevator—what appeared to be an open freight elevator. As you know, to get to your top floor you would have a shaft on up higher to raise the elevator. This shaft up there is enclosed with tin. And the tin had been pried loose from the inside—up in the shaft, the tin had been pried loose from the inside and out.

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Q. Is there any way that you could tell whether that had been pried loose recently or if it had been that way for some time?

A. It appeared to be recent. How recent I couldn't say.

Q. What evidence do you base that conclusion on that it was recent rather than of some duration?

A. Well, I think that due to the fact that there was what appeared to be scuff marks from a person's knees and the toes of his shoes as he came out of that. I think that the weather would have possibly done away with that.

Q. Where did you find these scuff marks?

A. They were on the tin that encloses the elevator shaft.

Q. Did you take any fingerprints in the ABC Store, from the safe, or any other parts of the ABC Store?

A. The Identification Bureau was called there. And they were dusted for prints to the best of my knowledge. I was back up on the roof most of the time that the men were at the ABC Store.

Q. Who from the investigation bureau took these prints?

A. I believe it was Detective R. D. Hopson.

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Q. Have the results of these fingerprint tests been made available to your department?

A. Yes, they have.

Q. Do you personally know what these fingerprint tests show as far as identifying the prints?

A. I believe it was inconclusive.

Q. It is inconclusive?

A. Yes, sir.

Q. You have had available to you the fingerprints of these three defendants; is that correct?

A. That is correct.

Q. Have you matched these fingerprints with the fingerprints obtained from the safe in the ABC Store?

P. E. Hastings

A. Personally I have not. The I.D. Section, I am told, has.

Q. Did any of the fingerprints that were obtained in the ABC Store correspond with the fingerprints of these three defendants?

A. Whether any fingerprints were lifted or not, I don't know.

Q. What do you mean by "lifted"?

A. Well, that is how you obtain fingerprints.

Q. You don't know whether any fingerprints were lifted?

A. That is correct.

Q. But you say the Investigation Bureau came in there. What did they do when they got in there?

Police Court 10/20/66 page 53 } A. They go in there and attempt to lift latent prints. You would have to talk with him in regards to that. I am not an expert on that.

Q. But he has prepared some sort of report for your department; is that correct?

A. Yes, sir. To the best of my knowledge.

Q. And that report you have said is inconclusive so far as identifying these three men?

A. That is correct.

Q. Now, turning our attention to 1205 East Main Street where these men were arrested, what entrances and exits are there in that building?

A. Well, as far as the rear, now, I don't know about the—I don't even know if there is a door there on that level for 1205.

Q. You are talking about the first floor?

A. That is right. But the whole front of the building is open. It is not enclosed. Like you stated, it is under construction.

Q. On the second and first floors are there any doors?

A. Yes, sir. I believe there are the same types of doors that were located on the ABC Store building.

Police Court 10/20/66 page 54 } Q. These are between floors; is that correct?

A. That is correct.

Q. Are there any doors to adjacent buildings?

A. To my knowledge, no.

Q. If someone were up on the fourth floor and didn't come down, how would they get out of the building? What access routes are open? How would they get out through the roof, I mean?

A. I don't follow you now.

P. E. Hastings

Q. You are up on the fourth floor of 1205 and you want to get out without going down to the first floor to get out. How would you get out through the roof?

A. How would I get out.

Q. How would anybody get out?

A. They would go to the top of the elevator shaft is my opinion.

Q. That would be the only way to get out?

A. No. There is a skylight there on the roof, which can be lifted off and a ladder placed down in it, and go down through there.

Q. Can it be lifted off from the roof itself?

A. That is correct.

Q. When you approached that skylight, was it locked?

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A. No. When I approached this, I just picked it up and flipped it over. And that is how we got into 1205. I didn't want to go the same route, because it was—in other words, I was dirty enough. And I figured I would take the easy route.

Q. Is it physically possible for someone to go down through this other route you are talking about, through this metal shaft, and get down into the building?

A. Yes, sir.

Q. How would they do it?

A. Well, I went back there with Lieutenant Clark and myself. We went down there. And we climbed all the way to the top of this elevator enclosure. It is very possible.

Q. Where were each of the defendants found in the building?

A. Foster and Bowles, I don't know where they were found. Like I stated before, it is my understanding that they gave themselves up on the first floor there where it is under construction. Bernard Wiltshire was on the second floor of 1205 East Main Street. When I got to him, he was standing on the elevator.

Q. Now, did he make any statements to you besides what you have already said?

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A. No, sir.

Q. Did he give any explanation why he was there?

A. No, sir. I didn't ask him.

Q. Did you participate in this case after these men were taken to the police headquarters?

A. What do you mean?

P. E. Hastings

Q. Were you present when their clothes were obtained?
A. No, sir.
Q. Were you present before the magistrate?
A. No, I was not.
Q. Did you have any contact with them at all after they were brought—
A. None whatsoever. After Wiltshire was placed in the wagon, that is the last time that I saw any of the three of them until this morning. Bowles and Foster were already in the wagon.
Q. In the ABC Store, is there a panel door of some sort on the third floor? Or is that the door that we talked about that was torn open?
A. The only door there, like I stated, which would be, oh, I would say approximately twenty-four by twenty- four, was the door that the entry was gained through.

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Q. That is the only door you know of? That is the plywood door covered with metal that we have talked about?
A. That is correct.
Q. Were you present when the defendants were put in a lineup?
A. No, I was not.
Q. Did you participate in examination of the homes of the defendants?
A. No, sir.
Q. What type of opening is there in 1205 between the first floor and the second floor? Describe it as best you can.
A. Well, the opening—I believe I stated before there was a piece of sewer pipe—
Q. This is 1205 we are talking about.
A. I am sorry. 1205? What kind of opening is where?
Q. Between the first floor and the second.
A. Well, the building is under construction. As you go to the rear left, there was a ladder there. And the ductwork for what I presumed to be the heating system which is going to be installed in the building—all of this ductwork is there. You can go up the ladder onto this ductwork. And the floor is out above this where this ductwork was placed on the second floor.

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Q. It is wide open? Anybody can just walk on up there?
A. No, you can't walk up there. You have got to climb up there.
Q. You can climb up to the second floor?

A. Yes, sir, you have to climb.

Q. When you arrived, had any of the detectives or policemen entered 1205 by the front opening?

A. I couldn't say. I don't know.

Mr. Dorset: Those are all the questions I have.

RE-DIRECT EXAMINATION

By Mr. Wilkinson:

Q. Let me straighten out one thing. You arrested Raymond LeRoy Wiltshire on the second floor?

A. That is correct.

Q. The other two men were arrested inside 1205? That would be James Wesley Bowles and Bernard Foster, alias Bernard Rease?

A. Yes, sir.

Q. And they are the three men here?

A. That is correct.

Police Court Mr. Wilkinson: That is all.

10/20/66 The witness stood aside.

page 59 } Mr. Wilkinson: That is our case, Judge.
Mr. Dorset: I would like to call Fred M. Block.

FRED M. BLOCK was called as a witness, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Dorset:

Q. State your name and address?

A. Fred M. Block, 5 Roslyn Hills Drive.

Q. Where is your place of business?

A. 1207 East Main Street.

Q. Is your place of business between the ABC Store and 1205 East Main Street?

A. I would say so, yes, sir.

Q. Were you in the downtown area on the 9th of October, 1966?

A. Yes, sir.

Fred M. Block

Q. You were?
A. Yes, sir.
Q. Were you at your place of business?
A. Yes, sir.

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Q. What time did you arrive at your place of business? What time in the morning did you arrive?
A. Approximately quarter to ten.
Q. Approximately quarter to ten?
A. Yes, sir.
Q. Now, at quarter of ten did you make any observations—well, did you take a look in the liquor store, by any chance?
A. Well, is this relevant to this case at this particular stage?

Mr. Wilkinson: Yes. Just answer Mr. Dorset. Did you or did you not look in the liquor store?
The Witness: No, I did not look in the liquor store.

Q. (By Mr. Dorset) At any time that morning did you look in the liquor store?
A. Yes, sir.
Q. When did you first look in the liquor store? Approximately what time?
A. At about 10:20, 10:15 approximately.
Q. What caused you to look into the liquor store?

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A. What caused me to look in the liquor store?
Q. Yes.
A. The police.
Q. The police had arrived at that time, 10:20?
A. Yes, sir.
Q. While you were in your place of business, did you hear any noises either in the liquor store—

Mr. Wilkinson: I object to that. I don't see that it is relevant what he heard.
Mr. Dorset: I think it is very relevant as to whether he heard any noises in either building.
Mr. Wilkinson: I don't think that is relevant.
The Court: I think it would be relevant, Mr. Wilkinson. I will let him answer it. Answer the question.
The Witness: Yes, sir, I heard noises.

Fred M. Block

Q. (By Mr. Dorset) In which building did you hear noises?
A. My building.
Q. Your building?
A. Yes, sir.
Q. Did you hear any noises in the ABC Store?
A. Coming from the ABC Store.
Q. You heard noises coming from the ABC Store?
A. Yes, sir, that is right.
Q. While you were in your building?
A. That is right.
Q. What did these noises sound like?
A. They were hammering noises.
Q. Hammering noises?
A. Yes, sir.
Q. Approximately what time did you first hear these noises?
A. Shortly before 10:00.
Q. Shortly before 10:00?
A. Yes, sir.
Q. And when you heard these noises, what did you do?
A. What did I do?
Q. Yes, sir.
A. I went up the street, and I told somebody to call the police.
Q. What time were the police called?
A. About that same time. Shortly before 10:00.
Q. Just for the record, what time were the police called?

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A. I couldn't say to the minute. It was shortly before 10:00 o'clock.
Q. Shortly before 10:00 o'clock?
A. Yes, sir. Five minutes before ten, or something like that.
Q. Between the time you heard the noises and the time the police arrived, did you look into the liquor store at all?
A. No, sir.

Mr. Dorset: No further questions.
Mr. Wilkinson: That is all.

The witness stood aside

Mr. Dorset: I would like to call Detective E. R. Marrin.
Mr. Wilkinson: Your Honor, since this is his witness and this is his part of his case, what purpose does he call Officer

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Marrin for? Does he call him as a witness for him or what? I think we have shown probable cause here.

Mr. Dorset: The evidence has been that he was a witness to this arrest. Since he was a witness, I think we are entitled to question him on whatever evidence he has got.

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Mr. Wilkinson: I think we are on a point of probable cause, your Honor.

Mr. Dorset: I believe the evidence will be that Officer Marrin participated in the case after these men were brought to the police headquarters. And his evidence will be relevant to some of the motions that I have made that your Honor overruled that would depend on the evidence.

Mr. Wilkinson: Your Honor, I submit that would not be relevant at this hearing. If he has to make other motions to suppress evidence and so forth, that would be a matter in the Hustings Court, not in this Court.

The Court: Mr. Dorset, I am inclined to agree with the Commonwealth's Attorney. We are here on a preliminary hearing on probable cause. That is all we are on.

Mr. Wilkinson: He can make a motion there.

The Court: You certainly have an entree to this through Hustings Court. And I think we are here strictly on probable cause, and this is a preliminary hearing. I think the Commonwealth has certainly shown probable cause.

Mr. Dorset: Your Honor, certainly the defendants have the right to present evidence to contradict what the Commonwealth has put on and to bring out other features of their case at this time. I would object and except to any ruling that the defendants are not entitled to have the men subpoenaed and testify.

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Mr. Wilkinson: I take the same position, Judge. This is a probable cause. If he came in and had alibi witness after alibi witness that these men weren't there, that they weren't the men arrested—well, we are going purely on the Commonwealth's evidence as to whether there is probable cause.

The Court: That is right.

Mr. Wilkinson: This is not a fishing expedition.

Mr. Dorset: Judge, I don't believe there is any evidence it is a fishing expedition. The defendants are certainly entitled to put on evidence. There are phases of the case that have not been brought out in the evidence up to now; because the officer who testified, the detective who testified, said that he did not participate once these men were put in the paddy wagon. The defendants are entitled to have this evidence brought forth at this time on their behalf.

Mr. Wilkinson: Judge, I think certainly he might have many motions he will make on the trial of the merits of the case. I have no question about that. He has a right to make every motion on the trial of the case at the trial on its merits. He can call witness after witness or anything like that. I am only talking about the probable cause hearing.

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The Court: Yes. That is all we are here for. That is it. We are here strictly for probable cause.

Mr. Wilkinson: Once the Court determines there is probable cause here—

The Court: I am satisfied that there is probable cause. And it is my understanding that that is all we are here for.

Mr. Dorset: All right, Judge. There has been evidence that Officer Connors saw someone in the store. I certainly think it is relevant to probable cause for the evidence to be brought out as to what he saw at this time. If he saw somebody that didn't look like these defendants, I think it is very pertinent to this case. I think the defendants are entitled to have his evidence put on at this time. I would say the same about Officer Adams who the evidence has shown found the burglary tools. I think the defendants are entitled to put on evidence as to what tools were found and where they were found.

The Court: Mr. Dorset, I am going to overrule you. I feel that my only obligation here is to determine whether or not there is probable cause. I am satisfied that there is probable cause. And I am going to certify the cases to the Hustings Court.

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Mr. Dorset: I would like the record to show that I object and except to the Court's ruling that the defendants are not entitled to call as witnesses at this preliminary hearing the various witnesses which the record will show the defendants have subpoenaed and whose name have already been brought into the record.

I would like these motions to be part of the papers, your Honor.

Mr. Wilkinson: May I make a suggestion, Mr. Dorset? That instead of filing that with these papers, to file them all in the Hustings Court so they would be renewed there, since this is probable cause. Then you can get a hearing in the Court over there.

Mr. Dorset: I speak on behalf of my clients here. They are very much interested in having these motions a part of the papers here.

Mr. Wilkinson: All right.

The Court: We will file them with the papers here.

The Court: Let the record also show that Mr. Benton, the court reporter, has taken all of this evidence down.

Police Court
10/20/66 The Court: All right, sir.

* * * * * *

page 1 } VIRGINIA:

IN THE HUSTINGS COURT
OF THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA
V.
RAYMOND LEROY WILTSHIRE

Transcript of the evidence and other incidents of the above when heard on November 21, 1966, before the Honorable W. Moscoe Huntley, Judge.

APPEARANCES:

DAVID C. DORSET, ESQ.,
WILLIAM A. PUSEY, ESQ., &
JOHN RITCHIE, JR., ESQ.
Comm. v. Attorneys for the Defendant

Wiltshire JAMES B. WILKINSON, ESQ.
11/21/66 Attorney for the Commonwealth

* * * * *

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* * * * *

JOSEPH A. BROOKS, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Dorset:

Q. Will you state your name and occupation for the record, please?

Joseph A. Brooks

A. Joseph A. Brooks, Detective Sergeant, Richmond Bureau of Police.

Q. Sergeant Brooks, were you on duty on October the 9th, 1966?

A. Yes, sir, I was.

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Q. Did you participate in the arrest of the defendants, Raymond Leroy Wiltshire, Bernard Foster and James W. Bowles?

A. I personally participated in the arrest of Mr. Wiltshire, and the other two were arrested a floor below us.

Q. Were you in the wagon, the paddywagon, I believe the term is used, to take these men to the lockup or wherever they were taken?

A. No, sir, I was not.

Q. Did you participate in the interrogation or other contact with these men after their arrest?

A. They were informed of their rights and that was it—they said they had nothing to say.

Q. I don't believe that's responsive to my question, Detective Brooks, were you present at the Police Headquarters or wherever these men were taken?

A. Yes, sir, I was.

Q. Where were they taken?

A. They were taken to the Detention.

Q. Detention, where is that?

A. Detention Section—it's in the new building at 9th and Leigh.

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Q. Now, tell the Court what happened from the time they arrived there?

A. Well, they were—they were taken into the Detention, put in the cell, and then—you want the whole story?

Q. Just a chronological—

A. Then they were taken out, and we told them we wanted their clothes and that was it.

Q. You told them you wanted their clothes?

A. Yes, that's right.

Q. At the time you told them you wanted their clothes, had they been advised of their rights to counsel?

A. Yes, sir.

Q. You are sure of that?

A. As far as I am concerned, I'm sure.

Q. Did you, yourself, advise them of the right to counsel?

A. Yes, I did.

Joseph A. Brooks

By The Court:

Q. Excuse me, you say you advised them of their rights, what did you advise them?

A. I advised him that he had the right to an attorney, that he did not have to make any statement and any statement he did make would be used in Court. That was on the scene of the arrest, not at Headquarters.

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page 31 } By Mr. Dorset:

Q. At the scene of the arrest?

A. Yes, sir.

Q. Right, right. Now, did you request the—Mr. Wiltshire and the other defendants to turn their clothes over to you?

A. Yes, sir, I did.

Q. And what happened when you made that request?

A. Mr. Wiltshire said that he didn't want to take his clothes off, that he wanted to see his attorney first.

Q. I see, and what did you then do?

A. We told him we were going to take them and give him other clothes to wear that we had procured from the City Jail.

Q. Did he voluntarily give you his clothes at that time?

A. After I told him that, he did, yes, sir, he objected no further.

Q. There was no objection?

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A. Not after making the statement that he didn't want to take his clothes off and put on other clothes, that he wanted to see his attorney, we told him we were going to take his clothes off and that was it.

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Q. Did you have to fight with him in any way?

A. No, sir, we did not, he offered no resistance after that.

Q. Did you at any time strike Mr. Wiltshire?

A. No, sir, I did not. I had no occasion to.

Q. Let me get this straight, Detective Brooks, when you asked Mr. Wiltshire for his clothes he said that he wanted to see an attorney, is that right?

A. He said he didn't want to take his clothes off until he saw his attorney. I think they were about the exact words,

Q. All right?

A. and we told him we were going to take them.

Q. And you told him that you were going to take them?

A. Yes, sir.

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Q. And who—how many detectives were in the room when this conversation took place?

Joseph A. Brooks

11/21/66 page 33 } A. If my memory serves me correctly, it was Lieutenant Clark and I'm not sure, but I believe it was Detective E. R. Marrin, I think, and myself, the three of us.

Q. After Mr. Wiltshire refused to voluntarily give you his clothes, did any of the detectives approach him or otherwise move towards him?

A. No, sir, we just told him that we were going to take them off of him, we were all right there together, we were right at him. All four of us were there together. And he was sitting on the bench and he didn't object at all to giving his clothes up when we told him we were going to take them.

Q. But you made it clear to him that you were going to take them whether he liked it or not?

A. I most assuredly did, sir.

Q. Now, why did you want to take the clothes?

A. I wanted to have them checked for certain evidence.

Q. What evidence?

A. Do I have to answer that—well, there was—we were looking for paint particles, we were looking for debris where the building was entered and I think that's about all, those two.

Comm. v. Wiltshire 11/21/66 page 34 } Q. Have chemical analysis or other tests been taken of these clothing since you took them from the defendant?

A. Not as far as I know, Mr. Dorset, no, sir, not as far as I know.

Q. These clothes have not been sent to the F.B.I.?

A. Oh, yes, I misunderstood your question, I thought you meant someone else other than us.

Q. F.B.I. has made a chemical analysis

A. Yes, sir.

Q. of these clothes, hasn't it?

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A Copy—Teste:

Howard G. Turner, Clerk.

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