Marijuana Cases in the Commonwealth of Virginia
Distinguishing Personal Possession from Intent to Distribute

Background :
Excerpts from Selected Virginia Court of Appeals Opinions

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Presentation Outline:

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2. Legal Criteria
3. Evidence
4. Intent
5. Medical Use

Key Distribution Issues:

Quantity
Packaging Paraphernalia
Method of Packaging
Instrumentalities of Distribution
Locations
Personal Use Patterns
Indicia of Personal Use
Linkages Between Evidence
Types of Marijuana

Key Manufacturing Issues:

Number of Viable Plants
Amount and Value of Saleable Marijuana
Instrumentalities of Distribution
Technology
Production Chain
Indicia of Personal Use

Quantity Just One Factor

"[t]he quantity of the controlled substance [possessed] is one factor to be considered" in determining the intended use by an accused . . . "[a] small quantity of drugs, along with other circumstances, may support a conviction of possession with intent to distribute." Davis v. Commonwealth, 12 Va. App. 728, 733, 406 S.E.2d 922, 925 (1991) [from WARD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1164-97-3, MAY 19, 1998]

Other Factors

"Such other circumstances include the presence of paraphernalia used in packaging," id., and "the absence of any [evidence] suggestive of personal use" by an accused. Glasco v. Commonwealth, 26 Va. App. 763, 775, 497 S.E.2d 150, 156 (1998) (citations omitted). [from WARD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1164-97-3, MAY 19, 1998]

Circumstances relevant to proof of an intent to distribute include the quantity of drugs possessed, the method of its packaging, Monroe v. Commonwealth, 4 Va. App. 154, 156, 355 S.E.2d 336, 337 (1987),). [from TAYLOR v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1976-93-1, MAY 30, 1995]

and the presence of paraphernalia common to drug distribution. Servis, 6 Va. App. At 524, 371 S.E.2d at 165. [from TAYLOR v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1976-93-1, MAY 30, 1995]

Possession of cash and instrumentalities of the drug trade, such as scales, pagers, and baggies, may evince an intent to distribute drugs. See Davis v. Commonwealth, 12 Va. App. 728, 733, 406 S.E.2d 922, 931 (1991). [from MOOREFIELD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2686-96-2, FEBRUARY 3, 1998]

Moreover, the presence of scales and "baggies" provided additional evidence of defendant's intent to distribute. See Davis v. Commonwealth, 12 Va. App. 728, 733, 406 S.E.2d 922, 925 (1991).). [from TAYLOR v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1976-93-1, MAY 30, 1995]

Circumstances relevant to proof of an intent to distribute include the "quantity of drugs and cash possessed, the method of packaging," Poindexter v. Commonwealth, 16 Va. App. 730, 735, 432 S.E.2d 527, 530 (1993), [from SHEARS v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1928-95-1, NOVEMBER 5, 1996]

and the presence of paraphernalia related to distribution. Hambury v. Commonwealth, 3 Va. App. 435, 438, 350 S.E.2d 524, 525 (1986). [from SHEARS v.

COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1928 95-1, NOVEMBER 5, 1996]

The remaining evidence offered by the Commonwealth, Charles' possession of a pager and $769.19 in cash, is similarly problematic. While we have consistently found that these facts may be probative of "intent to distribute," they do not demonstrate that Charles was aware of the presence and character of the marijuana under his seat, or that he controlled it. See Burchette v. Commonwealth, 15 Va. App. 432, 437, 425 S.E.2d 81, 85 (1992) (rejecting the possession of guns, cellular telephones and beepers as evidence linking the defendant to marijuana found in his car); [from CHARLES v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2310-00-2, DECEMBER 18, 2001]

see also Glenn v. Commonwealth, 10 Va. App. 150, 155, 390 S.E.2d 505, 508 (1990) (noting that the unexplained possession of a large amount of cash in small denominations constitutes evidence of "intent to distribute," but not including such evidence in its analysis of possession); [from CHARLES v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2310-00-2, DECEMBER 18, 2001]

Glasco v. Commonwealth, 26 Va. App. 763, 775, 497 S.E.2d 150, 156 (1998) (finding possession of a pager and a large amount of cash probative of "intent to distribute" controlled substances but not citing that evidence as probative of possession (citing White, 24 Va. App. at 453, 482 S.E.2d at 879)).

Manufacturing

In the instant case, our decision is controlled by our holding in Reynolds v. Commonwealth, 9 Va. App. 430, 388 S.E.2d659 (1990). In that case, the defendants were charged with manufacturing marijuana not for their own use. The Commonwealth proved that the police seized twenty-nine marijuana plants, a scale and a smoking pipe from the defendants' home. However, in Reynolds, we held that such evidence was insufficient to convict defendants of manufacturing marijuana for distribution rather than for personal use. The defendants explained that they grew the plants for their own use, and the Commonwealth failed to introduce evidence of: (1) how many plants were healthy enough to produce a useable product; (2) how much saleable marijuana could be produced from the seized plants; (3) the value of the contraband; (4) the presence of the receptacles to bag the marijuana for sale; or (5) watering devices and lights to assist in the plants' growth. [from Darlington v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2937-96-2, SEPTEMBER 23, 1997]

We find that the circumstantial evidence proved by the Commonwealth in the instant case is similarly insufficient to support appellant's conviction. The evidence recovered from appellant's home, .15 ounces of marijuana and fourteen marijuana plants, when combined with the other evidence adduced, does not permit the inference that appellant was manufacturing marijuana for other than his personal use. Rather, the evidence is consistent with the personal use of marijuana. Here, the police observed appellant

smoking when they arrived at his house. Appellant testified that he had been smoking marijuana for ten to fifteen years, and that he had the marijuana solely for his own use. He specifically denied selling or giving the marijuana away. Moreover, the minimal quantity of marijuana at issue is consistent with personal use. See, e.g., Davis v. Commonwealth,12 Va. App. 728, 730, 406 S.E.2d 922, 923 (1991) (analyzing expert testimony that 6.88 ounces of marijuana is not consistent with personal use, but that "an ounce or less of the drug on hand" is typical for a marijuana user). [from Darlington v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2937-96-2, SEPTEMBER 23, 1997]

Finally, the Commonwealth failed to produce any evidence of how much saleable marijuana could be produced from the fourteen plants recovered or of the value, if any, of the marijuana. [from Darlington v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2937-96-2, SEPTEMBER 23, 1997]

Various Locations

Evidence that drugs are located at various locations throughout the appellant's house, whether it be in rooms occupied exclusively by the appellant, in common areas, or in rooms or areas occupied primarily by other family members, is relevant because it tends to show that appellant was aware of the drugs, he exercised dominion and control of the drugs, either by himself for jointly with his sons, and he intended to distribute them using the various paraphernalia found in his house. See Wymer v.Commonwealth, 12 Va. App. 294, 300-01, 403 S.E.2d 702, 706-07(1991) (evidence of cocaine and drug paraphernalia found in common areas of house and bedroom shared by accused and another relevant in accused's prosecution for cocaine possession). [from MOOREFIELD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2686-96-2, FEBRUARY 3, 1998]

Furthermore, the evidence that drugs and paraphernalia were throughout the house was material in that it related to and tended to prove the Commonwealth's charges of possessing drugs with the intent to distribute. Accordingly, the trial court did not abuse its discretion when it admitted the evidence seized from the sons 'bedrooms and the common areas of the house. [from MOOREFIELD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2686-96-2, FEBRUARY 3, 1998]

Different Types of Marijuana

However, the evidence established no connection between the cigarettes in Charles' possession and the plastic bag of marijuana under the car seat in which he sat. See Monroe v. Commonwealth, 4 Va. App. 154, 156, 355 S.E.2d 336, 337 (1987) (finding that possession of a small quantity of drugs usually implies possession for personal use). [from CHARLES v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2310-00-2, DECEMBER 18, 2001]

The Commonwealth claims that Charles' possession of two cigarettes of marijuana connects him to the ziploc bag containing the larger quantity of marijuana. . . . The two drugs found by the police in this case were markedly different. The marijuana Charles had on his person was in a different form and packaged differently from the marijuana under his seat. The Commonwealth offered no lab reports indicating that the cigarettes and the marijuana found under the seat were of the same type and no testimony that the two were even the same color. [from CHARLES v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2310-00-2, DECEMBER 18, 2001]

The Commonwealth, however, argues that the Virginia Supreme Court's statement in Colbert v. Commonwealth that a fact finder might infer that a small quantity of drugs seized "was what remained from a larger supply held for distribution," 219 Va. 1, 4, 244 S.E.2d 748, 749 (1978), controls our inquiry on this issue. Such reliance is misplaced. The reasoning in Colbert that the Commonwealth refers to applied only to its analysis of "intent to distribute," not to the establishment of possession, a fact established by other evidence. Id. The Court did not find, as the Commonwealth suggests, that the possession of the smaller quantity of marijuana provided sufficient evidence to convict the defendant of possession of a much larger, separately packaged, and elsewhere located quantity of marijuana. Rather, in determining possession, the Court considered the defendant's inculpatory conduct, his proximity to the drugs, and his control of the premises where the drugs were found. Id. at 3-4, 244 S.E.2d at 749. Specifically, the Court noted that the police observed a bucket with five "nickel bags" of marijuana weighing a total of 1.91 ounces between the defendant's legs, and observed the defendant, presumably fearful of detection, move the bucket and place it behind a seat. Id. at 4, 244 S.E.2d at 749. Here, the Commonwealth has not presented comparable evidence of inculpatory conduct or evidence of Charles' control over the vehicle in which the drugs were found. [from CHARLES v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2310-00-2, DECEMBER 18, 2001]

Admissibility of Evidence

"The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion." Blain v. Commonwealth, 7Va. App. 10, 16, 371 S.E.2d 838, 842 (1988) (citation omitted). [from TAYLOR v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1976-93-1, MAY 30, 1995]

The test for relevancy "is not whether the proposed evidence conclusively proves the fact, but whether it has any tendency to establish the fact in issue." Radar v. Commonwealth, 15 Va. App.325, 331, 423 S.E.2d 207, 211 (1992). [from MOOREFIELD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2686-96-2, FEBRUARY 3, 1998]

Assessment of Credibility

it was within the province of the trial court to assess credibility and disbelieve all or portions of such testimony. See Servis v. Commonwealth, 6 Va. App. 507, 525, 371S.E.2d 156, 165 (1988). [from WARD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1164-97-3, MAY 19, 1998]

The credibility of a witness, the weight accorded the testimony, and the inferences to be drawn from proven facts are matters to be determined by the fact finder. See Long v. Commonwealth, 8 Va. App. 194, 199, 379S.E.2d 473, 476 (1989). [from HOLLAND v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 0664-96-1, FEBRUARY 25, 1997]

The fact finder is not required to believe the entire testimony of a witness, but may find portions believable, while rejecting the balance as implausible. See,e.g., Pugliese v. Commonwealth, 16 Va. App. 82, 92, 428 S.E.2d16, 24 (1993). [from HOLLAND v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 0664-96-1, FEBRUARY 25, 1997]

Circumstantial Evidence of Transfer

"[A] successful drug prosecution must establish both the existence of a proscribed substance and an accused's unlawful activity with respect to it." Hinton v. Commonwealth, 15 Va. App. 64, 66, 421 S.E.2d 35, 37 (1992).The nature of the illegal substance transferred need not be proved by direct evidence but can be demonstrated by circumstantial evidence. The types of circumstantial evidence that may be considered include the following: "[E]vidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that the transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence." [from Bareford v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 0564-00-2, MARCH 27, 2001

Exclude Reasonable Hypotheses that flow from the evidence

"Where circumstantial evidence is sufficient to exclude every reasonable hypothesis of innocence, it is sufficient to support a conviction. The hypotheses which must be thus excluded are those which flow from the evidence itself, and not from the imaginations of defense counsel." Cook v. Commonwealth, 226 Va. 427, 433, 309 S.E.2d 325, 329 (1983) (citing Turner v. Commonwealth, 218 Va. 141, 148-49, 235 S.E.2d 357, 361 (1977)). [from John v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2487-00-2, OCTOBER 2, 2001]

Where an offense consists of an act combined with a particular intent, proof of the intent is essential to the conviction. Because direct proof of intent is often impossible, it must be shown by circumstantial evidence. But "[w]here . . . the Commonwealth's evidence of intent to distribute is wholly circumstantial, 'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence.'" Servis v. Commonwealth, 6 Va. App. 507, 524, 371 S.E.2d 156, 165 (1998) (internal citations omitted). [from John v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2487-00-2, OCTOBER 2, 2001]

Circumstantial evidence of possession is sufficient to establish possession, provided it excludes every reasonable hypothesis of innocence. See, e.g., Tucker v. Commonwealth, 18Va. App. 141, 143, 442 S.E.2d 419, 420 (1994). [from HOLLAND v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 0664-96-1, FEBRUARY 25, 1997]

However, "[t]he Commonwealth need only exclude reasonable hypotheses of innocence that flow from the evidence, not those that spring from the imagination of the defendant." Hamilton v. Commonwealth, 16 Va.App. 751, 755, 433 S.E.2d 27, 29 (1993). [from HOLLAND v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 0664-96-1, FEBRUARY 25, 1997]

Whether a hypothesis of innocence is reasonable is a question of fact, see Cantrell v. Commonwealth, 7 Va. App. 269, 290, 373 S.E.2d 328, 339 (1988),and a finding by the trial court is binding on appeal unless plainly wrong. See Martin, 4 Va. App. at 443, 358 S.E.2d at 418. [from HOLLAND v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 0664-96-1, FEBRUARY 25, 1997]

"The Commonwealth is required to prove every material element of the alleged crime beyond a reasonable doubt, and, when it relies on circumstantial evidence to sustain that burden, 'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence.'" Reynolds v. Commonwealth, 9 Va. App.430, 440, 388 S.E.2d 659, 665 (1990) (quoting Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 567 (1976)). [from Darlington v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2937-96-2, SEPTEMBER 23, 1997]

we find that "the deficiencies identified are sufficient in this case to point to a failure of the Commonwealth to exclude the reasonable hypothesis that the plants were being grown for personal use." Reynolds, 9 Va. App. at 441, 388 S.E.2d at 666. Accordingly, the judgment of the trial court is reversed. [from Darlington v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2937-96-2, SEPTEMBER 23, 1997]

Large Amount inconsistent with personal use

testimony that ordinarily such a large amount is inconsistent with personal use allows the trial court to infer these drugs were for distribution. See Glenn v. Commonwealth, 10 Va. App. 150, 155, 390 S.E.2d 505, 508 (1990) (holding jury could reasonably conclude that possession of over four pounds of marijuana was inconsistent with personal use and consistent with distribution); [from John v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2487-00-2, OCTOBER 2, 2001]

Gregory v. Commonwealth, 22 Va. App. 100, 110, 468 S.E.2d 117, 122-23 (1996) (holding evidence sufficient in view of quantity of cocaine, even though expert admitted it was conceivable a user with a "serious drug addiction" could consume that amount of cocaine). [from John v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2487-00-2, OCTOBER 2, 2001]

No indicia of personal use

nothing in the record indicates that appellant had the brick of marijuana for his personal use. No drug paraphernalia or other indicia of personal use was in his bag or on his person. See Clark v. Commonwealth, 32 Va. App. 286, 304-05, 527 S.E.2d 484, 493 (2000) (noting a factor from which one can infer intent to distribute was that no paraphernalia for smoking was found); Glasco v. Commonwealth, 26 Va. App. 763, 497 S.E.2d 150 (1998), aff'd, 257 Va. 433, 513 S.E.2d 137 (1999). [from John v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 2487-00-2, OCTOBER 2, 2001]

Sufficient for Conviction

the Commonwealth established that defendant possessed a bulk quantity of marijuana, consistent with a purchase by a drug dealer for resale at substantial profit, together with paraphernalia to facilitate distribution, but not personal consumption, of the drug. Defendant's statement to police further suggested that defendant possessed the marijuana for purposes of "dealing." Such evidence provided sufficient support for the instant conviction. [from WARD v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1164-97-3, MAY 19, 1998]

The evidence proves that not only did Wescoat and Holt negotiate a sale and prearrange a meeting to consummate the sale, Wescoat met Holt and intended and attempted to sell the amount of marijuana that he had with him. Except for the misunderstanding that Wescoat had regarding the amount of drugs that Holt wanted to purchase, the sale would have been consummated. Going to the parking lot with marijuana that he intended to sell to Holt as per their prior agreement constituted an attempt by Wescoat to sell marijuana to a juvenile. [from WESCOAT v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1256-98-2, FEBRUARY 15, 2000]

Here, a search of defendant's residence disclosed no less than 86.6 grams of marijuana, packaged in twenty-eight individual plastic bags, in a bedroom of defendant's residence together with several documents, important and personal to defendant, and substantial cash and firearms. Elsewhere in the residence, police discovered scales. Significantly, defendant admitted to Detective Burton that he was then actively involved in the narcotics trade. Such evidence, considered with other facts and the circumstances established in the record, clearly supports the trial court's finding that defendant constructively possessed the marijuana found in his bedroom with the intent to distribute it. [from SHEARS v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1928-95-1, NOVEMBER 5, 1996]

Clarification of "Intent"

"'An attempt to commit a crime is composed of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done towards its commission.'" Haywood v. Commonwealth, 20 Va. App. 562, 565, 458 S.E.2d 606, 607-08 (1995) citation omitted). [from WESCOAT v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1256-98-2, FEBRUARY 15, 2000]

A direct, ineffectual act, done toward commission of an offense need not be the last proximate act toward completion of the offense, but "it must go beyond mere preparation and be done to produce the intended result." Tharrington v. Commonwealth, 2 Va. App. 491, 494, 346 S.E.2d 337, 339 (1986). [from WESCOAT v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1256-98-2, FEBRUARY 15, 2000]

In distinguishing acts of mere preparation from acts that constitute an attempt, "'it may be said that preparation consists [of] . . . arranging the means or measures necessary for the commission of the offense and that the attempt is the direct movement toward the commission after the preparations are made.'" Granberry v. Commonwealth, 184 Va. 674, 678, 36 S.E.2d 547, 548 (1946) (quoting 14 Am. Jur. Criminal Law 67 (1938)). [from WESCOAT v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1256-98-2, FEBRUARY 15, 2000]

Moreover, where intent has been shown, any slight act done in furtherance of this intent will constitute an attempt. See Tharrington, 2 Va. App. at 494, 346 S.E.2d at 340. [from WESCOAT v. COMMONWEALTH, COURT OF APPEALS OF VIRGINIA, Record No. 1256-98-2, FEBRUARY 15, 2000]