IN THE COURT OF APPEALS OF VIRGINIA

WESLEY CLAY SMITH,	)	
	)	
APPELLANT / Defendant	)	
	)	
v.	)	**Record No. 2615-05-4**
	)	
***COMMONWEALTH OF VIRGINIA*,**	)	
	)	
APPELLEE / Plaintiff	)	

From Fairfax County Circuit Court, Commonwealth v. Smith case no: MI-2005-1559

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR APPEAL

An electronic copy of this brief with related documents, motions, and orders is available at:
http://www.liamsdad.org/court_case/trespassing/trespassing.shtml

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF APPEALS OF VIRGINA

COMES NOW the Defendant in response to the Commonwealth's BRIEF IN OPPOSITION TO PETITION FOR APPEAL submitted in this matter and states that reversible error was committed in the Circuit Court of Fairfax County, Virginia.

Commonwealth's Claim #1: The Appellant has failed to allege any facts that demonstrate an abuse of discretion by the Judge.

1. The Defendant certainly did make several specific claims of abuse of discretion, including but not limited to, denying the Defendant his right to court appointed counsel, denying the Defendant the ability to make a record of the proceeding, refusing to admit relevant material evidence, refusing to let the Defendant present witnesses, refusing to let the Defendant impeach witnesses, and refusing to properly rule on the Defendant's MOTION TO DISMISS and MOTION TO STRIKE when no legal basis for convicting the Defendant existed. The Defendant provided a statement of facts, which the Commonwealth chose not to oppose, that supports the Defendants claims of abuse of discretion.
2. The Defendant in his petition pointed out 14 Errors by the trial court and 'by definition, when the trial court makes an error of law, an abuse of discretion occurs. Bass v. Commonwealth, 31 Va. App. 373, 382, 523 S.E.2d 534, 539 (2000).

Commonwealth's Claim #2: The Appellant has produced no evidence that the Judge's Decision was based on the fact that the Appellant was a "non-custodial" parent.

3. This argument is without merit. In finding a Judge has abused his discretion and reversing his ruling, it does not matter if the Judge ruled erroneously because the Defendant was a non-custodial parent, was male, had brown hair, was too tall, not the right skin color, or that the Judge just likes abusing his discretion on Tuesdays. Being unable to prove the reason why the Judge abused his discretion is not a legal reason to deny an appeal. The fact that the Judge did abuse his discretion, for whatever reason, is grounds to grant an appeal.

Commonwealth's Claim #3:
The Appellant was appointed counsel but fired counsel right before trial.

4. This claim in intentionally misleading. On Sep 6th, 2005 the Public Defender chose to make an oral motion to withdraw because the Defendant insisted on presenting State law § 22.1-4.3, which grants non-custodial parents the right to attend their children's school events unless a court order specifically prohibits attendance, and O'Banion v. Com., where the court ruled that a person with a claim of right can't be convicted of trespass, and the Public "Defender" refused to present these to the court.

5. Given that any conversation between the Defendant and the Public Defender is covered by Attorney/Client privilege the only knowledge the Commonwealth could have of the situation are the statements made by the Public Defender and the Defendant at the Sep 6th, 2005 hearing at which the Public Defender stated the insistence of the Defendant that they present § 22.1-4.3 and O'Banion v. Com. was the reason they were withdrawing.

6. Asking that a Public Defender actually present a viable case can hardly be construed as firing, especially when the Defendant asked them to at least provide legal advice and assistance and also asked the Judge to appoint him a Public Defender who would present those items. The Defendant specifically told the Judge the refusal to present § 22.1-4.3 and O'Banion was why the Public Defender withdrew and asked for him to appoint another attorney that would present those. The Defendant not only asked for another attorney orally at the Sep 6th hearing but also by written motion.

7. The public Defender withdrew on Sep 6th, 2005 yet the trial was one month later on Oct 5th, 2005,

hardly “right before trial” as claimed by the Commonwealth.

Commonwealth’s Claim #4: The Appellant has failed to allege any facts that the Judge was upset about the Appellant's website, nor that it had any bearing on the Judge's decisions.

8. The Defendant submitted exhibits of orders by Judge Finch that specifically mentioned the Defendant by name, address, and specified his website as one to be removed. It’s hard to believe the Commonwealth didn’t notice them attached to the petition. If Judge Finch was happy with the Defendant’s website why on earth was he making a court order demanding that information be removed from it? Clearly Judge Finch took an interest in the Defendants website and according to eyewitnesses was very upset about it.

9. The fact that Judge Finch, when asked to recuse himself, denied having any knowledge of the Defendant or his website, instead of stating it did not impact his decision, certainly appears as a possible motive for his adverse rulings. No person seeing a Judge lie about his previous conduct is going to believe the Judge is ruling in a fair and impartial manner.

Commonwealth’s Claim #5: The Judge has complete discretion in determining what evidence is admissible and the Appellant has failed to demonstrate any abuse of discretion by the Judge.

10. This is perhaps the most laughable claim made in the Commonwealth’s brief. While a Judge does have some discretion in determining what evidence is admissible a Judge does not have **complete discretion** and the attorney filing the brief surely knew that is not the case. In making this claim the Commonwealth’s attorney is not only counting on the ignorance of the Defendant but collusion from the Court of Appeals as well. Clearly the Commonwealth was mistaken as to the Defendant’s ignorance that there are rules of evidence and hopefully wrong about the Appeals Court’s willingness to go along with the trial court denying the Defendant his right to present relevant and material evidence, as well as denying his right to cross-examine and impeach the Commonwealth’s witnesses.

11. If a Judge has “complete discretion” why does the Code of Virginia contain laws about what evidence is admissible? See Title 19.2 - CRIMINAL PROCEDURE, Chapter 16 - Evidence and Witnesses… hmm an entire chapter of law that a judge is allowed to ignore? I don’t think so.

12. If a Judge has “complete discretion” why do rulings made by the Court of Appeals repeatedly

contain reference to “rules of evidence”:

> “common law and statutory rules of evidence shall be as observed and administered by the courts of record of the Commonwealth. In other proceedings, evidentiary rules shall not be unreasonably used to prevent the receipt of evidence having substantial probative effect.”

13. If a Judge has “complete discretion” why do rulings made by the Court of Appeals argue whether or not a judge was required to admit evidence or admitted prohibited evidence? If a Judge, as claimed by the Commonwealth, can do whatever he wants with regards to admitting/denying evidence why are all these high priced lawyers making the argument that the Judge does have to follow rules and why does the Court of Appeals often agree with them? Note all of these are quoted from Virginia Court of Appeals rulings:

"**Evidence is admissible if it is both relevant and material**," and it is inadmissible if it fails to satisfy either of these criteria. "Evidence is relevant if it has any logical tendency**, however slight**, to establish a fact at issue in the case." "Evidence is material if it relates to a matter properly at issue." Peeples v. Commonwealth, 28 Va. App. 360, 365, 504 S.E.2d 870, 873 (1998) (citations omitted).

"'[C]alling for evidence in one's favor is central to the proper functioning of the criminal justice system. It is designed to **ensure that the defendant in a criminal case will not be unduly shackled in his effort to develop his best defense**.'" Clark v. Commonwealth, 31 Va. App. 96, 109, 521 S.E.2d 313, 319 (1999) (quoting Massey v. Commonwealth, 230 Va. 436, 442, 337 S.E.2d 754, 757 (1985)). Therefore, "no legislation, however salutary its purpose, can be so construed as to deprive a criminal defendant of his Sixth Amendment right to confront and cross-examine his accuser and to call witnesses in his defense." Winfield, 225 Va. at 218, 301 S.E.2d at 19 (citing Davis v. Alaska, 415 U.S. 308 (1974)); see also Neeley v. Commonwealth, 17 Va. App. 349, 355, 437 S.E.2d 721, 724 (1993).

The Due Process Clause of the United States Constitution requires the Commonwealth to disclose to a criminal defendant exculpatory or favorable evidence and provides that failure to disclose such evidence may require reversal where that evidence is material to either guilt or punishment, "irrespective of the good faith or bad faith of the prosecution." Soering v. Deeds, 255 Va. 457, 464, 499 S.E.2d 514, 517 (1998); see Lowe v. Commonwealth, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977). **Exculpatory evidence includes evidence that impeaches the credibility of a witness for the Commonwealth**. See Robinson v. Commonwealth, 231 Va. 142, 150, 341 S.E.2d 159, 164 (1986).

14. A Judge having “complete discretion” would be unconstitutional by both the Federal and Virginia constitutions. According to Article I Section 8 of the CONSTITUTION OF VIRGINIA “That in criminal prosecutions **a man hath a right … to call for evidence in his favor**,…” A Judge must allow the Defendant to present evidence sufficient to qualify with the requirement of the constitution.

15. This court itself has recognized the right of the accuse to present evidence and that Judges do not have the authority to deny admitting relevant evidence and has overturned and remanded cases for

that very reason. See Record No. 2157-99-1 where this ruled that "With the aid of the tape recordings, the jury might well have found Washington more credible and returned a verdict in his favor."

16. In this case if the Jury had been allowed to listen to the audio tape of the incident, or District Court trial, they may well have found the Defendant more credible than the Prosecution's witnesses. Especially in light of the Jury's question about when Mr. Vanderhye made a specific statement, had the Jury been allowed to listen to the tape, or read the transcript, and verify for themselves that he **did not make the statement in question**, it seems likely the Jury would have returned a different verdict.

17. The Defendant point out several errors the trial court made in not admitting evidence favorable to him, such as the audio recordings of the incident in question, and of the district court hearing as well as the transcripts made from those recordings, as well as photographs of the scene. Given the previous citations, the Judge's refusal to admit these as evidence was in error as they clearly were relevant and material to the issue of trespassing, relating to both when or if he was asked to leave the property and if by the appearance of the property he had reason to think he was no longer on school property.

18. The trial court erred in allowing, over the Defendant's objection, the prosecution's witnesses, Mr. Vanderhye to comment on supposed "bad acts" of the Defendant unrelated to the case.

> Generally, evidence tending to show an accused committed prior crimes or **bad acts is inadmissible for the purpose of showing the accused committed the crime charged**. See Woodfin v. Commonwealth, 236 Va. 89, 95, 372 S.E.2d 377, 380 (1988).

19. The trial court erred in excluding evidence that contradicted the statements of the Commonwealth's witnesses. The Defendant sought to prove for impeachment purposes that statements made by Mr. Vanderhye and Officer Beyer were inconsistent with their statements made at the incident and in District Court. The Defendant even attempted to question them by specifically reading from the transcripts. Under these circumstances, it was error to exclude the recordings/transcripts even if somehow not admissible on the merits, they would still be proper for impeachment. By rejecting the relevant portion of the transcript, the trial court denied the Defendant the opportunity to prove the inconsistent statement upon which his effort to impeach Vanderhye and Beyer rested. Had the Defendant succeeded in impeaching Vanderhye and/or Beyer and in raising a reservation as to the

credibility of either, he might well have won an acquittal.

> It is fundamental to the right of cross-examination that a witness who is not a party to the case on trial may be impeached by prior statements made by the witness which are inconsistent with his present testimony, provided a foundation is first laid by calling his attention to the statement and then questioning him about it before it is introduced in evidence. Hall, 233 Va. at 374, 355 S.E.2d at 594.
>
> Generally, after a proper foundation has been laid, the credibility of a witness may be impeached by showing that the witness, on a prior occasion, made statements that were inconsistent with or contradictory of the witness' evidence at trial. Cassady v. Martin, 220 Va. 1093, 1099, 266 S.E.2d 104, 107 (1980); Neblett, 207 Va. at 340, 150 S.E.2d at 119.
>
> "Code 8.01-403, applicable in criminal as well as civil cases, allows impeachment of a party's witness with prior inconsistent statements after that witness has been found by the trial court to be adverse." Ragland v. Commonwealth, 16 Va. App. 913, 920, 434 S.E.2d 675, 680 (1993) (citing Brown v. Commonwealth, 6 Va. App. 82, 85, 366 S.E.2d 716, 718 (1988)); see also Beverly v. Commonwealth, 12 Va. App. 160, 163, 403 S.E.2d 175, 176 (1991); Roberts v. Commonwealth, 230 Va. 264, 269, 337 S.E.2d 255, 258 (1985).
>
> In addition, the credibility of a witness may be impeached by showing that he has made prior statements "inconsistent with . . . the evidence he has given on the trial." Neblett v. Hunter, 207 Va. 335, 340, 150 S.E.2d 115, 119 (1966).

20. It really goes beyond belief to think that the Commonwealth's Attorney was not aware that there are limits to the Judge's ability to exclude evidence. This absurd claim is punishable by sanctions per Virginia Code § 8.01-271 as it relies on a legal position that is not well grounded in fact, is not warranted by existing law, and the Commonwealth's Attorney would have been aware of that had he made any reasonable inquiry (or more likely was aware of this fact but hoped the Defendant was not).

> § 8.01-271 - The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative**, shall impose** upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.

Commonwealth's Claim #6: A jury verdict should only be overturned when the judgment is plainly wrong or it is without evidence to support it. The Appellant has failed to demonstrate that the jury verdict was plainly wrong or without evidence.

21. The Commonwealth also states incorrectly the standard for overturning a jury verdict. Once an error is showed to have been made by the trial court the presumption is that the error did affect the jury verdict and must be overturned. The burden of proof is on the Commonwealth to show, beyond a reasonable doubt, that the errors were harmless not on the Defendant to show they caused harm.

> **If the evidence was admissible, its exclusion was not harmless.** Daniel P. Brugh V. John Lee Jones, Record No. 020852 Opinion By Justice Donald W. Lemons, January 10, 2003
>
> It is well settled that a mistake of the court must be **presumed to a have affected the verdict of the jury** and is therefore ground for which the judgment **must be reversed** unless it plainly appears from the record that the error did not affect and could not have affected the verdict. See Norfolk Ry. & Light Co. v. Corletto, 100 Va. 355, 360, 41 S.E. 740, 742 (1902).
>
> While an error committed in the trial of a criminal case does not automatically require reversal of an ensuing conviction, Code 8.01-678, **once error is established it is presumed to be prejudicial**. The burden then shifts to the Commonwealth to show that the error was non-prejudicial. **A criminal case will be reversed if the Commonwealth fails to overcome the presumption of prejudice and fails to show that the error was harmless beyond a reasonable doubt**. Pavlick v. Commonwealth, 25 Va. App. 538, 544, 489 S.E.2d 720, 724 (1997)
>
> In the absence of a curative instruction from the trial court, a nonconstitutional error is **presumed to be harmful** "unless `it plainly appears from the record and the evidence' that the verdict was not affected by the error." See Lavinder v. Commonwealth, 12 Va. App. 1003, 1008-09, 407 S.E.2d 910, 913 (1991) (en banc)
>
> A reviewing court must take into account the burden of proof applied at trial when evaluating the impact of an error upon a verdict. To the extent that the impact of an error on a verdict is affected by the burden of proof, in a criminal case, **the reviewing court must consider that the fact finder was required to reach its verdict beyond a reasonable doubt**. Lavinder, 12 Va. App. at 1006, 407 S.E.2d at 911
>
> "In criminal cases, the requirement of proof beyond a reasonable doubt is a constitutional requirement of due process." Id. at 1007, 407 S.E.2d at 912. Thus, the error is harmless only if we can say beyond a reasonable doubt that the error did not affect the verdict.
>
> The Supreme Court of Virginia has "adopt[ed] the Kotteakos [v. United States, 328 U.S. 750 (1946),] harmless-error test" for measuring error under Code _ 8.01-678. Clay v. Commonwealth, 262 Va. 253, 260, 546 S.E.2d 728, 732 (2001). Applying that test, the United States Supreme Court recently held that "the principle of Kotteakos [means] that when an error's natural effect is to prejudice substantial rights and the court is in grave doubt about the harmlessness of that error, the error must be treated as if it had a 'substantial and injurious effect' on the verdict." O'Neal v. McAninch, 513 U.S. 432, 444 (1995) (citing Kotteakos, 328 U.S. at 764-65, 776). Moreover, when a trial error has been shown on direct appeal from a conviction, **the government bears the burden of proving**

> **harmlessness under this standard**. See O'Neal, 513 U.S. at 437. Indeed, the Supreme Court of Virginia has held that "error will be presumed to be prejudicial unless it plainly appears that it could not have affected the result." Caldwell v. Commonwealth, 221 Va. 291, 296, 269 S.E.2d 811, 814 (1980).
>
> Consistent with these principles, the Supreme Court of Virginia has held that even if "the other evidence amply supports the . . . verdicts, [error is not harmless when] the disputed [evidence] may well have affected the . . . decision." Cartera v. Commonwealth, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978). See also Hooker v. Commonwealth, 14 Va. App. 454, 458, 418 S.E.2d 343, 345 (1992) (holding that "a harmless error analysis . . . [is not] simply a sufficiency of the evidence analysis").
>
> "'[A] fair trial on the merits and substantial justice' are not achieved if an error at trial has affected the verdict." Lavinder v. Commonwealth, 12 Va. App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (quoting Code _ 8.01-678). Thus, we have held that "in determining if an error is harmless, a reviewing court . . . determines . . . whether as a matter of law, this decision of the fact finder was affected by the error." Id. at 1006, 407 S.E.2d at 911.

The Commonwealth's reply is completely unresponsive to several claims made by the Defendant.

22. The Commonwealth's brief failed to even address several of the errors claimed by the Defendant including but not limited to:

a. Error for refusing to allow the Defendant a complete record of the case for use in an appeal.

b. Error for refusing to appoint an attorney to represent the after the "Public Defender" withdrew.

c. Error for refusing to rule on the Defendants Motion To Dismiss

d. Error for refusing to rule on the Defendants Motion To Clarify Charges

e. Error for refusing to approve the Defendant's two Motion to Strike when the Prosecution had clearly presented a insufficient case, having failed to provide any evidence of criminal intent or that the school owned the property in question, and without disproving the Defendant's right to be on the property.

23. The Commonwealth's brief did not address the Defendant's claim that the trial court erred by refusing to allow the Defendant to call Mr. Dale as a witness and to properly cross-examine examine witnesses against him regarding relevant, probative facts introduced by the Commonwealth.

> "[A] party has an **absolute right to cross-examine** his opponent's witness on a matter relevant to the case, which the opponent has put in issue by direct examination of the witness." Friend, supra _ 3.8, at 112.
>
> "[o]ne purpose of cross-examination is to **show that a witness is biased and his**

testimony unreliable because it is induced by considerations of self-interest"); Hewitt v. Commonwealth, 226 Va. 621, 623, 311 S.E.2d 112, 114 (1984) (noting that **the Supreme Court of Virginia has "consistently held that the right of an accused to cross-examine prosecution witnesses to show bias or motivation, when not abused, is absolute**"); Keener v. Commonwealth, 8 Va. App. 208, 213, 380 S.E.2d 21, 24 (1989)

[O]n cross-examination **great latitude is allowed** and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out. If a witness gives testimony that **is inconsistent with a prior statement, . . . opposing counsel may cross-examine the witness as to the inconsistency.** In addition, all inconsistent portions of that prior . . . statement are admissible for impeachment purposes. Smith v. Commonwealth, 15 Va. App. 507, 511, 425 S.E.2d 95, 98 (1992) (citations omitted).

"no legislation, however salutary its purpose, can be so construed as to deprive a criminal defendant of his Sixth Amendment right to confront and cross-examine his accuser and to call witnesses in his defense." Winfield, 225 Va. at 218, 301 S.E.2d at 19 (citing Davis v. Alaska, 415 U.S. 308 (1974)); see also Neeley v. Commonwealth, 17 Va. App. 349, 355, 437 S.E.2d 721, 724 (1993).

CONCLUSION

For the foregoing reasons, it is apparent that the BRIEF IN OPPOSITION TO PETITION FOR APPEAL in this case is completely without merit, the Defendant respectfully requests that it be denied and that the Defendant be granted an appeal or a summary judgment in the Defendant's favor with a remand for new trial. In addition given that several of the claims made by the commonwealth, especially claim #5, were so unfounded as to be made in violation of law §8.01-271 and asks this court to follow §8.01-271 which states "…the court … shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction…" and to impose a sanction on Brandon R. Shapiro and/or ROBERT F. HORAN JR, as appropriate for violating §8.01-271.

Respectfully submitted,
WESLEY C. SMITH
Appellant / Defendant

_____

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CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class to Fairfax County Commonwealth's Attorney's Office, 4110 Chain Bridge Rd., Room 123, Fairfax VA 22030-4047 on Mar 7, 2006.

_____
Wesley Smith