VML Insurance Programs

Brief Cases

A Review of Legal Cases and How they Affect Your Jurisdiction

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Greetings again from the Commonwealth. I am happy to report that I am writing my second update since my return from Iraq. I am thankful every day and I hope that you all continue to think of your colleagues serving in harms way across the world. This quarter showed an increase in decisions associated with computers and digital evidence. This further emphasizes the need to stay ahead of the criminals and realize the wealth of evidence that can be collected on digital storage devices. Most notably on the national level, the Supreme Court decided Hudson v. Michigan. This case suggests that the new makeup of the Court may start to reduce the effects of the exclusionary rule in the future. This will be interesting to watch as this view develops.

Criminal Procedure

Knock and Announce on Search Warrants

Hudson v. Michigan, Record No. 04-1360 June 15, 2006 (Supreme Court of the United States)

Officers obtained a search warrant for defendant's residence. When they executed the warrant, they knocked and waited 3-5 seconds and forcibly entered the residence. The state conceded that 3-5 seconds was not a reasonable amount of time between the knock and forced entry. However, the State argued that this violation should not result in a suppression of the gun and drugs discovered inside. The court agreed noting that the public should not have to pay, by the release of the defendant, for the technical mistake of the officers.

What should I do?

This will prove to be a significant case in the future of criminal procedure but be careful. Do not read this case to mean you can now shorten your time between knock and entry. The court felt that the threat of lawsuits for violations of the knock and announce rule should be an adequate deterrent from violations of this Constitutional protection. However, this type of violation should not result in suppression of the evidence.

This case also gives a good review of the knock and announce rule. Specifically, the court pointed out that officers must knock and announce when executing a search warrant on a home unless they have reasonable suspicion that:

1. There is a threat of physical force
2. There is reason to believe evidence will be destroyed
3. Knocking would be futile.

When officers knock and announce, they should wait a reasonable time before breaching the

door. The proper measure of a reasonable wait time is not how long it would take the resident to reach the door, but how long it would take to dispose of the items being searched for. In drug cases the Court has held that 15 to 20 seconds is a reasonable wait time. They also noted this time may be extended when the suspected contraband is not easily concealed. Case law does not give us good guidance on contraband not easily concealed. Suffice it to say that if you are looking for a washing machine you will need to wait longer than 20 seconds unless you have reasonable suspicion that one of the three knock exceptions apply.

Plain View

Rosa v. Commonwealth, Record No. 0288-05-2 April 11, 2006 (Court of Appeals of Virginia)

Officer executed a search of defendant's computer looking for text documents between the defendant and the victim. The officer's computer forensic software identified files associated with pictures as possibly meeting the criteria of his search for evidence. The officer opened one of these previously deleted picture files to determine if it was in fact evidence and identified child pornography. The officer then obtained a second warrant and discovered numerous images of child pornography. The defendant argued that since the officer was looking for text files he exceeded the scope of his warrant by looking at picture files. The court disagreed noting that often files are hidden or improperly marked to hide their true identity.

What should I do?

Hopefully, you have a good computer forensic examiner like the one in this case. He clearly articulated how files are easily hidden or improperly marked. Most importantly he acted reasonably by obtaining a second warrant before continuing with his examination of the computer after finding the child pornography. Always remember that good facts make good law just like bad facts can make bad law.

Probable Cause

McLaughlin v. Commonwealth, Record No. 0250-05-3 May 23, 2006 (Court of Appeals of Virginia)

The officer stopped the defendant for a minor traffic violation. When he approached the vehicle he observed a handgun in plain view in the passenger seat. In the same seat he observed numerous slim CD cases with blurry titles on the CDs. The officer received special training from the recording industry that led him to believe the CDs were bootlegs based on the packaging. He searched the rest of the car and recovered more CDs and found almost four ounces of marijuana. The defendant argued that the officer did not have probable cause to search the vehicles. He pointed out that legitimate CDs similar to the compilations made by disc jockeys appear in the same format as those in the defendant's car. The court agreed and dismissed the case noting that the homemade appearance of the CDs alone does not amount to probable cause to believe a violation occurred.

What should I do?

First of all if you plan on seizing pirated CDs you need to read the appropriate statutes. In this case, the court pointed out how even if the CDs were pirated, the statute did not allow for their seizure unless they were associated with a sale or rental.

Criminal Law

Forge and Utter of a Public Document § 18.2-168

Bennett v. Commonwealth, Record No.0309-05-3 June 27, 2006 (Court of Appeals of Virginia)

Defendant signed an electronic signature box at DMV with a false name in order to obtain a fake drivers license. Officers charged him with forge and utter of a public document. The defendant conceded the forgery but challenged the utter since he never presented the forged document. The court upheld the conviction noting that the signing of the electronic box initiated the process for him to receive the fake license. For this reason the utter was complete at the time of the forgery.

What should I do?

This case is another example of how more and more crimes are going to have computers and technology associated with the case. While computers and technology scare many of us away from cases, this one is an example of how old-fashioned theories can be applied to new technology.

Hit and Run § 46.2-894

Tooke v. Commonwealth, Record No. 2335-04-2 March 28, 2006 (Court of Appeals of Virginia)

Defendant attempted to pass a vehicle on a two lane road which caused the driver approaching in the opposite direction to veer off the road and crash into the woods. A citizen wrote down the defendant's license plate number since he never stopped. The victim and her husband were severely injured so the officer issued two violations for hit and run. On appeal, the defendant argued that one accident could not result in two convictions. The court agreed noting that the statute is intended to punish a single accident.

What should I do?

Does it sound fair to charge somebody for two hit and run counts over the crash of one vehicle? If you say yes, imagine if the defendant was your son or daughter. The court reached this conclusion even though the defendant did not properly make this argument. They clearly felt this was not reasonable.

"About The Author"

Russell McGuire heads The McGuire Consulting Group, LLC, a constitutional and criminal law training and consulting company. He has presented at conferences, lectured in seminars, and trained entire departments on various legal subjects. Currently, he is a special prosecutor in the office of the Attorney General. He served as an Assistant Commonwealth Attorney for the City of Richmond. Russell holds a Juris Doctor, cum laude, from the Thomas M. Cooley Law School and Bachelor of Arts degrees in English & History from Virginia Military Institute, distinguished military graduate.