



# *Brief Cases*

A Review of Legal Cases and How they Affect Your  
Jurisdiction

---

---

Winter 2006

Greetings again and I hope that each of you enjoy the time with your families over the holidays. I know it will be hard for those who will have to spend the holiday on duty. For that I thank you and let you know you are appreciated. In between the holiday cheer are some cases from an active Supreme Court of Virginia. I hate to keep beating the drum about search incident to arrests involving misdemeanors but it came up again in Moore v. Commonwealth. I continue to encourage you to read the case and provide training on the subject or you will lose cases in your jurisdictions. Enjoy the holidays and until the next time peace be with you.

## **Criminal Procedure**

### **Search Incident to Arrest**

**Moore v. Commonwealth, Record No. 052619 November 3, 2006 (Supreme Court of Virginia)**

Officers stopped defendant for driving on a suspended operator's license. They searched him and discovered narcotics. The defendant challenged the search based on the requirement of §19.2-74 to release him on a summons. The court agreed that the arrest clearly violated the express language of §19.2-74 and reversed the conviction.

### **What should I do?**

In the Spring 2006 issue of Brief Cases I reported on this case after the Court of Appeals affirmed the conviction. In that issue I said "Bottom line, I would still continue to train on the language of §19.2-74 and monitor this case to see if the Supreme Court of Virginia will finally rule on this issue." The Supreme Court has now given finality to this issue. You cannot perform a search incident to an arrest for misdemeanors unless you articulate one of exceptions that allow the officer to make an arrest. The default position for all misdemeanors is that officers shall release them on summonses.

§19.2-74.

Class 1 and 2 misdemeanors

1. If the defendant shall fail or refuse to discontinue the unlawful act;
2. If arresting officer believes the defendant is likely to disregard a summons;
3. If arresting officer believes the defendant is likely to cause harm to himself or to any other person; or
4. If the defendant refuses to give his written promise to appear in court.

Class 3 and 4 misdemeanors

1. If the defendant shall fail or refuse to discontinue the unlawful act; or
2. If the defendant refuses to give his written promise to appear in court.

### **Driving Under the Influence (Implied Consent)**

#### **Bristol v. Commonwealth, Record No. 060263 November 3, 2006 (Supreme Court of Virginia)**

Defendant wrecked his motorcycle after a night of drinking. The defendant was taken to a hospital. While being treated, the officer told the defendant he was under arrest, read him the implied consent law, and the defendant consented to a blood test. The officer did not physically take him into custody until the results were returned months later. The defendant argued at trial that the certificate of analysis was not admissible. He maintained that the arrest was not valid since an implied consent had been read. The court agreed and dismissed the case.

#### **What should I do?**

I previously reported on this case when the Court of Appeals affirmed the conviction. The court wants to actually see some physical restraint in order to effectuate an arrest for purposes of implied consent. This could include merely having an officer standing watch over the defendant until you can get them to a magistrate. As an alternative you could always get a search warrant for the blood. I encourage your training officer to review this case to develop a strategy for when you cannot physically take the suspect before a magistrate.

## **Criminal Law**

### **Rape § 18.2-61**

#### **Molina v. Commonwealth, Record No. 060267 November 3, 2006 (Supreme Court of Virginia)**

Defendant, had sex with a female who was under the influence of benzodiazepides, cocaine, opiate and had a .24 blood alcohol content. These levels were deadly but the defendant argued that the victim consented to sex. In addition the victim arrived at the hospital with a head injury. The court upheld the conviction stating that voluntary intoxication can result in lack of consent if the intoxication goes beyond reduced inhibition to the point the victim does not understand the nature and consequences of the act.

#### **What should I do?**

This case shows us that transitory incapacity can be a basis to find lack of consent in a rape case. I will point out that in this case the victim had also suffered head trauma in addition to the voluntary intoxication and she did not recall giving consent.

### **Anti-SPAM Act § 18.2-152.3:1**

#### **Jaynes v. Commonwealth, Record No.1054-05-4 September 5, 2006 (Court of Appeals of Virginia)**

Defendant sent unsolicited bulk e-mail from his computer in North Carolina to victims around the world. He used false transmission information to mask his identity in order to evade the filters of the Internet service provider (ISP) located in Virginia. Before messages reach the end

receiver, they are required to go through the servers of the ISP. The defendant peddled his fraudulent products and amassed a wealth of \$24,000,000. The jury sentenced the defendant to serve nine years in prison. The defendant argued that Virginia did not have jurisdiction and the statute violated the First Amendment, commerce clause and due process clause. The court disagreed finding the harm occurred in Virginia regardless of where the defendant meant for the harm to occur. The court also disagreed with the Constitutional challenges.

### **What should I do?**

This is a first of the cases we will be seeing in the future. While the technology is different the crime is the same. This case was a simple fraud case committed on a global level. Hopefully, this case will motivate you to pursue an internet related case. When we arrested Jaynes in 2003 we had no idea how large a theft he had committed.

## **Civil Liability**

### **Vehicle Pursuit**

**Sanders v. City of Union Springs, 2006 U.S. App. LEXIS 28226, November 15, 2006  
(United States Court of Appeals 11th Circuit)**

Suspect did not stop when he observed officer who turned on his lights and sirens. The officer did not see the two year old in the passenger seat and initiated a pursuit. Ultimately, the suspect's vehicle crashed killing the suspect and the two year old. The mother of the two year old filed a civil law suit against the officer and the chief of police alleging that they violated the two year old's right to be free from unreasonable seizures. The court dismissed the charge on summary judgment noting that a seizure does not occur from a wreck in a pursuit but only occurs when one submits to the authority of the officer. They also noted that the officer was attempting to seize the suspect and not the two year old.

### **What should I do?**

Recently, there have been a number of cases involving pursuits and fatalities so we decided to mention this case. In this case, we will never know why the suspect decided to run. Over the years many officers have told me that pursuits were over minor offenses such as driving on a suspended operator's license. This case is not meant to tell you to stop initiating pursuits but to clearly think about the repercussions of a pursuit before you turn on the lights.

### ***“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.*