

2525
192-83

Record No. 3790

In the
Supreme Court of Appeals of Virginia
at Richmond

PENSY WALLER

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF CAMPBELL COUNTY.

RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

M. B. WATTS, Clerk.

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

192 VA 83

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel 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.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

IN THE
Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 3790

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Thursday the 5th day of October, 1950.

PENSY WALLER,

Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in Error.

From the Circuit Court of Campbell County.

Upon the petition of Pency Waller a writ of error and *supersedeas* is awarded her to a judgment rendered by the Circuit Court of Campbell County on the 28th day of July, 1950, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, but said *supersedeas* is not to operate to discharge the petitioner from custody, if in custody, or to release her bond if out on bail.

RECORD

page 1 } State of Virginia,
 County of Campbell, To-wit:

To any Police Officer or Constable of the said County:

Whereas, Frank Tucker of the said County has this day made complaint and information on oath before me, W. H. Overbey, Trial Justice of the said County, that Pency Waller in the said County, did on the 4 day of February, 1950, unlawfully commit adultery with George Elder.

These are therefore, To command you in the name of the Commonwealth, to apprehend and bring before the said Trial Justice, the body of the said Pency Waller, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon, as witnesses.

Given under my hand and seal, this 30 day of June, 1950.

W. H. OVERBEY, T. J. (Seal)

DOCKET NO. 20126.

COMMONWEALTH

Warrant of Arrest

vs.

Pency Waller

Executed, this the day of , 19
J. L. Miles and Frank Tucker Police Officers.

Upon the examination of the within charge, I find the accused guilty, 12 months in Jail, June 30, 1950.

W. H. OVERBEY

Fine.....\$
Costs.....\$
Total.....\$

Capias Issued
Will Pay
Appeal Noted.
Filed July 11, 1950.

C. W. WOODSON, Clerk.

The following witnesses were recognized to appear before the Circuit Court of Campbell County, on the 10 day of July, 1950, under a penalty of \$
Frank Tucker.

W. H. Overbey, T. J.

COSTS

Warrant.....	\$	1.00
Trial.....		2.00
Bail.....		
Arrest.....		
Mileage.....		
Clerk.....		
Jail Fee and Board.....		
Witness Attendance.....		
Summoning Witnesses.....		
Commonwealth Attorney.....		
Total Cost.....	\$	

Fine.....

Total.....\$

State of Virginia—County of Campbell, to-wit:

I,....., a Trial Justice in and for the County of Campbell, Virginia, do hereby certify that.....and.....as his suret....., have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of.....Dollars (\$.....), to be made and levied of their goods and chattels, upon this condition: That the said.....shall appear before the.....Court of Campbell County, on the.....day of....., 19.., and not leave hence without leave of the said Court, to answer the charge in this warrant, or to await the action of the Grand Jury of the said Court upon the within charge or until the within charge is finally disposed of.

Given under my hand this, the.....day of....., 19..

....., T. J.

page 2 } Virginia:

In The Circuit Court of Campbell County.

Commonwealth of Virginia,

v.

Pensy Waller.

STATEMENT OF TESTIMONY ON CHARGE OF ADULTERY WITH GEORGE ELDER AS SET OUT IN WARRANT DESIGNATED NO. 2, TRIED JULY 10TH, 1950.

The testimony in this case heard on July 10th, 1950, in the Circuit Court of Campbell County, was that Frank Tucker, a

Supreme Court of Appeals of Virginia

town policeman of the Town of Brookneal, Virginia on February 4th, 1950, in the afternoon saw Pency Waller in the act of sexual intercourse with one, George Elder, beside the Norfolk and Western Railroad tracks, at or near a pickle factory near the corporate limits of the Town of Brookneal, Virginia. The defendant then moved the Court to strike the evidence on the grounds that the Commonwealth had not shown that the said Pency Waller was married. The Court then allowed the Commonwealth to introduce the evidence of Jack Miles, Sheriff of Campbell County, to show that Pency Waller was married.

The defendant did not introduce any evidence, and the case was submitted to the jury on the evidence introduced by the Commonwealth.

We hereby certify that this is all of the evidence heard in the case of the Commonwealth v. Pency Waller on July 10th, 1950, in the Circuit Court of Campbell County, Virginia on a charge of adultery under a warrant entitled Warrant No. 2.

Given under our hands this 25th day of August, 1950.

S. J. THOMPSON, Attorney
for the Commonwealth.
HAROLD B. SINGLETON,
Attorney for the De-
fendant.

page 3 } I hereby certify that the foregoing is all of the evi-
dence that was heard in the case of Commonwealth of
Virginia v. Pency Waller on a charge of adultery under a warrant
entitled Warrant No. 2, which said case was tried in the Circuit
Court of Campbell County, Virginia on July 10th, 1950.

Given under my hand this 28 day of August, 1950.

CHAS. E. BURKS,
Judge of the Circuit Court of
Campbell County, Virginia.

Filed Aug. 28, 1950.

C. W. WOODSON, Clerk.

page 4 } Virginia:

In the Circuit Court of Campbell County

Commonwealth of Virginia,

v.

Pency Waller.

**STATEMENT OF INSTRUCTION GIVEN BY THE COURT
ON CHARGE OF ADULTERY WITH GEORGE ELDER
AS SET OUT IN A WARRANT, DESIGNATED NO. 2,
TRIED JULY 10, 1950.**

At the trial of Pensy Waller held on July 10th, 1950, in the Circuit Court of Campbell County, Virginia, on a charge of adultery with one, George Elder, on February 4th, 1950, designated as Warrant No. 2, the following instruction was given for the Commonwealth:

“The Court instructs the jury that if you find the defendant guilty of adultery as charged in the warrant, then she may be punished by a fine not less than twenty dollars and not exceeding \$500.00, or a jail sentence not exceeding twelve months, either or both, in your discretion.”

To this instruction the defendant, by counsel, excepted on the ground that a jail sentence could not be imposed for the crime of adultery. The objection was overruled and the said defendant, by counsel, excepted to the ruling of the Court.

We hereby certify that the foregoing instruction was given in the case of the Commonwealth of Virginia v. Pensy Waller tried in the Circuit Court of Campbell County, Virginia on July 10th, 1950, on a charge of adultery with one, George Elder, designated as Warrant No. 2.

S. J. THOMPSON,
Attorney for the Commonwealth.
HAROLD B. SINGLETON,
Attorney for the Defendant.

I, Charles E. Burks, Judge of the Circuit Court of Campbell County, Virginia, do hereby certify that the foregoing instruction was given in the Circuit Court of Campbell County, page 5 } in the case of the Commonwealth of Virginia v. Pensy Waller on a charge of adultery with one, George Elder, on February 4th, 1950, designated as Warrant No. 2.

Given under my hand this 28 day of August, 1950.

CHAS. E. BURKS,
Judge of the Circuit Court of Campbell
County, Virginia.

Filed Aug. 28, 1950.

C. W. WOODSON, Clerk.

* * * * *

page 7 } We the jury find Pensy Waller guilty of *drunkenness*
as charged in warrant, punished by Fine of \$5.00.

CLARENCE DINWIDDIE,
Foreman.

We the jury find Pensy Waller guilty of *indencent* exposure
as charged in warrant #1 and fix her punishment by imprisonment
in Jail for a term of 12 months.

CLARENCE DINWIDDIE,
Foreman.

We the jury find Pensy Waller guilty of Adultery as charged
in warrant #2 and fix her punishment by imprisonment in Jail
for a term of 12 months.

CLARENCE DINWIDDIE,
Foreman.

Verdicts:

C. W. WOODSON, Clerk.

page 8 } Virginia:

In the Circuit Court of Campbell County, July 10, 1950.

Commonwealth of Virginia,

v.

Pensy Waller.

UPON TWO WARRANTS APPEALED FROM THE
TRIAL JUSTICE COURT.

This day came the Attorney for the Commonwealth as well as
the defendant and her attorney, and by consent of all parties it
is ordered that the two warrants against the defendant be tried
together; and thereupon came a jury, to-wit, Wm. Woodall,
Clyde O. Owen, O. S. Metz, Clarence Dinwiddie and Cheatham
Thompson, who were sworn to try the issues joined, and having
heard the evidence and argument of counsel and received the
instructions of the Court, retired to their room to consider their
verdicts, and after some time returned into Court and rendered
the following verdicts: "We the jury find Pensy Waller guilty
of drunkenness as charged in the warrant and fix her punishment
at a fine of \$5.00 (signed) Clarence Dinwiddie, Foreman," and
"We the jury find Pensy Waller guilty of indecent exposure as
charged in the warrant and fix her punishment by imprisonment

in Jail for a term of 12 months (signed) Clarence Dinwiddie, Foreman," And "We the jury find Pensy Waller guilty of Adultery as charged in the warrant No. 2 and fix her punishment by imprisonment in Jail for a term of 12 months (signed) Clarence Dinwiddie, Foreman."

It is therefore ordered that said Pensy Waller forfeit and pay to the Commonwealth of Virginia the said fine of Five Dollars, together with the costs of this prosecution, and that she be confined in jail for two terms of 12 months each, as fixed by the jurors in their verdicts aforesaid. The defendant made a motion to set aside the verdicts of the jury and grant her a new trial, which motion the Court takes time to consider.

A Copy—Teste.

C. W. WOODSON, Clerk.

page 9 } Virginia:

In the Circuit Court of Campbell County.

Commonwealth of Virginia,

v.

Pensy Waller.

MEMORANDUM.

On July 10th, in the Circuit Court of Campbell County, Pensy Waller was charged in a warrant designated as No. 1 with adultery, drunkenness and indecent exposure, and in a warrant designated as No. 2, with adultery with George Elder. The charge of adultery in Warrant No. 1 was nol-prossed at the suggestion of the Commonwealth Attorney, and the jury convicted the accused of drunkenness and fined her \$5.00, and of indecent exposure and sentenced her to jail for 12 months. Under Warrant No. 2, the jury brought in the following verdict: "We the jury find Pensy Waller guilty of adultery as charged in Warrant No. 2 and fix her punishment by imprisonment in jail for a term of 12 months." (Signed) Clarence Dinwiddie, Foreman.

A motion was made by the accused, by counsel, to set aside all three verdicts. The Court sustained the motion as to the verdict for drunkenness and as to the verdict for indecent exposure. The specific ground of the motion to set aside the conviction of adultery under Warrant No. 2 is that under Sec. 18-82, the accused could not be punished by a jail sentence but could be fined only by an amount not less than \$20 nor more than \$500, there being no question raised as to the guilt of the accused.

The Court is of opinion that the motion must be determined by a proper construction of Sections 18-1, 18-82 and 19-265, of the Code of Virginia. Section 18-1 provides that all offenses in Virginia are either felonies or misdemeanors. Section 19-265 provides that a misdemeanor for which no punishment or no maximum punishment is prescribed by a statute shall be punished by fine not exceeding \$500 or confinement in jail not exceeding 12 months or both. Section 18-82 provides that if any person commit adultery, he shall be fined not less than \$20. Adultery is a misdemeanor and under Sec. 18-82 no maximum penalty is prescribed, therefore the offense of adultery being a page 10 } misdemeanor and no maximum punishment being prescribed therefor by statute, is punishable under the provisions of Sec. 19-265 and the penalty may be fixed by a fine not exceeding \$500 or by a jail sentence not exceeding 12 months or both. The Court is therefore of opinion that the verdict of the jury is within the limits of the law prescribing the punishment. The Court doth therefore overrule the motion to set aside the verdict and directs that the proper order be entered upon the verdict, to which ruling of the Court the accused, Pensy Waller, by counsel, excepts.

Filed: July 28, 1950

C. W. WOODSON, Clerk.

page 11 } Virginia :

In the Circuit Court of Campbell County, July 28, 1950.

Commonwealth of Virginia,

v.

Pensy Waller.

UPON TWO WARRANTS, NOS. 1 AND 2, APPEALED
FROM TRIAL JUSTICE COURT.

The Court having maturely considered the motion heretofore made by the defendant by her attorney, to set aside the verdicts of the jury rendered in these cases at a former day of the present term, sustained said motion as to the verdict for drunkenness and as to the verdict for indecent exposure, whereupon the said verdicts are accordingly set aside; but as to the said motion to set aside the verdict of the jury on Warrant No. 2, finding the said Pensy Waller guilty of adultery and fixing her punishment at confinement in jail for twelve months, the Court overruled the said motion, and to which ruling of the Court the said defendant

by counsel excepted. It is therefore ordered that said Pensy Waller be and is hereby sentenced to confinement in jail for a term of twelve months, the period by the jurors in their verdict ascertained.

A Copy—Teste.

C. W. WOODSON, Clerk.
Circuit Court of Campbell
County, Va.

page 12 } Virginia:

In the Circuit Court of Campbell County.

Commonwealth of Virginia,

v.

Pensy Waller.

NOTICE OF APPEAL.

The defendant, Pensy Waller, hereby gives notice that she will apply to the Supreme Court of Appeals of Virginia for an appeal in the case of the Commonwealth of Virginia v. Pensy Waller on a charge of committing adultery with one, George Elder, on February 4th, 1950, and designated Warrant No. 2 in the case heard in the Circuit Court of Campbell County, Virginia on July 10th, 1950, wherein the jury returned the following verdict: "We the jury find Pensy Waller guilty of adultery as charged in Warrant No. 2 and fix her punishment by imprisonment in jail for a term of twelve months." (Signed Clarence Dinwiddie, Foreman.)

The said Pensy Waller, the defendant, hereby assigns the following grounds of error as the basis of her appeal:

1. The Court erred in instructing the jury that the offense of adultery could be punished by a jail sentence, as the offense of adultery can only be punished by a fine.

2. The Court erred in refusing to set aside the verdict of the jury and grant a new trial to the defendant, as the same is the contrary to the law and the evidence, for the reason that a person convicted of adultery under 18-82 of the Code must be fined not less than \$20.00, and no jail sentence can be imposed for the crime of simple adultery, but the crime should be punished as

provided in Section 18-82 of the Code, and only a
page 13 } fine levied.

Respectfully,

PENSY WALLER,
By: HAROLD B. SINGLETON,
Counsel.

HAROLD B. SINGLETON, p. d.
416 Peoples Bank Building
Lynchburg, Virginia.

I, Harold B. Singleton, Attorney for Pensy Waller, do hereby certify that on August 23rd, 1950, I delivered a copy of the foregoing Notice of Appeal to Honorable S. J. Thompson, Attorney for the Commonwealth, at his office in Rustburg, Campbell County, Virginia.

Given under my hand this 28th day of August, 1950.

HAROLD B. SINGLETON,
Attorney for the Defendant.

Filed, Aug. 28, 1950.

C. W. WOODSON, Clerk.

State of Virginia
County of Goochland, to-wit:

I, Pensy Waller, being first duly sworn, do make oath that I am the appellant in a certain case now being appealed to the Supreme Court of Appeals of Virginia, and tried in the Circuit Court of Campbell County, Virginia, under the style of Commonwealth of Virginia v. Pensy Waller, Warrant No. 2, which warrant charged me with committing adultery with one George Elder, on February 4th, 1950; that I am a poor person, and am not able to raise the money to print the record in this case, and that I respectfully request that I be allowed to dispense with the printing of the record in my case.

Given under my hand this 29 day of August, 1950.

PENSY WALLER.

Witness.

ELOUISE F. RUCKER.

State of Virginia

County of Goochland, to-wit:

I, H. H. Ferrell, a Notary Public in and for the County of Goochland, in the State of Virginia, do hereby certify that Pensy Waller this day appeared before me in my County aforesaid and made oath that the matters set out in the foregoing statement are true.

Given under my hand this 29 day of Aug., 1950.

My commission expires on the 20 day of Aug., 1952.

H. H. FERRELL,
Notary Public.

Filed in Clerk's Office of Campbell Circuit Court,.....,19..
.....Clerk.

I, Charles E. Burks, Judge of the Circuit Court of Campbell County, Virginia, do hereby approve the foregoing affidavit of Pensy Waller, and do hereby certify that she is financially unable to pay the costs of the printing of the record in her case entitled, "Commonwealth of Virginia v. Pensy Waller—Warrant No. 2," on which said warrant she was convicted of adultery in the Circuit Court of Campbell County, Virginia on July 10th, 1950.

Given under my hand this 9th day of September, 1950.

CHARLES E. BURKS,
Judge of the Circuit Court of Campbell
County, Virginia.

Filed in Clerk's Office of Campbell Circuit Court Sept. 15, 1950.

C. W. WOODSON, Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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