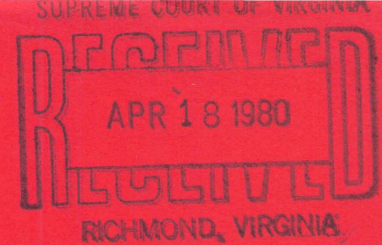


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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

RECORD NO. 791798

THOMAS HART  
Appellant

v.

COMMONWEALTH OF VIRGINIA  
Appellee

JOINT APPENDIX

Edward S. Rosenthal, Esq.  
Attorney at Law  
MILLER, ROSENTHAL & GRIMALDI  
117 North Fairfax Street  
Alexandria, Virginia 22314

Counsel for Appellant

Marshall Coleman  
Attorney General of  
Virginia  
Supreme Court Building  
Richmond, Va. 23219

Counsel for Appellee



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WARRANT OF ARREST

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX:

To Any Law Enforcement Officer of the Commonwealth:

Whereas, Investigator T. Baker of Fairfax County Police  
COMPLAINANT

has this day made proper complaint before me under oath, and

Whereas, on the grounds of said complaint I have found probable cause to believe that Thomas Hail  
DEFENDANT

a W M born 6-19-60 who can be located at 9124 Belvoir Rd  
RACE SEX BIRTHDATE ADDRESS

Fort Belvoir, Va. did, in the County aforesaid, on or about the 24 day

of June, 19 78, unlawfully and feloniously, in violation of State Code, Section 18.2-91

of the 1950 Code of Virginia as amended Break and enter McDonald's Rest.

8735 Richmond Highway, Alexandria, VA. in

the nighttime, with the intent to commit

Larceny or any felony.

8/2 Conf. only

8/16 7/1

These, Therefore, are to command you in the name of the Commonwealth to forthwith apprehend and bring before the Fairfax County General District Court at Fairfax \_\_\_\_\_, Virginia on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_\_ M. the subject to answer the said complaint and to be further dealt with according to law and there have this warrant with your return.

Given under my hand this 17 day of July, 19 78.  
JUL 20 1978

IC

Baker M. D. #52  
Special Magistrate

(Class 2 felony)

F 78 05007

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

March 19, 1979

COMMONWEALTH OF VIRGINIA	)	
	)	INDICTMENT FOR
vs.	)	
	)	STATUTORY BURGLARY
THOMAS HART	)	

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its March Term, 1979 charges that: On or about the 24th day of June, 1978 in the County of Fairfax, Thomas Hart did break and enter a certain restaurant, Golden Arch Realty Corporation, t/a McDonald's, 8735 Richmond Highway, Alexandria, Virginia, with the intent to commit larceny.

Va. Code §18.2-91

A True Bill\_\_\_\_\_

No True Bill\_\_\_\_\_

\_\_\_\_\_  
F O R E M A N

Witnesses subpoenaed, sworn and available to testify before the Grand Jury:

Inv. T. Baker, Fairfax County Police Dept.

MOTION TO SUPPRESS

COMES NOW the Defendant, THOMAS HART, by Counsel, and moves this Honorable Court for entry of an Order suppressing all fruits of an unlawful search and seizure of his person and property. In support whereof, Defendant states:

1. On or about the 24th day of June, 1978 he was unlawfully arrested and imprisoned without probable cause or a warrant by the Fairfax County Police.

2. In the course of this unlawful arrest and detention, Defendant was subjected without a warrant or probable cause therefor to a search and seizure of his person and property, including several items of his clothing.

3. These unlawful searches and seizures led to the subsequent obtaining by police of other evidence, both tangible and intangible, including laboratory analyses, scientific tests, and a statement by the accused, which were fruits of the primary unlawful intrusions.

WHEREFORE, Defendant prays that all fruits of the unlawful searches and seizures be suppressed and for such other and further relief as may be just and proper.

THOMAS HART  
By Counsel

## 1 EVIDENCE ON BEHALF OF THE COMMONWEALTH

2 Whereupon,

3 OFFICER RICHARD REEDER,

4 called as a witness by Counsel for the Commonwealth, having  
5 been duly sworn by the Clerk of the Court, was examined and  
6 testified as follows:

## 7 DIRECT EXAMINATION

8 BY MS. KIMBLE:

9 Q. Would you please state your name and occupation.

10 A. Richard Reeder, Fairfax County police officer.

11 Q. You will have to speak up because I can't hear  
12 you very well.

13 A. Richard Reeder, Fairfax County Police Department.

14 Q. How long have you been so employed?

15 A. Approximately two years.

16 Q. Were you so employed back in June of 1978?

17 A. Yes, ma'am.

18 Q. Directing your attention to on or about June  
19 24, 1978, around 5:00 in the morning, where were you  
20 located?21 A. I was at the McDonald's in Woodlawn which is  
22 the intersection of Cooper Road and Route 1 in Fairfax  
23 County.

1 Q. Were there other people out on the street at that  
2 time?

3 A. Yes, ma'am. There were myself, a truck driver  
4 for McDonald's and another subject on Route 1.

5 Q. Was your attention drawn to any particular one  
6 of these people?

7 A. Well, I was talking to the truck driver from  
8 McDonald's.

9 Q. Did you have occasion after that to see any  
10 other individual?

11 A. Yes. I spoke to another subject who was walking  
12 up Route 1.

13 Q. And is that person in the Courtroom today?

14 A. Yes, ma'am, he is.

15 Q. Would you point him out, please.

16 A. The gentleman in the blue shirt there. (Indicating)

17 Q. The Defendant in this case?

18 A. Yes, ma'am.

19 Q. Now, would you tell the Court what you did when  
20 you saw the Defendant.

21 A. Well, I was talking to the truck driver in  
22 reference to a burglary at the McDonald's there and he was  
23 giving me a description of the subject he saw come out of

1 the McDonald's.

2           While we were talking, he looked towards Route 1  
3 and he saw the Defendant and he said, "well, the gentleman  
4 that came out of McDonald's looks -- was dressed similar  
5 to that man out there on Route 1."

6           So, myself and the truck driver walked out and  
7 spoke with Mr. Hart, talked to Mr. Hart and asked him where  
8 he had been, what was he doing out on Route 1.

9           He gave me his driver's license. I believe it  
10 was some type of identification. I don't know exactly  
11 what it was. I copied down all the information that he had.

12           I spoke with the truck driver and I asked the  
13 truck driver if this was the gentleman that he had seen  
14 inside the McDonald's. He said that he wasn't sure. He  
15 was dressed the same, but he couldn't positively identify  
16 the man because he was too far away when the subject came  
17 out of McDonald's and ran towards the apartment complex.

18           Q. Would you please describe Mr. Hart's physical  
19 condition at that time.

20           A. Physically, he was -- his eyes were bloodshot.  
21 There was alcohol on his breath. He was a little unsteady  
22 standing and his speech was a little slurred.

23           Q. When you saw him, where was he at that time?



1 Where specifically was he?

2 A. When I stopped him, he was on Route 1 at the  
3 intersection of Cooper Road which is at the parking lot  
4 of McDonald's.

5 Q. Was he driving or was he walking?

6 A. He was walking.

7 Q. Were there other people out on the road at this  
8 time walking?

9 A. Not to my knowledge. I don't remember seeing  
10 anybody else.

11 Q. Did you have occasion to place Mr. Hart under  
12 arrest for anything?

13 A. I placed him under arrest for drunk in public.

14 Q. After you placed him under arrest for drunk in  
15 public, what did you do with him?

16 A. Transported him to the station, the Groveton  
17 station, arraigned him in front of the Magistrate and  
18 then asked him the particulars about the McDonald's. I  
19 read him his rights..

20 He advised me that he didn't have anything to do  
21 with the McDonald's at which time I did not ask him anything  
22 else and I took his pants and his shoes.

23 Q. I show you these two items and ask you if you

1 can identify them. One that appears to be shoes and that  
2 appears to be a pair of pants. (Indicating)

3 A. It looks like the pants and shoes I took from  
4 Mr. Hart.

5 Q. Did you make any marks when you took the shoes  
6 and the pants from Mr. Hart? What did you do with them?

7 A. I placed them in the plastic bags.

8 Q. Did you mark them in any way?

9 A. Yes, ma'am, I did. I placed the legs of the  
10 pants, as they were wet, inside separate plastic bags  
11 inside another bag and I placed the shoes in one separate  
12 bag.

13 Q. And did you mark these in any way with your  
14 initials or the date and time?

15 A. Yes, ma'am. I put the stickers on them. .

16 Q. Is there one on this one as well? (Indicating)

17 A. Yes.

18 Q. Is that your handwriting?

19 A. Yes, ma'am, it is.

20 Q. Now, from the time that you took the items, took  
21 the shoes and pants from Mr. Hart, from his person, until  
22 the time you put them in these bags, did you alter them in  
23 any way? Did you change them, put any substance on them or

1 take any substance off?

2 A. The only thing I did was put my initials on the  
3 shoes and on the inside of the pants.

4 Q. What did you do with these items once you placed  
5 them in these bags?

6 A. After I placed them in the bags, I gave them to  
7 the investigator to take them to the lab.

8 Q. Do you remember what investigator that was?

9 A. Investigator Mullins, I believe.

10 Q. After you put them in the bags, did you change  
11 the substance in any way?

12 A. No, ma'am.

13 Q. Alter the substance?

14 A. No, ma'am.

15 Q. Now, Officer Reeder, when you stopped Mr. Hart,  
16 how far -- what McDonald's, first of all, are we talking  
17 about?

18 A. It's the McDonald's in Woodlawn.

19 Q. Do you remember the address of that McDonald's?

20 A. I believe it carries a 8700 block of Richmond  
21 Highway, I think is the address.

22 Q. Did you have occasion to go to that McDonald's?

23 A. Yes, ma'am.

1 Q. How far approximately was it from this McDonald's  
2 that you stopped and spoke with Mr. Hart?

3 A. Not more than 100 yards.

4 Q. When you got to the McDonald's, would you please  
5 describe the physical condition of the McDonald's when  
6 you got there.

7 A. Yes, ma'am. On the outside of the building  
8 there were several windows broken out. There were rocks  
9 laying inside the building and the one south door was  
10 completely broken out. There was no glass in the door at  
11 all. There was glass leading inside the store and there  
12 was glass out to the parking lot.

13 Q. While you were there at the McDonald's, did you  
14 take any property from that McDonald's while you were there?

15 A. Yes, ma'am. I took some glass from inside the  
16 store.

17 Q. From where did you take that glass?

18 A. I took some glass from around the door and from  
19 around the windows and I believe we took -- found some glass  
20 by the refrigerator in the back.

21 Q. Now, what did you do with these glass fragments?

22 A. We placed them in vials and sent them to the lab.

23 Q. Where was it that you put them in the vials?

1 A. There at the scene.

2 Q. Did you mark them in any way at that time?

3 A. Yes, ma'am, and Officer Kokinda assisted me.

4 Q. Between the time you picked up the glass fragments  
5 and through this process, did you alter them in any way?

6 A. (Shaking head.)

7 Q. Do you remember to whom you gave them?

8 A. I also gave those to Investigator Mullins.

9 Q. I show you this envelope. It has some envelopes  
10 in it and a vial in it. Can you identify them, please.

11 A. This is the glass we took from inside the store.

12 Q. Did you mark these in some way?

13 A. I believe Officer Kokinda marked those.  
14 These are also glass.

15 MR. ROSENTHAL: Can I ask the officer to speak up.

16 THE WITNESS: There are also glass fragments in  
17 the envelope there.

18 MS. KIMBLE: That's all the questions I have.

19 THE COURT: All right. Cross examine.

20 CROSS EXAMINATION

21 BY MR. ROSENTHAL:

22 Q. Officer Reeder, about what time was it when you  
23 first stopped Mr. Hart?



1 A. The exact time I am not sure. I believe it was  
2 right around 5:00 or so. It was just starting to get day-  
3 light.

4 Q. What time was it that you placed him under arrest?

5 A. That I don't remember. It was shortly thereafter.

6 Q. Within a few minutes thereafter?

7 A. I would say within no more than ten minutes.

8 Q. Did you place him under arrest at the same time  
9 during the same transaction when you confronted him with  
10 the truck driver and asked him questions?

11 A. No, sir, not the first time.

12 Q. That was not the first time?

13 A. That's not the time I placed him under arrest.

14 Q. It was a subsequent occasion?

15 A. It was thereafter I placed him under arrest.  
16 It was thereafter that I placed him under arrest.

17 Q. In fact, Officer Reeder, wasn't it about an hour  
18 afterwards at around 6 a.m.?

19 A. It might have been that time when we got to the  
20 station. I don't recall.

21 Q. But you don't recall whether it might have been  
22 an hour after that you in fact placed him under arrest?

23 A. It wasn't an hour, no, sir. Like I said, it

1 might have been an hour at the time we got to the Magistrate.

2 Q. But isn't it a fact, Officer Reeder, that you did  
3 not place him under arrest the first time that you spoke  
4 to him and the first time you had contact with him?

5 A. That's true, yes, sir.

6 Q. And in fact at that time you went about your  
7 business and he went about his?

8 A. Yes, sir.

9 Q. Now, this first time that you confronted Mr.  
10 Hart you had some conversation with him?

11 A. Yes, sir.

12 Q. And you were asking him about the burglary or  
13 suspected burglary?

14 A. I don't recall. I recall asking him his name  
15 and what he was doing in the area. I don't recall.

16 Q. And he spoke with you. He told you his name?

17 A. Yes, sir.

18 Q. And he showed you identification?

19 A. Yes, sir, he did.

20 Q. And you in the course of this transaction, you  
21 wrote down his driver's license number?

22 A. Yes, sir.

23 Q. And all the figures?

1 A. Yes, sir.

2 Q. And this was at the same time that the other  
3 gentleman, the truck driver --

4 A. Yes, sir.

5 Q. -- was present?

6 A. Yes, sir.

7 Q. After you had finished asking Mr. Hart some of  
8 these questions about what he was doing there, you conferred  
9 with Mr. Hardesty?

10 A. Yes, sir.

11 Q. And Mr. Hardesty could not make a positive  
12 identification of Mr. Hart?

13 A. No, sir. He said it could be him, but he wasn't  
14 positive because he wasn't close enough to get a look at  
15 his face.

16 Q. So, then I am correct in assuming you didn't feel  
17 at that time you had sufficient evidence to arrest Mr. Hart?

18 A. I felt --

19 Q. At that time?

20 A. I felt at that time I could have placed him under  
21 arrest for drunk in public. However, it was my responsibil-  
22 ity to handle the burglary and not become involved in a  
23 drunk in public arrest. At that point I did not feel he

1 was involved with the burglary.

2 Q. So, you were -- you had received a call about  
3 the possible break-in?

4 A. Yes, sir.

5 Q. And you were responding to that call?

6 A. Yes, sir.

7 Q. Did it turn out that Mr. Hardesty had made that  
8 call?

9 A. Yes, sir.

10 Q. The truck driver?

11 A. The truck driver, yes, sir.

12 Q. And about how long after you had received that  
13 call and spoke to Mr. Hardesty did you see Mr. Hart?

14 A. No more than ten minutes.

15 Q. And he was just walking along Route 1?

16 A. He was walking northbound on Route 1.

17 Q. There were no other people with him?

18 A. No, sir.

19 Q. Was he in the lane or was he on the shoulder or  
20 off the road?

21 A. He was on the shoulder of the road.

22 Q. So, it wasn't sufficiently important or evident  
23 or whatnot for you to place him under arrest for drunk in

1 public the first time you saw him?

2 A. No, sir. I obtained the information from him  
3 and was going to put his name in the report and turn it  
4 over to the investigator.

5 Q. On the burglary charge?

6 A. Yes, sir.

7 Q. But at that time you just let him go about his  
8 business?

9 A. Yes, sir.

10 Q. What did you proceed to do?

11 A. I proceeded to walk back to the scene with Mr.  
12 Hardesty to the south side of the building to get further  
13 information from him about, you know, the other circumstances  
14 he saw.

15 Q. What brought your attention to Mr. Hart again?

16 A. Another officer stopped Mr. Hart just two minutes  
17 or so after I let him go and that officer checked and  
18 looked at his pants, pants legs and his shoes and could  
19 see some glass fragments and I responded back to help that  
20 officer.

21 Q. Did he call you because it was possibly related  
22 to the burglary?

23 A. Yes, sir.



1 Q. Now, at the time you got back, you were the one  
2 who placed him under arrest for drunk in public?

3 A. Yes, sir.

4 Q. Now, you did that at this time because you were  
5 interested in getting the evidence as to those glass  
6 fragments?

7 A. Yes, sir.

8 Q. Now, you proceeded to take him down to the station  
9 or the substation?

10 A. I responded back to the scene. Mr. Hart sat in  
11 back of my cruiser and I assisted Officer Kokinda in  
12 obtaining some glass fragments from the scene and then I  
13 responded to the Groveton station.

14 Q. Did you personally remove the clothing from Mr.  
15 Hart or take it from him?

16 A. I took it from him, yes, sir.

17 Q. This was at the substation?

18 A. Yes, sir.

19 Q. This was as soon as he arrived?

20 A. Yes, sir. Well, excuse me, no. We went to talk  
21 to the Magistrate first and then I took his clothes.

22 Q. He was placed in a cell then for the rest of the  
23 time just in his underwear?

1 A. Yes, sir. He made a phone call and had someone  
2 bring some pants to him.

3 Q. When they were going to pick him up?

4 A. I don't recall if they were told to bring them  
5 when they picked him up or told to bring them.

6 Q. He was in fact released soon after that the  
7 next morning?

8 A. I believe so, yes, sir. I wasn't there.

9 Q. Now, when you came back after, I believe it was  
10 Sergeant Jackson had notified you about this, the glass  
11 particles?

12 A. Yes, sir. I believe it was.

13 Q. When you responded back to the scene, you  
14 immediately placed Mr. Hart under arrest?

15 A. I looked at his pants and his shoes and I could  
16 see something that appeared to be glass fragments in his  
17 shoes.

18 Q. And at that point you placed him under arrest  
19 for drunk in public?

20 A. Yes, sir.

21 Q. Is there anything in your standard departmental  
22 policy as far as you know of, Officer Reeder, for stripping  
23 or taking the clothes and shoes from somebody arrested for

1 drunk in public or any other offense?

2 A. I'm sorry. Would you repeat that.

3 Q. Is there a standard policy to take the clothes  
4 and shoes from people who are arrested for drunk in public?

5 A. Not that I know of, no, sir.

6 Q. When and where did you give the items that you  
7 had seized to Investigator Mullins?

8 A. At the station. As soon as he came to work  
9 which I believe was around 8:00 or 8:15 or something.

10 Q. Now, you said that several of the windows had  
11 been shattered?

12 A. Yes, sir.

13 Q. Could you tell what had done that? Were there  
14 rocks or bottles or anything nearby?

15 A. Yes, sir. There were rocks inside the store.

16 MR. ROSENTHAL: That's all the questions I have  
17 at this time.

18 THE COURT: Any redirect?

19 REDIRECT EXAMINATION

20 BY MS. KIMBLE:

21 Q. Officer Reeder, during the first time that you  
22 saw Mr. Hart, when you first spoke with him and the time  
23 you actually arrested him, could you please estimate how

1 long the difference in time that was?

2 A. Not more than two minutes.

3 Q. Where was he the second time?

4 A. He was just north of the McDonald's. He was at  
5 the Little Detroit Garage.

6 Q. How far had he gotten from the point where you  
7 first saw him?

8 A. I would estimate 1,000 yards. It was a 100 block.  
9 Little Detroit is the 8600 block and I believe McDonald's  
10 is the 8700 block.

11 Q. Now, what was his physical condition at that time,  
12 the second time?

13 A. It was the same as it was the first time. His  
14 speech was slurred and his eyes were bloodshot and the  
15 odor of alcohol about his person.

16 Q. Were you the complainant on the drunk in public  
17 charge?

18 A. Yes, ma'am.

19 Q. Did you come to Court on that charge?

20 A. Yes, ma'am, I did.

21 Q. Do you know what the results of that particular  
22 charge were?

23 A. I believe Mr. Hart paid a fine.

1 MR. ROSENTHAL: I will object to that, Your  
2 Honor.

3 MS. KIMBLE: I think it goes to the probable  
4 cause. If they are contesting the probable cause as far  
5 as whether he could have arrested him for drunk in public  
6 at that time, I think the results of that would go to  
7 whether there was probable cause or not.

8 Mr. Hart's actions with regard to that charge,  
9 I think, are quite relevant to the probable cause for the  
10 arrest of that charge.

11 THE COURT: Objection sustained.

12 BY MS. KIMBLE:

13 Q. Now, between the time before you gave these  
14 items that you already identified to Investigator Mullins,  
15 did anybody else have possession or custody of those items  
16 during that time?

17 A. No, ma'am.

18 MS. KIMBLE: That's all the questions I have.

19 THE COURT: May this witness be excused?

20 MR. ROSENTHAL: No, Your Honor. I have one more  
21 question. I would also like to, in view of the fact that  
22 we may need more testimony perhaps on the suppression  
23 motion, I would ask that Officer Reeder not be excused.



1 I do have one question.

2 THE COURT: One brief question then.

3 RECROSS EXAMINATION

4 BY MR. ROSENTHAL:

5 Q. Officer Reeder, I believe I asked you before  
6 whether you knew the time that you had arrested Mr. Hart  
7 for drunk in public and you weren't sure, although I  
8 believe you said it could have been as late as 6 a.m.

9 Now, I have here a copy of your -- of the  
10 summons that you issued and it states in fact 6:00 a.m.  
11 Would it refresh your memory to look at a copy of this or  
12 do you have a copy of your own?

13 A. I don't have a copy. If I could see that copy.

14 Q. Does that refresh your memory as to the time?

15 A. No, sir, it doesn't. It could have been I put  
16 down 6:00 when I had Mr. Hart at the station and was  
17 filling out the summons there or it could be I estimated  
18 the time.

19 That's the best of my recollection because I  
20 don't recall exactly what time it was.

21 Q. But you had put down in your report 6:00?

22 A. On my summons, yes, sir, it was 6:00.

23 MR. ROSENTHAL: That's all I have at this time.

THE COURT: Officer, if you will step back outside, subject to recall. Thank you very much.

(The witness stood aside.)

Whereupon,

INVESTIGATOR MULLINS,

called as a witness by Counsel for the Commonwealth, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. KIMBLE:

Q. Are you Investigator Mullins of the Fairfax County Police?

A. Yes, I am.

Q. For how long have you been so employed?

A. Ten and a half years.

Q. Were you so employed back in June of 1978?

A. Yes, I was.

Q. Investigator Mullins, I am going to show you several items and ask if you can identify them, please.

I will keep these things in order.

(The items referred to were marked for identification as Commonwealth's Exhibits 1 through 6.)

Commonwealth's Exhibit No. 1 for identification looks like a pair of pants. Tell us from where you got

1 a day and a half.

2 Q. During that time did anybody else have possession  
3 or control of these items?

4 A. Absolutely not. Not from the time I opened the  
5 sealed packages, until I resealed them and as far as I  
6 could tell they are resealed as I resealed them.

7 MS. KIMBLE: Thank you. That's all the questions  
8 I have.

9 THE COURT: May this witness be excused?

10 MS. KIMBLE: Yes, sir.

11 MR. ROSENTHAL: Yes, sir.

12 THE COURT: You are excused. Thank you very much,  
13 sir. You are free to go.

14 (The witness was excused.)

15 MR. ROSENTHAL: Your Honor, for the purpose of  
16 this motion, I would like to call Mr. Hart and at this time  
17 I would note that it is for the limited purpose of the  
18 motion to suppress.

19 THE COURT: All right.

20 MOTION TO SUPPRESS

21 Whereupon,

22 THOMAS K. HART,

23 the Defendant, called as a witness by and in his own behalf,

1 having been duly sworn by the Clerk of the Court, was  
2 examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. ROSENTHAL:

5 Q. Would you state your name.

6 A. Thomas Kirkwood Hart.

7 Q. Mr. Hart, you are the Defendant in this case?

8 A. Yes.

9 Q. I would like to ask you several questions, as  
10 you have heard, with the factors concerning your arrest  
11 and the seizure of your clothing.

12 Do you recall that incident?

13 A. Yes.

14 Q. Now, you heard Officer Reeder testify that after  
15 you had been taken down to the station your clothes were  
16 taken from you and you were placed in a cell in your under-  
17 wear. For how long were you so placed?

18 A. I'd say three hours at the least.

19 Q. Did you have any clothing at that time?

20 A. A shirt, t-shirt.

21 Q. And otherwise --

22 A. Underwear and socks.

23 Q. Did the police provide or offer to provide you.

1 with any other clothing?

2 A. No, sir.

3 Q. Did they make any calls for you?

4 A. No, sir.

5 MS. KIMBLE: I didn't hear that answer.

6 THE DEFENDANT: No.

7 BY MR. ROSENTHAL:

8 Q. How long was it before you received other  
9 clothing?

10 A. About four hours.

11 Q. What were those circumstances?

12 A. I had a friend -- I called a friend of mine and  
13 had him bring me a pair of pants so I could wear them home.

14 Q. Were you released at that time?

15 A. Yes.

16 Q. Approximately three or four hours after you had  
17 been placed in?

18 A. Yes. It was getting close between 9 and 10:00.

19 Q. Now, when you were arrested, did Officer Reeder  
20 express why you were being arrested or the purpose for  
21 which he was making that arrest?

22 A. Yes; for drunk in public. He simply stated that  
23 I was drunk.

1 Q. Did he say -- did he have an interest in something  
2 other than that?

3 A. Yes, that he stated the way he saw my pants.

4 Q. He stated that he wanted --

5 A. Not actually stated it, but between the officers  
6 conferring with themselves, it was pretty definite.

7 Q. What was pretty definite?

8 A. That they wanted to get either some glass or  
9 some kind of tests from my clothes that I had on to match  
10 in with the McDonald's.

11 Q. And that was why they were arresting you?

12 A. They didn't say it out right, but it was very  
13 obvious.

14 Q. Now, between the first and the second time that  
15 you were stopped by Officer Reeder, had you consumed any  
16 alcoholic beverages?

17 A. No, sir.

18 Q. About how much time had elapsed?

19 A. Somewhere, ten to fifteen minutes.

20 Q. And you had moved up the road that you were on?

21 A. Yes, a couple of hundred yards.

22 Q. What road was that?

23 A. Route 1, Richmond Highway.

1 Q. Were you in any sense in danger yourself? Did  
2 you feel yourself to be in any danger because of any  
3 condition that you were in?

4 A. No.

5 Q. What were you doing at that time?

6 A. I was walking to a friend's house.

7 Q. Had you been in direct face-to-face contact with  
8 Officer Reeder the first time?

9 A. Yes.

10 Q. And you had exchanged --

11 A. I did. He asked me several questions. I  
12 answered them, gave him my driver's license, really  
13 answered any question he would like to know.

14 Q. Had he told you that you were drunk at that time?

15 A. No, sir.

16 Q. When were the clothes and shoes actually taken  
17 from you?

18 A. I was taken into the station, talked to Officer  
19 Reeder for five minutes or so while he filled out the  
20 summons or arrest warrant and immediately after that they  
21 were taken from me.

22 Q. Did Officer Reeder tell you any reason why he  
23 wasn't simply issuing you a citation?

A. He said that he believed I was a suspect in McDonald's and that the clothes and the glass on them would be used for evidence and sent to a lab and checked.

MR. ROSENTHAL: That's all the questions I have.

THE COURT: Cross examine.

CROSS EXAMINATION

BY MS. KIMBLE:

Q. Mr. Hart, before you saw Officer Reeder the first time, had you been drinking that night, that morning?

A. Yes.

MR. ROSENTHAL: Objection, Your Honor. I think it's beyond the scope.

THE COURT: No. Objection is overruled. Go ahead.

BY MS. KIMBLE:

Q. Had you been drinking?

A. Yes.

Q. How much had you to drink?

A. A lot. I know I passed out several times that night.

Q. When was the, if you remember, when was the last drink that you had prior to seeing Officer Reeder the first time?



A. I would imagine it was around 3:00.

Q. And when Officer Reeder, when you first saw him and the second time you saw him, were you still feeling the effects of the alcohol that you had been drinking that night?

A. Yes.

MS. KIMBLE: That's all the questions I have.

THE COURT: All right. Any redirect?

MR. ROSENTHAL: No, sir.

THE COURT: You may step down. Just have a seat with your counsel, please.

(The witness stood aside.)

THE COURT: Mr. Rosenthal?

MR. ROSENTHAL: Yes, Your Honor. I have no further evidence to present in connection with the motion to suppress. I do have a memorandum of law, a copy of which I am providing to the Commonwealth which sets out two of the grounds on which I would move for a suppression.

There are also two other grounds -- excuse me. There is one other ground and that I would deal with last. But basically there are three grounds, two of which are set out in my memorandum.

The first is that even if there was probable

1 cause for arrest for drunk in public, at this time under  
2 both Virginia Code and the Fairfax County Code there has  
3 been a clear violation of the explicit terms of the require-  
4 ment in a misdemeanor case that a summons be given in place  
5 of a warrant.

6       There is certain exceptions set out in both the  
7 Fairfax County Code and in the State Code. However, I  
8 don't think there has been any testimony, certainly none  
9 by the officer and I think in fact the testimony goes  
10 against either of those exceptions being applicable here.

11       Your Honor, if I might summarize on this ground  
12 and I have set out the language from both of the provisions  
13 in my memorandum. Being drunk in public is a Class 4  
14 misdemeanor under the Fairfax County Code. This was the  
15 charge for which the arrest was made.

16       The maximum fine or penalty for a Class 4  
17 misdemeanor does not even include incarceration. It's  
18 not only a misdemeanor, it's quite a modest infraction  
19 among misdemeanors. The maximum fine is \$100. It's quite  
20 similar in the State Code offense.

21       Now, the exceptions in the Statute, Your Honor,  
22 apply only, and I believe otherwise the Statute is  
23 expressly made, mandatory, that a citation rather than an

1 arrest be made. The only exceptions are that a person  
2 refusing to give a promise to appear is not entitled to a  
3 summons and also that if the officer reasonably believes  
4 that the person is likely to cause harm to himself or to  
5 any other person, the officer may take such person before  
6 a Magistrate or other issuing authority of the County or  
7 City in which the violation occurred and request the  
8 issuance of a warrant.

9 Now, Your Honor, it is clear that neither of  
10 these exceptions is applicable here. No warrant was in  
11 fact issued. A summons was in fact issued. Excuse me.

12 Mr. Hart was taken before the Magistrate and  
13 was in fact arrested and incarcerated. I believe the  
14 testimony shows and demonstrates what the reason for the  
15 incarceration was. I think the officer was quite clear  
16 and candid in stating that the reason he arrested Mr. Hart  
17 the second time was because he wanted to get the evidence  
18 which he felt might be contained in the pants and shoes.

19 Your Honor, there was no testimony, certainly,  
20 that Mr. Hart was in any manner dangerous to himself or  
21 to others and that certainly is buttressed by the fact  
22 that the officer did not make an arrest or issue a  
23 citation the first time. That he confronted Mr. Hart.

1 He had many words with him that first time. He  
2 received his license. He received his information on him  
3 as to his identity, as to what he was doing. He had  
4 conversation with him. The officer did testify that he  
5 detected elements of possible intoxication at that time,  
6 but he said it wasn't really a matter of concern to him  
7 at that point because he was investigating a burglary  
8 and since he couldn't tie Mr. Hart at that time into the  
9 burglary, he was not going to get involved.

10 Your Honor, certainly that's as close as we can  
11 come to an out-right concession that Mr. Hart was in no  
12 way a danger to himself or to anyone else. Certainly  
13 in those cases, as the Court knows, the officer would have  
14 made an immediate arrest.

15 The officer testified there was no change in  
16 condition between the two times. Ten or fifteen minutes  
17 had elapsed and the only reason he responded differently  
18 the second time was because he hoped that the arrest  
19 would turn up -- the arrest for drunk in public would  
20 turn up incriminating evidence on another charge.

21 Your Honor, therefore, I think because of the  
22 explicit command of both of these provisions and the fact  
23 that in this case, unlike perhaps some other cases of drunk

1 in public or other misdemeanors, there is absolutely no  
2 evidence on behalf of the Commonwealth tending to show  
3 that an exception is justified.

4 I believe that this Court should follow the  
5 explicit mandate of both 19.2--274 and Fairfax County Code  
6 Section 1--1--15; should uphold the mandatory requirements  
7 as set out herein and should hold that a citation should  
8 have been issued and a citation having been avoided for  
9 the express purpose of obtaining further evidence, that  
10 further evidence should be suppressed as the fruits of  
11 an unwarranted and therefore unlawful arrest which was not  
12 justified by Statute.

13 I would point out, Your Honor, that just in  
14 closing, that there is a specific exception in the Statute  
15 also which is not applicable here for things that are  
16 provided otherwise in the traffic code, including the  
17 provision for drunk driving in which it is necessary to  
18 take a breath test later and there are specific reasons  
19 why an arrest of a custodial nature is required.

20 Your Honor, that does not come out in here and  
21 I emphasize this point to show that the -- both the  
22 Fairfax County Board of Supervisors and the General  
23 Assembly could have provided an easy exception if they

1 had wanted to for specifically a drunk in public type  
2 offense.

3           However, there is no such exception. It seems  
4 to me quite reasonable that     what was intended was that  
5 if a drunk in public charge arose to the point where the  
6 person might be reasonably believed to be a danger to  
7 himself and/or to others that this other exception would  
8 cover it.

9           Your Honor, I believe that therefore it would  
10 be unwarranted to carve out a specific additional  
11 exception for any drunk in public arrest which the Legis-  
12 lature has not seen fit to carve out itself and since  
13 on the facts clearly there was no danger to himself or  
14 to others, none of the other exceptions apply either.

15           I have also cited in my memorandum, I will  
16 allude to it briefly, that many Courts have recognized  
17 the principle that a detention which goes beyond what  
18 may have been lawful at the outset can of itself become  
19 illegal and require that the fruits of the further intrusion,  
20 the unwarranted parts of the intrusion be suppressed and  
21 that's what we are asking.

22           THE COURT: All right.

23           MR. ROSENTHAL: Your Honor, the second ground

1 which I think is also very clearly made out on the facts  
2 in this case is the so called sham or pretext arrest  
3 theory.

4 This has been recognized by many of the authorities,  
5 perhaps the leading case is the case of Amador-Gonzalez  
6 versus the United States which I have set out in the  
7 memorandum.

8 This is a doctrine which states, Your Honor,  
9 that search incidents, which supposedly this was, this was  
10 a search incident to arrest, I assume is the theory of the  
11 Commonwealth. It was certainly the theory of the police  
12 officers that a search incident to arrest cannot be  
13 justified by what comes later.

14 In other words, the search cannot precede the  
15 arrest and serve as justification. By the same token,  
16 the need for a search cannot justify an arrest where it  
17 might otherwise have been improper or would not -- would  
18 have been avoided.

19 Your Honor, in the cases setting out this  
20 doctrine, it's been stated that even if there is probable  
21 cause and reason to make an arrest for another offense,  
22 a minor offense, often times a traffic offense, that that  
23 will not serve to justify the fruits where it is clear

1 that the officers used the arrest itself as a pretext.  
2 They did the act where otherwise they would not have  
3 certainly done it and in similar instances do not do so,  
4 merely as a way to search for further inculpatory evidence.

5 Your Honor, the reasoning is that this turns  
6 the arrest in which police are justifiably given in many  
7 instances broad custodial search rights. It turns the  
8 arrest in a general exploratory search for evidence and  
9 the general search is precisely the evil that the Fourth  
10 Amendment was designed to protect against.

11 Your Honor, I would submit that on the facts  
12 of this case we have precisely that. We have an officer  
13 who was investigating a possible burglary, who could not  
14 get an identification -- concededly did not have enough  
15 evidence to charge Mr. Hart with the offense of burglary  
16 or in connection with that case.

17 He then saw Mr. Hart, discussed with him, did  
18 not at that time see fit to make an arrest until it came  
19 to his attention that an arrest might prove quite  
20 successful in turning up other evidence of the real crime  
21 that he was interested in.

22 The real crime, as he said himself, was the  
23 burglary. He was there on the burglary. He didn't have



1 time to get involved in an unrelated drunk in public  
2 arrest, as he stated himself.

3 Your Honor, the record at this point is quite  
4 clear that that's the only reason this arrest was made  
5 and the only reason it was made a custodial arrest was to  
6 provide an excuse for Officer Reeder to turn up whatever  
7 inculpatory evidence he could about the suspected burglary.  
8 That considering that he did not have sufficient evidence  
9 to move on that charge on its own merits, he used a pre-  
10 text or a sham, and I think that is applicable here, to do  
11 the job for him.

12 Your Honor, I would hasten to add that the  
13 cases are quite clear that this doctrine applies, notwith-  
14 standing the fact that there may have been probable cause  
15 and antecedent probable cause to make the arrest, that  
16 such an arrest could have been sustained.

17 In other words, the DIP arrest could perhaps  
18 have been sustained on its own merits. But let us suppose  
19 there was probable cause. Let us suppose that a citation  
20 was not required, that a full custodial arrest was  
21 warranted in this case.

22 Still, Your Honor, the cases are quite clear in  
23 stating that it cannot be used for an explicit ulterior

1 motive such as existed in this case to search for other  
2 incriminating evidence.

3 I would refer also to what I have appended with  
4 the discovery letter of April 26, 1979, which I have  
5 appended as an exhibit to my memorandum and I have put  
6 it in my memorandum itself and it basically relates what  
7 was testified here today.

8 But I think the words itself gives evidence to  
9 what I am saying. A truck driver delivering bread to this  
10 McDonald's was the person who called in the complaint.  
11 Officer Reeder didn't have -- said I don't know the  
12 driver's name, so forth.

13 The driver told Officer Reeder he saw a man  
14 inside the McDonald's and two boys on the property running  
15 into the woods. The driver gave a hair and clothing  
16 description to Officer Reeder, so forth and so on.

17 As they were talking, the driver pointed out  
18 Hart on the street, said he looked a lot like that. Hart  
19 was stopped. The driver could not positively identify  
20 his face. He said something like he thought that was the  
21 person, but couldn't be positive. Probably never saw  
22 his face.

23 Now, Officer Reeder did smell alcohol at the

1 time, but it wasn't until Sergeant Jackson stopped him  
2 and noticed what appeared to be glass particles on his  
3 pants and shoes was Hart arrested for DIP. Officer Reeder  
4 read Hart his rights and asked him what he was doing in  
5 the McDonald's.

6 Hart replied he knew nothing about it. Your  
7 Honor, I think that is a very fair summary of what happened  
8 in this case. I cannot think of a stronger expression of  
9 the type of evidence that this was in fact a pretext,  
10 that the real reason for making this arrest was only  
11 solely exclusively in order to gather further evidence  
12 which the officer didn't feel he was otherwise entitled  
13 to and was not otherwise entitled to on its own merits.

14 Your Honor, the third and final claim that I  
15 would make is that even given a custodial arrest under  
16 the circumstances in this case, the seizure, the post-  
17 arrest seizure of the clothing from Mr. Hart was improper  
18 because it was without a warrant.

19 Even if Mr. Hart was properly in custody at that  
20 time, it was improper without a warrant showing specifically  
21 probable cause to take these items and interposing a  
22 Magistrate between the police officers' hunch and the  
23 Defendant's privacy that a warrant should have been required.

1 I understand, Your Honor, it's quite clear that  
2 up until fairly recently the case law was wholly the other  
3 way on this type of a point. The case law seemed to say  
4 that given an arrest under the Robinson and Gustafson  
5 cases and cases which have succeeded them.

6 The case law did seem to say that once a custodial  
7 arrest is made, anything in the Defendant's hands, anything  
8 around him, within his reach and so forth and so on, including  
9 the clothes, including wallets or what have you, can be  
10 searched, seized and processed; further kept from him.

11 Your Honor, I submit, and other Courts have so  
12 interpreted, that the case of United States versus Chadwick,  
13 a 1977 U. S. Supreme Court case, has changed all that.  
14 Chadwick is at 53 L.E. 2nd 533, by the way.

15 Chadwick involved, as I am sure the Court is  
16 well aware, a case where Federal agents arrested a man at  
17 a bus depot or a train depot and there was certain pieces  
18 of luggage which were closed and which were later found  
19 to contain incriminating evidence. I believe it was in  
20 fact narcotics.

21 The Defendants' were taken, processed and  
22 arrested, placed in a cell. The baggage was not opened  
23 at the scene. It was taken to the station house and

1 there subsequently within an hour or two it was searched.  
2 It was opened, searched and the contents analyzed by the  
3 police without a warrant.

4           Your Honor, the Court, in Chadwick, held that  
5 notwithstanding Robinson, still, a search incident to  
6 arrest can only go so far. Once the police have an item  
7 belonging to the Defendant in which the Defendant continues  
8 to maintain some privacy or property interest, some Fourth  
9 Amendment interest remains, that is, no further intrusion  
10 is warranted into that property or into the Defendant's  
11 privacy or other rights in it unless by reason of a warrant  
12 from a Magistrate.

13           The reasoning, I think, is simple, and it is  
14 set out at length in Chadwick. The reasoning is once  
15 the police have in their sole custody and control whatever  
16 it is that they want, then to go further and intrude further  
17 into it, in this case, I would say by keeping the property  
18 while Mr. Hart was without clothing and sitting in his  
19 underwear in a jail cell and beyond that keeping the  
20 clothing after Mr. Hart was out on the street no longer  
21 in custody and having certainly a privacy and a property  
22 interest in his own clothing, that once the police, the  
23 authorities had this in their sole possession, the Defendant

1 could no longer destroy evidence from it. He could no  
2 longer reach it to secrete anything. He couldn't get a  
3 weapon from it or any of that.

4 Any of the normal justification for a search,  
5 a full custodial search incident to arrest are no longer  
6 available once the property is separated from the Defendant.

7 Your Honor, I would say also in this case that  
8 that holds true. That, as the Sixth Circuit has noted,  
9 once the belongings are safely in the possession of the  
10 police, there is very little reason other than convenience  
11 not to obtain a warrant before a search is conducted.  
12 The police would be well advised to err on the side of  
13 caution in making these searches, thereby eliminating  
14 potential flaws in any conviction which might ensue  
15 without corresponding disadvantages or even serious  
16 inconvenience.

17 Your Honor, the Chadwick case has been held by  
18 many of the Circuit Courts to have been such a drastic  
19 detour from prior law, especially Robinson and Gustafson.  
20 It has not been given retrospect application.

21 I mention this because I believe it's a drastic  
22 law because all the prior law would tend to say in this case,  
23 no, Mr. Hart, the police had complete rights to search

1 your belongings, after they made a full custodial arrest,  
2 that custodial arrest was lawful. But Your Honor, I  
3 believe Chadwick was a radical departure. I believe  
4 after Chadwick each incremental intrusion has to get  
5 separate justification, has to get some kind of reasonable,  
6 at least, justification..

7 Your Honor, in this case detaining Mr. Hart's  
8 clothing, keeping him in jail in his underwear, releasing  
9 him with him forced to make whatever arrangements he could  
10 for alternative clothing or whatnot, keeping his property  
11 in which he maintained a property and a privacy right, as  
12 well as keeping it away from him all the time pending  
13 prosecution on this case, it is now, as we can see, it's  
14 been a year; that that is not justified and isn't certainly  
15 a warrant by a neutral and detached Magistrate justifying  
16 it in the particular case.

17 I might add as well, Your Honor, that in very  
18 few of the cases does the evidence -- in fact, I am aware  
19 of no case such as the one here where we have a crime  
20 such as drunk in public which does not carry any evidence.  
21 There is no evidence of drunk in public normally about  
22 the person or about his clothing. I am not aware of any  
23 of the cases which allow a prolonged search and seizure of

1 property unrelated to the arrest crime where the second  
2 offense, the evidence or so called evidence is not contra-  
3 band and it is not in itself subject to lawful seizure.

4 Your Honor, the clothing here or the possible  
5 glass fragments which may or may not, as far as the officer  
6 knew, be at all inculpatory at that time, these were at  
7 most mere evidence of another crime. They were not  
8 contraband subject to seizure on their own.

9 Under these circumstances, Your Honor, especially  
10 an arrest as I have said, used more or less for the sole  
11 purpose of obtaining other evidence and the evidence  
12 itself not being subject on its own to lawful seizure,  
13 a warrant should have been obtained, possibly could have  
14 been obtained. The Magistrate was right there and the  
15 intercession of a neutral and detached judicial officer  
16 would have certainly preserved Mr. Hart's rights in the  
17 case, would have tested whether the police had any reasonable  
18 suspicions, reasonable basis to hold these clothing and this  
19 would have been a simple and not inconvenient way to  
20 vindicate Mr. Hart's continuing privacy and property  
21 interest in the clothing.

22 I would make only one more comment and that is  
23 that as Mr. Miller testified, without the type of testing



1 that he was able to do, one could not tell that these  
2 glass particles were the same as those in the McDonald's.  
3 Much less, one could not even tell that they were glass  
4 particles rather than sand. So that, Your Honor, there is  
5 certainly a serious question whether there might have been  
6 probable cause sufficient to seize these clothing on their  
7 own.

8 I certainly stipulate that there has been no  
9 mention of probable cause to seize them on their own or  
10 no justification for seizing them as a matter of evidence  
11 without a warrant and without probable cause.

12 MS. KIMBLE: Your Honor, the first argument  
13 of the Commonwealth is that there was adequate probable  
14 cause for Officer Reeder to arrest Mr. Hart for drunk in  
15 public. I mean Officer Reeder was there in that area  
16 investigating the burglary. He saw the Defendant, went  
17 over to speak with him, for whatever reasons, did notice  
18 the unsteadiness of the feet and the classic circumstances  
19 of being drunk in public.

20 He did testify here on the stand that he felt  
21 he, at that time, could have arrested him for drunk in  
22 public, but he had a very important matter he had to take  
23 care of and that was the burglary, the suspected burglary

1 of the McDonald's that was nearby. He felt that he did  
2 not have time at that point, that he had to go finish his  
3 investigation on that.

4 At a later time a separate police officer,  
5 another police officer stopped the Defendant in this case.  
6 There is no evidence that that police officer was necessarily  
7 investigating people for the burglary and during his  
8 stopping of the Defendant, happened to notice the glass  
9 particles.

10 At this point in time, Mr. Hart supposedly  
11 became a little more important to Officer Reeder and he  
12 went back and still based on the same condition he had  
13 seen earlier, in his feelings of the matter, placed him  
14 under arrest at that point for drunk in public.

15 I think there is ample probable cause, both  
16 by his observations, particularly of the Defendant's  
17 condition and in fact from Mr. Hart's testimony here today  
18 that he had been drinking and that he was still feeling  
19 the effects of all the drinking he had done prior to that  
20 time certainly corroborates Officer Reeder's observations  
21 at the time.

22 At that point I think it is fairly common that  
23 police officers were putting people for drunk in public

1 under arrest and taking them to the station. The whole  
2 purpose, I am guessing, but it would seem the Legislature's  
3 intent for the drunk in public statute is not to allow  
4 people who have been drinking and who may be a danger --  
5 may be a danger to themselves and others being on the road.

6 Here was the Defendant. He was walking down  
7 the shoulder of the road. Fortunately, there weren't a  
8 lot of other people out at that time. It was early in the  
9 morning. I think it is common practice to arrest a person  
10 for drunk in public and take them to the station. I don't  
11 think that his procedure in this was anything unusual or  
12 out of the ordinary.

13 So, our first contention would be that there  
14 was sufficient probable cause for the arrest for the drunk  
15 in public and therefore for the search incident to that  
16 arrest. Even if there was not probable cause and we do not  
17 concede that point, it would be the Commonwealth's position  
18 that there was independent probable cause to take these  
19 particular pieces of clothing.

20 Let's look at the facts and circumstances.  
21 First, we have a witness who described a man he sees inside  
22 the McDonald's and running from it, gives a clothing and  
23 hair description to Officer Reeder and nearby, just not

1 very far from this particular -- from the McDonald's in  
2 question, they see Mr. Hart and the man who had seen some-  
3 body inside says it looks a lot like him.

4 There are, concededly, very few people out on the  
5 street at this time and this man meets the clothing  
6 description, the basic description of Mr. Hardesty, I think  
7 it was. So, they go over and they talk to him.

8 At that time Mr. Hardesty does mention that he  
9 can't recognize the face and in fact I think it's probable  
10 that he never did see the face. That's just a conclusion,  
11 but I think that under the circumstances from what I  
12 knew of the situation that that was fairly a legitimate  
13 conclusion.

14 But he says it looks like him. It looks like  
15 his clothing and his hair, but I can't say for absolute  
16 certain. So, we have, first of all, a person who meets  
17 the basic descriptions as well as Mr. Hardesty can give of  
18 the person he saw by the McDonald's.

19 Officer Reeder, who had other things on his mind  
20 at the time, did not, I gather from the evidence, did not  
21 notice anything unusual about his clothing at that time.  
22 A separate police officer a few minutes later, just about  
23 a block down the street, stops Mr. Hart again. This time

1 that officer does notice something. He notices what appears  
2 to be glass particles on his pants.

3 I think it was clear from the testimony that the  
4 other glass particles from the shoes came from the bottom  
5 of the shoes, but that he noticed what appeared to be  
6 glass particles from the pants. Here again he calls over  
7 to Officer Reeder and here comes our next part of the  
8 probable cause in that by this time Officer Reeder realizes,  
9 having been at the McDonald's, there is broken glass, and  
10 Sergeant Jackson calls and says this guy has what looks like  
11 glass particles on his pants.

12 -- I think if Your Honor looks at some of those  
13 particles, they are fairly large. Some of them are pretty  
14 fair sized chunks. He goes as Officer Reeder goes there.

15 We not only have the broken glass at the  
16 McDonald's, we have the close proximity of Mr. Hart to  
17 the scene near the time of the burglary. We have what  
18 appears to be glass particles on his pants and we have  
19 the lack of other people in the area at this time.

20 So, independently for the arrest for drunk in  
21 public, I believe there was probable cause to take these  
22 items. I think the case law is fairly clear. I had to  
23 do a lot of research on this for a search warrant, just

1 because an arrest or in the cases I looked at, the arrest  
2 warrant or search warrant in themselves aren't invalid;  
3 that is, if there is independent probable cause for the  
4 arrest or the -- and the search incident to that arrest or  
5 say in the case of a search warrant for the search itself  
6 just 'because the police officer may have made a mistake in  
7 one spot, if there was independent probable cause for it,  
8 then the search or the arrest as it may be stands. I can  
9 only give you some. I did not bring all of these cases  
10 and I had to have somebody run back and get them for me.

11 There is one called United States versus White  
12 which is at 342 Fed 2nd 379.

13 THE COURT: What is that again?

14 MS. KIMBLE: 342 Fed 2nd 379. It had to do  
15 with an invalid arrest warrant and just summarizing said,  
16 "did not invalidate the arrest and search and seizure  
17 which took place as incident thereof."

18 It's been awhile since I read these, so I am  
19 not sure how precisely applicable they are. There is  
20 another case. There is one called United States versus Farr  
21 which is at 342 Fed 2nd 383. United States versus Gearhart,  
22 again, another Fourth Circuit case at 326 Fed 2nd 412. There  
23 was an invalid search warrant, but they still said the

1 search was still valid.

2 I have other ones here, but I am not sure what  
3 they all are. A lot of them are repeats. That, therefore,  
4 even if the probable cause for the drunk in public arrest  
5 ensues, they still did have probable cause to take these  
6 items, ' the independent probable cause to take the items.

7 Finally, as far as that, the allegation that they  
8 should have, once he was in custody that they should have  
9 gotten a search warrant, I think there again the case law  
10 is fairly clear that once there is the probable cause to  
11 arrest and to search incident to that arrest that the  
12 probable cause can carry on farther than that.

13 There is one case that immediately came to my  
14 mind and I cannot remember the name of it, but the fact  
15 situation I remember was that they had arrested a person  
16 up in Richmond and there was -- his clothing would have  
17 been part of the evidence that they would have needed and  
18 I can't remember if it was a robbery charge or something  
19 like that.

20 They transported him from Richmond back down to  
21 Charlottesville, I believe it was, and in the car, left  
22 him there at the station and went back later and got his  
23 clothing and that was upheld by saying that they did have

1 the probable cause to take those particular items because  
2 of the other evidence that they had and that the probable  
3 cause to take them up in Richmond carried with it and  
4 continued all the way down into Charlottesville and just  
5 because they could have gone to get a warrant was not the  
6 main issue.

7 It was the fact that they did have the probable  
8 cause to take it at one point and it was a continuing  
9 probable cause to take it at another point.

10 THE COURT: Let me ask you just one question  
11 as we go on. Let's concede for the purpose of argument  
12 that they had probable cause to arrest him for drunk in  
13 public, number one.

14 Are you contending that this search was made  
15 incident to the arrest for being drunk in public?

16 MS. KIMBLE: Not entirely. I don't really think  
17 it was entirely. I think it was more because of the  
18 probable cause that these items --

19 THE COURT: Totally of the probable cause they  
20 thought he might be involved in the burglary, wasn't it?

21 MS. KIMBLE: I believe that is the vast majority  
22 of it.

23 THE COURT: And there was no arrest for that.

MS. KIMBLE: No, but I don't think they have to



1 have an arrest, if they have probable cause to take  
2 a particular item, I don't think they have to have arrested  
3 that man for that particular offense to do that.

4 Again, going on the continuing probable cause and  
5 this case had to do with continuing probable cause to take  
6 an item, not search incident to arrest. The cases are  
7 replete with like, for instance, cars.

8 They talk about if you have the probable cause  
9 to search it at one place and it's taken to the station.  
10 There are many, many cases where that probable cause  
11 carries with it until it gets to the station and did not  
12 have to search it right then and there, especially when  
13 you have the exigent circumstances and I think we, even  
14 in this case, have exigent circumstances.

15 THE COURT: In what way?

16 MS. KIMBLE: Not only could he get out on bond  
17 or get out when the bail was -- I mean the collateral was  
18 posted, but in addition to that, from Mr. Hart's own  
19 testimony, he heard the officers talking about glass  
20 particles on his pants. He knew already about the suspected  
21 burglary over at the McDonald's.

22 In the jail cell, while they were going off  
23 getting a search warrant, he could have stood there and

1 scraped off particles off his pants legs and then the  
2 whole chain of custody and the whole evidentiary value  
3 of those glass particles would have gone right out the  
4 window.

5 So, I think there was ample exigent circumstances  
6 in this case and ample probable cause for them to take  
7 these particular items when they did and in the manner in  
8 which they did it.

9 THE COURT: All right. Very briefly.

10 MR. ROSENTHAL: Your Honor, as to the -- it  
11 seems to me, at least by more silence than the Common-  
12 wealth is tending to concede that this was not a search  
13 incident to a drunk in public or at least not a proper  
14 search into a drunk in public arrest.

15 Given that, the sole justification seems to be  
16 that there was independent probable cause to search and  
17 seize for the items themselves.

18 Your Honor, number one, that is undercut  
19 factually by the fact that no arrest was made by the  
20 statements that Officer Reeder himself made. If there  
21 was probable cause to believe that Mr. Hart's clothing  
22 contained inculpatory evidence as to this burglary, it  
23 certainly would have been probable cause to arrest him at

1 this point, yet the officers themselves didn't feel, so  
2 they did not make the arrest and given that, Your Honor,  
3 and the way they used to, certainly the pretext of the  
4 drunk in public arrest, none of the other arguments stand  
5 because -- let us assume that they could have taken him  
6 into custody, remove the clothes as they did and then  
7 certainly the argument that I posed my third argument,  
8 a warrant could have been obtained. Mr. Hart then no  
9 longer had access to the clothing under Chadwick.

10 There was no further justification for a further  
11 warrantless intrusion or invasion and no real inconvenience  
12 to getting a warrant and a warrant should have, could  
13 have been obtained.

14 The fact that it doesn't, Your Honor, I think  
15 disposes of the argument of independent probable cause  
16 for a search by itself.

17 THE COURT: All right. It's five minutes of  
18 two. Let's recess until 2:00 for lunch. I want to take  
19 a look at these cases during lunch.

20 MS. KIMBLE: Your Honor, I have given you a copy  
21 of them.

22 (Whereupon, at 12:55 o'clock p.m., the trial in  
23 the above-entitled matter was recessed for lunch.)

AFTERNOON SESSION

1  
2 THE COURT: Mr. Rosenthal and Ms. Kimble, I have  
3 read the memorandum of points from authorities submitted  
4 by the Defendant on behalf of his motion to suppress and  
5 the cases and argument submitted by the Commonwealth. I  
6 think from the testimony and evidence as presented to the  
7 Court at this particular time, particularly in view of the  
8 fact that there were two encounters with the Defendant  
9 within a rather brief period of time, it occurs to me that  
10 the reason the officer arrested the Defendant on the  
11 second encounter for drunk in public was simply by virtue  
12 of the fact that he had additional cause to believe at  
13 that time that he might be involved in the breaking and  
14 entering by virtue of having sand or what appeared to be  
15 some type of glass on his trousers, as such.

16 I think charging him with drunk in public and  
17 taking him in as they did was simply a pretext arrest.  
18 Motion to suppress is granted.

19 MS. KIMBLE: As far as the evidence -- as far  
20 as that physical evidence?

21 THE COURT: That's correct; yes.

22 MS. KIMBLE: I call Mr. Hertzog.

23 ~~EVIDENCE ON BEHALF OF THE COMMONWEALTH~~

1 THE COURT: You can renew that at the end of  
2 the Commonwealth's case.

3 MR. ROSENTHAL: Very well, Your Honor.

4 Whereupon,

5 INVESTIGATOR TERRY BAKER,  
6 called as a witness by Counsel for the Commonwealth, having  
7 been duly sworn by the Clerk of the Court, was examined and  
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MS. KIMBLE:

11 Q. Would you please state your name and occupation.

12 A. Terry W. Baker, Investigator, Fairfax County  
13 Police Department.

14 Q. How long have you been so employed?

15 A. Investigator for six years.

16 Q. Were you working in that capacity back in June  
17 or July of 1978?

18 A. Yes, I was.

19 Q. In July of 1978, did you have occasion to speak  
20 with the Defendant in this case, Mr. Hart?

21 A. Yes, I did.

22 Q. Where was it that you spoke with him?

23 A. At the Groveton office, Criminal Investigations

1 Section.

2 Q. When was this that you spoke to him?

3 A. July 18, 1978.

4 Q. About what did you speak with him?

5 A. Burglary.

6 Q. Where?

7 A. At the McDonald's on Richmond Highway in Fairfax  
8 County.

9 Q. Before you spoke with him, did you have occasion  
10 to advise him of any constitutional rights?

11 A. Yes, I did.

12 Q. How did you so advise him?

13 A. From the Warning and Consent Form.

14 Q. Of what specifically did you advise him at that  
15 time?

16 A. I read each right individually and asked him after  
17 reading each one if he understood that one before I went  
18 to the next one.

19 Q. What did he answer?

20 A. Would you like for me to read them?

21 Q. Yes, if you would.

22 A. Your basic Warning and Consent Form. It says  
23 on July 18, 1978, at 8:20 p.m. at the Fairfax County Police

1 Criminal Investigations Section at Groveton, it says, "I  
2 was advised by Detective Baker and Richter of the Fairfax  
3 County Police Department that he was investigating the  
4 alleged commission of a crime of burglary.

5 Number one, I have the right to remain silent  
6 and I am not required to say anything to anyone at any  
7 time or to answer any questions."

8 After I read that to him, I asked him if he  
9 understood it and I noted that he said yes.

10 The second one, "anything I do or say can and  
11 will be used against me in a Court of law.

12 Do you understand that? Yes.

13 I have the right to talk to a lawyer before  
14 being questioned and I also have the right to have a lawyer  
15 with me while being questioned.

16 Do you understand that? Yes.

17 If you cannot afford a lawyer and want one,  
18 one will be provided for you.

19 Do you understand that? Yes.

20 If you want to answer questions now without a  
21 lawyer present, you have the right to stop answering  
22 questions at any time.

23 Do you understand that? Yes.

1           You also have the right to stop answering  
2 questions any time you want to talk to a lawyer.

3           Do you understand that? Yes."

4           Q. Did you ask him any -- did he seem to understand  
5 what you had advised him of?

6           A. Yes.

7           Q. Did he seem to be under the influence of any  
8 drugs or intoxicants at that time?

9           A. No.

10          Q. Were you able to ascertain his educational  
11 background?

12          A. Yes.

13          Q. What did you ask him about that?

14          A. I asked him if he could read and write, if he  
15 understood what I asked him. He said yes, that he had  
16 attended the 11th grade.

17          Q. At that time did he sign this Warning and Consent  
18 Form?

19          A. Yes, he did.

20          Q. Did anybody else sign it?

21          A. Yes.

22          Q. Who signed it besides him?

23          A. Investigator Richter.



1 Q. Did you sign it?

2 A. And myself.

3 Q. Were you present when he signed -- when Mr.  
4 Hart signed the form?

5 A. Yes, I was.

6 Q. Do you have that form with you today?

7 A. Yes, I do.

8 MS. KIMBLE: At this time, Your Honor, I would  
9 offer this form, Warning and Consent Form, into evidence  
10 as Commonwealth's Exhibit No. 8.

11 THE COURT: Any objection?

12 MR. ROSENTHAL: No objection.

13 THE COURT: It will be received as Exhibit No. 8  
14 without objection.

15 (The item referred to was marked  
16 for identification as Common-  
17 wealth's Exhibit No. 8 and was  
18 received in evidence.)

19 BY MS. KIMBLE:

20 Q. Now, Investigator Baker, did you have occasion  
21 to speak with him about this burglary at the McDonald's  
22 at 8735 Richmond Highway?

23 A. Yes, I did.

1 Q. Did he in fact make a statement regarding that  
2 burglary?

3 A. He made an oral statement to me and from that  
4 statement I took some brief notes concerning it.

5 Q. Now, before he gave you a statement, did you  
6 force him or threaten him to give a statement?

7 A. No, ma'am.

8 Q. Did you offer him any promises or inducements?

9 A. No, ma'am.

10 Q. What did he state about this burglary?

11 MR. ROSENTHAL: Objection, Your Honor.

12 THE COURT: What basis?

13 MR. ROSENTHAL: At this point, Your Honor, I  
14 think the witness should be voir dired to determine  
15 whether this is a fruit of the original unlawful arrest  
16 and search and seizure. I believe the evidence would show  
17 that it is.

18 THE COURT: You want to voir dire him briefly?

19 MR. ROSENTHAL: Yes, sir.

20 THE COURT: All right. Go ahead.

21 VOIR DIRE

22 BY MR. ROSENTHAL:

23 Q. Investigator Baker, how did it come about that

1 Mr. Hart was in your office on this particular day?

2 A. I had called him and requested that he come in.

3 Q. Did you tell him why?

4 A. Yes, sir.

5 Q. What did you tell him?

6 A. I told him in reference to the burglary at  
7 McDonald's.

8 Q. Now, this was on July 17th. Is that right?

9 A. I believe so.

10 Q. Nearby?

11 A. July 18, I believe.

12 Q. Almost a month after the alleged offense?

13 A. Yes.

14 Q. Now, during that time you had received back the  
15 certificate of analysis in this case. Is that correct?

16 A. That's correct.

17 Q. And was this the basis for your calling in Mr.  
18 Hart?

19 A. One of them.

20 Q. Up until you received the certificate of analysis,  
21 you knew all the other facts which you knew on the 18th.

22 Is that right?

23 A. Yes, sir.

1 Q. The one additional fact that led you to call  
2 Mr. Hart in for questioning was your receipt of the certifi-  
3 cate of analysis?

4 A. That was one of them; yes, sir.

5 Q. Now, you related to Mr. Hart that you had gotten  
6 further evidence of his involvement in the alleged burglary?

7 A. Be more specific, sir.

8 Q. Did you relate to him that you had gotten back  
9 a certificate of analysis or that you had further evidence?

10 A. Yes, sir.

11 Q. Did you tell him the import of that evidence?  
12 Did you describe what had happened and what the results  
13 were?

14 A. I didn't speak specifically of the lab report.  
15 When I interviewed the Defendant, I related to him that I  
16 knew there was glass found on his clothing at the time that  
17 he was arrested; not so much as the report, what it dealt  
18 with.

19 Q. But you did tell him and he did know at that time  
20 that that glass had been sent down to the lab for analysis?

21 A. Yes, sir.

22 Q. And you told him that that lab analysis had come  
23 back showing that he was there?

1 A. Yes, sir.

2 MR. ROSENTHAL: I don't have any further questions.

3 THE COURT: All right.

4 MS. KIMBLE: I have no other questions.

5 THE COURT: All right.

6 Do you object to the last question, Mr. Rosenthal?

7 MR. ROSENTHAL: Yes, Your Honor. Very briefly,

8 I believe the burden is on the Commonwealth after a  
9 primary illegality has been shown under the principles of  
10 Wong Song that the primary taint has been attenuated, that  
11 this has not come about by exploitation of the primary  
12 taint and it's clear from the cases after Wong Song,  
13 I believe Moore versus the State of Illinois, that the  
14 mere execution of Miranda warnings and waivers does not  
15 make even a prima facie case under Wong Song of attenuation,  
16 that something further has to become it.

17 It is not just a lack -- the Commonwealth's doesn't  
18 have to show a lack of a causal in connection, Your Honor,  
19 but they do have to show that this was not gotten by  
20 exploitation of the primary illegality.

21 Here, quite clearly, Mr. Hart knew that evidence  
22 had been taken from him, possibly linking him to a crime,  
23 that at least this is what the police suspected. Then he

1 was told that in fact that had happened.

2 This was the sole intervening event which led  
3 to him being called down and questioned. He was told that  
4 this had linked him further to the crime. Clearly, Your  
5 Honor, this was used, this was exploited. There was  
6 nothing like attenuation of the taint.

7 MS. KIMBLE: Your Honor, I think that it must  
8 be shown in any confession or statement by a Defendant  
9 that it is freely and voluntarily given. I think that is  
10 the number one criteria.

11 We have to look at not only was the rights  
12 read which they were in this case, he did understand them,  
13 as to whether then any statement after that, after the  
14 rights were read, were done by any force or threats or  
15 promises or inducements.

16 I think there has been testimony that there were  
17 no threats or force or promises or inducements. He didn't  
18 seem to be intoxicated at the time he gave them a statement.  
19 It was sometime after the incident occurred that they called  
20 him in and asked him questions about this particular  
21 incident.

22 I think that the evidence is clear that it was  
23 freely and voluntarily given in this particular case. The

1 statement was freely and voluntarily given and it should  
2 be admitted, what that statement was.

3 THE COURT: You don't think the fact that the  
4 officer told him that glass was found on his clothing at  
5 the time of the arrest induced him to make the statement?

6 MS. KIMBLE: I don't think so. I think just  
7 by the mere fact of that kind of statement he knew way  
8 back then that there was glass. I mean, he overheard the  
9 conversation between Officer Reeder and Sergeant Jackson  
10 that they found glass and there were questions whether he  
11 told them about the results and he said no, he did not tell  
12 him about the results.

13 So, the fact that there was glass found, Mr.  
14 Hart already knew that way back from the very beginning  
15 when he was first arrested for drunk in public. I don't  
16 think that has induced him at all to give a statement.

17 THE COURT: Objection is overruled.

18 The question was what statement did he make to  
19 you orally about this incident.

20 DIRECT EXAMINATION (Continuing)

21 BY MS. KIMBLE:

22 Q. About this incident, yes. What did he say?

23 A. He stated that the night prior to the burglary

1 that he and his girlfriend had an argument and that he  
2 had been drinking to some extent and was walking on his  
3 way home and was hungry and he decided to break the window  
4 on the south side of the McDonald's which led to the door-  
5 way.

6 He stated that once he was in there that he  
7 removed -- he couldn't remember exactly, five or six  
8 packages of buns and an undetermined amount of sausage  
9 patties.

10 He stated that he heard someone coming in the  
11 area of the store, became scared, went out the same way  
12 he had gone into the McDonald's and hid the items in some  
13 bushes located on the south side of the building and just  
14 after that Officer Reeder approached him and placed him  
15 under arrest for being drunk in public.

16 MS. KIMBLE: That's all the questions I have.

17 THE COURT: All right. Cross examine.

18 CROSS EXAMINATION

19 BY MR. ROSENTHAL:

20 Q. Investigator, may I assume that he told you  
21 in considerably more detail many of the items about what  
22 led up to this? Is that correct?

23 A. No, sir. Basically, that's exactly what he told



1 me.

2 Q. That's all he told you?

3 A. Yes, sir.

4 Q. Did he tell you about how much he had been  
5 drinking that night?

6 A. No, sir. He said he had been drinking a  
7 considerable amount.

8 Q. Did he say he was very intoxicated?

9 A. No, sir.

10 Q. Did he tell you about what in fact had occurred  
11 between himself and his girlfriend?

12 A. The only thing he told me, sir, was he and his  
13 girlfriend had an argument and they had split up.

14 Q. They had split up?

15 A. Yes.

16 Q. And he had started drinking. Did he tell you  
17 what time that was?

18 A. No, sir. It was sometime during the darkness.

19 Q. Now, you say he told you he decided to throw a  
20 brick or something through the window?

21 A. He told me he broke the window with a rock.  
22 There were several windows that were broken with rocks.

23 Q. Several of the windows?

1 A. Yes, sir.

2 Q. By throwing rocks did he say?

3 A. I don't know, sir. When I got there, the area  
4 was cleaned up. But he told me he had broken the window  
5 at the door and that's how he gained access to the building.

6 Q. Did he tell you that he broke the window because  
7 he was upset about his girlfriend?

8 A. No, sir. He told me that he was hungry and he  
9 decided to go in there and get something to eat.

10 Q. That was before or after he broke the window?

11 A. That was before he broke the window.

12 Q. And he told you he got scared when someone else --

13 A. He heard someone outside he said.

14 Q. Were the rolls and buns and whatnot ever  
15 recovered?

16 A. No, sir.

17 Q. Did Mr. Hart also tell you at that point that he  
18 thought he had a problem with alcoholism?

19 A. No, sir.

20 MR. ROSENTHAL: That's all I have.

21 THE COURT: Any redirect?

22 MS. KIMBLE: No, Your Honor.

23 ~~THE COURT: May this witness be excused?~~

1 motion to strike.

2 MS. KIMBLE: Your Honor, it was brought out that  
3 at the time of this incident, Mr. Hertzog was working for  
4 the Golden Arch Realty Corporation and that the store  
5 he was working for at then was the McDonald's. I think the  
6 inference there is they owned the McDonald's, that is,  
7 employer, and he was working at the specific store or  
8 restaurant in this case.

9 THE COURT: Motion to Strike is denied.

10 MR. ROSENTHAL: Your Honor, I would call Mr.  
11 Hart to the Stand.

12 THE COURT: Mr. Hart, you have been previously  
13 sworn, sir. You remain sworn. Just have a seat.

14 EVIDENCE ON BEHALF OF THE DEFENDANT

15 Whereupon,

16 THOMAS HART,

17 the Defendant, called as a witness by and in his own behalf,  
18 having been previously sworn, was further examined and  
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. ROSENTHAL:

22 Q. Mr. Hart, you have heard the testimony of  
23 Investigator Baker as to the statement that you made to him.

1 Would you relate to the Court, was that a complete version  
2 of what you told him?

3 A. It appears to me that I told him somewhat more.  
4 I cannot be sure. I cannot say definitely that I did, but  
5 it was somewhat complete, yes.

6 Q. What he related?

7 A. Somewhat the basics, yes.

8 Q. Do you recall -- did you explain to him anything  
9 further in terms of the argument that you had had with your  
10 girlfriend?

11 A. I do not remember totally. I may have. It seems  
12 to me that I did.

13 Q. Would you relate what those are.

14 A. I had come home from work. The girl that I had  
15 thought we were going to get married and caught her and a  
16 one time friend of mine, they were in bed together and I  
17 kind of lost it. I just turned around and left.

18 I went to a liquor store. I had a guy buy me  
19 a bottle of liquor and just started wandering around  
20 drinking. I started blacking out around 10:00, 11:00, and  
21 from then on until when Officer Reeder spoke to me, it  
22 was really when I was starting to come back and realize  
23 what I was doing.

1 Q. Who was the person that you stated you had seen  
2 with your girlfriend?

3 A. William Sluzarz.

4 Q. William Sluzarz. How much did you tell the  
5 investigator you had had to drink that night?

6 A. I do not recall.

7 Q. How much had you had to drink?

8 A. Most of the bottle of grain alcohol.

9 Q. A bottle of grain alcohol?

10 A. Pretty close to it. Some beer.

11 Q. And beer?

12 A. Yes.

13 Q. When had you started drinking?

14 A. It was about 5:00 that afternoon.

15 Q. How long did you continue drinking?

16 A. Until about 12, maybe possibly later. I am not  
17 completely sure.

18 Q. Do you recall telling the investigator why you  
19 had thrown the bottle or the brick through the window at  
20 the McDonald's?

21 A. Just out of frustration. Actually, more or less  
22 wanted to get away from it. I had nothing else to do,  
23 really, to go to jail.

1 Q. What had you been doing immediately before then?

2 A. I remember I had come to. I was sitting behind  
3 the Pines Motel up there which was beside McDonald's. I  
4 really had no idea how I got there. I had just been out  
5 walking for six or seven hours.

6 I woke up, stopped in front of McDonald's for a  
7 while on that side and I had just -- I don't know. I took  
8 a rock and threw it.

9 Q. Did you break more than one window?

10 A. Yes.

11 Q. You took another rock and threw that?

12 A. Yes. I hit one with my fist.

13 Q. Mr. Hart, did you tell the investigator -- do  
14 you recall telling him about whether or not you might have  
15 an alcoholism problem?

16 A. No, I do not believe so. I do not think I told  
17 him.

18 Q. Do you have such a problem?

19 A. At one time I thought I did. I could say now  
20 that I don't. I was in trouble on and off for the first  
21 six months after I turned 18 with it. Several times I was  
22 arrested for drunk in public. Since then, I have had no  
23 problems with it. I had a lot of help from some friends of

1 mine and the girl I am going out with now. I do not have  
2 a problem with it.

3 Q. Were you thinking rationally or thinking ahead  
4 or planning at the time that you threw the rock at the  
5 window?

6 A. No, not really.

7 Q. Were you thinking ahead to your next step?

8 A. No.

9 Q. Did you have anything specifically in mind?

10 A. No.

11 Q. Now, did you tell the investigator that you  
12 entered the store?

13 A. Yes, I did.

14 Q. And you did thereafter attempt to take something?

15 A. Yes.

16 Q. Some kind of food?

17 A. Yes.

18 Q. When was the last time you had eaten?

19 A. At lunch the day before.

20 Q. What did you do after you heard the noise and you  
21 ran out?

22 A. I heard some noise. It sounded like glass  
23 falling or somebody stepping on it or something like that.

1 At first I ducked around one of the corners inside the  
2 building and then I waited several minutes and then went  
3 out the door. That's when I saw the truck pulling into  
4 the place and I just kept running.

5 Q. Then what were you doing when the officer stopped  
6 you the first time?

7 A. Well, I was walking back up the road. Well,  
8 actually standing right in front of the McDonald's parking  
9 lot attempting to get a ride hitchhiking.

10 Q. How long after the incident was that?

11 A. Two minutes, a little longer. I just cut behind  
12 the motel and right back on to the road.

13 Q. Didn't you know that the police might come by  
14 or were you thinking about that?

15 A. I really didn't care. It made no difference to  
16 me at that time at all.

17 MR. ROSENTHAL: I don't have anything further.

18 THE COURT: All right. Cross examine.

19 CROSS EXAMINATION

20 BY MS. KIMBLE:

21 Q. Mr. Hart, did you go inside after you broke the  
22 window? You did go inside this McDonald's, didn't you?

23 A. Yes.



1 Q. And you did take some meat and some buns and take  
2 them out of the store?

3 A. Yes. I think my original purpose was to get  
4 something to drink. I didn't think about breaking the  
5 windows, but then after --

6 Q. Just answer my question. You did take these  
7 things out. Is that correct?

8 A. Yes.

9 Q. Where did you put them?

10 A. Behind the bushes on the other side of the  
11 McDonald's parking lot.

12 Q. This is like you told Investigator Baker what  
13 you did. Is that correct?

14 A. Right.

15 Q. Now, you say you threw the rock out of frustration.  
16 Did you tell Investigator Baker that's the reason you threw  
17 the rocks?

18 A. Yes, I believe so; that I was just so upset.

19 MS. KIMBLE: That's all the questions I have.

20 THE COURT: All right. You may step down, sir.  
21 Just have a seat with your counsel.

22 (The witness stood aside.)

23 MR. ROSENTHAL: I have no further evidence.

1 THE COURT: Is that the Defendant's case?

2 MR. ROSENTHAL: (Nodding head.)

3 THE COURT: All right.

4 MS. KIMBLE: I have no rebuttal.

5 THE COURT: All right. Do you want to argue or  
6 save for rebuttal?

7 MS. KIMBLE: I will do both, Your Honor.

8 CLOSING ARGUMENT ON BEHALF OF THE COMMONWEALTH

9 MS. KIMBLE: Your Honor, the evidence, just  
10 very briefly in this case, has come out after all the  
11 motions to suppress and everything is that on June 24th,  
12 1973, in the early morning hours before the store was  
13 opened that Mr. Hart, through his statement here on the  
14 Stand and through his statement to Investigator Baker in  
15 July was that he went to the store, for whatever reasons,  
16 and he had been drinking earlier that day.

17 He went by this store and probably was angry.  
18 That he broke the windows, went inside and took some buns  
19 and sausage patties, heard somebody coming, left the store,  
20 hid those in some bushes and went on his way. It was at  
21 that time that he was stopped by Officer Reeder.

22 We have that evidence. We have the evidence  
23 from Mr. Hertzog as to the store, as to its condition when

1 he arrived that morning, as to what his inventory found  
2 missing and it's fairly consistent with what Mr. Hart says  
3 he took from that store that same day.

4 We have the circumstantial evidence of Mr. Hart  
5 being very close in proximity to this store about the time  
6 it was actually being broken into, being found in close  
7 proximity to the store, walking in somewhat an intoxicated  
8 state at that time.

9 But more importantly we have the direct evidence  
10 of his confession to Investigator Baker as to his involve-  
11 ment.

12 I suspect that part of the argument is going to  
13 be that he was intoxicated to the point where he may not  
14 have known what he was doing. I think that the evidence  
15 shows that it's not the case. Maybe I will say more on  
16 that on rebuttal.

17 I think the evidence is clear that although he  
18 had been drinking at one point through that evening,  
19 through his own testimony, he had stopped drinking around  
20 12:00, maybe a little bit later. That it was before, taking  
21 his evidence at best, it was before he came -- before he  
22 actually came to the McDonald's that he started coming out  
23 of whatever intoxicated stupor he had been in.

1 He remembers what he did. He remembered in  
2 July to Investigator Baker what he did and in a fair amount  
3 of detail to Investigator Baker. I think all that shows  
4 that he was not so intoxicated at that point in time in  
5 July that he did not know what he was doing.

6 This is a prima facie case of a statutory  
7 burglary of breaking and entering with the intent to commit  
8 larceny.

9 As Your Honor well knows, voluntary intoxication  
10 is not an excuse for a crime. There is a 211 case,  
11 Cheatham versus Commonwealth that talks about specific  
12 intent and voluntary intoxication. That's the only time  
13 a voluntary intoxication is the defense in a specific  
14 intent is in a homicide case. It does not apply or is not  
15 an offense in other cases.

16 In a way I feel sorry for Mr. Hart. I think it  
17 was probably a traumatic event what happened to him, but it  
18 was no excuse for going to a restaurant or to any kind of  
19 store where he did not belong, break in the windows, go  
20 in and steal property from that particular establishment.

21 I think it's a clear case of a burglary and I  
22 think we have proven him guilty beyond a reasonable doubt.

23 THE COURT: All right.

## 1 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

2 MR. ROSENTHAL: Your Honor, first let me say that  
3 I agree that in Virginia there is no defense to a crime  
4 based on voluntary intoxication. That's not the defense  
5 that is being interposed by the Defendant here.

6 It's taking the fact of the intoxication, of the  
7 elements that were going through the Defendant's mind,  
8 taking the fact of the statement that we have heard in  
9 here that simply the specific intent, which in order to form  
10 statutory burglary, has to be combined with the acts, simply  
11 did not exist in this case.

12 There was no specific intent; not that he was too  
13 intoxicated to have entertained such an intent because  
14 the law says that if he got so intoxicated as to not  
15 to be able to entertain, he is responsible for whatever  
16 happens. But not that he couldn't have, Your Honor, but  
17 that in fact under the facts of the case, under the  
18 evidence, it is not clear beyond a reasonable doubt and  
19 in fact it is clear that there was no such specific intent.

20 I agree, Your Honor, that based on the evidence  
21 here today and again with the exception of the aspect of  
22 ownership which I would renew, that we have all the elements  
23 of a felony and that felony being statutory burglary.

1 But I would ask the Court and I would ask the  
2 Court with some degree of mercy in the process and some  
3 degree of understanding in the process to look at it and  
4 see from the evidence whether the act concurred with the  
5 specific felonious intent.

6 , Certainly there is evidence that Mr. Hart did  
7 break. He did enter and in fact there is evidence that  
8 he did carry away, now based on the statement. However,  
9 Your Honor, I think the cases do state that these things  
10 have to concur.

11 Breaking, by itself, destroying property is a  
12 misdemeanor in the Code. Section 18.2--231--7, it's a  
13 Class 1 misdemeanor. A trespass is also a simple misde-  
14 meanor. Stepping onto the property of another, that's  
15 Section 18.2--121. Taking the property of another amounting  
16 to less than \$100, Your Honor. If those are the facts  
17 here, it's also a misdemeanor.

18 What puts them altogether and makes it a felony  
19 is if the intent concurs with the act; not if they simply  
20 come around the same time, but if somebody intentionally,  
21 purposely breaks and enters under the Statute with the  
22 intent to do so for the purpose of stealing.

23 Your Honor, I would submit I have looked at,

1 carefully looked at, in view of the evidence which is  
2 uncorroborated as to the state of mind. The direct evidence  
3 as to what in fact was being thought at the time this was  
4 being done, that although we may have a series of mis-  
5 demeanors here, quite possibly for which Mr. Hart could be  
6 guilty and could be convicted that we do not have something  
7 which rises to the level of a felony.

8           Your Honor, I believe there is more than a simple  
9 piecing together. I think what we have here is a sum which  
10 is less than, a total which is somewhat less than the sum  
11 of its part and for that reason, Your Honor, I would ask  
12 the Court which it can do to strike the case of the Common-  
13 wealth and not to convict on the felony and whether some  
14 other offense has been proven on which a conviction can  
15 be rendered after this trial I would leave to the discretion  
16 of the Court.

17           But I do believe, Your Honor, that looked at in  
18 this light that there is no felony here. That if there is  
19 really to be a distinction between a felony which is a  
20 very serious aggravated crime like statutory burglary and  
21 a series of misdemeanors without felonious intent, but this  
22 is the case in which that kind of distinction should be  
23 made.

## 1 REBUTTAL ARGUMENT ON BEHALF OF THE COMMONWEALTH

2 MS. KIMBLE: Your Honor, if we first look at the  
3 statement of Mr. Hart to Investigator Baker back in July  
4 which is much closer to the actual incident than testimony  
5 here today is, he told Investigator Baker and Investigator  
6 Baker, said what he has related to the Court is as far as he  
7 can recall everything that Mr. Hart had told him was that  
8 he got hungry.

9 He was walking by. Mr. Hart was walking by the  
10 McDonald's. That he got hungry. He broke the window,  
11 went in to get something to eat, heard somebody coming,  
12 took the things with him and left.

13 Today, Mr. Hart, Your Honor, I would point out  
14 would be the classic example of breaking with the intent  
15 to commit larceny. Even if he doesn't intend to take  
16 item A, say this piece of paper and walk out of the store  
17 with it, consumption of an item is certainly take, steal  
18 and carry away with the intent to permanently deprive.  
19 You can't bring that back at all.

20 So, even eating would be with the intent to  
21 commit larceny. Today, Mr. Hart says that he threw the  
22 rock out of frustration which is a conflict in what he  
23 told Investigator Baker back in July of last year.



1 In questioning him on whether he told Investi-  
2 gator Baker this in the direct examination, he says, or if  
3 he told him more than Investigator Baker had relayed, he  
4 says he thinks he did, but he really couldn't say for  
5 certain that he did.

6 So, I think what we have today is his testimony  
7 how he recollects the events in his own mind or how he  
8 justifies it in his own mind versus what he told Investi-  
9 gator Baker at the time of only a month after this  
10 particular incident occurred or less than a month after  
11 this incident occurred.

12 Taking all the evidence, I think he is clearly  
13 guilty of all the elements of a statutory burglary, the  
14 breaking, the entering, all of this with the intent to  
15 commit larceny, even though it was just to eat or drink  
16 property there on the premises, that's a larceny.

17 There is no way they could get the property back  
18 once it is consumed like that and I think the elements  
19 are there to prove him guilty beyond a reasonable doubt.

20 THE COURT: All right. I think that we all  
21 concur that the necessary elements of the offense of  
22 statutory burglary are shown and counsel for the Defendant  
23 very vigorously and effectively argues that however some

1 lesser included offense perhaps would be most appropriate  
2 because of the condition of the Defendant at the time of  
3 the offense.

4 Just checking through my notes and I think that  
5 in looking through my notes, it occurs to me that Mr. Hart  
6 has testified that at the time of the incident he didn't  
7 care what happened to himself. He simply was frustrated.  
8 He threw a rock through the window. He knocked one window  
9 or glass out with his fist and then he admitted that he  
10 took the items and so forth and then just ran out one side  
11 of McDonald's and was standing, virtually standing in  
12 front of the parking lot of the McDonald's at the time  
13 he was arrested or hitchhiking.

14 I think the Defendant's testimony loses some  
15 credibility when you compare the statement as given to  
16 Investigator Baker and the statement he makes here today.  
17 Secondly, if that indeed was his state of mind at that  
18 time, why did he deny to Officer Reeder that he knew any-  
19 thing about the incident when he was first approached by  
20 Officer Reeder and the truck driver from McDonald's.

21 I don't think his testimony is credible in that  
22 respect.

23 Mr. Hart, stand up, please, sir.

1           Based on the testimony and evidence before the  
2 Court at this time I find you guilty as charged, sir.

3           Counsel for the Defendant have any motions?

4           MR. ROSENTHAL: Yes, Your Honor. We would move  
5 for a presentence report.

6           THE COURT: Does the Commonwealth have any  
7 objection?

8           MS. KIMBLE: No, Your Honor.

9           THE COURT: Mr. Hart, stand up, please, sir.

10           On the testimony and evidence here before the  
11 Court, I find you guilty as charged. The motion of your  
12 counsel is granted. The case is continued to Friday,  
13 September 14, 1979, for the receipt of the presentence  
14 investigation and report; that is, 10:00 a.m.

15           The Defendant is on bond at this time?

16           MR. ROSENTHAL: Yes, Your Honor, and I would  
17 move to continue that.

18           THE COURT: Does the Commonwealth have any  
19 objection?

20           MS. KIMBLE: No, Your Honor.

21           THE COURT: The Defendant will remain on bond  
22 until that time, sir.

23           (Whereupon, at 3:00 o'clock p.m., the trial in

WARNING AND CONSENT

ON July 18, 19 78, AT 820 P.M., AT THE FAIRFAX COUNTY POLICE  
CIS# 20 HEADQUARTERS, I WAS ADVISED BY OFFICER (DETECTIVE) BAKER E Richter OF THE

FAIRFAX COUNTY POLICE DEPARTMENT THAT HE WAS INVESTIGATING THE ALLEGED COMMISSION OF THE CRIME

OF Burglary., AND THAT:

- ☒ 1. I have the right to remain silent. I am not required to say anything to anyone at any time or to answer any questions. yes
- ☒ 2. Anything I do or say can and will be used against me in a court of law. yes
- ☒ 3. I have the right to talk to a lawyer before being questioned and I also have the right to have the lawyer with me while being questioned. yes
- ☒ 4. If I cannot afford a lawyer, and want one, one will be provided for me. yes
- ☒ 5. If I want to answer questions now without a lawyer present, I will still have the right to stop answering questions at any time. yes I also have the right to stop answering questions at any time if I want to talk to a lawyer. yes

Thomas K. HART  
6'0 160  
BR - BR

11th Grade  
Can you read & write ok yes.

CONSENT TO SPEAK

I know what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me by anyone.

X-T.K. Hart  
Person Being Interviewed

DATE AND TIME 7-18-78 822pm

WARNING AND CONSENT STATEMENT WAS READ TO SUBJECT yes

SIGNATURE OF OFFICER James W. Baker

WITNESS: Mr. Albert H. Richter

WITNESS: \_\_\_\_\_

1 MR. ROSENTHAL: Yes, Your Honor. I would call  
2 the defendant.

3 THE COURT: All right.

4 MR. ROSENTHAL: Your Honor, before beginning,  
5 if I could simply ask the Court, I would just as soon stay  
6 away from going into the whole version of the offense. I  
7 believe the Court will recall the testimony, although it  
8 was some months ago, and I --

9 THE COURT: All right. The Court recalls it.

10 MR. ROSENTHAL: I won't go back through that,  
11 Your Honor.  
12 Whereupon

13 THOMAS HART

14 the defendant, was called for examination by counsel on  
15 his own behalf, and, after having been previously duly  
16 sworn, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. ROSENTHAL:

19 Q Tom, as far as the mentioning that you had  
20 claimed innocence in this case, have you ever claimed that  
21 you were in no way at fault or not responsible for the  
22 occurrence that happened at the McDonald's?

23 A No, sir, I don't.

1 Q Did you tell Ms. Groff that you were innocent  
2 of the charges, that you were denying them?

3 A No, I do not believe so. I went in and I knew  
4 that I had been charged with it and convicted. Even to the  
5 police at the very beginning, I admitted to it. I do not  
6 see why I would turn around and change it right at that  
7 point, after I had been through all of that, you know; it  
8 has been over a year ago.

9 Q Tom, another serious problem is the fact that  
10 you missed your second appointment with Ms. Groff. Can you  
11 explain what has been going through your mind and how some-  
12 thing like that could have happened?

13 A I knew I had the appointment that day, and I had  
14 my version of what happened written out. She had asked me  
15 to bring in some paychecks from my work, to prove that I  
16 had been working and for how long, and I had that with me.  
17 Then when I went in, my boss, my foreman, asked me if I  
18 could work that night.

19 At the time -- even still now, I am in a  
20 little bit of financial difficulty, but at the time we  
21 were very close to losing our apartment; the rent was  
22 behind and I just really needed the money; the extra work  
23 really helps. I'm working now at night and on weekends, and

1 Q Tom, other than the fact that you know that  
2 you're facing some possibly severe consequences for  
3 burglary, which you know is considered a very serious  
4 offense, do you have any regret or remorse for having done  
5 something wrong?

6 A Yes, I do. It's something that I wish, at one  
7 time, I could go back and change like it had never happened.  
8 I wish there was some way I could change it or something  
9 but I really don't know how. I was very foolish.

10 Q Now, do you recall your testimony, and also your  
11 statement to the police? And what your mother said was  
12 that part of this was during a period of some personal  
13 problems in your life. Has there been a change in that?

14 A Yes, sir. Well, it seems like for a while, for  
15 really the first time in a long time, a lot of things are  
16 starting to work with me. I'm not having to fight and  
17 struggle every day. Things are starting to look up a  
18 little bit. I can get up and I've got something to look  
19 forward to now.

20 I would really like to be able to get this over.  
21 I want to get married and there's no way I can do it, having  
22 this sitting over top of me every day that I wake up.

23 Q Tom, you've had quite a few drunk-in-public

## CROSS EXAMINATION

BY MR. WILLIAMS:

Q Mr. Hart, what was taken from the burglary?

A. Some sausage patties and some rolls.

Q Just food?

A. Yes.

Q And you were doing this by yourself?

A. Yes.

Q Now, what was the value of that; do you have any idea?

A. I imagine, under 20 dollars.

Q I'm not sure I understood, but in reference to the reason why you did not make your second appointment, was it because you were working?

A. Yes. I had the chance to work and I needed the money very seriously.

Q When did you get the job?

A. He just come up to me that afternoon and asked me if I'd like to do some extra work for him that night; I had a little bit of spraying to do, fireproof spraying.

Q What time was your appointment with the probation officer?

A. 4:30.



1 THE COURT: All right.

2 Mr. Hart, please stand up, sir.

3 (The defendant complied with the request.)

4 Mr. Hart, do you know of any reason why sentence  
5 should not now be imposed?

6 THE DEFENDANT: No, Your Honor.

7 THE COURT: Do you have anything further that  
8 you would like to say to the Court prior to imposing  
9 sentence?

10 THE DEFENDANT: Yes, sir.

11 I realize what I've done. I've had more than a  
12 year to think about it. It's just constantly on my mind,  
13 realizing it -- the hurt that I did to somebody else and  
14 the hurt that it's done to me. It always is going to be  
15 haunting me, no matter how long it takes.

16 It's something that I'm always going to be  
17 ashamed of having done. It was very foolish, immature,  
18 and it showed no sense at all, no common sense whatsoever.  
19 It's something that I guarantee you will not be repeated.

20 THE COURT: Mr. Hart, as I've explained briefly  
21 to some of the other individuals who came before the Court  
22 today, you've come with some concern to the Court, first of  
23 all, because you do have a minimal prior record which is

Indictment - Statutory Burglary

#29020

This 14th day of September, 1979, came the Commonwealth, by her Attorney, and the Defendant, THOMAS HART, who stands convicted for a felony, to-wit: statutory burglary, appeared agreeably in accordance with his recognizance of bail; also appeared Edward Rosenthal, Counsel for the Defendant.

Thereupon, the Court Reporter was sworn.

And the Probation Officer of this Court to whom this case had been previously referred for investigation appeared in open Court with a written report, copies of which had previously been furnished to Counsel for the Defendant, Attorney for the Commonwealth and the Court. Counsel for the Defendant then advised the Court that he had discussed the report with the Defendant and the Defendant was fully advised of the contents thereof.

Whereupon, the accused and his Counsel were given the right to cross-examine the Probation Officer as to any matter contained in said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is filed herein and made a part of the record of this case.

Thereupon, it was demanded of him, THOMAS HART, if anything he knew or had to say why the Court should not proceed to pass sentence and judgment upon him, and nothing being offered or alleged in delay of judgment, it is ADJUDGED and ORDERED that the Defendant serve two (2) years in the Penitentiary House of this Commonwealth, at hard labor, but in mitigation of punishment, it appearing compatible with

the public interest so to do, the Court doth now suspend all of the said sentence conditioned upon the Defendant's good behavior, that he be on active probation subject to the conditions set forth in P. B. Form 2, revised 1/76 for a period of two (2) years, that he be evaluated for a alcohol problem and receive treatment if indicated and further that he make restitution in the amount of \$1,200.00 to the McDonald Corporation in monthly installments of \$40.00 until paid in full.

Edward Rosenthal, Attorney who was heretofore appointed to represent the Defendant in this case is hereby allowed a fee of \$ 200.00.

The fee of the Court Reporter who recorded the evidence and incidents of trial in this case is hereby assessed as costs, as provided in Sec. 19.2-165 of the 1950 Code of Virginia, as amended.

The Court certifies that the Defendant was present during all stages of this trial.

The Defendant is hereby released upon the aforesaid conditions.

  
JUDGE GRIFFITH

ASSIGNMENT OF ERROR

The Court erred in admitting evidence of HART'S oral confession to police over his timely objection that it should have been suppressed as the fruit of an illegal arrest and of the unlawful search and seizure of his clothing.