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This the 15th day of Sept. 1981 at 9:09 A.M.

Dwight H. Seaton
Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA

v.

DANIEL CURRY CROWLEY

MOTION

Now come the Commonwealth of Virginia and the Department of Corrections of the Commonwealth of Virginia, by counsel, and move the Court to vacate and set aside its order of February 19, 1981, which directed the release of the defendant, Daniel Curry Crowley, from custody. In support of said motion, the Commonwealth and said Department say as follows:

1. On September 27, 1979, the defendant, Daniel Curry Crowley, was convicted in this Court pursuant to his pleas of guilty, of possession of marijuana with intent to distribute and possession of LSD. He was sentenced on January 29, 1980, to twenty (20) years in the penitentiary, with eight (8) years thereof suspended, and to five (5) years in the penitentiary, respectively. The five-year sentence was ordered to run concurrently with the first sentence. The sentencing order also directed that "as soon as possible after the entry of this order the defendant be removed and safely conveyed according to law from the jail of this Court to the said penitentiary." On January 31, 1980; the defendant filed motions to "set aside" the verdicts. That same day the Court entered orders taking "under advisement the aforesaid motion to set aside the verdict and/or to suspend or modify the judgment entered on the 29th day of

January, 1980." The judgment order of January 29th was not modified, vacated or suspended. The defendant, Daniel Crowley, was received into the penitentiary system on February 12, 1980. On February 19, 1981, the Court ordered that the defendant "be forthwith released from custody and that the remainder of his term be suspended..."

2. In the case of "In Re: Commonwealth of Virginia, Department of Corrections, Petitioner," Record No. 810667, the Supreme Court of Virginia held on September 11, 1981, that "after the expiration of 21 days from the sentencing order if the prisoner has been committed and delivered to the penitentiary and no order has been entered within 21 days after final judgment suspending the sentence, the trial court has no further authority to suspend the sentence." (See Slip Opinion, a copy of which is enclosed, at 10). The Court also held that "by taking... motions to set aside under advisement the trial court did not 'modify, vacate, or suspend' the judgments" and "orders entered thereon did not affect the finality of the sentencing orders." (Slip Opinion at 11). "[C]ontrol of the destiny of the prisoners passes from the trial court to the Department of Corrections" when they are removed to the penitentiary, and the "trial court no longer has jurisdiction to act on the motions to suspend." (Slip Opinion at 11-12).

3. Although the Supreme Court declined to specifically address the validity of the aforesaid order of this Court of February 19, 1981, on procedural grounds, the Court's Opinion on two related cases clearly reveals that the order was entered after this Court lost jurisdiction by the expiration of the 21-day period and delivery of the defendant to the penitentiary.

(Slip Opinion at 8-13).

4. An order entered without jurisdiction is invalid. Moore v. Smith, 177 Va. 621, 15 S.E.2d 48 (1941). Such an order - especially one regular on its face - should be vacated and set aside. See United States v. The Honorable Nicholas S. Nunzio, Associate Judge, 430 A.2d 1372 (D.C. Ct.App. 1981); State ex rel. Lemley v. Roberts, 260 S.E.2d 850 (W.Va. 1979); State ex rel. Chambers v. County Court of Mingo County, 123 S.E.2d 241 (W. Va. 1962); 55 C.J.S. Mandamus § 89 (1948).

5. It is respectfully requested that the defendant be granted ten (10) days within which to file his response, if any, to this motion.

WHEREFORE, the Commonwealth of Virginia and the Department of Corrections pray that the aforesaid order of this Court of February 19, 1981 be vacated and set aside.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA and

VIRGINIA DEPARTMENT OF CORRECTIONS

By: Marshall Coleman
Counsel

Present: All the Justices

IN RE: COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF CORRECTIONS,
PETITIONER

Record No. 810667 OPINION BY JUSTICE GEORGE M. COCHRAN
September 11, 1981

UPON A PETITION FOR A WRIT OF PROHIBITION

On April 28, 1981, the Department of Corrections of the Commonwealth of Virginia (the Department) filed its petition in this Court for a writ of prohibition to be directed to the Honorable J. R. Snoddy, Jr., Judge of the Circuit Court of Cumberland County, and to that court, to prohibit the judge and the court from enforcing orders heretofore entered suspending the sentences of three convicted felons, co-defendants Larry Noel Sherman, Daniel Curry Crowley and David Steeves Taylor, and from entering orders to modify, suspend or vacate the sentences of two additional co-defendants, Douglas Bogue and William Hannah Syfrett. Service of a copy of the petition was accepted by Judge Snoddy.

The petition recites in detail the proceedings in which all five co-defendants were convicted in separate trials, upon their guilty pleas, and sentenced to serve terms in the penitentiary. Sherman was convicted of feloniously aiding and abetting in the possession of marijuana with intent to distribute, and was sentenced to serve ten years. Crowley was convicted of possession of marijuana with intent to distribute and

possession of LSD, and sentenced to serve twenty years, with eight years suspended, and five years, respectively, the five-year sentence to run concurrently with the other. Taylor was convicted of feloniously aiding and abetting in the possession of marijuana with intent to distribute, and sentenced to serve ten years. Bogue was convicted of possession of marijuana with intent to distribute and possession of cocaine, and sentenced to serve twenty-five years, with five years suspended, and five years, respectively, the five-year sentence to run concurrently with the other. Syfrett was convicted of conspiring, confederating and combining with another or with others to possess marijuana with intent to distribute, and sentenced to serve twenty years, with five years suspended, to "run concurrently with any sentence he may receive from Henrico County".

Copies of court proceedings attached to the petition as exhibits show that each sentencing order required that "as soon as possible ... the defendant be removed and safely conveyed according to law from the jail of this Court to the said penitentiary". All the defendants, except Crowley, filed motions to set aside the verdicts and judgments and to suspend or modify all or part of the sentences. In the motions the defendants noted that they had not been removed to the peniten-

tiary. In these cases, the trial court, within 21 days after entry of the sentencing orders, entered orders, endorsed "Seen" by the Commonwealth's Attorney, stating that the defendants had not yet been committed to the penitentiary system, that the court was not prepared to rule on the motions at that time, and that the motions were taken "under advisement". Motions filed by Crowley to set aside his two convictions did not seek suspension or modification of his sentences or state whether he had been removed to the penitentiary. Within 21 days after entry of the sentencing orders in Crowley's cases, the trial court entered orders, endorsed "Seen" by the Commonwealth's Attorney, stating that the court took under advisement the motions to set aside "and/or to suspend or modify" the verdicts and judgments. Attached to the petition is an affidavit made by a custodian of records of the Department showing that Crowley and the other defendants were received into the penitentiary system on specified dates after entry of the orders taking their respective motions under advisement.

Thereafter, in three separate orders entered on different dates, the trial court ordered that Sherman, Crowley and Taylor be released from custody, suspended the remainder of the

terms of incarceration of each, and placed each on "probation for the balance of his original sentence under the auspices of the Virginia Department of Probation and Parole". When the orders of release were entered, Sherman had been in the penitentiary three and one-half months, Taylor four and one-half months and Crowley one year. Copies of the release orders show that they were endorsed by the Commonwealth's Attorney "Seen and Agreed to". No action has been taken by the court on the motions filed on behalf of Bogue and Syfrett.

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I. Sherman, Crowley and Taylor.

Sherman filed a motion to dismiss and grounds of defense, with supporting memorandum of law, in which he stated that his counsel sought and obtained advice from the Attorney General's Office to expedite his release after entry of the order suspending the balance of his sentence; that he was released on September 17, 1980, upon authorization of the Department; that he has rejoined his wife and begun his own photographic printing and graphics business in Durham, North Carolina; and that he has complied with all the terms of his probation.

Crowley filed a motion to dismiss and grounds of defense, with supporting memorandum of law, in which he stated that he was released from custody by the Department on February 26, 1981, and that, after reporting to the Virginia Department of Probation and Parole, he had returned to Florida, his former

home, where he was living "as a law-abiding citizen".

Taylor filed a motion to dismiss and grounds of defense, with supporting memorandum of law, in which he stated that his counsel sought and obtained advice from the Attorney General's Office to expedite his release after entry of the order suspending the balance of his sentence; that he was released on October 15, 1980, upon authorization of the Department; that he returned to Colorado to his former seasonal employment in a ski shop; that he was employed for the summer as an electrician in construction work; and that he has complied with all the terms of his probation.

The Department's theory, as advanced by the Attorney General, is that the cases of Sherman, Crowley and Taylor are not concluded, and that the orders suspending the balance of their sentences and placing them on probation were invalid orders, so that the Department may reacquire custody of the three as if they were escaped felons without incurring the risk of being held in contempt of the trial court. The Attorney General suggested in oral argument that the proper mandate for this Court to enter would prohibit the trial court from effectuating the release orders already entered.

We can not pass upon the validity of the orders under which Sherman, Crowley and Taylor were released from custody. The Attorney General has misconstrued the function of the writ of prohibition, which is not available to undo errors that may

have been committed in ordering the release of these defendants. The function of the writ was defined in United States v. Hoffman, 71 U.S. (4 Wall.) 158 (1866) as follows:

The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be

already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction.

Id. at 161-62.

The writ may be used to prevent the exercise of assumed jurisdiction of the court by the judge to whom it is directed, either when he has no jurisdiction or when he exceeds his jurisdiction, but it may not be used to correct error already committed. Rollins v. Bazile, 205 Va. 613, 616, 139 S.E.2d 114, 117 (1964); Grief v. Kegley, 115 Va. 552, 557, 79 S.E. 1062, 1064 (1913). See Lee v. Jones, 212 Va. 792, 793, 188 S.E.2d 102, 103 (1972); see also English v. McCrary, 348 So.2d 293, 297 (Fla. 1977); Burks Pleading and Practice § 200, at 326 (4th ed. 1952).

Here, three defendants were released from custody by orders entered by the court which tried the cases, with the

approval of the Commonwealth's Attorney, and pursuant to a practice approved in 1975 by the then Attorney General. In each case, the release is an accomplished fact; thus, the time for challenging such releases in a petition for a writ of prohibition has passed. So long as these defendants continue to comply with the terms of their probation, the orders of the trial court are final and conclusive. The only portions of the release orders that remain executory are the requirements for continuing supervisory probation. If the orders were improperly entered, the effect of prohibiting enforcement of the unexecuted provisions would be to leave the defendants free from the constraints of probation, a result that unquestionably would be contrary to the public interest. We hold, therefore, that the purpose of the releases has been accomplished, that the writ of prohibition may not be used to revoke these releases, and that the Department's petition must be dismissed as to Sherman, Crowley and Taylor.

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VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA

v.

DANIEL CURRY CROWLEY

ORDER

A motion having been filed by the Commonwealth and the Virginia Department of Corrections to vacate the Order of this Court of February 19, 1981, entered in this matter, which directed the release of the defendant from custody and suspended the remainder of his sentence, it is ORDERED that the defendant may file a responsive pleading within ^{twenty-one (21)} ~~ten (10)~~ days of the date of this Order.

The Clerk is directed to forward a certified copy of this Order to Robert G. Cabell, Jr., Esquire, 523 East Main Street, Richmond, Virginia 23219, counsel for the defendant, and to Marshall Coleman, Attorney General of Virginia.

Enter this 21 day of Sept., 1981.



Judge

This the 12th day of Oct 1981

VIRGINIA:

Thomas W. Dunstall
Clerk

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRIGNIA)

v.)

DANIEL CURRY CROWLEY)

CASE NO. _____

DEFENDANT'S RESPONSE TO PETITIONER'S MOTION

Comes now the defendant, Daniel Curry Crowley, by counsel, and for his response to the petitioner's motion to vacate and set aside this Court's order of February 19, 1981, says as follows:

1. Counsel for petitioner is acting without authority in violation of Virginia Code Section 2.1-124 and accordingly this motion should be dismissed.

2. Petitioner's motion is barred by Rule 1:1 of the Rules of the Supreme Court of Virginia and the equitable doctrine of laches.

3. This Court is powerless to invalidate its order of February 19, 1981, since the Supreme Court of Virginia has ruled that this order is a "final and conclusive" one valid so long as this defendant "continues to comply with the terms of his probation" (see In Re: Commonwealth of Virginia, Department of Corrections, Petitioner, slip opinion, page 7) and no court has held that the order of February 19, 1981, was entered without jurisdiction.

4. Petitioner has acted in a manner that violates defendant's rights to due process and equal protection of the law under the Fifth and Fourteenth Amendments of the United States Constitution.

DANIEL CURRY CROWLEY

COUNSEL:

Robert G. Cabell, Jr.
C. Michael DeCamps
CABELL, PARIS, LOWENSTEIN & BAREFORD
523 East Main Street
Richmond, Virginia 23219

BY

Robert G. Cabell, Jr.
Of Counsel

Filed in the Clerk's Office of the Circuit
Court of Cumberland County, Virginia.

This the 12th day of Oct 1981

V I R G I N I A:

James H. Zinstall
Clerk

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

DANIEL CURRY CROWLEY)

CASE NO. _____

MOTION TO DISMISS

Comes now the defendant, Daniel Curry Crowley, by counsel, and for his motion to dismiss says as follows:

1. The Commonwealth of Virginia and the Department of Corrections of the Commonwealth of Virginia through their counsel, the Attorney General of Virginia, have filed a motion in this Court requesting this Court to vacate and set aside its order of February 19, 1981, releasing the defendant from custody and suspending the remainder of his term of confinement.

2. The Department of Corrections of the Commonwealth of Virginia is not and never has been a party to the criminal proceeding against the defendant in this Court and therefore should be dismissed as a party to the motion described in paragraph one above.

3. Counsel for the petitioner, the Attorney General of Virginia, has not produced in this Court any document exemplifying a specific request by the Governor of the Commonwealth of Virginia for the Attorney General to participate in this case in this Court, and without such a specific request the Attorney General has no authority to act as counsel for the Commonwealth of Virginia in this matter pursuant to Virginia Code Section 2.1-124. Accordingly since the Attorney General is acting without authority, the previously filed motion must be dismissed.

WHEREFORE, the defendant, Daniel Curry Crowley, prays that the motion to vacate and set aside the order of February 19, 1981, be dismissed.

DANIEL CURRY CROWLEY

BY Robert G. Cabell, Jr.
Of Counsel

COUNSEL:

Robert G. Cabell, Jr.
C. Michael DeCamps
CABELL, PARIS, LOWENSTEIN & BAREFORD
523 East Main Street
Richmond, Virginia 23219

Filed in the Clerk's Office of the Circuit
Court of Cumberland County, Virginia.

This the 29th day of October, 1981.

Imogene M. Dunstree Clerk
By: Betty R. Hutton, Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA

v.

DANIEL CURRY CROWLEY

REPLY MEMORANDUM

Now come the Commonwealth of Virginia and the Department of Corrections of the Commonwealth of Virginia, by counsel, and respectfully submit this Reply Memorandum.

I.

Standing

The defendant asserts that the Attorney General and Department of Corrections have no standing to move this Court to vacate its suspension order of February 19, 1981. His position is unsound.

In the case of In Re Commonwealth of Virginia, Department of Corrections, Petitioner, ____ Va. ____, ____ S.E.2d ____, Record No. 810667, slip op. (Sept. 11, 1981), the Supreme Court

recognized the standing and interest of the Department of Corrections, because the Department is vested with jurisdiction over prisoners and is a "proper party to raise the question" of the validity of the suspension order. Id. (slip op. at 13). Also, in Richmond Newspapers, Inc. v. Commonwealth of Virginia, et al, ____ Va. ____, ____ S.E.2d ____, Record No. 801370, slip. op. (Sept. 11, 1981), the Supreme Court implicitly acknowledged the standing of an interested third party to be heard in a criminal proceeding. In that consolidated case members of the news media successfully challenged closure orders of a trial court excluding the public and newsmen from pretrial hearings. Id. Accordingly, the Department of Corrections has standing.

The defendant further argues that the Attorney General - insofar as he also appears on behalf of the "Commonwealth of Virginia" - is without authority to move for vacation of the suspension order because under § 2.1-124 of the Code of Virginia (1950), as amended, he normally does not represent the

Commonwealth in a criminal prosecution. The fact is, however, that the "motion to vacate" is not a "criminal prosecution," and the Attorney General is seeking at this point only to have an order formally vacated on the ground that it was clearly entered without jurisdiction.

Finally, the defendant maintains that the motion to vacate constitutes an "appeal" by the Commonwealth which is not authorized in a criminal case. This is patently without merit. Not only was the motion filed in the trial court, but seeking vacation of a jurisdictionally defective order in this fashion no more amounts to an "appeal" than did filing for a writ of prohibition, which was granted by the Supreme Court in the cases of Douglas Bogue and William Syfrett.

¹ The purpose of the provision of the Virginia Constitution prohibiting appeals by the Commonwealth is to insure that a defendant is not put twice in jeopardy for the same offense. Smyth v. Godwin, 188 Va. 753, 51 S.E.2d 230, cert. denied, 337 U.S. 946 (1949). It does not prohibit an appeal by the Commonwealth from a habeas corpus judgment which overturns a conviction. Id. Also, a petition of the Commonwealth for a rehearing in a criminal case on appeal in the Supreme Court does not constitute an "appeal" within the meaning of the constitutional prohibition. Burgess v. Commonwealth, 136 Va. 697, 118 S.E.2d 273 (1923). In Burgess the conviction, which initially was ordered reversed, was affirmed on rehearing sought by the Commonwealth.

V I R G I N I A :

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY
COMMONWEALTH OF VIRGINIA

v.

DANIEL CURRY CROWLEY

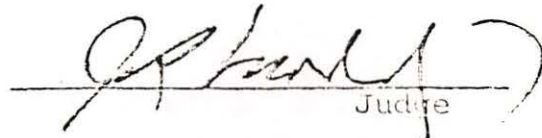
ORDER

This matter having been brought before the Court by the Commonwealth of Virginia and the Virginia Department of Corrections upon a Motion to Vacate the Order of this Court entered on February 19, 1981, the defendant having filed his Motion to Dismiss and the Commonwealth of Virginia and the Department of Corrections having thereafter filed a Reply Memorandum, no party having requested further argument thereof;

Upon careful consideration whereof, for reasons stated in defendant's pleading, and the decision of the Supreme Court of Virginia in the recent case of In Re: Commonwealth of Virginia, Department of Corrections, Petitioner, rendered on September 11, 1981, the Court finds the Motion to Vacate to be without merit and hereby ADJUDGES, ORDERS and DECREES that the same be dismissed with prejudice, to which action the exception of the Commonwealth of Virginia and the Department of Corrections is duly noted.

Let the Clerk certify copies of this Order to all counsel of record.

Enter this 5th day of December, 1981.


Judge


ASSIGNMENT OF ERROR

Pursuant to Rule 5:21 of the Rules of the Supreme Court of Virginia, the appellants assign the following as error:

That the Circuit Court erred in refusing to vacate and set aside its suspension order of February 19, 1981, which was entered after that Court's jurisdiction had been extinguished by the expiration of twenty-one days from final judgment and delivery of the prisoner to the penitentiary.

CERTIFICATE OF SERVICE

I hereby certify that on or before this 22nd day of November, 1982, three (3) copies of this joint appendix have been mailed, postage prepaid, to Robert G. Cabell, Jr., Esquire, 523 East Main Street, Richmond, Virginia 23219, counsel for appellee.



James E. Kulp
Senior Assistant Attorney General

