

203Va 455

Record No. 5401

**In the
Supreme Court of Appeals of Virginia
at Richmond**

SAMUEL BURNETTE

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ESSEX COUNTY

RULE 5:12—BRIEFS.

§5. **NUMBER OF COPIES.** Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. **SIZE AND TYPE.** Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

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

AT RICHMOND.

Record No. 5401

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Essex County

Upon the petition of Samuel Burnette a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Essex County on the 10th day of May, 1961, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

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No.....

State of Virginia,
County of Essex, to-wit:

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, W. F. Davis, Deputy Sheriff has this day made complaint and information on oath before me, J. J. Johnson Justice of the Peace of the said County, that Samuel Burnette in the said County did on the 24 day of March, 1961: Unlawfully possess, store and offer for sale illegal type fireworks in violation 59-214 of the Code of Virginia.

We, the jury upon the issue joined, find the defendant Samuel Burnette guilty of storing and offering for sale illegal type of fireworks in violation of Sec. 59-214 of the Code of Virginia as charged in the within warrant and we fix his punishment at confinement in jail for six months and that he pay a fine of one hundred dollars.

JOHN W. WARE
Foreman.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon:

.....	color	.....	Address	.....	[ ]
.....	color	.....	Address	.....	[ ]
.....	color	.....	Address	.....	[ ]
.....	color	.....	Address	.....	[ ]
.....	color	.....	Address	.....	[ ]

as witnesses.

Given under my hand and seal, this 24 day of March, 1961.

J. J. JOHNSON, J. P. (Seal)
(Title of Issuing Officer).

(on back)

State of Virginia,
County of Essex, to-wit:

I, Elizabeth M. Hardwich, a Clerk in and for the County aforesaid, State of Virginia, do certify that Samuel Burnette and cash, as his surety, have this day each acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Two hundred and 00/100 Dollars (\$200.00), to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to be rendered, yet upon this condition: That the said Samuel Burnette, shall appear before the Circuit Court of Essex County, on the 17th day of April, 1961, at 10:00 A. M., at Tappahannock, Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged, and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; and upon the further condition that the said shall keep the peace and be of good behavior for a period of days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this 6th day of April, 1961.

ELIZABETH M. HARDWICH, Clerk
County Court.

H 211067—\$200.00.
Q 637134 \$1.00 pd. 4-6-61.

Called 4/6/61.
Committed 3/24/61.

DOCKET NO. A7107.

Commonwealth,

v.

Samuel Burnette.

Executed this, the 24 day of March, 1961.

W. F. DAVIS, Dep. Sheriff.

Upon the examination of the within charge, I find the accused guilty and fine him \$100.00 and costs of \$11.25, and hereby sentence him to 10 days in jail and order the fireworks to be confiscated at the end of the 10 day period if the appeal of the case is not perfected.

C. VINCENT HARDWICH
Judge, Essex County Court.

4-6-61.

Appealed on 4-6-61.

Fine	\$100.00
Costs	11.25
Total	\$111.25.

The following witnesses were recognized to appear before the Circuit Court of County, Virginia,
County

at M., on the day of,
19, under penalty of \$

Rec'd. \$200.00 4-6-61.

H 211067

Rec'd. \$298.00—H 211056 Ck. #745—Arnold Motley Clerk
in the amount of \$498.00, dated 4/14/61.

COSTS.

Warrant	\$200
Trial	200
Bail	
Arrest	100
Mileage	200
Clerk	125
Jail Fee and Board	50
Witness Attendance	
Summoning Witnesses	
Commonwealth Attorney	250
Total Costs	\$ 11.25
Fine	100.00
Total	\$111.25

DEPARTMENT OF STATE POLICE

County of Essex Date 3-24-61 M Samuel Burnette You are hereby summoned to appear in the Essex County Court at Tappahannock on Mar. 30, 1961 at 10 A. M., to answer for violating the motor vehicle laws of Virginia, to-wit: Reckless Driving [] Speeding MPH in a MPH
Chauffeurs

Zone [] No Operators License [] Illegal.....
....[] Other illegal sale and possession of illegal fireworks

I hereby promise to appear at the time and place specified above.

Defendant's Signature

Trooper C. E. Olive Shield No. 345.

Summons issued under Title 46.1—Section 178, Code of Virginia. Failure to comply with this summons constitutes a separate offense.

All traffic fines for State violations are paid into the Literary Fund for Educational purposes.

COMMONWEALTH OF VIRGINIA DIVISION OF MOTOR
VEHICLES RICHMOND.

If this abstract relates to a conviction of exceeding a speed limit, the Court is requested to state rate of speed and zone.

Defendant Samuel Burnette, Center Cross, Va., Race W,
Sex M, Weight 150, Height 5 ft. 10 in., Code Eyes Gray,
Hair Brn., Month Born Feb., Year Born 1899, oper. or chauf.
License No. 2 B 552414, State Va. Vehicle , Year ,
Make None, Type , Vehicle License No. None, Year ,
State , Occupation Gift Shop Operator.

Name of Arresting Officer C. E. Olive.

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page 3 } OFFICIAL RECEIPT FOR CASH DEPOSIT IN
LIEU OF RECOGNIZANCE WITH
SURETY.

No. 11395 P

County of Essex Virginia, Received of W. J. Keister for the appearance of Samuel Burnette before the County Court of Essex County on the 30 day of March 1961 at 10:00 A. M.

to answer charge made against him under oath by W. F. Davis on the 24 day of March 1961 Three Hundred and no/100 Dollars \$300.00 which includes fee of the justice for taking this recognizance.

March 24, 1961.

Section 19-107, 1950 Code of Virginia.

J. J. JOHNSON

Justice of the Peace.

DUPLICATE TO COURT

page 4 } OFFICE OF THE CLERK OF THE COURT
ESSEX COUNTY.

Tappahannock, Va., April 14, 1961 Received of Essex County Court Dollars For the account of
Writ Tax and Deposit in the Following Chancery Cause or Action at Law.

Plaintiff Commonwealth of Virginia,

v.

Defendant Samuel Burnette.

Official Receipt.

Amount 498.00.

Total 498.00.

No. 1648

Docket No. 74.

A., Clerk.

page 5 } COMMONWEALTH OF VIRGINIA

Essex County Court April 14, 1961 to Mr. Arnold Motley, Clerk Circuit Court Tappahannock, Va.

I Hand you Herewith my Check No. 745 In settlement of my account as follows:

Date 4/6/61 Descriptions Case appealed Docket #A 7107
Cash Bond of J. J. Johnson, J. P., # 11395 P \$298.00.

Additional Bail bond in Cash pd. to Clerk of County Court
\$200.00
Amount \$498.00.

C. VINCENT HARDWICK, Judge
By ELIZ. M. HARDWICK, Clerk.

page 6 } INSTRUCTION NO. 1.

The Court instructs the jury that the law presumes the defendant innocent until the Commonwealth has established his guilt by evidence so strong, so clear and so conclusive that there is left upon the minds of the jury no reasonable doubt of his guilt. This is an abiding presumption and goes with the defendant throughout the entire trial and applies at every stage thereof, until a verdict is reached. If possible, the jury should reconcile the evidence with this presumption. Mere suspicion or probability of guilt, however strong, is never sufficient to convict; nor is it sufficient that, by the greater weight or preponderance of the evidence, the guilt of the defendant is more probable than his innocence; for until his guilt has been proven so clearly that there is no reasonable theory upon which he can be innocent, the presumption of innocence still applies and the jury must acquit him, for a verdict of "Not Guilty" means nothing more than that the defendant's guilt has not been proven beyond a reasonable doubt.

D. W., Judge.

page 7 } INSTRUCTION NO. 2.

The Court instructs the jury that if they find there is a conflict in the evidence in this case on any fact or circumstance tending to establish the guilt or innocence of the defendant, a part of which is in favor of the theory of the state and a part is in favor of the theory of the defendant, and the jury should entertain a reasonable doubt as to which is true, then it is the duty of the jury in arriving at their verdict to adopt the evidence, theory and conclusion most favorable to the defendant.

D. W., Judge.

page 8 } INSTRUCTION NO. 3.

The Court instructs the jury that unless you believe from

the evidence, beyond a reasonable doubt, that the fireworks found at the defendant's store and dwelling are such as are prohibited by Section 59-214 of the Code of Virginia, then you cannot convict the defendant.

D. W., Judge.

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INSTRUCTION NO. 4.

The Court instructs the jury that unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, at the time and place charged, offered for sale fireworks of a type prohibited by Section 59-214 of the Code of Virginia, then you cannot convict the defendant of offering fireworks for sale.

D. W., Judge.

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INSTRUCTION NO. 5.

The Court instructs the jury that if you find the defendant guilty of the offense as charged in the warrant beyond a reasonable doubt, then you shall fix his punishment by confinement in jail not exceeding twelve months or a fine not exceeding Five Hundred Dollars (\$500.00) either or both in the discretion of the jury.

D. W., Judge.

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INSTRUCTION NO. 3a.

The Court instructs the jury that unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, at the time and place charged, offered for sale fireworks of a type prohibited by Section 59-214 of the Code of Virginia, then you cannot convict the defendant.

Offered by Defense.

Refused.

Excepted to by Defendant.

D. W., Judge.

page 12 } Virginia:

In the Circuit Court of Essex County.

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STATEMENTS OF COSTS.

Writ Tax Fine	\$100.00
Attorney Commonwealth	5.00
Clerk	5.00
County Court	11.25
Jury	64.52
Total	\$185.77

Attest:

ARNOLD MOTLEY, Clerk.

Docketed: 11 May 1961.

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Commonwealth of Virginia, County of Essex, to-wit:

BE IT REMEMBERED, That on the 11th day of May, 1961, Samuel Burnette, Principal, and G. W. Lawson, Surety, (Box 1627 College Station, Fredericksburg, Virginia) personally appeared before me, Arnold Motley, Clerk of the Circuit Court of the County of Essex, and respectively acknowledged themselves to owe and stand indebted to the Commonwealth of Virginia, in manner and form following, that is to say, the said Samuel Burnette in the sum of One thousand seven hundred and Fifty-two (\$1,752.00)—Dollars, and the said G. W. Lawson in the sum of One Thousand Seven Hundred Fifty-two and 00/100 (\$1,752.00) Dollars, to be levied, each, of their respective real estate, goods and chattels, to the use of the said Commonwealth, to be rendered, and respectively waived the benefit of their respective homestead exemptions as to this debt.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the above bound Samuel Burnette shall personally appear before the Circuit Court of the County of Essex Virginia on the 10th day of July, 1961, at 10 o'clock A. M., and at any time or times to which the proceedings may be continued or further heard, and before any Court, Judge or

Justice thereafter having or holding any proceedings in connection with this proceeding, then and there to answer the Commonwealth for and concerning the misdemeanor case of *Commonwealth of Virginia v. Samuel Burnette*, the said Burnette having been convicted before a jury on the 10th day of May, 1961, in the Circuit Court of Essex County, Virginia, of storing and offering for sale illegal type of fireworks in violation of Section 59-214 of the Code of Virginia, in Essex County, Virginia, on the 24th day of March, 1961, the said jury having sentenced the said Samuel Burnette to confinement in the County Jail for six (6) months and a fine of One Hundred Dollars (\$100.00), plus court costs, the said Samuel Burnette having expressed his intention to apply to the Supreme Court of Appeals for a writ of error and the Court having suspended the execution of the sentence for sixty (60) days, expiring on the said 10th day of July, 1961; and the said Burnette shall appear before the said Court, as aforesaid, and shall not depart thence without the leave of the said Court, and shall in the meantime keep the peace and be of good behavior, then this recognizance to be void when said case is finally disposed of or when this recognizance is declared void by order of a competent Court; else to remain in full force and effect.

Non-appearance of above bound Samuel Burnette shall be deemed to constitute a waiver of trial by jury, in any Court having jurisdiction.

Witness our signatures and seals, this 11th day of May, 1961.

SAMUEL BURNETTE [L.S.]
G. W. LAWSON [L.S.]

Signed, sealed and acknowledged by each of the above-mentioned parties before me, on the 11th day of May, 1961, in the County of Essex.

Given under my hand, this 11th day of May, 1961.

ARNOLD MOTLEY, Clerk.

All of the foregoing is hereby certified to the Clerk of the Circuit Court of the County of Essex, this 11th day of May, 1961.

ARNOLD MOTLEY, Clerk.

In addition to Samuel Burnettes cash bond of \$498.00.

page 14 } Received of G. W. Lawson, Box 1627 College Station Fredericksburg, Virginia, the sum of One Thousand Seven Hundred Fifty-two Dollars (\$1,752.00) as cash appeal bond for the suit of Commonwealth of Virginia v. Samuel Burnett as tried in the Essex County Circuit Court the 10th day of May, 1961.

ARNOLD MOTLEY, Clerk
Circuit Court of Essex County.

page 15 } Official Receipt.

OFFICE OF THE CLERK OF THE COURT
ESSEX COUNTY

Tappahaunock, Virginia, May 11, 1961.

Received of G. W. Lawson, Box 1627 College Station, Fredericksburg DOLLARS For the account of Cash bail bond Samuel Burnette.

Cash bail bond 1,752.00.

No. 7836.

A. MOTLEY, Clerk.

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JUDGMENT.

This day came the Attorney for the Commonwealth, and the accused, Samuel Burnette, in person, who was represented by his attorneys, Dabney Overton and Dabney Overton, Jr., appeared in court in discharge of his recognizance and being arraigned in person on the warrant in this case in which he is charged with unlawfully in Essex County, Virginia, on the 24th day of March, 1961, storing and offering for sale illegal type of fireworks in violation of Section 59-214 of the Code of Virginia, appealed from a decision of the Essex County Court, pleaded not guilty and put himself upon the country for trial and the Commonwealth doth likewise and issue is joined.

Thereupon came a panel of eleven jurors selected according to law, who were examined by the Court and found free of all legal causes of exception and qualified in all respects

to serve as jurors for the trial of this case, and the Commonwealth and the accused each having erased three names from the said panel, the remaining five against whom there was no exception, to-wit; A. C. Turner, Robert R. Dishman, D. A. Allen, J. M. Evans and J. W. Ware, were sworn to well and truly try and a true deliverance make between the
 page 17 } Commonwealth and the accused and a true verdict render according to the law and evidence, and having heard all of the evidence of the Commonwealth counsel for the accused moved the Court to strike the evidence as being insufficient in law to sustain a verdict of guilty, which said motion was overruled by the Court and to which said ruling the accused noted an exception; thereupon the accused rested his case without putting on any testimony. The jury received the instructions of the Court and heard argument of counsel and then retired to their room and after some time filed into Court, having found the following verdict, to-wit:

“We, the jury, upon the issue joined, find the defendant Samuel Burnette guilty of storing and offering for sale illegal type of fireworks in violation of Sec. 59-214 of the Code of Virginia as charged in the within warrant and we fix his punishment at confinement in jail for six months and that he pay a fine of one hundred dollars.

JOHN W. WARE, Foreman.”

Thereupon counsel for the accused moved to set aside the verdict and grant a new trial on the grounds that (1) the verdict was contrary to the law and the evidence; (2) that the Court improperly admitted evidence over the objection of the accused; and (3) that the Court improperly instructed the jury, which said motion was overruled by the Court and to which said ruling the accused noted an exception.

Therefore, in accordance with the verdict of the jury, it is considered by the Court that the accused be found guilty of storing and offering for sale illegal type of fireworks in violation of Section 59-214 of the Code of Virginia, as charged in the said warrant, and that he be sentenced to jail for a period of six (6) months and that he pay a
 page 18 } fine of ONE HUNDRED DOLLARS (\$100.00) and the costs of this prosecution.

Whereupon counsel for the accused moved the Court to suspend the execution of the said jail sentence, which said motion was overruled by the Court and to which said ruling counsel for the accused noted an exception.

Thereupon counsel for the accused expressed the intention

of the accused to apply to the Supreme Court of Appeals for a writ of error, upon consideration of all of which the Court doth suspend the execution of said sentence for a period of sixty (60) days from this date, pending the application for said writ of error, and the accused may be let to bail, with surety approved by the Clerk of this Court, in the penalty of \$2,250.00, conditioned according to law, for his appearance before this Court on the 10th day of July, 1961, at 10:00 A. M.

The accused being unable to furnish said bail was remanded to jail.

Enter—Law May 10, 1961.

DANIEL WEYMOUTH, Judge.

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Filed in the Clerk's Office of Essex County, Va., Circuit Court the 1st day of July 1961.

ARNOLD MOTLEY, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

NOTICE OF APPEAL.

To Arnold Motley, Clerk, Circuit Court of Essex County, Tappahannock, Virginia:

The defendant, Samuel Burnette, hereby gives notice of his appeal in this case, and that he will apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *supersedeas*.

ASSIGNMENTS OF ERROR.

The said defendant, Samuel Burnette, assigns as error the action of the court in the following:

1. In permitting the Attorney for the Commonwealth to make an improper statement to the jury in his opening statement;
2. In permitting the introduction of improper evidence;

3. In granting improper instructions to the jury;
4. In refusing to grant an instruction tendered by the defendant;
5. In refusing to strike the evidence of the Commonwealth and dismiss the charge against the defendant; and,
6. In refusing to set aside the verdict of the jury as contrary to the law and evidence and without evidence to support it, and grant to the defendant a new trial.

SAMUEL BURNETTE
By Counsel.

OVERTON AND OVERTON
Warsaw, Virginia
Attorneys for Samuel Burnett
By DABNEY OVERTON

I hereby certify that a true copy of the foregoing
page 20 } notice of appeal and assignments of error was
mailed to Emory L. Carlton, Attorney for the Com-
monwealth, Tappahannock, Virginia, on this the 30th day of
June, 1961.

DABNEY OVERTON.

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* * * * *

OVERTON AND OVERTON
Attorneys at Law
Warsaw, Virginia

June 30, 1961.

Arnold Motley, Clerk
Circuit Court of Essex County
Tappahannock, Virginia

In *Re*: Commonwealth v. Samuel Burnette

Dear Arnold:

I enclose a Notice of Appeal and Assignments of Error
for filing among the papers in this case.

Yours very truly,

OVERTON AND OVERTON
DABNEY OVERTON

DO/bw

cc: Emory L. Carlton, Esquire
Attorney for the Commonwealth
Tappahannock, Va.

Encl. 1

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* * * * *

NARRATIVE STATEMENTS OF TESTIMONY AND
OTHER INCIDENTS OF TRIAL.

In his opening statement, the Attorney for the Commonwealth stated to the jury that the Commonwealth expected the evidence to show that Mr. Davis, the Deputy Sheriff of Essex County, happened to be near Center Cross, Virginia, in the vicinity of the defendant's store, in the investigation of an offense with which the defendant was not connected, on the date of the offense here alleged against the defendant, March 24, 1961; that, as Mr. Davis passed the defendant's place of business, returning to his office at Tappahannock, he noticed a car with several sailors in it pull away from the defendant's place of business; that at a point some two miles from the defendant's place of business, Mr. Davis noticed that one or more of the sailors in the automobile threw out two (2) firecrackers which exploded on the highway; that Mr. Davis then stopped the car driven by the sailors and found in the car a paper bag containing ten (10) firecrackers; and that he then went to Tappahannock, procured a search warrant for the search of the defendant's premises and returned to the defendant's premises, with two (2) other officers, State Troopers Olive and Terry. Objection was made to this statement from its beginning as being irrelevant, incompetent, inadmissible, and tending inescapably to the prejudice of the defendant. The Court ruled that the Attorney for the Commonwealth could state this set of circumstances to

page 24 } the jury as explaining why the Deputy Sheriff obtained a search warrant and the Court instructed the jury that they should not consider this statement in

Deputy Sheriff Davis.

arriving at the guilt or innocence of the accused. The defendant excepted to the ruling of the Court for the reasons assigned. In their opening statement to the jury, Counsel for the defendant stated that the evidence would present two questions:

1. Whether or not the particular fireworks here involved are, in the present state of the law, illegal; and,

2. Whether or not the defendant offered such fireworks for sale as charged in the warrant; and that the evidence would fail to disclose that the said fireworks are illegal or that the defendant offered them for sale. Counsel for defendant took no position in his opening statement as to storing of illegal fireworks.

Thereafter, the witness,

DEPUTY SHERIFF DAVIS,

was called to the stand and testified that he saw three sailors coming from the direction of the defendant's novelty shop at Center Cross and that there was one sailor sitting in the automobile; that at this time he, Davis, was driving an automobile towards Tappahannock; that he continued North and that the same automobile that he had seen at the defendant's novelty shop passed him just South of Dunnsville; that just South of Essex Mill Road in front of Fred Bray's home he, Davis, saw something thrown from this automobile into the ditch which appeared to be exploding firecrackers; that he continued on following this automobile until he passed over Piscataway Creek Bridge and that he then saw what appeared to be exploding firecrackers thrown into the ditch; that he followed this automobile on up to Gresham's woods and at that point he stopped the said automobile and there were four sailors therein and he found in this automobile a paper bag containing ten (10) firecrackers. Objection was again interposed to this evidence, but,

page 25 } over the objection and exception of the defendant, the witness Davis was permitted to testify as stated above but the Court stated that the above statement of the witness, Davis, would be received for one purpose only and that was to explain why he obtained the search warrant, and the jury was instructed by the Court that they could consider the said evidence as explaining why the said Davis obtained a search warrant and for no other purpose and that

Deputy Sheriff Davis.

they should not consider the said evidence in determining the guilt or innocence of the accused.

Mr. Davis testified, further, that, he then proceeded on toward Tappahannock and obtained a search warrant and returned to the defendant's premises, with State Troopers Olive and Terry; that when he and the other officers reached the defendant's store which is a gift and novelty shop with defendant's residence nearby and having a number of tourist cabins which are operated in connection therewith, near Center Cross, Virginia, that they read the search warrant to the defendant and the defendant then stated to them: "You can search any damn place you want to but you won't find any firecrackers here; I have no fireworks whatever that are unlawful;" that he and the officers proceeded to search the store; that in about a minute Mrs. Burnette, wife of the defendant, left the store and went to the nearby dwelling; that, in one part of the store, the defendant had a large display of legal fireworks, including sparklers and many other *varities*; that, on a shelf in this display, in one of the boxes marked "Sparklers" they found twelve firecrackers in a bag of the type which had been exploded by the sailors; that the witness Davis saw Trooper Olive find in the presence of the defendant approximately twelve (12) packs of fifty (50) in a pack of firecrackers one and one-half inch long and these were in sparkler boxes on a shelf with sparklers in boxes; that, when the officers presented the twelve (12) firecrackers in the bag to the defendant, the defendant stated
page 26 } that they were some loose firecrackers that had been left on his premises when the officers had been there once before and explained to him what type of fireworks were legal and what illegal; that the defendant denied having sold any fireworks whatever to the sailors and having sold any of these particular fireworks to anyone; that, thereafter, Trooper Olive and Davis went to the residence of the defendant, which is located a short distance from the store and to the rear thereof; that the search warrant they had obtained covered the residence as well as the store; that upon searching the residence, one of the Troopers, namely, Trooper Olive, tapped upon a false fireplace; that the space behind sounded empty and that, upon removal of this panel, they found a large number of packages of various assorted firecrackers and rockets, which were then presented in Court and offered and received in evidence; that he and the other officers had, sometime after the search, set off a number of these fireworks; that the firecrackers exploded with a very

State Trooper Olive.

loud noise, but the rockets "went whiff" and went up in the air some thirty (30) to forty (40) feet.

Upon cross examination Mr. Davis admitted that he was not entirely familiar with fireworks; but that he was entirely familiar with firecrackers; that he did not know the nature of some of the items which are permissible under the law; but that he did know what a firecracker is; and that the fireworks found in a box marked "sparklers" and all of those found in the defendant's home are firecrackers; and that he had had no prior conversations with the defendant with respect to fireworks and did not, at the time of the search discuss the legality of the fireworks with him.

The witness,

STATE TROOPER OLIVE.

then testified that he went to defendant's premises with Deputy Sheriff Davis and Trooper Terry and Fire Marshall Johnson; that when they arrived the defendant stated to them, after they had read the search warrant, that they "wouldn't find any"; that he noticed Mrs. Burpage 27 } nette, wife of defendant, who was in the store on arrival, leave the gift shop and went to the dwelling; that they began to search both sections of the gift shop, one section used generally for pottery, and the other for various novelties and fireworks; that a few minutes after beginning the search he found on the top shelf a box of approximately six inches square and six inches deep half full of the same type firecrackers that Mr. Davis had taken from the automobile; that next, Trooper Terry found a small paper bag identical to the one that Mr. Davis had taken from the sailors with twelve (12) firecrackers of the same type and the price on the bag was marked One Dollar (\$1.00); that further search revealed that several sparkler boxes that were stacked approximately five boxes high and six boxes wide contained not sparklers, but firecrackers, camouflaged; that all of these fireworks were shown to Mr. Burnette and Trooper Terry and Fire Marshall Johnson; that at the same time they were searching the pottery section of the gift shop they found approximately one-half case of small skyrockets. Next, Fire Marshall Johnson and Mr. Olive along with Mr. Burnette, the owner, searched the cabins on the premises and found nothing; then Mr. Davis, Deputy Sheriff, and Mr. Olive went to the dwelling house of Mr. Burnette and as they went inside Mrs. Burnette came out of the front door and

State Trooper Terry.

returned to the gift shop; that when they got in the living room Mr. Burnette stated to Olive that Olive could "search the whole damn place and he would not find a thing," that Mr. Davis went on into another room adjoining the living room. Mr. Burnette remained with Olive. In the living room was a false sheet metal fireplace, which he began to hit with his knuckles and it sounded hollow. When he did this, Mr. Burnette said, "that is just an old fireplace, you will not find anything there." At this time he noticed that the fireplace was ajar from the wall approximately one-
page 28 } half inch. He looked through this crack, he saw a light reflect from the window on the opposite side on what appeared to be cellophane wrappers. At this time he, Olive, said to Mr. Burnette, or rather asked him why he had not saved them all of this trouble. He still said, "you will not find anything here." He, Olive, then removed the fireplace from the wall, found a vast accumulation of fireworks which was displayed in the courtroom. They are various sizes of firecrackers and in the fireplace itself only firecrackers were found. However, behind a settee, under some Christmas tree decorations he found another approximately one-half case of small skyrockets. They started to search the other rooms in the residence and Mr. Burnette said, "you need not search these other rooms, because you have them all now," referring to the fireworks. When they found all of these fireworks and they were all illegal fireworks, Mr. Burnette said that he had not bought any more but they were fireworks left over from the last time and that he was only storing them in the house. They then accumulated the fireworks, put them in the automobile and brought them to Tappahannock as evidence; that with the vast amount of fireworks found in the dwelling house, they overlooked or forgot to pick up the smaller amount that they had originally found in the gift shop, leaving them there on the premises, except the paper bag containing twelve firecrackers with the price marked on it of One Dollar (\$1.00), and the ones in the sparkler boxes.

Thereupon, the

STATE TROOPER TERRY,

took the stand and testified that on March 24, 1961, Trooper Olive approached him in Tappahannock with reference to *accompanying* him to Center Cross with Deputy Sheriff Davis, they went to Mr. Burnett's gift shop at Center Cross with a

State Trooper Terry.

search warrant and entered the establishment. A search warrant was read to Mr. Burnette and he was instructed as to why they were at his place of business, to look for illegal type fireworks. It was asked of Mr. Burnette if he had any illegal type fireworks, to which he said, no, he
page 29 } didn't have any more. Terry advised Mr. Burnette that they were going to search his premises and establishment for the fireworks, and if he had any, it would be easier for them and him also, if he just would turn them over to them, it would save them a lot of time and trouble. He then replied that he had no illegal fireworks. Fire Marshall Johnson and Terry went into the half of the *novelty* shop which is generally used to display pottery, and which also has a display of fireworks. They searched in this area for sometime and found no illegal fireworks. Mr. Terry said that when they entered the establishment, just as soon as they had entered, in the matter of a minute or so, Mrs. Burnette left the business establishment going in the direction of the home which is located a short distance from the novelty shop. After going back into the section of the novelty shop which contains generally *novelities* and gifts and continuing to search in them, Trooper Olive opening a box of sparkers found some illegal firecrackers. Upon doing this, knowing that they were camouflaged in the sparkler boxes, they then began to open all of the boxes regardless as to what they were marked. Mr. Terry then found some illegal fireworks which were known as "Bulldog Salutes." There were twelve of these firecrackers in a small paper bag which had the top of it twisted closed. Further search revealed some more small inch and one-half firecrackers. Finding this small *quantity* of fireworks they were of the opinion that there had to be more, so Trooper Olive and Fire Marshall Johnson left the building novelty shop premises and went over to the home to search. Mr. Davis and Mr. Terry continued searching in the novelty shop. Back over in the pottery section of the shop, Terry then found some small rockets known as "Pop-bottle Rockets" which are illegal. Then Trooper Olive called for Terry to come over to the home. He then went over to the home and found the fireplace which was sitting out from the wall and a number of cases of illegal firecrackers
page 30 } which were sitting in the center of the floor. Terry had talked to Mr. Burnette on two previous occasions before this date, in 1959 and again on July 4, 1960. Illegal fireworks were pointed out to Burnette by Terry and

Burnette was shown these "Bulldog Salutes" and small inch and one-half firecrackers and told that they were illegal.

All of the fireworks alleged to be illegal, found by the officers on the premises of the accused were offered in evidence by the Attorney for the Commonwealth and without objection by the accused were received in evidence and marked "Commonwealth's Exhibits."

At this point, the Commonwealth closed its case and the defendant moved the Court to strike the evidence and to dismiss the warrant on the following grounds:

1. That the evidence was inconclusive as to whether or not the fireworks found in the defendant's premises were illegal; and,

2. That there was no evidence whatever that the defendant had offered any of the fireworks involved for sale and that this was necessary to sustain the Commonwealth's case, for the reason that, whereas the statute makes the storing of fireworks an illegal act, and, also, the sale thereof, the warrant in this case charges that the defendant did "possess, store and offer for sale" in the conjunctive and that, where the charge is thus framed, it is essential that the case include both the storing and offering for sale. The Court overruled the defendant's motion and the defendant excepted and assigned his reasons.

The defendant offered no evidence and the Court dismissed the jury for the argument of instructions.

The Commonwealth offered Instruction Number Five (5) which was given by the Court without objection by the defendant, and the Commonwealth's Attorney requested the Court to verbally instruct the jury as to the law pro-

page 31 } hibiting the sale of certain fireworks. The Court instructed the jury as to the law covered by Title 59, Chapter 15 of the Code of Virginia, as amended, covering "Fireworks." The defendant objected to the Court telling the jury that if from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant stored and offered for sale illegal fireworks as prohibited by the statute, you may find him guilty as charged in the warrant or if you believe the defendant guilty beyond a reasonable doubt of only storing illegal fireworks as prohibited by the statute, but of not offering them for sale, then you may find the defendant guilty of storing illegal fireworks and conversely if you believe beyond a reasonable doubt that the defendant did not store fireworks as prohibited by the statute but offered them for sale, then you may find the defendant guilty of offering for sale illegal fireworks, but in any

event the jury could find the defendant guilty of but one offense under the statute.

The defendant objected to the foregoing on the ground that, since the warrant charged "store and offer for sale" in the conjunctive, the Commonwealth, in order to convict, must prove an offer to sell as well as storage and stated to the Court that he would offer an instruction telling the jury that they could not convict the defendant unless it believed that the defendant, at the time and place charged, offered fireworks for sale of a type prohibited by Section 59-214. The Court overruled the defendant's objection and stated that it was an offense under the statute to either offer for sale or of storing illegal fireworks. To this ruling of the Court the defendant excepted. The Court refused defendant's Instruction Number 3A and gave defendant's Instruction Numbers 1, 2, 3 and 4.

Thereafter, the jury retired to its room to consider of its verdict and, in time, returned with a verdict finding the defendant guilty of storing and offering fireworks
page 32 } for sale as charged in the warrant and fixed his punishment at a fine of One Hundred Dollars and confinement in jail for six (6) months.

After the Court had recorded the jury's verdict and it had been signed by the foreman, the defendant moved the Court that this verdict be set aside and the defendant granted a new trial for error on the part of the Court in permitting the Attorney for the Commonwealth, in his opening statement, to make to the jury the statement to which objection and exception was noted by the defendant as hereinabove set out; for error on the part of the Court in permitting the introduction of evidence with respect to the facts outlined in this statement; for error on the part of the Court in refusing to grant the instruction requested by the defendant, as noted above, and in instructing the jury that under the law it is an offense to store or offer for sale fireworks as prohibited by statute or both but that in any event it is but one offense and for the further reason that the verdict was without evidence to support it.

The Court overruled this motion of the defendant and the defendant excepted, for the reasons assigned.

The instruction refused to the defendant was the following: "The Court instructs the jury that unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, at the time and place charged, offered for sale fireworks of a type prohibited by Section 59-214 of the Code of Virginia, then you cannot convict the defendant."

Counsel for defendant now concedes that the firecrackers found in the store and most, if not all, of the fireworks found in the home are illegal and that there was evidence before the jury from which the jury could believe that the defendant knew this.

Tendered July 1, 1961.

Filed July 5, 1961.

DANIEL WEYMOUTH, Judge.

DABNEY OVERTON
Attorney for Defendant

EMORY L. CARLTON
Comm. Atty. Essex Co.

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OVERTON AND OVERTON
Attorneys at Law
WARSAW, VIRGINIA

August 7, 1961.

Mr. Arnold Motley, Clerk
Circuit Court of Essex County
Tappahannock, Virginia

In *Re*: Commonwealth v. Samuel Burnette

Dear Arnold:

Please transmit the record in this case to the Clerk of the Supreme Court of Appeals of Virginia.

Yours very truly,

DABNEY OVERTON.

DO/aer

Filed in the Clerk's Office of Essex County, Va., Circuit Court the 7th day of Aug. 1961.

ARNOLD MOTLEY, Clerk.

A Copy—Teste:

H. G. TURNER, Clerk.

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