IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

CLARENCE SMITH

vs.

COMMONWEALTH

Motion to Dismiss and Brief on Behalf of the Commonwealth

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Rule II of this court provides in part:

> " * * * Before any petition for appeal or writ of error is presented to a judge in vacation, or to the court in term, or filed with a clerk of the court, a copy thereof shall be first mailed or delivered to the opposing counsel in the trial court, and the petition shall aver the date of such mailing or delivery. * * *."

There is nothing in this record to show that the quoted requirement of this rule was complied with, and the peti-

tion does not aver that a copy thereof was mailed or delivered to the Commonwealth's attorney of the city of Norfolk, Virginia.

Since the accused was not entitled, under Rule II of this court, to present his petition, and since it is now too late for him to present a proper petition, it is respectfully submitted that this writ of error should be dismissed.

In the event this court should be of the opinion that the motion to dismiss is not a sound motion, and to prevent further delay, we desire to make the following reply on the merits of this case, discussing the assignments of error in the order in which they are set forth on page 3 of the record.

FIRST ASSIGNMENT OF ERROR

The evidence in this case is very brief. Six witnesses were introduced for the Commonwealth and their testimony is found on pages 15, 16, 17 and 18 of the record. If their testimony be true, the accused should have been convicted. If their testimony be not true, he should not have been convicted. However, on the conflicting evidence the case was fairly presented to the jury.

SECOND ASSIGNMENT OF ERROR

This assignment presents the real question on the merits in this case. It appears from the record (R. pp. 19 and 27), that the Commonwealth's attorney asked the accused whether he had ever been convicted and sen-

tenced to a term in the State penitentiary, to which the accused replied in the affirmative. He subsequently desired to introduce testimony to the effect that the main complaining witness against him in that former conviction had committed perjury and had made an affidavit that he had committed perjury, and had then been sued civilly by the accused and had settled the case out of court for $1,000.00.

The court refused to admit this evidence and this action of the court is assigned as error.

Prior to the adoption of section 4779 of the Code, a person convicted of a felony could not qualify as a witness. That section now provides that a convicted felon is competent to testify, but the fact of the conviction may be shown in evidence to affect his credibility.

The statute goes no further than this. It permits a felon to testify and makes of his testimony admissible evidence, but you can introduce the fact of his conviction as tending to show the credibility of his evidence. The statute thus permits a partial inquiry into a collateral matter, but it does not go so far as to open up the whole field of collateral testimony so as to permit the accused to testify regarding that conviction, and perhaps the unjustness of it, and so as to make it necessary in the case then being tried to rehash and retry the former case in order that the jury in the case then being tried may determine whether or not the jury in the former case should have convicted. An accused need not take the stand unless he so desires. If he does not take the stand, there is, of course, no ground to introduce evidence to the effect that he is a convicted felon. If he takes the stand of his

own accord, then it is permissible for the Commonwealth to attack his credibility by showing his former conviction, but that does not mean that he is at liberty then to have retried the former case.

Nor do we believe that the expression quoted in the petition from *Harris* v. *Commonwealth,* 129 Va. 751, alters this situation. In that case the accused, in his direct testimony, had indicated that during the year 1910 he was in Atlanta. On cross-examination the Commonwealth's attorney asked him what he was doing in Atlanta, and he replied that he was in prison. This court said it would have been permissible for him, on redirect examination, to tell the jury "all about his imprisonment."

It nowhere appears in the case of *Harris* v. *Commonwealth, supra,* that the accused had been convicted of a felony. So far as the case shows, it may have been a misdemeanor. Again the question on cross-examination in the *Harris Case, supra,* was not, so far as the record shows, for the purpose of affecting the credibility of the witness, but it was legitimate cross-examination on a matter opened up by him on direct examination.

The situation in this case is entirely different. We are here dealing with a man who had been convicted of a felony and who, under the statute, could be asked that question to affect his credibility; but we say again that, unless in the one trial there are had two trials, the matter must stop at that point as the judge in this case stopped at that point.

THIRD ASSIGNMENT OF ERROR

The criticism of the Commonwealth's attorney, to which exception is taken, is found on page 26 of the record.

It needs no argument to sustain the proposition that this was no reversible error. The language is sarcastic and, to that extent, might perhaps be open to some slight criticism, but it is impossible to conceive that it could in any way have tended to bring about a conviction.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error is based upon the ground of after-discovered evidence.

That after-discovered evidence is found in the affidavit of Walter Morris (it should be Walter Morris, Jr., R. p. 23). The affidavit of Morris is completely refuted by the affidavit of his father (R. pp. 23, 24) and by the affidavit of Ivie N. Dail (R. pp. 24, 25). From these subsequent affidavits it appears beyond peradventure of doubt that there is no truth in the affidavit relied on by the accused, and that the so-called after-discovered evidence would, under no conditions, bring about a different result.

FIFTH ASSIGNMENT OF ERROR

The record shows (R. p. 16) that, after the introduction of three witnesses, the Commonwealth announced

that it rested, and the court, as is shown by the record, then permitted it to introduce some furher evidence. It is objected that reversible error was committed by this action of the court in allowing the Commonwealth to introduce additional testimony.

The introduction of additional testimony is not a matter of right; it is a matter in the sound discretion of the court, and, unless it can be seen that the lower court clearly abused that discretion, this court will not interfere with its action.

Bishop v. *Webster,* 154 Va. 771.

Respectfully submitted,

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