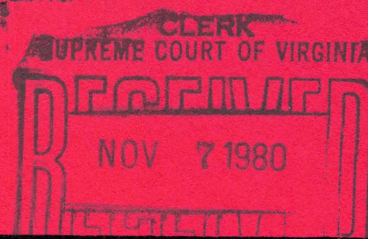


221 Va 972



RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 800551

Wayne R. Trunfio,

Appellant

v.

Commonwealth of Virginia,

Appellee

APPENDIX

Robert C. Whitestone, Esquire
WHITESTONE, RODWAY, PHILLIPS
& BRENT, P.C.
10511 Jones Street - Suite 200
Fairfax, Virginia 22030
Counsel for Appellant

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9357
V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

May 21, 1979

COMMONWEALTH OF VIRGINIA)	INDICTMENT FOR POSSESSION OF A
)	CONTROLLED DRUG WITH INTENT TO
vs.)	DISTRIBUTE AND DISTRIBUTING A
)	CONTROLLED DRUG
WAYNE R. TRUNFIO)	

COUNT I

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 May Term, 1979, charges that: On or about the 16th day of February, 1979 in the County of Fairfax, Wayne R. Trunfio did unlawfully and feloniously, knowingly or intentionally possess with the intent to distribute a controlled drug: to-wit: marihuana.

Va. Code Section 18.2-248

COUNT II

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 May Term, 1979 charges that: On or about the 16th day of February, 1979, in the County of Fairfax, Wayne R. Trunfio did unlawfully and feloniously, knowingly or intentionally distribute a controlled drug, to-wit: marihuana.

Va. Code Section 18.2-248

A True Bill _____

No True Bill _____

FOR L E A N _____

Witnesses subpoenaed, sworn
and available to testify
before the Grand Jury:
Off. C. A Polizzi

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)	Indictment - Distribution of a
)	controlled drug
VS.)	
WAYNE TRUNFIO)	Cr. #29350

This 18th day of January, 1980, came the Commonwealth by her Attorney, and the Defendant, WAYNE TRUNFIO, who stands convicted of a felony, to-wit: distribution of a controlled drug, appeared agreeably in accordance with his recognizance of bail; also appeared Robert Whitestone, Counsel for the Defendant.

Whereupon, the Court Reporter was sworn.

It appearing to the Court that this case was continued from the 21st day of September, 1979 for imposition of sentence; therefore it was demanded of him, WAYNE TRUNFIO, 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 therefore ADJUDGED and ORDERED that the Defendant, WAYNE TRUNFIO, do serve five (5) years in the Penitentiary House of this Commonwealth, but in mitigation of punishment, it appearing compatible with the public interest so to do, the Court doth now suspend the said sentence conditioned upon the Defendant's good behavior and that he be placed on active probation subject to the conditions as set forth in P. B. Form 2-revised 1-76 for a period of two (2) years.

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

The Court hereby certifies that the Defendant was present at all stages of trial in this case.

And the Defendant is hereby released upon the aforesaid conditions.


JUDGE MILLSAP

DOB: 08/09/56

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

CRIMINAL DOCKET NO. _____

WAYNE R. TRUNFIO)

ASSIGNMENT OF ERROR

The Circuit Court of Fairfax County erred in finding the Defendant guilty of a felony and erred in sentencing the Defendant to serve five (5) years in the Penitentiary after Defendant's request that he be sentenced pursuant to § 18.2-248.1 of the Code of Virginia, as amended.

Respectfully submitted,

WAYNE R. TRUNFIO
By Counsel

WHITESTONE, RODWAY, PHILLIPS
& BRENT, P.C.

Robert C. Whitestone, Esquire
10511 Jones Street - Suite 200
Fairfax, Virginia 22030
703-591-0200
Counsel for Defendant

CERTIFICATE

I hereby certify that a true copy of the foregoing Assignment of Error was mailed, postage prepaid, this ____ day of _____, 1980, to the Office of the Commonwealth Attorney for Fairfax County, Virginia.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)	
)	
v.)	CRIMINAL DOCKET NO. 29350
)	
WAYNE R. TRUNFIO)	

MEMORANDUM IN SUPPORT
OF
NOTICE OF ELECTION

STATEMENT OF FACTS

On or about February 16, 1979, in Fairfax County, Virginia, the Defendant distributed less than one-half (1/2) ounce of Marijuana. The law then in effect provided that such distribution was a felony punishable by not less than five (5) nor more than forty (40) years imprisonment and by a fine of not more than \$25,000.00. If such distribution was as an accommodation, the penalty was a Class I misdemeanor. Section 18.2-248, 1950 Code of Virginia, as amended. Effective July 1, 1979, the Legislature enacted Section 18.2-248.1 which provides that any person who distributes one-half (1/2) ounce of Marijuana or less is guilty of a Class I misdemeanor. Section 18.2-248.1, 1950 Code of Virginia, as amended. The Defendant's case was heard on July 16, 1979, at which time he elected to be sentenced under Section 18.2-248.1.

ARGUMENT

The law in the Commonwealth provides that the Defendant has the right to elect whether he should be sentenced under the old

Section 18.2-248 or the newly enacted Section 18.2-248.1. See Section 1-16 of the 1950 Code of Virginia, as amended, and Conaway v. Commonwealth, 118 Va. 792 (1916).

It is clear that the penalty for the distribution of less than one-half (1/2) ounce of Marijuana has been mitigated by the provisions of Section 18.2-248.1, that such penalty is a misdemeanor, that such provision should be applied in any judgment in this case.

WAYNE R. TRUNFIO
By Counsel

WHITESTONE, RODWAY, PHILLIPS
AND BRENT, P.C.

Robert C. Whitestone, Esquire
10511 Jones Street - Suite 200
Fairfax, Virginia 22030
Counsel for Defendant

CERTIFICATE

I hereby certify that a true copy of the foregoing Memorandum in Support of Notice of Election was hand-delivered this 19th day of July, 1979, to the Honorable Burch W. Millsap and to Robert F. Horan, Commonwealth Attorney, Courthouse, Fairfax, Virginia.

P R O C E E D I N G S

(The Court Reporter, J. Michelle Morgan,
was sworn by the Clerk of the Court.)

THE COURT: The Commonwealth of Virginia
versus Wayne R. Trunfio, case number 29349, 50,
and 99.

Are the parties ready?

MR. RICHARDSON: Yes, Your Honor.

MR. WHITESTONE: Yes, Your Honor. We do
have a preliminary matter with the Court.

THE COURT: What's that?

MR. WHITESTONE: My client is charged
with three counts of distribution of marijuana
and I believe for purposes of the record we
can stipulate to certain facts.

Mr. Richardson has agreed as a matter to
amend two of the charges, and as to the third
charge we both agree to amend. As Your Honor I'm
sure is aware the new statute has been amended
and I didn't bring my copy of the new statute, but
effective July the first, 1979 the distribution
of less than one half ounce of marijuana became
a misdemeanor under the penalties provision.

1 THE COURT: Is that crimes committed after
2 July 1?

3 MR. WHITESTONE: No, sir. The crime itself
4 was committed prior thereon.

5 THE COURT: On the new statute was that
6 on crimes committed on July 1?

7 MR. WHITESTONE: It doesn't say after or
8 before. It just says the distribution shall be --

9 It says less than half an ounce shall be
10 a misdemeanor, and actually it says that the
11 penalty for distribution of less than one half
12 ounce of marijuana shall be a misdemeanor, and
13 Your Honor is aware in Section 1-16 of the 1950
14 Code of Virginia amends insofar as the penalties
15 are concerned states that proceedings after the
16 *repealing* ~~refiling~~ or amendment of the criminal statute
17 should conform insofar as practical to the laws
18 enforced at the time of such proceedings.

19 Now, at the time of indictment, and if
20 any penalty forfeiture that's indicted any provision
21 of new law, in which we state, that it has been
22 such provision may with the consent of the parties
23 effected, which is what my client is asking for

1 that this be applied to any judgement pronounced
2 as to the new law that's in effect.

3 I'll give this to the Court if the Court
4 would like to see it.

5 It is the defenses position that with
6 respect to, that this offense was committed
7 before July 1, since the legislature mitigated
8 the punishment of the distribution quantity of
9 marijuana, less than one half ounce, we, again,
10 we stipulate that this is now a misdemeanor.

11 The law specifically states in this
12 penalty section, and this is a copy of the
13 amended statute. It's under penalty for the sale or
14 distribution.

15 THE COURT: You have a charge of possession
16 and a charge of distribution; is that included?

17 MR. WHITESTONE: It's a two count indictment.

18 THE COURT: On the old statute the accommo-
19 dation was not ^{applicable} ~~practical~~ to distribution, but
20 only to possession, wasn't it?

21 MR. WHITESTONE: If it was a ^{actual} ~~practical~~
22 accommodation, in essence, what Mr. Richardson
23 and I agreed that two of them are misdemeanors.

1 THE COURT: Then, what's the argument
2 about?

3 MR. WHITESTONE: The argument is about
4 this third charge which the Commonwealth, which
5 Mr. Richardson said he'll not reduce it to
6 accommodation which I say based upon the penalty
7 provision of Section, the new ^{§.2-} 248.1 it states
8 on the next page, distribution of one half an
9 ounce or less is a class one misdemeanor, and I'm
10 saying that the change of the new law and based
11 upon Section 1-16 of the 1950 Code as amended that
12 we are willing to ~~enter~~ ^{execute} a plea agreement, but
13 the reason ~~is~~ that we have not executed one is
14 because I feel in my opinion, Your Honor, is that
15 it's a misdemeanor.

16 THE COURT: Do you want an advisory
17 opinion?

18 MR. WHITESTONE: No, sir. I don't
19 want an advisory opinion, but the annotation
20 indicates that ^{if} the Defendant ask that he be
21 treated under the provision of the mitigated
22 statute or he waives that provision, and I may
23 ask that he be treated or requesting that under

1-16 that we be treated under that provision.

I believe that there's no question that Mr. Richardson thinks that it's still a felony, but it has a misdemeanor punishment, and I suggest that's not in fact what the law is.

I don't mean to raise these kind of thorny issues.

THE COURT: Mr. Richardson?

MR. RICHARDSON: Yes, sir. The new law is in effect on July 1, so, however, on those offenses occurring after July 1 the statute, 1-16 does give the benefit to the misdemeanor penalty if he chooses to accept it in 1-16.

The Commonwealth's position is that the maximum that the Defendant can receive if he accepts the benefit of Section 1-16 is 12 months and/or a thousand dollar, but the nature of the offense is still a felony because it occurred before July 1.

The penalty is the maximum penalty if he accepts the statute which is 12 months and/or a thousand dollar fine.

We believe because the offense occurred

1 before July 1 the Defendant committed a felony
2 offense whose maximum penalty is 12 months and/or
3 a thousand dollar fine in view of Section 1-16.

4 THE COURT: You have 1-16?

5 MR. RICHARDSON: Yes, sir.

6 MR. WHITESTONE: You have it before, Your
7 Honor. I just gave you that.

8 THE COURT: The Court would treat it as
9 a felony with punishment of 12 months, and a one
10 thousand dollar fine.

11 MR. RICHARDSON: Yes, sir.

12 THE COURT: 29350, is there a motion on
13 that case?

14 MR. WHITESTONE: Would the Court just
15 note my exception on that. I don't really, if
16 the Court please, we have a plea of guilty form,
17 but may I converse with the Commonwealth Attorney
18 for just a moment?

19 THE COURT: All right.

20 MR. WHITESTONE: Your Honor, we'll plead
21 guilty.

22 THE COURT: I'll take the motion of the
23 Commonwealth before arraignment.

1 Defendant guilty on the amended indictment.

2 Do you wish to refer this one, also?

3 MR. WHITESTONE: Yes, sir.

4 Your Honor, with respect to 29350 that
5 is the one in essence that we have made the
6 argument on. I would like to, if the Court please,
7 to enter in my clients behalf a plea of not
8 guilty, waive a jury, and stipulate that the
9 evidence would indicate that on the 16th day of
10 February, 1979 that my client did distribute to
11 a Fairfax County Police Officer a sum of marijuana
12 in an amount of less than one half ounce, and
13 I waive any argument to chain of custody. The
14 only reason I do this is to preserve our right to --

15 THE COURT: Any amendment to the indictment
16 on Count II?

17 MR. RICHARDSON: No, sir. Your Honor,
18 the Commonwealth does move to nolle prosequere Count I.

19 THE COURT: Any objection?

20 MR. WHITESTONE: No, Your Honor.

21 THE COURT: The Court would grant the
22 motion to nolle prosequere Count I.

23 Would the Defendant rise for arraignment?

1 MR. RICHARDSON: Your Honor, I would move
2 into evidence as Exhibit 1 the laboratory analysis.

3 THE COURT: Any objection?

4 MR. WHITESTONE: No, Your Honor.

5 THE COURT: Admitted as Commonwealth's
6 Number 1.

7 (The document, laboratory
8 analysis, was marked for
9 identification as
10 Commonwealth's Exhibit No. 1
11 and was received in evidence.)

12 MR. WHITESTONE: It's not in the -- let
13 the record show that it's 6.8 grams of marijuana
14 and which would be less than one half an ounce.

15 MR. RICHARDSON: That's all the questions
16 I have.

17 CROSS EXAMINATION

18 BY MR. WHITESTONE:

19 Q Officer, do you recall on that particular
20 occasion that Mr. Trunfio indicated that he would
21 like to keep that marijuana for himself, do you
22 recall that conversation might have taken place
23 on that day?

1 BY MR. RICHARDSON:

2 Q You are Officer Polizzi with the Fairfax
3 County Police Department?

4 A Yes, I am.

5 Q How long have you been a police officer?

6 A Approximately five and a half years.

7 Q Directing your attention to February
8 16th, 1979 were you employed in that position
9 on that date?

10 A Yes, I was.

11 Q Do you know Wayne Trunfio?

12 A Yes, I do.

13 Q Is he present in the courtroom?

14 A Yes.

15 Q Would you point him out, please?

16 A Sitting right here. (Indicating.)

17 Q What brought your attention to Mr. Trunfio
18 on the 16th day of February, 1979?

19 A I went to a residence, 8903 Braeburn
20 Drive, which is Mr. Trunfio's residence. I knocked
21 on the front door, another subject answered the
22 door and let me inside.

23 I went in and met Wayne in the living room.

1 At that time he produced a plastic baggie, after
2 some conversation, containing seven grams of
3 hashish, and wanted to know if I wanted to purchase
4 it for \$40.00, and I did.

5 I handed him the money and he handed me
6 the baggie of stuff and placed it in my pocket.

7 Q Did that occur in the County of Fairfax,
8 Virginia?

9 A Yes, it did.

10 Q Did you take steps to preserve the
11 evidence in this case?

12 A Yes, I did.

13 Q Would you be able to identify the laboratory
14 analysis related to this case?

15 A Yes, I would.

16 MR. RICHARDSON: Your Honor, at this point
17 I'll accept counsel's stipulation as to chain of
18 custody.

19 MR. WHITESTONE: On chain of custody.

20 BY MR. RICHARDSON:

21 Q Would you tell whether or not that relates
22 to the case of February 16th, 1979?

23 A Yes, it does.

excuse from you.

The Court is going to continue this case until January and see how you act between now and January.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: I had made up my mind that, frankly, to send you to the State Penitentiary. If there is any other information that Ms. Bubenhofer needs, she can call you for it and you are to be there.

THE DEFENDANT: Yes, sir.

THE COURT: The only reason the Court is doing this is because of the feeling of the Legislature in taking this statute and, of course, if I sentence you on the misdemeanor to a year in jail, you would serve more than a year in the Penitentiary.

I will hear argument from the Commonwealth Attorney.

MS. KIMBLE: The Commonwealth would object to the continuance in this kind of case, Your Honor. Two of the charges are punished as misdemeanors, even under the old law, the accommodation/distribution and what has happened in some cases in the past when the sentencing or the plea came up after July 1st, there is a statute under 1--16.

1 THE COURT: The Court is familiar with that.

2 MS. KIMBLE: That allows for the diminished
3 punishment. I have no objection to him not going to
4 the Penitentiary, but I think that 12 months in jail is
5 called for in these particular cases.

6 THE COURT: As I said, the one year in the
7 Penitentiary he would have to serve less time than 12
8 months in the Fairfax County Jail.

9 MS. KIMBLE: I realize that, Your Honor.

10 THE COURT: The Court is going, and I have
11 already written out my sentence here, the Court is
12 going to take another look at it. I am going to continue
13 it to January, the 18th of January.

14 Now, this does not mean that he is going to
15 walk away from here on probation. I am still going to
16 consider the same items that are before the Court now.

17 MR. WHITESTONE: I think I understand, Your
18 Honor.

19 THE COURT: He is going to have to overcome
20 a lot between now and January 18th.

21 MR. WHITESTONE: I appreciate the Court's
22 feeling. I will explain to Mr. Trunfio and I am sure
23 he will appreciate exactly what the Court -- what