

IN THE
SUPREME COURT OF VIRGINIA

Record No. 820086

VIRGINIA DEPARTMENT OF CORRECTIONS
and
COMMONWEALTH OF VIRGINIA,

Appellants,

v.

LARRY NOEL SHERMAN,

Appellee.

JOINT APPENDIX

Gerald L. Baliles
Attorney General

James E. Kulp
Senior Assistant
Attorney General

Jerry P. Slonaker
Assistant Attorney General

Edward L. Hogshire, Esquire
Post Office Box 272
Charlottesville, Virginia 22902

Counsel for Appellee

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Counsel for Appellants

TABLE OF CONTENTS

	<u>Appendix</u>	<u>Page</u>
Motion to Vacate..... (Filed Sept. 15, 1981)	1	- 4
Portions of Attachment to Motion..... (Copy of slip opinion in case of <u>In Re:</u> <u>Commonwealth of Virginia, Department of</u> <u>Corrections</u> ; filed with Motion on Sept. 15, 1981)	5	- 13
Order entered Sept. 21, 1981 allowing defendant to reply.....		14
"Motion to Dismiss" of defendant..... (Filed Oct. 12, 1981)	15	- 17
Portion of "Reply Memorandum" of Petitioner (pages 1 and 2)..... (Filed Oct. 29, 1981)	18	- 20
Order entered on Dec. 5, 1981 denying Motion to Vacate.....		21
Assignment of Error.....		22
Certificate of Service.....		23

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

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

Monroe H. Trustell
Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA

v.

LARRY NOEL SHERMAN

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 September 16, 1980, which directed the release of the defendant, Larry Noel Sherman, from custody. In support of said motion, the Commonwealth and said Department say as follows:

1. On October 9, 1979, the defendant, Larry Noel Sherman, was convicted in this Court, upon his guilty plea, of feloniously aiding and abetting in the possession of marijuana with the intent to distribute. On March 14, 1980, he was sentenced on that conviction to ten (10) years in the penitentiary, and in the sentencing order the Court "further ordered 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 that same date Sherman filed a motion to set aside the verdict of guilty and the judgment entered thereon. That motion also stated that "it being noted that the defendant has not as of this date been delivered to the penitentiary to commence serving his sentence," it was moved that the Court "suspend all or part of the sentence... or ... modify said sentence in the interest of justice." On March 28, 1980, the Court entered an order stating that "it appearing to the Court that the defendant has not yet been committed to the penitentiary system and that the Court is not prepared to Rule" on the motion, the Court took the motion "under advisement." The sentencing order was not modified, vacated or suspended. Sherman was received into the penitentiary system on June 2, 1980. By order entered on September 16, 1980, the Court stated that whereas the "defendant has had an exceptional institutional record since his incarceration on March 14, 1980" and there were presented "compelling exigent circumstances justifying the release of said defendant from confinement," it was ordered that he be "forthwith released from custody and that the remainder of his term of incarceration 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 September 16, 1980, 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 September 16, 1980 be vacated and set aside.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA and

VIRGINIA DEPARTMENT OF CORRECTIONS

By: Marshall Coleman
Counsel

Present: All the Justices

[Filed on Sept. 15, 1981 as
attachment to Motion to Vacate]

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 penitentiary. 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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Judge Snoddy filed his grounds of defense and supporting memorandum of law asserting that he did not exceed the jurisdiction conferred upon his court by law, and that his actions, agreed to by the Commonwealth's Attorney who represented the Commonwealth in the cases, were taken pursuant to the routine procedure in that circuit which had been accepted by the Department and sanctioned by the Attorney General. He cited two 1975 opinions of the Attorney General approving the procedure, and filed as exhibits copies of orders entered in numerous other felony cases in his judicial circuit wherein actions had been taken similar to those taken in the cases of Sherman, Crowley and Taylor.

One of the opinions of the Attorney General upon which Judge Snoddy relied was a letter dated July 30, 1975, addressed to the Honorable George F. Abbitt, Jr., then Judge of the same

¹ Rule 1:1 reads in pertinent part:

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer

² Code § 53-272 provides in pertinent part:

* * *

In case the prisoner has been sentenced but not actually committed and delivered to the penitentiary for a felony the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may at any time before the prisoner is committed to the penitentiary, suspend or otherwise modify and alter the unserved portion of any such sentence, or may place the defendant on probation under the supervision of the probation officer during good behavior, for such time and under such conditions of probation as the court shall determine.

* * *

judicial circuit, advising that if a trial court by order entered within 21 days after a sentencing order took under advisement a motion to suspend, the defendant was not "sentenced", that he should not have been removed to the penitentiary, and, having been improperly transferred to that facility, should be released upon order of the trial court. The other opinion, dated October 8, 1975, to the same effect, was addressed to the Honorable J. Randolph Tucker, Jr., Judge of the Circuit Court of the City of Richmond. 1975 Va. Op. Att'y Gen. 93-94. In addition, Judge Snoddy argued that a writ of prohibition would be inappropriate and ineffectual as to the three individuals who had been released.

The five felons whose interests might be affected by the Department's petition filed motions for leave to intervene in this proceeding, or in the alternative, to file briefs amicus curiae, and we granted those motions by order entered May 13,

1981. First, we will consider the cases of Sherman, Crowley and Taylor, who have been released from custody.

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.


LARRY NOEL SHERMAN

ORDER

A motion having been filed by the Commonwealth and the Virginia Department of Corrections to vacate the Order of this Court of September 16, 1980, 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 Edward L. Hogshire, Esquire, 500 Citizens Commonwealth Center, Post Office Box 1151, Charlottesville, Virginia 22902, counsel for the defendant, and to Marshall Coleman, Attorney General of Virginia.

Enter this 21st day of Sept., 1981.



Judge

Law Order Book 9 page 483

A copy - Testa:


_____, Clerk

This the 12th day of Oct. 1981

Dwight M. Heston
Clerk

VIRGINIA: IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA

v.

LARRY NOEL SHERMAN

MOTION TO DISMISS

Comes now Larry Noel Sherman, by counsel, and by way of his Motion to Dismiss the Motion filed by the Commonwealth of Virginia and the Department of Corrections seeking to vacate this Court's order of September 16, 1980, states as follows:

1. The Attorney General is acting ultra vires in attempting to make an appearance in a circuit court of this Commonwealth for the purpose of prosecuting a criminal case. The Virginia Code clearly delineates the duties of the Attorney General as distinguished from those of a local Commonwealth's Attorney. Under the precepts of Code § 2.1-124, "[u]nless specifically requested by the Governor so to do, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit courts of the State [except in certain named instances inapplicable here]." To date, no such request from the Governor has been alleged or proven by the Attorney General. Under the tenets of the same statute, unless in one of the exceptions named above (such as a case of unauthorized practice of law) "the authority of the Attorney General to appear and participate in the proceedings shall not attach unless and until a writ of error has been granted by the Supreme Court."

2. In a criminal case, only the Commonwealth's Attorney is to appear in the circuit court as counsel for the Commonwealth. Under the directives of Code § 15.1-8.1, the Commonwealth's Attorney "shall have the duty of prosecuting all warrants, indictments or informations charging felony" (Emphasis added.) The use of mandatory language here removes any doubt that, absent compliance with the special exception provisions of Code § 2.1-124, (where there has been a request by the Governor) the Attorney General has no place in a circuit court in a criminal case.

3. The Department of Corrections was never a party to the original criminal prosecution against the defendant here and cannot become a party at this late date in order to seek relief that the Commonwealth's Attorney has neither sought nor ratified on behalf of the Commonwealth.

4. The motion was filed herein by the Attorney General almost eleven months to the day from the date of the final order sought to be vacated. It appears that the Attorney General has overlooked the basic holding of the very case he cites as authority for his action, i.e., In Re: Commonwealth of Virginia, Department of Corrections, that Rule 1:1 must be read to mean that this circuit court cannot act to modify, suspend or vacate an order after 21 days have elapsed. In Re: Commonwealth of Virginia, Department of Corrections, slip opinion, page 10.

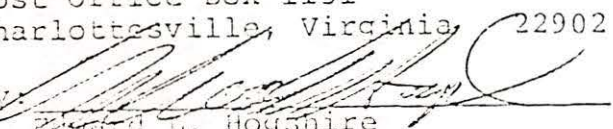
5. The Supreme Court of Virginia, although given every opportunity to do so, did not declare the order of September 16, 1980, void or even voidable; rather, the Court specifically stated that it could not "pass upon the validity of the orders under which Sherman, Crowley and Taylor were released from custody." In Re: Commonwealth of Virginia, Department of Corrections, slip opinion, page 7. While explaining that the Attorney General had misperceived the proper use of the writ of prohibition, the Court went on to hold that "[s]o long as these defendants continue to comply with the terms of their probation, the orders of the trial court are final and conclusive." Id.

WHEREFORE, for the foregoing reasons, Larry Noel Sherman asks that the Motion to Vacate filed herein by the Attorney General be dismissed; he further prays that this Court enjoin the Attorney General from making further unauthorized appearances in this Court and from maintaining in the future frivolous and burdensome actions such as this one.

Respectfully submitted,

LARRY NOEL SHERMAN

By Counsel

AXSON, SMITH, BOYD, GILLIAM
& GOULDMAN, P.C.
100 Citizens Commonwealth Center
Post Office Box 1151
Charlottesville, Virginia 22902
By: 
Edward L. Hogshire
Attorney for Larry Noel Sherman

CERTIFICATE

I hereby certify that on this 9th day of October, 1981, I mailed a true copy of the foregoing Motion to Dismiss to Marshall Coleman, Attorney General, 1101 East Broad Street, Richmond, Virginia, 23219.


Edward L. Hogshire

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

This the 29th day of October, 1981

James H. Tunstall, Clerk
By: Betty R. Hinton, Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF CUMBERLAND COUNTY

COMMONWEALTH OF VIRGINIA

v.

LARRY NOEL SHERMAN

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 September 16, 1980. 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.¹ 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.

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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

LARRY NOEL SHERMAN

ORDER

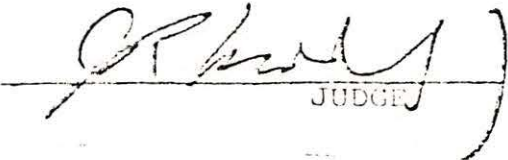
This matter having been brought before the Court by the Commonwealth of Virginia and the Virginia Department of Corrections upon a Motion to Vacate the Order of this Court entered on September 16, 1980, the defendant having filed his Motion to Dismiss and the Commonwealth of Virginia and the Department 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.

Entered
Law Order Book 10, page 18


JUDGE

A copy - Teste:

 Clerk

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 September 16, 1980, 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 Edward L. Hogshire, Esquire, 400 Court Square, Charlottesville, Virginia 22901, counsel for appellee.



James E. Kulp
Senior Assistant Attorney General

