IN THE

COURT OF APPEALS OF VIRGINIA

Record No. 0198-13-2
Circuit Court Case No. CR12001160-00

EMMANUEL ARTIS,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

PETITION FOR APPEAL

Thomas H. Roberts, Esq. (VSB 26014)
tom.roberts@robertslaw.org
Andrew T. Bodoh, Esq. (VSB 80143)
andrew.bodoh@robertslaw.org
Adam C. Calinger, Esq. (VSB 72793)
adam.calinger@robertslaw.org
Thomas H. Roberts & Associates P.C.
105 South 1st St.
Richmond, VA 23219
Phone: (804) 783-2000
Fax: (804) 783-2105

Counsel for Appellant

Cassandra Conover
Commonwealth's Attorney
150 North Sycamore St.
Petersburg, VA 23803
Phone: (804) 861-8899
Fax: (804) 861-2811

Counsel for Appellee

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COMMONWEALTH OF VIRGINIA,
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PETITION FOR APPEAL

Now comes the Appellant, Emmanuel Artis, by counsel, and hereby submits his petition for appeal from the final order of the Circuit Court of the City of Petersburg.

NATURE OF THE CASE

Artis was charged with trespassing by warrant on April 1, 2012. He received a jury trial in the Circuit Court of the City of Petersburg on January 7, 2013. At the conclusion of the Commonwealth's evidence, Artis moved to strike, which was denied. Artis renewed this motion at the conclusion of all the evidence, which the court again denied. Artis also made a motion to dismiss after the jury returned its verdict. The jury convicted Artis and imposed a $300 fine. Artis filed a motion to set aside the verdict on January 22, 2013. The court denied this motion. Artis now appeals.

References to the transcript of the circuit court trial will be referred to as Tr.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN HOLDING THE EVIDENCE WAS SUFFICIENT TO PROVE THAT A PROPER PARTY UNDER THE TRESPASS STATUTE EXCLUDED ARTIS FROM PROPERTY. (Preserved at motion to strike Tr. 102-03, renewed at Tr. 159, motion to dismiss after trial at Tr. 240-43, motion to set aside the verdict at 2-4).

II. THE TRIAL COURT ERRED IN HOLDING THE PROPERTY ARTIS WAS UPON IS COVERED BY THE TRESPASS STATUTE. (Preserved at motion to strike Tr. 99-102,

renewed at Tr. 159, motion to dismiss after trial at Tr. 237-38, motion to set aside the verdict at 1-2).

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A VIDEO SHOWING A PRIOR INCIDENT BETWEEN ARTIS AND THE POLICE BECAUSE THE VIDEO REVEALED BIAS BY THE POLICE OFFICERS AND WAS RELEVANT TO ESTABLISHING ARTIS' CLAIM OF RIGHT, A GOOD FAITH DEFENSE TO TRESPASSING. (Preserved at Tr. 113-16, 120).

IV. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF AN AUDIOTAPE BECAUSE THE AUDIOTAPE WAS RELEVANT TO DEMONSTRATE BIAS. (Preserved at Tr. 116-20).

V. THE TRIAL COURT ERRED IN DECLINING TO FIND THE TRESPASS STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED TO ARTIS BECAUSE THE LACK OF ANY STANDARDS GOVERNING WHAT CONSTITUTES TRESPASS GIVES THE POLICE THE ABILITY TO ACT ARBITRARILY IN DEFINING TRESPASS. (Preserved at motion to set aside the verdict at 14).

VI. THE TRIAL COURT ERRED IN HOLDING APPLICATION OF THE TRESPASS STATUTE TO ARTIS DOES NOT VIOLATE HIS FIRST AMENDMENT RIGHT TO PETITION FOR REDRESS OF GRIEVANCES. (Preserved at motion to dismiss after trial at Tr. 236-37, motion to set aside the verdict at 4-12).

STATEMENT OF FACTS

The police station of the City of Petersburg is open to the public. Tr. 77. The police station has four doors. Tr. 70. However, the public may only enter the front door. Tr. 76. A person must use the stairs leading to the front door to access the police station. Tr. 77. The City of Petersburg owns the police station. Tr. 12.

Leading to the stairs of the police station is a parking lot used by persons wishing to access the police station. See Defense Exhibits 1-2. A large road open to the public runs near the parking lot and police station. Id.

The Petersburg Police Department has established internal procedures to handle the taking of citizen complaints. Tr. 79. The police station represents the appropriate location to file a citizen complaint. Tr. 77. Upon arrival, a person should first speak with a shift supervisor,

who will give the complainant a form to complete. Tr. 46. Once returned, the form goes to the internal affairs division, which decides the next step. Tr. 46.

Nonetheless, the internal procedures regarding complaints come only from within the police department rather than by ordinance. Tr. 79. No ordinance regulates the time or place a member of the public may make a complaint. Tr. 79. No ordinance also directs the manner in which a member of the public may make a complaint. Tr. 79.

In the early morning of April 1, 2012, Emmanuel Artis went to the police station of the City of Petersburg to complain about police conduct.[1] Karen Richardson worked as a dispatcher at the police station that morning. Tr. 18. Her role included receiving calls for service and sending the necessary personnel to where the public need required. Tr. 18-19. That morning she worked at the front desk located immediately inside the front door. Tr. 19-20.

Artis came to the police station and asked Richardson to allow him to speak with a captain. Tr. 22. Artis appeared agitated, pacing back and forth, though his speech remained calm. Tr. 23. Richardson requested a sergeant to respond to the scene. Tr. 22.

Sergeant Jason Sharp was on duty in the early hours of April 1, 2012. He was serving as the northwest precinct commander, which gave him responsibility for supervising a large portion of the city, including the police station. Tr. 43. That morning he responded to the call for service from Richardson regarding Artis. Tr. 43. Sharp believed he was the first police officer to encounter Artis. Tr. 48. Sharp spoke with Artis, who expressed a desire to make a complaint

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[1] The trial court largely excluded evidence regarding the details of the incident prompting Artis to go to the police station to complain. Artis produced such evidence during the sentencing portion of the hearing. Artis has a history of confrontation with the police because he videotapes their activities. Tr. 207. Artis testified that earlier on the night of the incident, he went to the Cockade Bar and Grill in Petersburg. Tr. 208. He was confronted by six to seven officers. Tr. 211. The officers asked Artis to leave. Tr. 211. The officers then followed Artis with their hands near their weapons. Tr. 212. As a result of this incident, Artis went to the police station to complain about the officers' conduct. Tr. 214.

against an officer. Tr. 45. Sharp explained the procedure involved filling out a form and returning it to the police. Tr. 45-46. Artis became loud and cursed. Tr. 46. Sharp offered to get the complaint form for Artis, but Artis cursed at him. Tr. 47. Sharp told Artis the conversation had ended and directed him to leave the building. Tr. 47. Artis went through the door and down one step, but then stopped. Tr. 47. Sharp followed him and told Artis he had to leave the premises or he would be arrested for trespassing. Tr. 48. Nonetheless, Artis remained still.

Towards the end of Sharp's conversation with Artis, Officer Dillard arrived. Tr. 49. Officer Dillard informed Sharp that Artis had come to the police station to complain about Dillard's conduct. Tr. 94. Dillard and Artis briefly exchanged conversation. Tr. 70. Sharp eventually directed Dillard to arrest Artis for trespassing. Tr. 50. Sharp was Dillard's supervising officer at the time of this incident. Tr. 85.

Although Sharp directed the arrest of Artis, he knew of no authority permitting him to exclude Artis from police station property. Specifically, Sharp knew of no policy or ordinance granting him authority to exclude Artis from the police station, the stairs of the police station, or the parking lot of the police station. Tr. 78.

The testimony of Officer James substantially conflicted with the accounts of Sharp and Richardson.[2] James testified he received a call via radio transmission about an individual in the police station parking lot. Tr. 136. James responded to the parking lot almost immediately, where he encountered Artis. Tr. 136-37. No other officers were present, though other officers eventually arrived. Tr. 137-38. Artis informed James of a desire to speak with a captain in reference to police corruption. Tr. 147. Artis looked visibly upset, pacing back and forth. Tr. 149. James engaged Artis in conversation in an attempt to calm Artis while Artis remained in

[2] James testified as a defense witness. Artis believes he must separately summarize this witness' testimony to support his version of the facts. Rule 5A:12(c)(4).

the parking lot. Tr. 138-39. Artis never went on the steps of the police station. Tr. 141. James advised Artis of the possibility of filing a written complaint at the front desk of the police station, but Artis renewed his request to speak with a captain. Tr. 150. Officer Dillard arrived in a car and spoke with Artis in the parking lot. Tr. 140-41. James testified Dillard appeared to arrest Artis on Dillard's own initiative. Tr. 143.

James testified he knew of no policy or ordinance authorizing him to exclude members of the public from the police station. Tr. 157-58.

Artis was charged by warrant with trespassing in violation of Code § 18.2-119. After a trial in the General District Court, Artis appealed to the circuit court. Artis received a jury trial on January 7, 2013. The Commonwealth presented the testimony of Karen Richardson and Sergeant Sharp, as stated above. At the conclusion of the Commonwealth's evidence, Artis moved to strike. Tr. 99-112. The trial court denied the motion to strike. Tr. 112.

Counsel for Artis then informed the court of the need to rule on two pending evidentiary matters. The first issue concerned a video Artis sought to introduce of an incident with police earlier on the night of the trespassing charge. Tr. 113. Counsel told the court the video displayed five police officers removing Artis from a public sidewalk and then following "him down the road continually telling him that they are going to arrest him for trespassing or for obstructing a sidewalk." Tr. 114. Artis believed this evidence admissible in that it revealed the bias of the police and helped to establish a good faith defense to the trespassing charge in that it showed Artis having a legitimate claim of right or reason for later going to complain of police conduct. Tr. 114. Artis desired to introduce the video through the testimony of Officer Dillard,

who counsel stated was seen on the video from "the first moments of the film."[3] Tr. 113, 116. The second evidentiary issue involved an audiotape Artis desired to introduce through the testimony of Officer James. Tr. 117. Artis stated that James' voice was heard repeatedly on the tape. On the tape, Sergeant Young may be heard telling others "to arrest Artis for trespassing, that he has no business on the police headquarters." Tr. 118. Counsel argued the audiotape was relevant in that it showed the bias of the officers, who had been told to arrest Artis, and that it impeached the testimony of Sergeant Sharp. Tr. 117-118. The trial court denied Artis the ability to introduce either piece of evidence. Tr. 120. Artis proffered copies of each recording to the court. Tr. 120.

Artis presented the testimony of Officer James, who testified as stated above. At the conclusion of the defense case, Artis renewed his motion to strike on the same grounds and the trial court denied the motion. Tr. 159. Artis also made a motion to dismiss on various grounds after the jury returned its verdict.

The jury convicted Artis and sentenced him to pay a $300 fine. The court entered a final order incorporating this judgment. Artis filed a motion to set aside the verdict, setting out in detail legal arguments for why the court should set aside the conviction. The court entered an order denying this motion on February 11, 2013. Artis now appeals.

ANALYSIS

I. THE TRIAL COURT ERRED IN HOLDING THE EVIDENCE WAS SUFFICIENT TO PROVE THAT A PROPER PARTY UNDER THE TRESPASS STATUTE EXCLUDED ARTIS FROM PROPERTY. (Preserved at motion to strike Tr. 102-03, renewed at Tr. 159, motion to dismiss after trial at Tr. 240-43, motion to set aside the verdict at 2-4).

Code § 18.2-119 states:

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[3] In light of the Court's decision to exclude evidence, the defense chose not to call Officer Dillard to testify.

> If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian, or the agent of any such person, or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by or at the direction of such persons or the agent of any such person or by the holder of any easement or other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or portion or area thereof . . . he shall be guilty of a Class 1 misdemeanor.

In Baker v. Commonwealth, 278 Va. 656, 662, 685 S.E.2d 661, 664 (2009), the Virginia Supreme Court held that "the plain language of Code § 18.2-119 requires proof, as an element of the crime of trespass," that where a person is forbidden from remaining on property orally or in writing, the prohibition must come from an owner, lessee, custodian, agent of any such person, or other person lawfully in charge. The Court's holding requires the Commonwealth to prove one of the persons specifically enumerated by the statute issued the prohibition. Id. In Baker, the Court reversed a trespassing conviction because the evidence failed to prove the identity of a person that posted a "no trespassing" sign. Id. at 663, 685 S.E.2d at 665.

In this case, the evidence failed to prove that the police officers who encountered Artis represented proper parties to exclude him under the trespass statute. The officers did not own or have a lease on the property, as it is owned and maintained by the City. Tr. 12. The evidence also failed to prove the identity of the custodian, that the officers were agents of the City for purposes of property management, or that the officers were lawfully in charge of the property.

Instead, both Sergeant Sharp and Officer James specifically disclaimed any knowledge of any authority to exclude persons from the police station. Sergeant Sharp said he could not identify any policy or ordinance authorizing him to exclude Artis from the police station or the

parking lot.[4] Tr. 78. Officer James was asked: "Are you aware of any policy authorizing you to exclude Mr. Artis from the police station at that time?" Tr. 158. He responded negatively. Officer James also testified he knew of no state law or local ordinance authorizing him to exclude Artis from the police station.[5] Tr. 157-58.

Since the evidence failed to prove an officer represented a proper party to exclude Artis under the trespass statute, the Commonwealth failed to prove an essential element of the offense. The conviction should be dismissed.

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[4] Testimony of Sharp that could mistakenly be taken to indicate he had custodial authority over the property must be understood in context. Sharp testified: "Part of my job, at the time I was the northwest precinct commander. I was responsible for pretty much all the property west of Sycamore Street and north of Wythe Street [including the police station]." Tr. 43. Sharp here referred to the property zone he needed to patrol as an officer, not to property he had to supervise as custodian. Other testimony makes this apparent. For instance, he was asked: "How many officers are on duty normally on a Saturday night during March?" Tr. 57. He responded: "Depending on shifts working on vacation or training or reassignments, my side, which is the northwest, will have up to six or as few as four. No less than four for minimum staffing. One for each patrol sector out of four patrol sectors." Tr. 58. Again, he was asked: "You were on patrol throughout the city, correct?" Tr. 59. He responded: "Yes, sir. I stayed primarily in the northwest." Tr. 59. When combined with the fact that Sharp disclaimed any knowledge of authority to exclude from the police station, it becomes clear Sharp's responsibility for property did not include a role as custodian.

[5] The facts of this case distinguish it from Pleasants v. Commonwealth, 214 Va. 646, 203 S.E.2d 114 (1974). In that case, the Court affirmed convictions for trespassing after a school principal excluded protesting students from school property. Id. at 650, 203 S.E.2d at 117. However, the Court noted the record established the principal had authority to administer the school, to ensure the safety of students, to supervise the totality of school operations, and to maintain school discipline. Id. at 648, 203 S.E.2d at 116. The Court found the principal could not carry out these functions without the ability to exclude disruptive students as trespassers. Id. Unlike that case, the record here contains no evidence that the officers exercised comparable authority over police station property. Rather, as detailed above, the police officers specifically disclaimed knowledge of any policy or ordinance authorizing them to exclude persons from police station property.

II. THE TRIAL COURT ERRED IN HOLDING THE PROPERTY ARTIS WAS UPON IS COVERED BY THE TRESPASS STATUTE. (Preserved at motion to strike Tr. 99-102, renewed at Tr. 159, motion to dismiss after trial at Tr. 237-38, motion to set aside the verdict at 1-2).

In Johnson v. Commonwealth, 212 Va. 579, 582, 186 S.E.2d 53, 56 (1972), the Supreme Court of Virginia held that the criminal trespass statute is inapplicable to certain public property. Based on dicta in prior cases and Graham v. Harless, 153 Va. 228, 242-243, 149 S.E. 619, 623-624 (1929), which stated that one could not trespass on walkways and driveways of a public college campus, the Johnson court found that the criminal trespass statute does not apply to publically-owned "thoroughfares."

The meaning of "thoroughfares" was explained in Miller v. Commonwealth, 10 Va. App. 472, 393 S.E.2d 431 (1990). There the defendant was charged with trespassing in an alley owned by the Housing Authority. Id. at 473, 393 S.E.2d at 431. "No Trespassing" signs plainly marked the property. Id. After examining precedent, the Court concluded "thoroughfares" included "those ways or passages designated for general public access." Id. at 475, 393 S.E.2d at 433. The Court also opined "thoroughfares" encompassed "established walkways and driveways on a state college campus." Id. at 475, 393 S.E.2d at 432. On the facts of the case, the Court found the alley at issue was not a thoroughfare because of the plainly marked "No Trespassing" signs and other circumstances demonstrating an intent to keep the property not open to the public. Id. at 475, 393 S.E.2d at 433.

The Virginia Supreme Court similarly interpreted the language "open to public use" in Fullwood v. Commonwealth, 279 Va. 531, 689 S.E.2d 742 (2010). In holding a parking lot represented land open to public use, the Court found important that many members of the public used the lot, that it afforded easy access by the public, and that the record lacked evidence of any "No Trespassing" signs in the parking lot. Id. at 537-38, 689 S.E.2d at 746-47. The Court noted

concerning the lack of posted signs limiting access: "There being no evidence of any posted restriction on accessing the parking lot . . . members of the public could not have reasonably anticipated being challenged regarding their use of the lot, and thus we conclude that the parking lot was 'property open to public use' . . . ." Id. at 538, 689 S.E.2d at 747.

The Virginia Court of Appeals reached another conclusion relevant here in Smith v. Commonwealth, 26 Va. App. 620, 496 S.E.2d 117 (1998). Also interpreting whether property was "open to public use," the Court held the parking lot of a convenience store met this definition. Id. at 626, 496 S.E.2d at 120. The Court held it important that no evidence revealed the parking lot "was blocked, closed or in any way inaccessible to the public." Id.

In this case, Artis was arrested either on the outside stairway leading to the main door of the police headquarters or in the parking lot of the police headquarters. Both of these locations are "ways or passages designated for general public access." Regarding the stairway, Sergeant Sharp testified that the front door at the top of the stairs represents the only door of the police station the public may enter and that the police station is open to the public. Tr. 76-77. He lacked knowledge of any policy of ordinance allowing him to restrict access to the stairs. Tr. 78. Similarly, Officer James denied knowledge of any ordinance or policy allowing him to exclude a person from the parking lot. Tr. 157-58. Since both the stairs and parking lot of the police station constitute avenues of public travel to the public police station, the stairs and parking lot are excluded from the trespass statute as "ways or passages designated for general public access." The charge against Artis must be dismissed.

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF A VIDEO SHOWING A PRIOR INCIDENT BETWEEN ARTIS AND THE POLICE BECAUSE THE VIDEO REVEALED BIAS BY THE POLICE OFFICERS AND WAS RELEVANT TO ESTABLISHING ARTIS' CLAIM OF RIGHT, A GOOD FAITH DEFENSE TO TRESPASSING. (Preserved at Tr. 113-16, 120).

The trial court's decision regarding the admissibility of evidence typically only receives review for abuse of discretion. Branham v. Commonwealth, 283 Va. 273, 281, 720 S.E.2d 74, 79 (2012). However, a trial court always abuses its discretion by committing a legal error. Fitzgerald v. Commonwealth, 61 Va. App. 279, 284, 734 S.E.2d 708, 710 (2012).

Numerous cases from Virginia courts hold the defense should have the ability to cross examine regarding bias. Whittaker v. Commonwealth, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977). "This Court has often stated that the right to cross-examine a witness to show bias or motivation to falsify, when not abused, is absolute." Lewis v. Commonwealth, 269 Va. 209, 215, 608 S.E.2d 907, 910 (2005). The right to examine a witness for bias flows "from the constitutional right to confront one's accusers." Brown v. Commonwealth, 246 Va. 460, 464, 437 S.E.2d 563, 565 (1993).

The right to examine on bias extends to matters that may seem collateral to the litigation. Cousins v. Commonwealth, 56 Va. App. 257, 273, 693 S.E.2d 283, 290-91 (2010). The Court of Appeals has stated:

> Evidence of specific acts of misconduct is generally not admissible in Virginia to impeach a witness' credibility. However, where the evidence, as here, is relevant to show that a witness is biased or has a motive to fabricate, it is not collateral and should be admitted. . . . Courts in other jurisdictions follow this principle and admit evidence of specific acts of misconduct to impeach a witness when such evidence is relevant to show bias or motivation to fabricate.

Banks v. Commonwealth, 16 Va. App. 959, 963, 434 S.E.2d 681, 683-84 (1993) (citation omitted).

The case of Barker v. Commonwealth, 230 Va. 370, 337 S.E.2d 729 (1985) demonstrates how the trial court here should have allowed examination of Artis' prior interaction with the police. In that case, the defendant sought to cross-examine the victim about several matters in order to show bias. Id. at 376, 337 S.E.2d at 733. This included a million dollar civil suit the victim had pending against a landlord for unsafe premises, the victim's reception of benefits in a victim-assistance program, and the victim's workers' compensation claim arising from the crime. Id. The trial court denied defense counsel permission to cross-examine on these topics. Id. The Supreme Court reversed, holding: "Clearly, these matters were relevant to establish the victim's possible bias and motive to fabricate." Id. at 376, 337 S.E.2d at 734.

The Court also reversed a conviction where the trial court refused to allow examination on bias in Hewitt v. Commonwealth, 226 Va. 261, 311 S.E.2d 112 (1984). There the defense sought to cross-examine a witness about an agreement he made with federal authorities. Id. at 622, 311 S.E.2d at 113. The Commonwealth contended the federal matters were irrelevant and the court sustained the Commonwealth's objection. Id. at 623, 311 S.E.2d at 113. On appeal, the Supreme Court found the defense "was entitled to reveal to the jury the full weight of any pressures brought to bear on Talley, at the time he testified, which might motivate him to depart from the truth." Id. at 623, 311 S.E.2d at 114. The Court reversed the conviction. Id. at 624, 311 S.E.2d at 114.

Lastly, the decision in Banks reveals how a defendant may introduce other instances of police misconduct as evidence of bias. The defendant there sought to have four persons testify that an undercover police officer distributed drugs, but the trial court excluded the testimony. 16 Va. App. at 960-62, 434 S.E.2d at 682. The undercover officer provided critical testimony against the defendant. Id. at 962, 434 S.E.2d at 683. The Court held the excluded testimony

would have shown the undercover officer had a motive to fabricate testimony in order to conceal his own wrongdoing. Id. at 964, 434 S.E.2d at 684. Thus, the Court reversed.

Statements made in the videotape do not constitute hearsay since Artis offers the evidence not for the truth of the statements portrayed, but rather to demonstrate bias by the police.[6] "The hearsay rule does not operate to exclude evidence of a statement, request, or message offered for the mere purpose of explaining or throwing light on the conduct of the person to whom it was made." Fuller v. Commonwealth, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960).

In this case, Artis should have been allowed to introduce a videotape to demonstrate the bias of the police. The videotape was proffered into evidence at trial. Tr. 120. Artis also proffered the testimony of Officer Dillard necessary to authenticate the video. See Proffer of Evidence from February 12, 2013.[7] Artis stated the video would show five police officers following him and threatening him with arrest for trespass or obstructing a sidewalk. Tr. 114. While the video did not portray the particular incident at the police station, it did show an incident only hours before the police station action where the police manifested a bias against Artis. The video showed the officers' dislike of Artis and thus their propensity to charge him with a crime more rapidly than other individuals. Artis had a right to examine the police officers regarding this potential bias in order to enable the jury to understand all possible motivations of the officers. The video showed Officer Dillard, who according to all testimony was the officer

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[6] The record indicates the trial court did not consider hearsay as a basis for exclusion of this evidence. Tr. 113-16, 120. Artis merely mentions this point to avoid any argument that the case should be affirmed on other grounds.

[7] Pursuant to Lowery v. Commonwealth, 9 Va. App. 304, 308, 387 S.E.2d 508, 510 (1990), Artis may proffer evidence "after the verdict since the proffer [is] necessary only to provide a complete record for appeal, and not to assist the trial judge in ruling on the admissibility of evidence."

who arrested Artis. Tr. 116. The video could show bias on the part of the officer who actually made the arrest. Furthermore, any statements made in the video fall outside the hearsay rule since Artis offers the evidence only to show bias, not for the truth of the matters asserted. Thus, this Court should reverse the conviction.

Moreover, the trial court should have permitted Artis to introduce the videotape as a part of his good faith defense to the trespassing charge. A conviction for trespassing requires an intentional, willful trespass. Reed v. Commonwealth, 6 Va. App. 65, 70, 366 S.E.2d 274, 278 (1988). "A good faith belief that one as a right to be on the premises negates criminal intent." Id. at 71, 366 S.E.2d at 278. A claim of right to be on property represents an affirmative defense. Id. at 70, 366 S.E.2d at 277.

The video had relevance to Artis' claim of right, a good faith belief of his right to be on police station property in order to make a complaint against the police for their actions shown on the video. The video featured Officer Dillard and Artis sought to have Dillard authenticate the video. Tr. 113. Sharp testified he knew from Officer Dillard that Artis came to the police station to lodge a complaint against Dillard. Tr. 94. The video would reveal the substance of the things Artis went to complain regarding. If the jury believed Artis' version of events, the jury could find from the video that Artis' complaints had merit, thereby giving him a compelling reason to go to the police station to make a complaint.

Therefore, the trial court erred in denying Artis the opportunity to admit this video and the case should be remanded.

IV. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF AN AUDIOTAPE BECAUSE THE AUDIOTAPE WAS RELEVANT TO DEMONSTRATE BIAS. (Preserved at Tr. 116-20).

The trial court should have allowed Artis to play an audiotape from the night of the incident, where Sergeant Young stated over radio that Artis should face arrest for trespass. Such evidence had relevance to establish bias by the officers. Artis proffered the audiotape for the record. Tr. 120. Artis also proffered the testimony necessary for introduction of the audiotape. See Supplemental Proffer of Evidence from February 14, 2013.

As noted above, defendants have broad ability to introduce evidence to support claims of bias. Lewis, 269 Va. at 215, 608 S.E.2d at 910; Brown, 246 Va. at 464, 437 S.E.2d at 565. Provocative statements such as saying a person should face arrest plainly could influence the actions of others and so constitute a proper subject for examination on bias.

This Court's decision in Almond v. Commonwealth, Record No. 0273-03-2, 2004 Va. App. LEXIS 351 (Va. Ct. App. July 20, 2004) clearly shows how statements fall outside the hearsay rule when offered for impeachment. The defendant was charged with sodomy of his minor daughter. Id. at *1. The defendant sought to question the victim about whether the victim's mother told the victim the defendant had refused to relinquish his parental rights. Id. at *1-2. The trial court excluded the question on grounds of hearsay. Id. at *2. The defendant maintained the proceedings came from issues surrounding his parental rights and the question had relevance "to show [the victim's] bias and motivation for testifying and fabricating." Id. On appeal, this Court agreed with the defendant, finding the testimony offered for the purpose of credibility, not for the truth of the matters asserted. Id. at *3-4.

The prohibition on hearsay did not apply to Young's statements since Artis offered them to show their effect in creating potential bias in the minds of other officers. Artis offered the

audiotape here merely to show that other officers had been told by Sergeant Young, a superior officer, that Young's opinion was that Artis should face arrest for trespass. This perception could have colored subsequent actions by the police. Officer James, who was at the police station during the arrest, would have testified that he heard Sergeant Young state Artis should be arrested. See Supplemental Proffer of Evidence from February 14, 2013.

For these reasons, the trial court erred in declining to admit the audiotape. The case should be remanded for a new trial.

V. THE TRIAL COURT ERRED IN DECLINING TO FIND THE TRESPASS STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED TO ARTIS BECAUSE THE LACK OF ANY STANDARDS GOVERNING WHAT CONSTITUTES TRESPASS GIVES THE POLICE THE ABILITY TO ACT ARBITRARILY IN DEFINING TRESPASS. (Preserved at motion to set aside the verdict at 14).

Under the facts of this case, the trespass statute violates Artis' due process rights by being void for vagueness. The trespass statute leaves its application on police property entirely within the discretion of arresting officers. This represents a well-established void for vagueness invalidity.

The "void for vagueness" doctrine comes from the Due Process Clause of the Fourteenth Amendment. Parker v. Levy, 417 U.S. 733, 755 (1974). Under this principle, a criminal law may fail for two reasons. Hill v. Colorado, 530 U.S. 703, 732 (2000). First, the law may fail to reasonably advise people of what activity it forbids. Id. The second reason is that the law "authorizes or even encourages arbitrary and discriminatory enforcement." Id.

The second reason represents the more important area of constitutional concern. Kolender v. Lawson, 461 U.S. 352, 358 (1983). The legislature must "establish minimal guidelines to govern law enforcement." Smith v. Goguen, 415 U.S. 566, 574 (1974). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution

on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Application of the criminal law should not turn on the momentary decisions of police officers. City of Chicago v. Morales, 527 U.S. 41, 60 (1999). In an "as applied" challenge such as this one, a court determines vagueness based on the particular facts of the case. United States v. Ochoa-Colchado, 521 F.3d 1292, 1299 (10th Cir. 2008); see also Risbridger v. Connelly, 275 F.3d 565, 572 (6th Cir. 2002) ("Plaintiff mounted an 'as applied' challenge to the ordinance, which requires that we determine whether it is unconstitutionally vague as applied to the specific facts of this case.").

A court recently struck down police action in the trespass context under the void for vagueness doctrine in Williams v. West Virginia University Board of Governors, 782 F. Supp. 2d 219 (N.D. W. Va. 2011). In that case, West Virginia University (WVU) authorized campus police to issue trespassing notices to any person an individual officer believed should receive a ban from university property. Id. at 221. The trespassing notice advised a person that if he returned to university property, the police would charge him with criminal trespass. Id. Acting under this policy, police issued a trespassing notice to Kenneth Williams. Id. Persons in the student union facility reported they believed Williams' conduct suspicious. Id. at 222. Police searched Williams twice, but found nothing criminal. Id. Nonetheless, the police escorted Williams from university property and issued the trespassing notice. Id. at 223. Williams sued, alleging a deprivation of his rights. In support of the trespassing notice, the university cited a West Virginia statute allowing for the exclusion of any person from university property regardless of fault. Id. at 227. Finding this unpersuasive, the court stated that "based on the text of the statute and based upon the lack of any criteria for the issuance of a Trespassing Form, an

individual can be excluded from the premises based on the whim of a WVU officer." Id. The court continued by finding that "there are no standards with regard to the level of severity of a problem that necessitates issuance of a Trespass Form, nor are there standards with regard to the scope of the ban." Id. Thus, the court struck down the trespass notice as void for vagueness. Id. at 228.

Similarly, in this case, the decision to ban Artis from police station property rested entirely within the discretion of the officers on the scene. Under Sergeant Sharp's version of events, Artis voluntarily left the interior of the police station at Sergeant Sharp's direction. Tr. 47. Officer Dillard and Artis then exchanged conversation. Tr. 70. Sergeant Sharp eventually directed Officer Dillard to arrest Artis, in spite of the fact that Sharp knew Artis had come to the police station to complain about Dillard. Tr. 50, 94. Sharp commanded the arrest in spite of the fact that he knew of no policy or ordinance authorizing him to exclude Artis from the police station. Tr. 78. He also lacked knowledge of any ordinance regulating the time, place, or manner whereby a person could make a complaint. Tr. 79. In short, Sharp's personal desire to see Artis depart represented the only basis for the arrest.

Officer James' testimony, while presenting significantly different facts, also placed the decision to arrest Artis entirely within the discretion of the police. James understood Artis wished to speak with a captain about police corruption. Tr. 147. When asked to leave, Artis "continued to just complain." Tr. 152. James never ordered Artis to leave the property. Tr. 157. Furthermore, James knew of no policy or ordinance authorizing him to exclude Artis from the police station. Tr. 157-58. The climactic event came when Officer Dillard arrived, for he quickly chose to arrest Artis. Tr. 142-43. Once again, the decision to arrest appears based solely in an officer's personal discretion.

The officers' personal desire to see Artis depart represented their only basis for arresting him. Thus, under the facts of this case, enforcement of the trespass statute rested entirely within the arbitrary discretion of the officers. This violates due process by making the law void for vagueness. Since the statute is constitutionally deficient, this Court should dismiss Artis' conviction.

Although the Court upheld the trespassing statute against a void for vagueness challenge in Commonwealth v. Hicks, 267 Va. 573, 596 S.E.2d 74 (2004), that case is easily distinguishable from Artis' situation. In Hicks, the Supreme Court repeatedly emphasizes how the trespass statute clearly applied to the defendant there. At the beginning of its analysis, the Court noted the Commonwealth's argument that "Hicks may not challenge whether the trespass policy is unconstitutionally vague because his conduct was clearly proscribed by that policy." Id. at 580, 596 S.E.2d at 77. The Court soon stated: "It is clear that Hicks, who was engaged in conduct prohibited by the Housing Authority's trespass policy, may not complain that the policy is purportedly vague." Id. at 581, 596 S.E.2d at 78. The Court concluded: "Certainly, as to him, the Housing Authority's trespass policy could not have been any clearer." Id.

Unlike Hicks, the record in this case lacks any indication of any policy at all, much less a clear policy. Both Sergeant Sharp and Officer James—the only officers to testify—stated they knew of no policy or ordinance authorizing them to exclude Artis from the police station. Tr. 78, 157-58. Sergeant Sharp testified he did not know of any ordinance regulating the time, place, or manner of making a complaint about a police officer. Tr. 79.

Importantly, in determining vagueness in an as applied challenge such as this one, the court determines whether the statute is vague based on the particular facts of each individual case. Ochoa-Colchado, 521 F.3d at 1299; Risbridger, 275 F.3d at 572. Under these facts, where

the decision to arrest Artis rested entirely in the discretion of the individual police officer, the trespass statute fails the void for vagueness test. Artis' conviction should be dismissed.

VI. THE TRIAL COURT ERRED IN HOLDING APPLICATION OF THE TRESPASS STATUTE TO ARTIS DOES NOT VIOLATE HIS FIRST AMENDMENT RIGHT TO PETITION FOR REDRESS OF GRIEVANCES. (Preserved at motion to dismiss after trial at Tr. 236-37, motion to set aside the verdict at 4-12).

A. Filing Complaints with the Police Department Represents a Constitutionally Protected Activity.

The First Amendment provides persons a right "to petition the government for a redress grievances." The U.S. Supreme Court recently noted that the petition "as a word, a concept, and an essential safeguard of freedom, is of ancient significance in the English law and the Anglo-American legal tradition." Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2498 (2011). Indeed, the essence "of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." United States v. Cruikshank, 92 U.S. 542, 552 (1876).

In United States v. Hylton, 710 F.2d 1106 (5th Cir. 1983), the court held the right to petition protects persons filing nonfraudulent criminal complaints against government officials. In that case, the defendant filed a criminal trespass complaint against IRS agents who entered her property to investigate tax charges. Id. at 1108. In response, the government filed criminal charges against the defendant. Id. at 1109. In finding the defendant's action constitutionally protected action, the court wrote:

> [W]e have concluded that Hylton's actions represent a legitimate and protected exercise of her right to petition for the redress of grievances. The record clearly reveals that Hylton placed a high value upon her right to personal privacy and genuinely attempted to protect her rights through the orderly pursuit of justice—the filing of citizen complaints with a reasonable basis. Although we do not condone the Hyltons' continued opposition to this Nation's tax laws, we likewise cannot condone the imposition of criminal sanction for Hylton's exercise of her constitutional right.

Id. at 1111-12; see also Meyer v. Bd. of County Comm'rs of Harper County, 482 F.3d 1232, 1242 n. 5 (10th Cir. 2007) (stating that "a criminal complaint . . . is a form of the right to petition for redress of grievances, and thus one of the most basic of all constitutional rights").

A court also found the right to petition protected persons complaining of the activity of government agents in Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977). In that case, the plaintiff was the manager of an IRS team auditing a corporation. Id. at 1332. The plaintiff alleged the officers of the corporation fabricated charges against him and then communicated those charges as a complaint to IRS officials. Id. at 1333. The court, while assuming the plaintiff's allegations as true, held the complaint protected by the right to petition. While noting that a "scurrilous anonymous letter or an attempt to marshal political clout to ruin an offending agent" would present a different circumstance, the court found that since the petition there was presented as a straightforward complaint through the proper channels, it received protection. Id. at 1343.

Based on this precedent, it is clear that the filing of complaints with the police department about the conduct of officers represents protected activity under the Petition Clause. Artis had a fundamental right to seek redress from government officers at the police department.

B. Application of the Trespassing Statute to Artis Regulates His Right to Petition in a Manner Not Content Neutral or Narrowly Tailored to Serve a Significant Government Interest and in a Way That Forecloses Alternative Avenues of Communication.

Since the freedom to petition comes within the same amendment as the more often litigated freedom of speech, they typically receive the same analysis. Wayte v. United States, 470 U.S. 598, 610 n. 11 (1985). Under First Amendment analysis, the government may enforce reasonable regulations on the time, place, and manner by which petitions are made. Howard v.

Commonwealth, 277 Va. 184, 189, 671 S.E.2d 156, 158 (2009). Such regulations are constitutional if "'they are justified without reference to the content of the regulated speech . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.'" Adams Outdoor Advertising v. City of Newport News, 236 Va. 370, 381, 373 S.E.2d 917, 922 (1988) (quoting Va. Pharm. Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976)). Regulations on the First Amendment must also be narrowly drawn. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984).

Banning Artis from the police station was not content neutral. Sergeant Sharp admitted that Officer Dillard told Sergeant Sharp that Artis' complaint concerned Officer Dillard, and Sergeant Sharp subsequently directed Officer Dillard to arrest Artis. Tr. 50, 94. Artis' petition represented a potential embarrassment to the Petersburg Police Department that the police sought to remove.

Moreover, even if the prohibition was content neutral, it involved the impermissible attempt to enforce nonexistent regulations on the manner and time of Artis' First Amendment activity. The evidence suggested that the police have procedures for handling *written* complaints about the conduct of police officers, and that the officers on duty sought to force Artis to use this particular manner of exercising his right to petition. Tr. 45-46. There was no evidence that an established law, ordinance, or regulation precluded Artis from filing his petition by another means, e.g., verbally to a superior officer. Instead, Sergeant Sharp testified the police methods are simply "internal police procedures." Tr. 79. Similarly, there was no evidence presented that an established law, ordinance, or regulation precluded Artis from attempting to file a complaint at 4:30 a.m., or remaining at the police station until a superior officer was available to accept his complaint. As such, Artis could not permissibly be given the ultimatum of either filing it in

writing, returning to the police station later, or facing arrest for trespassing if he chose to wait until a superior officer arrived. See also Occupy Columbia v. Haley, 866 F. Supp. 2d 545, 556-562 (D.S.C. 2011) (declining to accept regulations that were not published or uniformly enforced).

Finally, even if the police could point to some previous regulation that authorized the police to limit Artis to written complaints, or prohibit Artis from attempting to file his oral complaint at 4:30 a.m., or attempting to wait at the police station until the appropriate officer arrived, this regulation would not be narrowly tailored to a significant government interest. Regulations limiting the public to written complaints would impair the ability of the illiterate to seek redress. If a complaint is of sufficient gravity, it cannot wait until the hours of 9 a.m. to 5 p.m. If a person is simply sitting in the foyer of police headquarters waiting for an appropriate officer to arrive, or standing in the parking lot waiting for an appropriate officer to arrive, as the evidence indicated Artis was, no significant government interest could justify a regulation prohibiting him from being there. After all, Artis was not charged with disorderly conduct, obstruction of justice, assault, battery, or any other criminal conduct. As such, the imposition of the regulations on Artis' petition rights was unconstitutional and his conviction must be dismissed.

C. The Petersburg Police Department Exercised Unbridled Discretion to Regulate Artis' Exercise of His First Amendment Right to Petition.

Insofar as the Petersburg Police Department claims the right to regulate the time, place, and manner of Artis' exercise of his First Amendment right to petition the Police Department for a redress of grievances, this constitutes an impermissible licensing scheme that grants unbridled discretion to the police. Licensing or permit schemes regulating the time, place or manner of First Amendment activities may not give the police unbridled discretion in determining who may

exercise such rights and who may not. The Supreme Court has condemned the "arbitrary application" of such standardless rules "as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981); see also Schneider v. State, 308 U.S. 147, 164 (1939) ("[W]e hold a municipality cannot . . . require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens . . . ."); Hague v. Committee for Indus. Org., 307 U.S. 496, 516 (1939) (holding an ordinance invalid where it enabled an official "to refuse a permit on his mere opinion").

In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Court reversed a conviction on First Amendment grounds where the defendant participated in a march without a permit since the ordinance requiring a permit allowed arbitrary application. The Court stated that where a law seeks to regulate First Amendment freedoms, it must have "narrow, objective, and definite standards." Id. at 151. Instead of doing this, the law in this case allowed officials "to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question." Id. at 153.

In Staub v. City of Baxley, 355 U.S. 313 (1958), the Court reversed a conviction for failing to apply for a permit on First Amendment grounds where the law gave local officials absolute discretion to grant or deny the permit. A local ordinance criminalized soliciting members for an organization without a permit from the mayor and city council. Id. at 322. The

Court found the freedom of speech abridged by the lack of any "semblance of definitive standards or other controlling guides governing" the grant of a permit. Id.

In this case, the record contains no evidence of any rule or regulation governing the time or manner of filing complaints against the police officers. Indeed, the officers testified that they were unaware of any such regulation. Tr. 79, 157-58. Despite this, the officers chose to require Artis to file a written complaint or to return later to file a verbal complaint. Tr. 147, 150. The officers then sought to enforce these regulations by charging Artis with trespassing.

In the absence of any express regulations on the time or manner of filing a citizen complaint about an officer's conduct, the police are asserting unbridled discretion to impose regulations as they see fit, and enforce those arbitrary regulations through criminal charges. Indeed, the regulations imposed on Artis permitted him to be arrested by the very officer about whose conduct he was there to complain. The potential for arbitrary enforcement of the criminal law is clear. Having no standards for who may enter or remain on police property, the police acted unconstitutionally in arresting Artis while he attempted to enforce his First Amendment right to petition.

D. The Steps and Parking Lot Outside the Police Station Represent a Constitutionally Protected Area for First Amendment Rights.

The Supreme Court has held repeatedly that certain areas of public property are protected areas for the exercise of First Amendment rights. In Flower v. United States, 407 U.S. 197 (1972), the Court found that a street on a military base was protected for First Amendment purposes where the military held the street open to civilian traffic. The defendant was arrested while distributing leaflets on the street and charged with unauthorized re-entry onto the base, having been previously barred for leaflet distribution. Id. The Court noted traffic flowed freely along the street without a military checkpoint. Id. at 198. In holding the military could not claim

special privileges of control over the street, the Court wrote: "Whatever power the authorities may have to restrict general access to a military facility, here the fort commander chose not to exclude the public from the street where petitioner was arrested." Id. (citation omitted). The Court held the defendant's activity constitutionally permitted, stating:

> Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street. Cf. Lovell v. City of Griffin, 303 U.S. 444 (1938), Schneider v. State, 308 U.S. 147 (1939). "Streets are natural and proper places for the dissemination of information and opinion." 308 U.S. at 163. "One who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion." Jamison v. Texas, 318 U.S. 413, 416 (1943).

Flower, 407 U.S. at 198-99; see also Burnett v. Tolson, 474 F.2d 877, 882 (4th Cir. 1973) ("Where the area of the base involved is one open to the public, the base commander has no discretion, but instead a ministerial duty to allow peaceful leafleting regardless of the views sought to be expressed.").

In United States v. Grace, 461 U.S. 171 (1983), the Court held unconstitutional a statute restricting free speech on the sidewalks outside the Supreme Court building. The Court noted that sidewalks typically represent public property open to free speech and that a public forum "will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." Id. at 180.

In this case, the parking lot, sidewalk, and steps outside the police station are open to public use without restriction from the government and so receive constitutional protection under the First Amendment. This area is outside a public building often used by members of the public, Tr. 76-77, includes a parking lot and sidewalk used by any member of the public visiting the police station, and is adjacent to a large street that represents the classic public forum.

Moreover, there is no evidence of any regulations regarding who can come and go from the area outside the police station. As such, the area is open for exercise of rights under the First Amendment.

The evidence here revealed Artis went to the police station to file a complaint about a police officer, which clearly represents a constitutionally protected activity. A police officer escorted Artis outside the police station, then ordered his arrest on the steps when he refused to leave. Tr. 48-50. Other testimony indicated the police arrested Artis in the parking lot of the police station. Tr. 143. In either case, the fact is clear Artis was in a public area outside the police station and seeking to exercise his First Amendment rights when arrested. He could not be subject to arrest here for desiring to petition the government.

Artis' conviction should be dismissed.

CONCLUSION

WHEREFORE, Emmanuel Artis requests this Court to grant his petition for appeal and dismiss the charge against him.

Artis desires to state orally the reasons his petition should be granted.

Respectfully submitted,

EMMANUEL ARTIS
By Counsel

Adam Calinger

Thomas H. Roberts, Esq. (VSB 26014)
tom.roberts@robertslaw.org
Andrew T. Bodoh, Esq. (VSB 80143)
andrew.bodoh@robertslaw.org
Adam C. Calinger, Esq. (VSB 72793)
adam.calinger@robertslaw.org
Thomas H. Roberts & Associates P.C.
105 South 1st St.
Richmond, VA 23219
Phone: (804) 783-2000
Fax: (804) 783-2105

CERTIFICATES

(1) A true and accurate copy of the foregoing petition for appeal was sent to counsel for Respondent, Cassandra Conover, Commonwealth's Attorney, 150 North Sycamore St., Petersburg, VA 23803, by first class mail, postage prepaid, on May 9th, 2013.

(2) Artis desires to state orally the reasons why his petition should be granted.

(3) Counsel certifies that a word count was used and the total number of words in this petition for appeal are 9,009.

Adam Calinger

Adam C. Calinger