Disabling Able: Why The Virginia Supreme Court Must Address Recent Changes in Narcotics Distribution Law

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DISABLING ABLE: WHY THE VIRGINIA SUPREME COURT MUST ADDRESS RECENT CHANGES IN NARCOTICS DISTRIBUTION LAW

Kevin R. Pettrey

ABSTRACT

The Virginia General Assembly has proscribed distributing narcotics within the Commonwealth. In order to further deter this illegal activity, increased punishments for repeat offenders have been established. However, what a charging document must allege changed in 2009 but these technical requirements are not always complied with. Prior to 2009, Virginia Code § 18.2-248 only required that a conviction be a “second or subsequent conviction” in order to qualify a defendant for a heightened sentence. In 2009, the Virginia General Assembly passed HB 2362 which required charging documents to allege that a defendant was convicted of violating Virginia Code § 18.2-248 prior to the date on which the subsequent offense occurred.

Despite this legal change, not every commonwealth’s attorney’s office has changed the way it drafts indictments. Because indictments are being improperly drafted, defendants face heightened punishments outside of the law’s scope. These errors could lead to a person who is being convicted for the first time at the sentencing hearing receiving a heightened punishment as a recidivist. Until each commonwealth’s attorney’s office and all Virginia courts become familiar with the law’s new requirements there is potential for heightened punishments to be imposed outside of the law and in violation of basic due process.

INTRODUCTION

Imagine that you are a cocaine distributor. Imagine that local law enforcement authorities begin investigating you, and send in a confidential informant to buy your product. You eagerly sell cocaine to the confidential informant, unaware of his ulterior motive, and make
a healthy profit by doing so. The confidential informant returns the next day, and you again sell him your product.

Law enforcement officials swoop in and arrest you. In the same trial, you are convicted for distributing cocaine for the first transaction and convicted for distributing cocaine after previously distributing narcotics (because the first conviction serves as a prior conviction even though it was entered the same day as your subsequent conviction). This seems unfair, but was perfectly legitimate in Virginia until 2009. However, in 2009 the Virginia General Assembly altered the state law to require that the conviction of the first offense be entered prior to the offense date for the subsequent offense, and required the Commonwealth to actually allege in the indictment, warrant, or information that the defendant has been previously convicted of distributing narcotics.

Prosecutors, defense attorneys, and courts in Virginia seem unaware that the General Assembly has changed the law. In fact, defendants in Virginia have been prosecuted on a regular basis, as if the law never changed. This article addresses the impact that the change in the statute should have had on Virginia criminal procedure and why Virginia’s appellate courts must take action to bring criminal prosecutions into compliance with Virginia law. Part I examines Virginia Code § 18.2-248 as it existed in the years leading up to 2009 and the cases applying it. Part II examines the legislation changing Virginia Code § 18.2-248, including the statute’s language and the legislative history. Finally, Part III calls Virginia prosecutors, defense attorneys, and courts to action to force compliance with the law.

PART I
The scenario outlined in the Introduction was a regular occurrence under the law in
Virginia prior to 2009. It is actually still a regular occurrence, but the difference is that prior to
2009 it was actually legal. In 1993, Virginia Code § 18.2-248(C) stated:

Any person who violates this section with respect to a controlled substance
classified in Schedule I or II shall upon conviction be imprisoned for not less than
five nor more than forty years and fined not more than $500,000. Upon a second
or subsequent conviction of such a violation, any such person may, in the
discretion of the court or jury imposing the sentence, be sentenced to
imprisonment for life or for any period not less than five years and be fined not
more than $500,000.

The Virginia Court of Appeals addressed the recidivist aspect of the statute on three
primary occasions. In each case, Mason v. Commonwealth, 1 Able v. Commonwealth, 2 and
Patterson v. Commonwealth, 3 the Court held that the statute did not require the prior conviction
to occur before the subsequent conduct. Considering this statute, the Virginia Court of Appeals
repeatedly held that an individual could be convicted in a single proceeding of possession with
intent to distribute, and of recidivist possession with intent to distribute. 4 The defendant need not
be convicted once, before breaking the law again. This may seem unfair, but it was how the
General Assembly had constructed the statute.

The rationale behind these holding was that the statute’s purpose was to “halt and punish
those who repeatedly sell drugs.” 5 The Court opined that any other reading of the statute “would
enable an offender to engage in a spree of drug sales over an extended period of time prior to his
apprehension and to receive the status of a first offender as to each violation.” 6 In Mason, the
defendant was charged with possession with intent to distribute narcotics on June 6 and June 8,

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   S.E.2d 543 (Va. App. 1993)).
5 Mason, 430 S.E.2d at 544.
6 Id.
but was tried for both offenses in the same proceeding.\textsuperscript{7} Due to the foregoing reasoning, the Court held that the defendant could be convicted of both first offense possession with intent to distribute ("PWID") and recidivist PWID.

The Court of Appeals also considered the statute in \textit{Able v. Commonwealth}. In \textit{Able}, the Court of Appeals discussed the statute’s requirements as to indictments.\textsuperscript{8} While the Court in \textit{Mason} had made it clear that the underlying conviction did not have to occur before the subsequent charged offense, it did not discuss how an indictment must be worded. The statute failed, in 1993, to require the indictment to allege any special conditions other than that the offense charged is a "second or subsequent offense."\textsuperscript{9} The indictment did not have to allege that the offense occurred after a prior conviction.\textsuperscript{10} The Court stated that had the General Assembly wanted to require special language regarding when the conviction had occurred in relation to the subsequent offense, then the General Assembly could have required it in the statute.\textsuperscript{11}

Finally, in \textit{Patterson v. Commonwealth}, the Court of Appeals considered \textit{Able} and \textit{Mason}. In \textit{Patterson}, the Court considered both whether or not the underlying conviction had to precede the subsequent conduct, and whether or not an indictment had to allege a prior conviction.\textsuperscript{12} The Court held, with little discussion, that \textit{Mason} and \textit{Able} were dispositive of the issues and "render appellant’s challenge to his conviction on this basis without merit."\textsuperscript{13}

Clearly, these decisions left little doubt as to the legal requirements when charging an individual under the statute. An assistant commonwealth’s attorney could draft an indictment against an individual alleging that he or she had “committed” a violation of Virginia Code

\textsuperscript{7} \textit{Id}.
\textsuperscript{8} \textit{Able}, 431 S.E.2d at 341-42.
\textsuperscript{9} \textit{Id}.
\textsuperscript{10} \textit{Id}. at 342.
\textsuperscript{11} \textit{Id}.
\textsuperscript{12} \textit{Patterson}, 440 S.E.2d at 415-16.
\textsuperscript{13} \textit{Id}. at 416.
§ 18.2-248 prior to the charged offense. This meant that the individual could be arrested for PWID on one occasion, be released on bail and then arrested again a few days later for PWID. In one proceeding the individual could be tried and convicted for both offenses, and the second charge would become a recidivist charge. While this was legal, it certainly seems unfair.

PART II

In 2000, the General Assembly added a second paragraph to § 18.2-248(C), creating a heightened punishment for individuals convicted of distributing narcotics after having been previously twice convicted of distributing narcotics. This new paragraph required that the indictment allege the two prior convictions and that the prior convictions both be entered before the subsequent offense date. While this new provision contained these requirements, the provision with regard to second offenses was not altered and so contained no additional requirements. Virginia courts never directly commented on the difference in the statutory provisions.

Virginia courts continued to uphold indictments alleging that a defendant had previously “committed” the offense, where the defendant was accused of his second offense.\textsuperscript{14} Clearly the 2000 amendment did not affect what must be alleged against defendants charged with a second offense. However, it did show that the General Assembly understood that convicting an individual as a recidivist when the individual had not been convicted of a crime prior to being arrested on the charge supporting the recidivist conviction is counterintuitive.

In 2009, Virginia’s General Assembly passed HB 2362 which amended Virginia Code § 18.2-248 to require that an indictment allege a prior conviction. \(^{15}\) In essence, the 2000 requirements for convicting someone as a third offender were incorporated into the second offender provision. Virginia Code § 18.2-248(C) currently reads:

> Upon a second conviction of such a violation, and it is alleged in the warrant, indictment, or information that the person has been before convicted of such an offense or of a substantially similar offense in any other jurisdiction, which offense would be a felony if committed in the Commonwealth, and such prior conviction occurred before the date of the offense alleged in the warrant, indictment, or information, any such person may, in the discretion of the court or jury imposing the sentence, be sentenced to imprisonment for life or for any period not less than five years and be fined not more than $500,000.

Now, there are explicit statutory requirements which must be met before a defendant may be sentenced as a recidivist. But individuals are being sentenced without these requirements being met, and Virginia’s appellate courts have not explicitly held that these requirements must be followed. In order for an individual to be sentenced under § 18.2-248(C), the warrant, indictment, or information alleging the charges against the defendant must clearly state that the defendant was convicted of a narcotics distribution offense before the new offense date. This is a drastic change from how the law read when Able, Mason, and Patterson were decided, and those decisions have now been legislatively overturned.

Nonetheless, in commonwealth’s attorney’s offices across Virginia indictments are being drawn up as they were before the new legislation took effect in 2009. These indictments allege that defendants distributed narcotics after previously “committing” a distribution offense. Assistant commonwealth’s attorneys, similar to most attorneys, use forms for many basic documents. The forms which many offices use still contain the old

\(^{15}\text{House Bill 2362 (2009), available at http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+CHAP0750.}\)
language and simply have not been updated. It is unlikely that any office is purposefully drafting indictments improperly. However, the law is clear as to its requirements, and these requirements must be met before an individual may be sentenced as a recidivist.

The legislature clearly understood that it was changing the law’s requirements in passing this legislation. Prior to HB 2362 becoming law the Virginia Department of Planning and Budget released a Fiscal Impact Statement (“the Statement”) regarding the law.16 The Statement explicitly explains that “under the new provisions, the higher penalty would apply to a second conviction in the following circumstances: the warrant, indictment, or information alleged that the defendant had been before convicted of the offense or of a similar offense in any other jurisdiction that would be a felony if committed in Virginia, and the prior conviction occurred before the date of the offense alleged in the warrant, indictment, or information.”17

This language makes clear that the General Assembly understood that the law would change the requirements to charge, convict, and sentence an individual with recidivist distribution. The Statement goes on to discuss the ways in which HB 2362 may impact “the number of persons housed in prison.”18 According to the Statement, the number of individuals housed in prison could be increased by the prosecutor’s new option to charge an individual as a recidivist who has been previously convicted under another state’s law.19 Previously the law only allowed individuals who had previously violated Virginia law to be charged as a recidivist.

16 http://leg1.state.va.us/cgi-bin/legp504.exe?091+oth+HB2362FER122+PDF; Fiscal Impact Statements are required by Virginia Code § 30-19.1:4 for many statutes.
17 http://leg1.state.va.us/cgi-bin/legp504.exe?091+oth+HB2362FER122+PDF.
18 Id.
19 Id.
However, the Statement also discussed judicial interpretation of § 18.2-248(C) as leading to a decrease in incarcerated individuals. The Statement points out that “a judicial interpretation of the current provision has held that … the enhanced penalty for a second conviction can be applied whenever the offender is being sentenced for multiple counts for [sic] the offense in the same sentencing hearing.” The Statement concludes that the law’s explicit requirements could lead to a decrease in incarcerated individuals because it could lead to a “decrease in … offenders eligible for the enhanced penalty.”

Despite the possibilities, the Statement ultimately concluded that there was insufficient data at the time to determine what actual impact the law would have with regard to how many individuals would be incarcerated. Regardless of the overall impact’s inconclusive nature, the Statement gave the General Assembly notice that the law’s requirements would change if HB 2362 was passed. With this knowledge in hand, the General Assembly chose to pass the bill, and the Governor signed it into law.

**PART III**

This comment now calls upon Virginia lawyers and courts to recognize that Virginia Code § 18.2-248(C) has been altered. However, it seems that at least some Virginia lawyers and courts have failed to notice the change. Perhaps it is because neither Westlaw nor Lexis indicate in their respective databases that the statutory change alters the status of the applicable cases. Perhaps Virginia prosecutors are aware of the change, but use the now irrelevant case law as a good faith basis to impermissibly increase punishments.

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20 *Id.*
21 *Id.*
Regardless of the reason, the Virginia legal community seems unaware of the change, leading to improper sentences for individuals who were improperly indicted. Prosecutors should be aware of when they can invoke recidivist statutes and should ensure that indictments, warrants, and/or informations are all compliant with applicable statutes. Defense attorneys should be advocating for their clients by forcing the Commonwealth to properly draft indictments, and ensuring that the charged offense occurred after the conviction date. These individuals should perform their basic functions to ensure that the law is complied with.

Generally *sua sponte* judicial conduct should be discouraged, however in this particular situation there is a statutory basis for unilateral judicial action. That basis is the statute’s language, which grants “discretion” to Virginia courts to impose punishment upon recidivists. Judges should use their discretion to not impose punishment on recidivists if the Commonwealth has failed to properly indict them. There are some who believe that a judge should only rule on arguments which the parties present to the court; however, when a law explicitly grants discretionary authority to a judge and also imposes explicit requirements on a prosecutor, the judge should use his or her discretion to ensure that the prosecutor fulfills his or her duty.

If an indictment or warrant is improperly drafted the Commonwealth may, with leave, amend the indictment or warrant to allege the proper facts. The trial court could amend the warrant or indictment on its own motion as well. Thus, if an individual is to be sentenced as a recidivist and the charging documents allege that the defendant has

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22 *See, e.g.*, Raja v. Commonwealth, 581 S.E.2d 237, 242 (Va. App. 2003) (“It is clear that the legislature has granted both district courts and circuit courts broad discretion in determining whether to amend an arrest warrant.”)

23 *Id.* (“as long as the warrant is not so defective as to fail to notify the defendant of the nature and character of the offense charged, both courts have the power to amend a warrant “in any respect in which it appears to be defective,” on its own motion and without the consent of the parties.”)
previously “committed” a narcotics distribution offense, the Commonwealth or the court should amend the charging document to allege that the defendant committed the offense after having been previously convicted of a distribution offense. This would comply with the law and would not cause the social harm which would come from the defendant going free based on this technicality.

Further, there is no basis for the court to refuse to amend the charging document. In Virginia, a court may only amend a charging document “as long as the [document] is not so defective as to fail to notify the defendant of the nature and character of the offense charged.”24 If an individual who could properly be charged as a recidivist is being charged under a flawed warrant, indictment, or information, an amendment would not prejudice that defendant. Clearly, the defendant would know the charged offense’s nature and character: distributing narcotics after previously committing a felony. An amendment changing “committed” to “convicted of” does not alter the charge’s character or nature.

If, on the other hand, the defendant was not previously convicted, then the amendment would aid the defense. The Commonwealth would have to prove, beyond a reasonable doubt, something that never happened. It is rare that a defendant finds himself in such a fortunate position. Ultimately, the charging document should initially allege the proper facts, if it fails to allege the proper facts it should be amended, and if a defendant was not previously convicted then the defendant cannot be treated as a recidivist.

The legislature has enacted laws which clearly state when a person may be punished as a recidivist. It is the courts’ responsibility to interpret that law, respecting its plain language, and ensure that no defendant is punished outside the

24 Id.
law. If defendants are incarcerated for conduct which did not violate the law, such as if the defendant is convicted of a first and second offense on the same day, serious constitutional issues are implicated. Due Process is violated if an individual is punished for an act which is not clearly a crime.\textsuperscript{25}

The Virginia Supreme Court must weigh in on these issues and definitively overrule the pertinent parts of \textit{Able, Mason,} and \textit{Patterson.} It is not surprising that improper indictments are still being filed, or that defense attorneys are not objecting to the improper proceedings. For decades, the law allowed the exact procedure being employed by commonwealth’s attorneys. If you were to research the issue then you will find \textit{Able, Mason,} and \textit{Patterson,} and electronic services such as Westlaw or Lexis indicate that the cases are still good law. The only way to determine that the cases are not still applicable is to research both the historical statute and today’s. This is a time-consuming task which many prosecutors and defense attorneys do not undertake.

Until the Virginia Supreme Court or Virginia Court of Appeals overrules these prior decisions, or at least clearly states that they are not applicable to the current code section, these procedural errors will persist. The Virginia Supreme Court will not be able to weigh-in on the matter except through an appeal, so the onus is upon defendants and defense attorneys to appeal cases to the Virginia Supreme Court to obtain a definitive decision on the topic.

\textbf{CONCLUSION}

The law has changed, Virginia’s lawyers and courts must recognize the change and adapt to it. It is the commonwealth’s attorney’s duty to enforce the

\textsuperscript{25} United States v. Robinson, 137 F.3d 652, 653-54 (1st Cir. 1998).
law, even if it makes a conviction harder to obtain. It is the defense attorney’s obligation to zealously advocate for his or client. It is the court’s duty to ensure that basic procedural rights are guaranteed to every defendant. Hopefully, this comment will raise awareness and lead to a decisive opinion from the Virginia Supreme Court or Court of Appeals on this topic.