

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY CLAY SMITH,)
)
 APPELLANT / Defendant)
)
 v.) **Record No. 2615-05-4**
)
 COMMONWEALTH OF VIRGINIA,)
)
 APPELLEE / Plaintiff)

From Fairfax County Circuit Court, Commonwealth v. Smith case no: MI-2005-1559

An electronic copy of this brief with related documents, motions, and orders is available at:
http://www.liamsdad.org/court_case/trespassing/trespassing.shtml

PETITION FOR APPEAL

SUBJECT INDEX:

CASE SUMMARY:	.....	2
FACTS:	.....	2 - 12
ASSIGNMENTS OF ERROR:	.....	11 - 13
QUESTIONS PRESENTED:	.....	13
ARGUMENT:	.....	13 - 20
CONCLUSION:	.....	20
CERTIFICATE:	.....	21

TABLE OF CITATIONS:

§ vs-cr-5A:8	.....	14
§ 22.1-4.3 VA Code	.....	2, 3, 4, 11, 12, 18, 19
§ 18.2-119 VA Code	.....	5
<i>O'Banion v. Com.</i> , 30 Va.App. 709, 717, 519 S.E.2d 817, 821 (1999)	.....	3, 18, 19
<i>Hooker v. Commonwealth</i> , 14 Va. App. 454, 458, 418 S.E.2d 343, 345 (1992)	.....	15
KYHL V KYHL Record No. 3000-98-4 MARCH 21, 2000	.....	14

People v. Slochowsky, 116 Misc 2d 1069, 456 NYS2d 1018	.....	16
Harris, 203 Va. 946, 128 S.E.2d 278	.....	14, 20

CASE SUMMARY:

On June 17th 2005, the Defendant, the non-custodial parent of an 8 year old son with Down Syndrome, attended his son’s class party to which the school had invited parents. The Defendant behaved appropriately and was not disruptive. There was no court order prohibiting contact and in fact the custody order required the mother to provide timely notice of such events so the Defendant could attend.

The School Principal, as part of his personal, and unapproved by the District, “red flag policy” and in violation of state law § 22.1-4.3, called the police and had them present the Defendant with a Trespass Notice. The Defendant left the school and was arrested on a soccer field while still walking away from the school.

FACTS:

1. The Defendant is the non-custodial parent of an 8-year-old son with Down Syndrome.
2. Per an order of the Circuit Court of Prince William County, dated 10/2/2003, the child’s mother was required to forward to Mr. Smith all copies of invitations to school events so that he might attend. Due to the child’s Mother not following the provision and Mr. Smith missing out on several school events, the Court signed a rule to show cause and in an order dated 03/03/2004 specifically ordered the child’s Mother to supply “notice of Special Events” at school to Mr. Smith so he could attend.
3. Per the order, the child’s Mother forwarded to Mr. Smith an invitation from the school that specifically invited parents to a school event on June 17th, 2005.
4. There is not, and was not on June 17, 2005, any court order in place barring Mr. Smith from participating in his son’s school activities, nor had the Defendant been served with a no trespass letter from the school.
5. Mr. Smith attended his son’s school event on June 17th and on the basis of the principals “red flag” policy was subsequently arrested and charged with trespass under Va. Code Ann. § 18.2-119.

6. The parties dispute if Mr. Smith was on school property or not when arrested, as after he was presented with the trespass letter he walked away from the school and was still walking away from the school when arrested on the soccer field next to the school.
7. There was no fence or sign to indicate the soccer field belonged to the school and was not part of the adjacent soccer fields/park. Indeed there was a sign indicating it was a “McLean Youth Soccer Field”.
8. The Defendant was held in jail in solitary confinement for the entire Fathers-Day weekend and released the following Monday on a \$1,000 bond.
9. Mr. Smith could not afford an attorney so the District Court appointed Dawn Butorac of the Office of the Public Defender to represent him.
10. Mr. Smith requested both orally and in writing that Ms. Butorac defend him based on state law Va. Code Ann. § 22.1-4.3 which specifically requires schools to allow non-custodial parents such as Mr. Smith to attend their children’s school events unless a court order specifically prohibits attendance, combined with established case law such as O’Banion v. Com., that a person with a claim of right can’t be convicted of trespass.
11. Ms. Butorac refused to present either the state law or the relevant case references at the trial in District Court on Aug 8, 2005; as a result Mr. Smith was convicted and given a suspended sentence.
12. Mr. Smith having not obtained a ruling based on the state law § 22.1-4.3 and case rulings appealed the case to the Circuit Court.
13. On Sep 6th, 2005 while waiting for the scheduling hearing, Ms. Butorac again advised Mr. Smith that her office was unwilling to present the state law and case rulings in Circuit Court. Mr. Smith informed her that the whole point of the appeal was to get a ruling based on the law and that he intended to get a ruling based on the law, not just gender/custody politics.
14. Ms. Butorac informed the Defendant her office was unwilling to represent him if he insisted on having the relevant state laws and case rulings presented.

15. Mr. Smith asked Ms. Butorac if her office would at least be willing to present legal assistance/advice to subpoena documents, witnesses etc, and was told they would not. Mr. Smith brought the matter up with the Judge who informed Mr. Smith he had a choice between the Public Defender, who was refusing to represent him, or representing himself. Mr. Smith clearly stated to the Judge that **he did not want to represent himself** but that the Public Defender was refusing to represent him and present the relevant state law and case rulings. The Judge instructed Mr. Smith to sign a waiver if he was unwilling to have the Public Defender represent him given their refusal to represent him as clients instead of representing themselves. Mr. Smith having already noted his objection to the Judge about the conduct of the Public “Defender” and also having clearly stated that he did not wish to represent himself did sign the waiver to avoid contempt of court.
16. On Sep 24, 2005 Mr. Smith filed a Request For Witness Subpoena for several school employees including Superintendent Dale.
17. On Sep 26, 2005 Mr. Smith filed a MOTION TO DISMISS on the grounds that Va. Code Ann. § 22.1-4.3 and Fairfax County School Board’s regulation number 2240.3 both of which state that a non-custodial parent is allowed to attend school events unless a court orders specifically states otherwise, constitutes a bona fide claim of right and that per Virginia case law, a person with a bona fide claim of right cannot be convicted of trespass. (exhibit A)
18. On Sep 26, 2005 Mr. Smith filed a MOTION FOR ATTORNEY requesting the court to appoint an attorney for him. (exhibit B)
19. On Oct 4th 2005, the day before the trial, the school district filed a motion to quash the witness subpoena of Superintendent Dale.
20. On Oct 5th 2005, The Circuit Court with Judge Finch held a trial on the trespassing charge.
21. Judge Finch denied the Defendant’s MOTION FOR ATTORNEY without any meaningful discussion and without giving any indication he had read the motion. When the Defendant tried to explain to the Judge why an attorney was needed Judge Finch cut him off and stated the Defendant already had a ruling.

22. The Defendant tried to present the court with a written MOTION FOR COURT REPORTER. Judge Finch refused to take the paper copy of the motion or to read the MOTION FOR COURT REPORTER (exhibit F).
23. The Defendant pointed out he would appeal if found guilty and wanted the ability to have a transcript for the appeal. Judge Finch denied the Ruled against the MOTION FOR COURT REPORTER and said he would not approve a court reporter for a misdemeanor.
24. There was a court reporter present and ready and Judge Finch instructed her not to record the hearing. When Judge Finch observed the court reporter manipulating her equipment he questioned her to ensure she was not recording the hearing.
25. The Defendant requested to be able to tape record the hearing and informed the court he had brought a tape recorder for that purpose. Judge Finch denied the Defendants request to tape record the hearing.
26. The Defendant requested that Judge Finch hear his MOTION TO DISMISS before hearing the motion to quash or holding the trial and pointed out that it might eliminate the need for a trial. Judge Finch refused to rule on the motion to dismiss.
27. Instead of hearing the MOTION TO DISMISS Judge Finch head the Schools MOTION TO QUASH WITNESS. The Defendant objected to hearing the motion, as it wasn't filed until the day before the trial and he didn't receive a copy of it until the night before the trial, denying him adequate time to prepare a response.
28. The Defendant tried to present the Judge with a written DEFENDANT'S REPLY TO MOTION TO QUASH. Judge Finch refused to take the paper copy of the motion or to read the DEFENDANT'S REPLY TO MOTION TO QUASH. (exhibit C)
29. The Defendant presented e-mail from the superintendent in which the superintendent made statements about the case, including one where superintendent Jack Dale stated, "The father in question has several court orders prohibiting contact and presence on school property. The principal was following police and court directives."

30. Judge Finch had previously personally met with Jack Dale and did not make that fact known to the Defendant.
31. In spite of the superintendent having made specific statements about why the Defendant was charged with trespassing, Judge Finch ruled to quash the subpoena for the superintendent.
32. The Defendant attempted to present the court with a written DEFENDANT’S MOTION FOR CLARIFICATION OF CHARGES, and stated by clarifying the charges the trial could be shorter and more focused. Again Judge Finch refused to take the paper copy of the motion or to read the DEFENDANT’S MOTION FOR CLARIFICATION OF CHARGES. (exhibit D)
33. The Defendant requested again that Judge Finch rule on his MOTION TO DISMISS. Judge Finch again refused to rule on the MOTION TO DISMISS and said the Jury was waiting and that he wasn’t going to keep them waiting any longer. The Defendant pointed out that a ruling on the MOTION TO DISMISS might eliminate the need for the Jury.
34. The Defendant gave his opening statement, including holding up a CD recording of the incident in question and told them he would play it for them so they could judge for themselves instead of having to rely on witnesses unreliable recollections of the incident. The Defendant also said that state law and school district policy both give him the right to attend his son’s school events and that according to case rulings the prosecutor would have to show he had a criminal intent and did not think he had a right to attend the event at school. (Exhibit E)
35. The prosecution entered as evidence the “no trespass” letter that the school issued the Defendant **after** the police arrived at the school.
36. Mr. Vanderhye testified that the Defendant did sign in at the principal’s office and that most parents could just sign in and got to the event but that he had instituted a “Red Flag” policy for custody cases. Mr. Vanderhye stated that non-custodial parents must seem him first before attending school events. Mr. Vanderhye testified that his “Red Flag” policy was not written, and that the school board did not approve it.

37. Under cross examination Mr. Vanderhye went on and on with claims the the Defendant had a website with comments about the custody case that Mr. Vanderhye didn't approve of. The Defendant objected to Mr. Vanderhye going on about these claims instead of answering the question asked of him. The Judge refused to order Mr. Vanderhye to answer the question and allowed him to continue his tirade against the Defendant.
38. The Defendant was confused why a Judge would allow such comments that were not related to the case, but after Mr. Vanderhye went on about being called a "White Collar Child Abuser" on the website it became clear that Judge Finch was allowing the commentary due to Judge Finch having been upset with the content website in connection with an unrelated case.
39. Judge Finch handled the custody case of Ron Jagannathan and ordered Ron Jagannathan to have pages referring to Janine Saxe and Mr. Robert Machen as "White Collar Child Abuser" s removed from the Defendant's web site. http://www.liamsdad.org/others/sveta_lisa.shtml The attempt by Judge Finch to have information removed from the Defendant's website is a gross abuse of his First Amendment Rights that Judge Finch had no legal authority to attempt. His actions were privately motivated and not as a result of his honoring his office or judicial responsibilities.
40. Once the Defendant realized that Judge Finch was the same Judge who was previously upset with his website and that Judge Finch appeared to be abusing his discretion as a result, the Defendant made an oral motion for the Judge to recuse himself. Judge Finch refused to recuse himself.
41. Judge Finch added a blatant lie that he had never heard the phrase "White Collar Child Abuser" before. (see official court documents for proof his statement was incorrect – that is if he reads orders before he signs them). (Exhibit F, G)
42. The Defendant repeatedly tried to question Mr. Vanderhye about the custody orders he and the superintendent claim are related to the case and which he may have told the superintendent about and each time Judge Finch would interrupt and say he would not allow the Defendant to ask questions about the custody orders.

43. Mr. Vanderhye stated that he perceived the Defendant as a danger due to his bulging fanny pack. Mr. Vanderhye did not make any comment about his fears subsiding after he observed the Defendant take a camera out of his fanny pack to take pictures of his son.
44. The Defendant asked Mr. Vanderhye how many times the Defendant had been to the school. Mr. Vanderhye stated he was only aware of 3 or 4 visits by the Defendant to the school. The Defendant asked Mr. Vanderhye if he was aware of the Defendant bringing his son to school on a weekly basis and entering the school each time to drop him off. Mr. Vanderhye indicated he was unaware of that taking place or that being a provision of the custody order.
45. The Defendant presented Mr. Vanderhye with the notice the school sent that specifically invited parents to the event along with the envelope the child's mother sent it in to the Defendant, per the custody order. Mr. Vanderhye admitted to knowing the school was holding a first grade Field Day and that the school had invited the parents to attend.
46. Mr. Vanderhye testified there were no signs or fence present to support his claim that the school owned the soccer fields next to the school where the Defendant was arrested.
47. The Defendant attempted to present photos of the soccer fields on both sides of the street, including a sign indicating the field next to the school as a "McLean Youth Soccer Field" and across the street as a park with soccer fields. Judge Finch admitted one or two of the photos close to the school itself but refused to admit most of the photos thus preventing the Defendant from showing that a reasonable person would not believe the property belonged to the school but was rather part of the remaining soccer fields.
48. The Defendant attempted to ask questions about the property boundaries, how Mr. Vanderhye arrived at his knowledge of the boundaries, the look of the supposed soccer field compared to the others and Judge Finch repeatedly cut off questioning preventing the Defendant from finding out exactly how Mr. Vanderhye learned of the boundaries, where he thought they were, and how anyone was supposed to know where the boundary is.

49. Mr. Vanderhye testified there were no previous no-trespass notices barring the Defendant from school property.
50. The Defendant asked Mr. Vanderhye to look at a photo of the Defendant at the event, taken by his son, and asked Mr. Vanderhye if there was any offensive or obscene material on the Defendant's shirt. The photo showed the Defendant wearing a red t-shirt with blue trim and no words or photos other than a white sticker with the letter 'V' on it. Mr. Vanderhye admitted the only item on the shirt was the sticker that was issued by the school to the Defendant to indicate he had signed in at the office as a visitor.
51. At several points during the cross-examination the Defendant held up copies of the recordings and transcripts of the incident and District Court trial and attempted to use them to impeach the testimony of Mr. Vanderhye as his testimony differed in material details from that which was recorded during the incident as well as that which he testified to at the District Court Trial.
52. Judge Finch repeatedly refused to let the Defendant use the transcripts and recordings to impeach Mr. Vanderhye and to show that his testimony differed from his previous testimony and differed from what actually occurred during the incident. The Defendant was repeatedly quite insistent on using the transcripts even going so far as to continue reading from them after the Judge interrupted him to say he wasn't going to allow use of the transcripts or recordings.
53. Officer Beyer testified that when the Defendant left the officers he went down the side walk to the end of the parking lot and then veered left onto the soccer fields where he was arrested.
54. Upon cross-examination of Officer Beyer the Defendant questioned her if she was sure she told the Defendant that he couldn't go to the soccer fields rather than that he couldn't see his son. She repeated she had told the Defendant he couldn't go on the soccer field. The Defendant attempted to read her exact words from the transcript but again the Judge interrupted him and prevented Officer Beyer and the Jury from hearing the actual words she uttered.
55. The prosecution didn't present any evidence about the exact property boundaries of the school.

56. At the end of the prosecutions case the Defendant made a MOTION TO STRIKE pointing out that the prosecution had not presented evidence to show that he did not have a claim of right to attend, that he had any criminal intent, that he had any reason to believe the soccer field was owned by the school, and in fact that no evidence had been presented to show that the school owned the soccer field, and that no evidence had been presented to show that Mr. Vanderhye had authority to instruct someone to leave the property in contradiction to school district policy. Judge Finch ruled against the Defendants MOTION TO STRIKE.
57. Ms. Richards, his son's teacher, stated that the Defendant was not disruptive, that he behaved appropriately. Ms. Richards stated that his son was happy to see the Defendant. Ms. Richards indicated that the problem wasn't with the conduct of the Defendant but rather that Mr. Vanderhye had told her that according to the mother the Defendant was not to have any contact with their son without her permission.
58. Officer Colwell stated the Defendant was still moving and was heading away from the school when arrested.
59. The Defendant asked if the school gave the Officer a copy of a previous "no trespass" letter. Officer Colwell stated the school did not, that he had the Defendant wait while the school wrote up a "no trespass" letter.
60. Officer Colwell stated he told the Defendant he needed to leave now. The Defendant asked if it wasn't the case that instead it was the Defendant who asked to leave instead of being told to leave. The Defendant again tried to refer to the transcript and again Judge Finch interrupted and refused to let the Defendant use the transcript to correct the statement of the officer.
61. At the end of his case the Defendant again made a MOTION TO STRIKE. Judge Finch denied the MOTION TO STRIKE
62. Closing statements were made by the Defendant, during which Judge Finch interrupted and objected to the Defendant reading a portion from state law 22.1-4.3 and added his own comments on the law.

63. The Defendant also pointed out that the testimony given differed from the actual facts and the previous testimony and that the Jury had been prevented from knowing the truth by the Judge by excluding the recordings and transcripts.
64. During the entire trial the demeanor of Judge Finch toward the Defendant was dismissive.
65. About 15 minutes after starting deliberations the Jury asked a question which the Judge read. The Jury had requested to know if Mr. Vanderhye had told the Defendant to leave before or after the police were called. Judge Finch said his response to the Jury was that they would have to rely on the testimony of the witnesses.
66. The Defendant pointed out he had recordings and transcripts that would show the truth that Mr. Vanderhye never instructed him to leave either before or after the police arrived and suggested the evidence be provided to the Jury
67. Judge Finch refused to provide the Jury with the recordings or transcripts that would have answered their question.
68. The Jury deliberated for about another hour and 15 minutes before returning a guilty verdict.
69. The Defendant submitted a written statement of facts to the trial court on 11/23/06 and has not heard from the trial court or prosecution since. The Appeals Court clerk reported the Statement of facts was unsigned.

ASSIGNMENTS OF ERROR:

1. The court erred by refusing to provide the Defendant an attorney to represent him after he was deemed to meet the financial criteria and after the Defendant requested the court to appoint one after the Public Defender refused.
2. Judge Finch erred by going out of his way to keep the Defendant from having any accurate record of the details of the trial, by refusing to provide a court reporter, insisting the reporter present did not record the hearing, and refusing to allow the Defendant to tape record the hearing.
3. Judge Finch erred by not answering the question posed by the jury when he had the means available to ascertain the answer with certainty.

4. Judge Finch erred by refusing to admit relevant material evidence, or to allow the Defendant to use the evidence for impeachment purposes, including the tape recordings of the incident and the first trial, the transcripts made from the tapes and photographs of the school and soccer fields.
5. Judge Finch erred by refusing to rule on the Defendants Motion To Dismiss, which was properly filed and served more than one week in advance of the trial.
6. Judge Finch erred by quashing a witness subpoena, without proper justification, depriving the Defendant of his right to question his accusers, and to impeach the testimony of the prosecution's main witness.
7. Judge Finch erred by refusing to read or consider the Defendants reply to the motion to quash.
8. Judge Finch erred by refusing to rule on the Defendants motion to clarify charges.
9. Judge Finch erred by arguing the case for the prosecution when he interrupted the Defendants closing remarks to insert his own contrary remarks about state law § 22.1-4.3.
10. Judge Finch erred by refusing to force witnesses to answer relevant questions asked by the Defendant, and for allowing prosecution witnesses to go on and on about issues not related to the case.
11. Judge Finch erred by refusing to reuse himself after it became obvious his actions in the case were motivated by personal interest instead of justice and that he had a previous connection to the Defendant and was upset about his web site.
12. Judge Finch erred by lying in court about his connection to the Defendant and in denying having ever heard of the Defendant or his website when it is contained in motions submitted to him and orders signed by him.
13. Judge Finch erred by refusing to allow proper questioning about custody orders, state law, and school policies.
14. Judge Finch erred by abusing his discretion by refusing to approve the Defendant's two Motion to Strike when the Prosecution had clearly not presented a sufficient case, having failed to provide any evidence of criminal intent or that the school owned the property in question

15. The Court erred by not respecting the Due Process rights of the Defendant as well as his right to equal justice under the law.

QUESTIONS PRESENTED:

1. Can a Judge intentionally deprive an indigent Defendant of a court record upon which to base an appeal? (Error #2, 4)
2. Is the Defendant by virtue of being a noncustodial parent unworthy of Due Process, Attorney, Court Reporter? (Error #1-10, 13-15)
3. Does the refusal of the Public Defenders Office to represent the Defendant, remove the obligation of the Court to provide counsel for him, or does the state still have an obligation to provide court appointed counsel? (Error #1)
4. Does a Judge have the ability to deprive a Defendant of Due Process and Constitutional rights because he is upset about the Defendants website? (Error #1-15)
5. Can a Judge, without proper justification, prevent a Jury from hearing/seeing evidence that would impact their decision and impeach the testimony of prosecution witnesses? (Errors 3, 4, 6, 10, 13)
6. Can a Court convict a Defendant when the basic elements of criminal trespass have not been proven? (Errors #3, 5, 8, 9)

ARGUMENT:

Lack Of Attorney (Error #1)

The Defendant was determined to be indigent and qualify for a court appointed attorney and was “represented” (not the quotes) by the Public Defender in District Court. The fact that the Public Defenders Office does not consider a non-custodial father worthy of representation, or perhaps that a trespassing charge is not worth their time, does not eliminate the obligation of the state to provide and attorney for an indigent Defendant – especially since the Defendant could have been sentenced to one year in jail.

Lack Of Court Record (Error #2, 15)

Judge Finch erred by refusing to approve the Defendant’s request a court reporter, followed by refusing to allow the Defendant to record the hearings as requested. The Defendant had informed Judge

Finch he would need an accurate record for appeal. Given a court reporter was already present and Judge Finch ordered her to stop recording it appears that Judge Finch wanted to ensure the Defendant did not have a record of the hearing. The Defendant submitted a statement of facts to the court for signature, in accordance with rule vs-cr-5A:8 yet Judge Finch did not follow but refused to sign or correct the statement of facts, thus completing his task of denying the Defendant of any official record for use in an appeal. Unless the Appeals Court is willing to accept the Defendants **unopposed** statement of facts then it does not have a complete factual record upon which to base a ruling and should vacate the order of the trial court and remand for a new trial per rule of Harris, 203 Va. 946, 128 S.E.2d 278.

“Once an appellant has complied with the first two steps, he or she has established prima facie compliance with the requirements of the Rule. See id. at 610, 425 S.E.2d at 820. The trial judge must then either sign the statement, correct it and sign the corrected statement, or, if the judge cannot in good faith recall or accurately reconstruct the relevant proceedings, order a new trial. See id. at 611, 425 S.E.2d at 820.” AMOS F. KYHL V BETTY C. KYHL Record No. 3000-98-4 MARCH 21, 2000

Hiding Evidence from the Jury (Error # 3, 4, 6, 10, 13, 15)

The tape recording of the incident was made with the Defendant holding the tape recorder in full view of the Principal and Police and even pointed out he was recording. The Recording of the District Court trial was made by the Public Defender with the permission of the Judge and knowledge of the Prosecution. The Prosecution should have been aware of the existence of these recordings yet did not ask for copies of them. Given that the Prosecution made no effort to examine the recordings prior to trial its not clear why the Prosecution objected at trial, but given that the Defendant brought the original tapes to court and stated the recordings were accurate and others on the tapes were present in court and could have authenticated their own voices and statements, it was an error to not allow the recordings/transcripts as evidence, and an even bigger error not to allow their use to impeach false testimony by Prosecution witnesses. The Defendant repeatedly from opening arguments to closing tried to use the tapes/recordings both as evidence and also to impeach witnesses. The Defendant even held up a copy in opening arguments and told the Jury he would play it for them so they could hear for themselves what really occurred. The Defendant also read from the transcript the exact words used by witnesses with the Judge yelling at him to stop.

With the aid of the tape recordings/transcripts, the Jury might well have found the Defendants statements more credible than those of the Prosecution and its witnesses and returned a verdict in his favor. Indeed the tape recording/transcript of the incident would have pointed out to the jury several important misstatements by the prosecution's witnesses and could reasonably be expected to result in a not-guilty verdict.

- A. The principal testified he told the Defendant to leave; yet the tape recording contradicts his testimony.
- B. The Principal testified he was concerned about the contents of the Defendants fanny pack, yet he made no mention of it on the tape of the incident, or on the tape of the first trial.
- C. The tape of the incident confirms the Principal's testimony at the first trial that his concern was with court custody orders, not with the Defendants actions or possessions. The Jury could have been expected to have significant concerns about why the reasons for the arrest as stated by the main witness changed materially from those he stated at the first trial.
- D. Officer Beyer testified she told the Defendant he would be arrested if he went to the soccer field, when in fact the tape recording indicates she stated he would be arrested if he went to see his son, which clearly is not only different but not related to trespassing.
- E. Officer Colwell testified he instructed the Defendant to leave when the tape recording indicates that he did not instruct the Defendant to leave but rather that the Defendant asked if he could leave and Officer Colwell instructed him not to come back.

The importance of this evidence is made even more clear by the fact the Jury interrupted deliberations to ask a question about when the Principal made a specific statement and the recording would have shown that he did not make the statement they were asking about. The Judge erred by refusing to provide an accurate answer to their question, leaving them in the dark as to what the Principal actually said. The trial judge erred by refusing to allow this evidence and refusing to allow it to be used to impeach the witnesses. See *Hooker v. Commonwealth*, 14 Va. App. 454, 458, 418 S.E.2d 343, 345 (1992). The Court's refusal to allow the Defendant to use audiotapes or transcripts made from those tapes is sufficient

error to justify ordering a new trial.

The Court also refused to allow the Defendant to present the photos of school and soccer field next to it where he was arrested. Given that the prosecution witnesses admitted there was no sign or fence indicating it was school property, the photos might very well have led the Jury to believe that the Defendant had thought he had left the school property, or had actually left school property, before being arrested, thus lacking any criminal intent or grounds for trespassing. It was an error by Judge Finch to prevent the Jury from seeing the photos because he didn't think they were important.

Judge Finch also erred by quashing a witness subpoena for Mr. Dale the District Superintendent. In the motion to quash the school claimed, "Dr. Dale can provide no testimony material to any of the issues in this case" however "*The relevancy of the testimony sought is not an issue which may be raised by a motion to quash.*" People v Slochowsky, 116 Misc 2d 1069, 456 NYS2d 1018. In fact Mr. Dale could have provided testimony material to the case. The school's motion to quash admits Mr. Dale learned of the Defendants arrest from his staff, which is also shown by e-mail written by Mr. Dale about the reasons the Defendant was arrested. The Defendant even showed the court e-mail where Mr. Dale stated, "The father in question has several court orders prohibiting contact and presence on school property. The principal was following police and court directives." The Defendant should have been allowed to have Mr. Dale testify as to the reasons the principal stated he had the Defendant arrested and any reports/documents written by the principal about the incident. Clearly the fact that the principal made statements that he had the Defendant arrested due to court orders is material since at this trial he is claiming other reasons and is unable to produce any court orders prohibiting contact or presence on school property, or even a prior no-trespass letter. Certainly the Jury would have had reason to question the prosecution's main witness when he made claims of non-existence court orders to justify his actions. Mr. Dale as an administrator would have been able to testify about the policies of the District and how they were or were not followed.

Judicial Misconduct (Errors 2 - 15)

Judge Finch engaged in judicial misconduct throughout the trial. His refusal to rule on the

Defendants timely filed motion to quash, then being willing to rule on the school's motion to quash which the Defendant received the night before trial, and refusing to even read the Defendants written reply to the motion to quash, looks like an abuse of discretion. The Judge refusing to rule on the Defendant's motion to clarify charges looks improper. The Judge refusing to let the Defendant have a court reporter or tape record the hearing looks like another abuse of discretion. The Judge refusing to admit the tape recording of the incident, or to allow it to be used to impeach witnesses is another abuse of discretion. His refusal to order witnesses to answer the Defendants question, while allowing them to wonder way off topic is another example of abuse of discretion. Clearly the Defendants questions about school policy for parents participation, or state law protecting participation by noncustodial parents is more relevant an appropriate then allowing a witness to ramble on about the contents of the Defendants web site. Although it is the long ratings by the principle about the website that Judge Finch allowed over the Defendants objections, that give a motive for Judge Finch to abuse his discretion. Judge Finch in an unrelated case to which the Defendant was not a party, had expressed being unhappy with the contents of the Defendants web site and ordered that attempts be made to coerce the Defendant into removing the information from his website. When it was clear that Judge Finch was enjoying allowing the principal to babble on about the website, the Defendant questioned Judge Finch if he wasn't the same Judge that wanted the website removed asked for the Judge to recuse himself. Judge Finch stated that he had never heard of the Defendant before or his website. When questioned about the specific phrase "White Collar Child Abuser" Judge Finch claimed not to have ever heard that before. His claims are false as shown by official court records of motions submitted to him that specifically mention my name and website, as well as an order he signed that on page 2 lists my name, address, phone number, e-mail address, and website. Given that the rules require not only an impartial Judge but also that he appear impartial.

Judge Finch also appears to have abused his discretion in not approving the Defendants two Motion to Strike. The prosecution had clearly failed to show that the Defendant had any criminal intent a requirement for conviction of trespass, had failed to show any evidence he came on the property after being notified to remain off, and failed to provide any evidence he refused to leave, in fact Officer

Colwell testified he was waling away from the school. The prosecution failed to provide any evidence that he was on the property when arrested – no signs, fence, landmark, or property plot. At the minimum the prosecution needed to show he came on or remained on the school’s property in violation of law and the prosecution did neither.

Judge Finch went so far as to argue the prosecution’s case for them, an action that is clearly improper. He interrupted the Defendant’s closing statement to interpose his own contrary statements as to the law the Defendant was discussing, a clearly inappropriate action by a judge. Judge Finch should have recused himself, as certainly he does not appear impartial. In fact it seems suspicious that the only Judge having any known connection to the Defendant took the case instead of having it assigned to another judge. The appearance in this case is that he intentionally took the case to make sure justice was denied. The improper conduct of Judge Finch is sufficient to vacate and remand for a new trial, with instructions for it to be heard by a different Judge and perhaps venue.

Clearly Wrong Without Evidence To Support It (Errors 3, 5, 8, 14)

The Verdict in this case is clearly wrong and without the evidence to support it.

Case law in Virginia has uniformly construed the statutory offense of criminal trespass to require a willful trespass. “As such, one who enters or stays upon another’s land under a bona fide claim of right cannot be convicted of trespass. A bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property.” *O’Banion v. Com.*, 30 Va.App. 709, 717, 519 S.E.2d 817, 821 (1999), citations omitted.

Mr. Smith did have a bona fide claim of right—as well as an actual right—to be present at the Spring Hill Elementary School on June 17, 2005 because: (a) Mr. Smith is parent of a student in attendance at Spring Hill Elementary School; (b) on the day in question, the school was holding a special event open to all parents; and (c) Mr. Smith had received an invitation to attend the event.

Va. Code Ann. § 22.1-4.3 specifies that “Unless a court order has been issued to the contrary, the noncustodial parent of a student enrolled in a public school or day care center . . . **shall not be denied the**

opportunity to participate in any of the student’s school or day care activities in which such participation is supported or encouraged by the policies of the school or day care center.”

This affirmation of noncustodial parents’ rights to participate in their children’s school activities is mirrored by the Fairfax County School Board’s regulation number 2240.3, which specifies that “A noncustodial parent retains rights to participate in the special education process, to receive information about the child, and to participate in certain school activities **unless a valid court order specifically removes or limits those rights,**” and that “**This regulation, not custody orders** or settlement agreements, governs school decisions, unless a valid court order specifically directs the school to take a particular action.”

There is not, and was not on June 17, 2005, any court order in place barring Mr. Smith from participating in his son’s school activities. On the contrary, per an order of the Circuit Court of Prince William County, dated 10/2/2003, the child’s mother was required to forward to Mr. Smith all copies of invitations to school events so that he might attend. Due to the child’s Mother not following the court signed a rule dated 03/03/2004 specifically ordering the child’s Mother to supply “notice of Special Events” at school to Mr. Smith so he could attend.

Because (a) state law, local school board regulations, and individual school policy all permit Mr. Smith to attend school events like the one in question; and (b) there was no court order in place prohibiting him from participating in such events; and (c) his presence at the class party was in response to an invitation that he had received from the child’s mother, Mr. Smith clearly had a bona fide claim of right, as defined by *O’Banion*, to be present at his son’s school on June 17, 2005 and to participate in his son’s class party.

The principal of Spring Hill Elementary School, Roger Vanderhye, purports to justify his refusal to allow Mr. Smith to participate in this school event with the statement that he had “red flagged” the parties’ file because it involved a court custody dispute. However, cases involving custody cases are precisely the sorts of cases that Va. Code Ann. § 22.1-4.3 was enacted to address. Under this statute, school officials—whether acting on their own initiative or at the behest of the custodial parent—are

prohibited from acting unilaterally to deny, on the basis of noncustodial status, a noncustodial parent's right to participate in their child's school activities.

The principal, Mr. Vanderhye, is not a judge in the Prince William County Court system. Consequently, he had no authority to issue what was essentially an order preventing Mr. Smith from participating his son's school activity on June 17, 2005—regardless of how many “red flags” he had chosen to stick on the parties' file. If either Mr. Vanderhye or Mr. Smith's wife felt that it would be inadvisable for Mr. Smith to participate in school activities, they should and could have gone through the proper legal channels and attempted to obtain a court order to that effect.

In the absence of such an order, by law and school policy, Mr. Smith had every right to be present at his son's school on June 17, 2005 and to participate in his son's class party. He should not have been prevented from participating by the school principal, and should certainly not have been found guilty of trespass.

CONCLUSION:

The Judge refused to act in an impartial manner and used his authority to prevent the Defendant from exercising his right to an Attorney, to have a record of the proceedings, to present evidence, and to question witnesses. The Judge intentionally kept the Jury from seeing/hearing evidence that would have almost certainly resulted in a not-guilty verdict. The trial of the Defendant in this case was nothing short of a Kangaroo Court. Given the lack of record was due to the actions of the Judge not the Defendant, the rule of Harris, 203 Va. 946, 128 S.E.2d 278, applies and the case should be remanded for a new trial.

The Defendant requests this court vacate the order of the trial court and remand for a new trial and the Defendant be appointed an attorney, who will be required to present state law and case precedence, with a court reporter present, and be allowed to present the audio recordings/transcripts, as well as to call Mr. Dale as a witness.

Oral Argument on the Petition is not requested.

**Respectfully submitted,
WESLEY C. SMITH
Appellant / Defendant, pro se**

Wesley C. Smith
5347 Landrum Rd APT 1
Dublin VA 24084-5603
liamsdad@liamsdad.org (No phone)

CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class, postage pre-paid, to Fairfax County Commonwealth's Attorney's Office, 4110 Chain Bridge Rd., Room 123, Fairfax, VA 22030 on Feb 3, 2006.

Wesley Smith

Exhibits

- Exhibit A Defendants' Motion to Dismiss
http://www.liamsdad.org/court_case/trespassing/2005_09_26_motion_dismiss.pdf
- Exhibit B Defendant's Motion for an Attorney
http://www.liamsdad.org/court_case/trespassing/2005_09_26_motion_attorney.pdf
- Exhibit C Defendant's Reply to Motion to Quash Witness
http://www.liamsdad.org/court_case/trespassing/2005_10_05_reply_quash.pdf
http://www.liamsdad.org/court_case/trespassing/2005_10_05_reply_a.pdf
http://www.liamsdad.org/court_case/trespassing/2005_10_05_reply_b.pdf
- Exhibit D Defendant's Motion For Clarification Of Charges
http://www.liamsdad.org/court_case/trespassing/2005_10_05_motion_clarification.pdf
- Exhibit E Transcripts and Recordings
MP3 Recording of incident at school 06/17/2005 (20 MB):
http://www.liamsdad.org/hall_of_shame/fcps/springhill_tape.mp3
Text Transcript Part 1 - Sign in at Office, and harassed by Principal:
http://www.liamsdad.org/court_case/trespassing/2005_06_17_office_vanderhye.pdf
Text Transcript Part 2 - In the classroom with my son Liam:
http://www.liamsdad.org/court_case/trespassing/2005_06_17_classroom.pdf
Text Transcript Part 3 - The cops arrive, discuss court orders and arrest me:
http://www.liamsdad.org/court_case/trespassing/2005_06_17_cops.pdf
MP3 Recording - **District** (not circuit) Court 'Trial' (13 MB) recorder was voice activated:
http://www.liamsdad.org/court_case/trespassing/2005_08_08_court_district.mp3
Vanderhye Testimony - Text Transcript of Roger Vanderhye's **District** Court testimony
http://www.liamsdad.org/court_case/trespassing/2005_08_08_vanderhye.pdf
Colwell Testimony - Text Transcript of Officer Colwell's **District** Court testimony
http://www.liamsdad.org/court_case/trespassing/2005_08_08_colwell.pdf
- Exhibit F Defendant's Motion For A Court Reporter (also next page)
http://www.liamsdad.org/court_case/trespassing/2005_10_05_motion_reporter.pdf

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia :
v. : CASE NO: MI-2005-1559
Wesley Smith :

DEFENDANT'S MOTION FOR COURT REPORTER

The Defendant, Wesley Smith, requests the Court provide Court Reporter to record the trial and a written or electronic transcript of the trial:

1. The Defendant is charged with a crime with a potential sentence of up to one year in jail.
2. The Defendant has been determined by the Court to be indigent (qualify for a court appointed attorney), and cannot afford to hire a Court Reporter or pay for a transcript.
3. The Virginia Appeals Court has ruled that indigent people have the same right to appeal as others and that a transcript is necessary to appeal and should be provided at state expense for indigent Defendants.
4. The Defendant will certainly appeal the case if he is not acquitted and would need a certified transcript.

Wesley Smith

Wesley Smith Pro Se
5347 Landrum Rd APT 1
Dublin VA 24084-5603
(no phone) liamsdad@liamsdad.org

DEFENDANT'S MOTION FOR COURT REPORTER 10/05/2005

-1-

Exhibit F

From: Ron Jagannathan <ron.jagannathan@gmail.com>
Date: December 4, 2005 5:06:31 PM EST
To: "Liam's Dad" <liamsdad@liamsdad.org>
Subject: Re: finch order

Wes,

I will send this to you soon.

A motion with Liams dad as exhibit 1 was presented to Judge Finch, There was a 3 hour hearing on a Friday docket that was scheduled as 30 min. Ron Fisher was a witness to the whole hearing. There was also a court reporter. (If you want a transcript).

There is an order, asking you to be contacted via certified mail and to remove the web pages of White collar child abuse.

I will scan the doc and send it to you soon. Actually in an hour.

Ron J

Exhibit G

This further Order that Raja Jagannathan shall be prohibited from providing any information regarding this case to any individual, organization or other entities that will distribute or attempt to distribute and/or publish or make public this information and Mr. Jagannathan is also ordered to contact those individuals and organizations that know make public information about this case and request that this information is removed from the web and all other communication entities; it is also

Ordered that those organizations, individuals and websites identified that either received, transmitted or responded to the petition naming the guardian of Robert Nochi, all that Raja Jagannathan provide this information to the Court by November 1, 2004. Defendant's motion to

Remains a change of ^{TO the order that 60,343 is} ~~support or child support~~ demand regarding

Entered this 10 day of Dec 2004.

Gaylord L. Finch, Jr.

Gaylord L. Finch, Jr.
Judge, Circuit Court of Fairfax County

Robert M. Mason
Counsel for the Plaintiff

Attila C. ^{SEEN AND} ^{01950175 TO} ^(SEE REVERSE)
Counsel for the Defendant

A COPY TESTE:
JOHN T. FREY, CLERK
BY: *Claudia A. Acosta*
Deputy Clerk
Date: 10 22 - 2004

Guardian of Robert Nochi

Exhibit H

VALERIA V. JAGANNATHAN, :
 PLAINTIFF, : IN CHANCERY NO. 182927; 182928
 :
 vs. : ON APPEAL FROM:
 : THE FAIRFAX COUNTY JUVENILE &
 RAJAN JAGANNATHAN : DOMESTIC RELATIONS DISTRICT COURT
 DEFENDANT. : IN RE: SVETA JAGANNATHAN
 : LISA JAGANNATHAN
 : CASE Nos: JJ352771-01-01; JJ352762-01-01

LIAM'SDAD.ORG

**"PLEASE JOIN US IN STANDING UP AGAINST ORGANIZED
 WHITE COLLAR CHILD ABUSE OF OUR CHILDREN BY ATTORNEY
 MS. JANINE SAXE AND ATTORNEY MR. ROBERT MACHEN.**

EXHIBIT "B"

Exhibit H

1. That Rajan Jagannathan shall, in writing, contact the following individuals and organizations and request that all references to this case, the parties' children, and Janine M. Saxe, be immediately removed from the Internet:

(a) ThePetitionSite.com [<http://www.thepetitionsite.com>]; [thepetitionsite.com/takeaction/116360611]. Hosted by Care 2, Inc. at abuse@earth.care2.com. This organization's address is: Care 2, Inc., 275 Shore Drive, Suite 151, Redland, California 94065; its phone number is: (650) 622-0860. The author of the petition is: Walter Johnson; and his email address is: wjohnsonva@lycos.com; and

(b) LiamsDad.org [liamsdad.org/wes/Wesley.shtml]; [liamsdad.org/others/petition.html]. Hosted by Wesley Smith. Mr. Smith's address is: 3215 Ridge View Court, # 104, Woodbridge, Virginia 22192; his phone number is (703) 220-2637; and his email address is liam'sdad@liam'sdad.org;

2. That Rajan Jagannathan shall, in writing, contact all Internet search engines and request that all Internet sites pertaining to this case and alleging child abuse by Janine M. Saxe be immediately re-indexed, and that all such references be deleted, together with all cached information, from the Internet. The Internet search engines to be contacted include, but are not limited to, the following:

- | | |
|------------------|----------------------|
| (1) Altavista; | (7) webcrawler; |
| (2) dogpile; | (8) search.netscape; |
| (3) lycos; | (9) search.com |
| (4) yahoo; | (10) alltheweb; |
| (5) metacrawler; | (11) go.com; and |
| (6) excite; | (12) msn.com; |