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

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

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

Wesley Smith
5347 Landrum Road, #1
Dublin, Virginia 24084
liamsdad@liamsdad.org
Appellant

Robert F. Horan, Jr.
Commonwealth Attorney for Fairfax County
4110 Chain Bridge Road Room 123
Fairfax, Virginia 22030-4047
Counsel for Appellee

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF APPEALS OF VIRGINA

COMES NOW the Defendant and respectfully prays that this court grant a rehearing and rehearing en banc of the decision of this court dated April 7, 2006, and respectfully suggests that the decision is based on outdated court rulings, that Rule 5A:8 has been modified since the rulings relied upon, and the decision conflicts with decisions of the Supreme Court, and that the decision does not adequately account for arguments that would change the outcome of the decision.

As will be shown below, the decision was incorrect in its application of existing law and it is likely that the majority of this Court, sitting en banc, would, or should, disagree with the underlying opinion as a matter of law.

The decision concluded that the Statement Of Facts was not part of the record due to alleged noncompliance with Rule 5A:8, and that the issues could not be decided without a transcript or statement of facts. The Defendant will show that he the dismissal was based on old case rulings before a relevant revision of the rule in 1997, that he did in fact comply with Rule 5A:8, and also that the denial was unconstitutionally based on his indigent status, and that further several of the issues can be decided without a transcript or statement of facts.

Compliance with 'notice' requirement of Rule 5A:8

1. Given that the Defendant was indigent and had filed a motion to have an attorney provided for him it seems improper for the Court to be denying his case due to a supposed technical violation of a rule. Had the trial court respected the Defendants right to counsel and appointed an attorney for him and/or approved his motion for a court reporter this issue wouldn't have come up.

2. It should be noted that the cases relied on in the dismissal were Clary v. Clary,(1993) quoting Mayhood v. Mayhood, (1987), both occurred before the 1997 amendments to Rule 5:11, which changed so that **failure to comply with the notice provision no longer leads to automatic dismissal of the appeal**. Thus if the identical language in Rule 5A:8 was added at the same or later time, it would be appropriate for a new ruling based on the revised rule instead of outdated prior cases.

3. The Decision states:

> The appellant has not established that "a copy of the statement was mailed or delivered to opposing counsel along with a *notice* that the statement will be presented to the trial judge between fifteen and twenty days after filing."
>
> The November 23,2005 letter to the clerk does not constitute a notice of presentation. It is the duty of an appellant, not the clerk, to notice a hearing and to bring the matter before the court within the requisite period. Accordingly, appellant has not established *prima facie* compliance with Rule 5A: 18(c)(1).

4. Given the Statement of Facts and notice submitted to the court contained a certificate of mailing to the prosecuting attorney it appears the court is claiming only about the format of the notice sent to the prosecution rather than if it was sent (and Defendant has proof from the post office if that is at issue).

5. This Court appears to be trying to define this statement in the rule: "… a notice that the statement will be presented…" to require scheduling a hearing with the judge and informing the opposing counsel of the hearing. Such an interpretation is neither reasonable nor consistent.

6. The same rule uses the term 'notice of appeal' and certainly there is no hearing associated with filing a notice of appeal. It also mentions giving 'notice' of filing a transcript. Does this court presume to claim that a hearing is required when a transcript is filed? Such an interpretation of a

hearing being required for a 'notice' with a transcript is not warranted and given the statement of facts is an alternative to a transcript and in the same rule it is reasonable to assume the notice for a transcript is the same type of notice needed for a statement of facts. It also uses 'notice of objection' does that also require a hearing? Both of us scheduling two different hearings about the same thing? That's just plain silly. If the rule required a hearing before a judge it should have so stated. Instead it just claims notice to the opposition upon which the opposition can submit any objections.

7. In its use of the word 'notice' it neither uses capitalization or other emphasis to indicate anything other than its plain English meaning. I did look the word 'notice' up in a legal dictionary and even though it lists multiple lengthy definitions, not a one of them suggested the word 'notice' would imply a hearing.

> "NOTICE. The information given of some act done, or the interpellation by which some act is required to be done."

8. The courts interpretation about a hearing is also unreasonable as in practice it is common practice to submit a document to a judge for signature without a hearing such as in agreed orders or in submitting a petition to precede without fees/costs. The rule provides a procedure for the opposition to object. It is reasonable to conclude that since the opposition did not file an objection to the statement of facts that the judge could simply sign the statement without the burden of a hearing.

9. Using the reasonable and consistent interpretation of 'notice' as inform the Defendant has complied with rule 5A:8 and the court should apply the following:

> "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

10. It important to note that the reason a statement of facts approach was used instead of a transcript was because the Commonwealth refused to provide the Defendant with a court reporter and transcript in spite of his requested the same and in spite of the Commonwealth recognizing his indigent status.

11. Rule 5A:8 does not state how to handle the issue of failure to comply with the notice provision of a

statement of facts it does specifically state how to address failure to comply with the notice provision for a transcript and that the transcript may be stricken if the failure "materially prejudices an Appellee" and that the Appellee shall have the burden of establishing such prejudice. It is reasonable to expect that a similar procedure will be applied to a failure to notice for a transcript of facts. Indeed given that the transcript approach is available to the rich and not the indigent applying a different standard to the statement of facts in this case would be unconstitutional making Rule 5A:8 unconstitutional. Thus a proper interpretation is that a statement of facts will not be stricken from the record unless material prejudice is shown.

12. The prosecution not established that any supposed failure of 'notice' caused it material prejudice it **has not even alleged material prejudice or made any objection whatsoever as to the statement of facts in either its contents or to any of the circumstances surrounding its filing with the court and/or notice.** Not only has no material prejudice been proven or even claimed, none has occurred. The prosecution was provided with the statement of facts and informed of when it would be submitted to the judge. The prosecution who tries cases for a living could reasonably be expected to be aware of Rule 5A:8 and could have filed any objections or schedule any hearings he felt necessary. The prosecution was fully advised the statement of facts was filed and could have taken but the **prosecution chose to do nothing.**

13. Given that the prosecution did not object to the statement of facts or make any claim of material prejudice, the prosecution has waived any objection and the statement of facts should be accepted as part of the record.

14. The position of the ruling that a trial judge can refuse an indigent person's request for an attorney and a court reporter, forcing the untrained person to attempt to file his own statement of facts, then be denied an appeal on technicalities will mean indigent, therefore, enjoy **"only the right to a meaningless ritual, while the rich man has a meaningful appeal."** *Douglas*, 372 U.S. at 358.

15. In Griffin v. Illinois, [351 U.S. 12 (1956)], the Supreme Court held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of

their poverty.

16. This courts interpretation of Rule 5A:8 would violate the Fourteenth Amendment *because it applies only to the indigent*. A non-indigent that can afford a court reporter and is thus allowed to appeal without following a notice requirement unless the prosecution can show material prejudice but an indigent defendant who can't afford a court reporter will have his appeal denied for the very same type of non-compliance even though no material prejudice has occurred. This interpretation makes it more difficult for indigents to appeal, while fully preserving the right of moneyed defendants to appeal. The rule does not require a moneyed criminal defendant to give up his or her right to an appeal on the merits; **only the poor lose their right to a meaningful appeal**.

17. The Supreme Court has also ruled that indigent defendants are entitled to a free transcript see Draper v. Washington, [372 U.S. 487 (1963)]. In this case the Defendant was denied a court reporter with which to make a transcript that has directly led to denying him an appeal on the merits of the case.

Is Statement Of Facts Indispensable To A Determination Of The Issues

18. The decision claimed: "We conclude that a transcript or statement of facts is indispensable to a determination of these issues." While that is the case for some of the questions/issues presented such as relating to the exact questions asked of witnesses, it is not true that a transcript or statement of facts is needed for all of the questions presented.

19. Question I: "Can a trial judge intentionally deprive an indigent defendant of a court record upon which to base an appeal?" The record does contain the Defendants Motion for Court Reporter, which is available for review and makes it clear the Defendant wanted a court reporter and transcript for use in an appeal. Even if a transcript of the trial did exists it is doubtful that it would be of assistance in a decision on this matter other than documenting a court reporter was present and ready.

20. Question II: "Is the defendant by virtue of being a noncustodial parent unworthy of due process, attorney, court reporter?" The record contains the Defendants Motion for Court Reporter and Motion for Attorney. Even if a transcript of the trial did exists it is doubtful that it would be of assistance in a

decision on this matter. The record makes it clear that the Defendant was indigent and requested an attorney to be appointed for him prior to the trial without any subsequent informed waiver of his right to an attorney.

21. Question III: "Does the refusal of the Public Defender's Office to represent the defendant remove the obligation of the court to provide counsel for him, or does the state have an obligation to provide court-appointed counsel?" Again the record contains the Defendants Motion for Attorney and since Judge Finch didn't allow meaningful discussion of it, a transcript of the final trial would not assist in ruling on it. The ruling will need to be based on the Constitution and actions of the Public Defender.

22. The Defendant had a right to effective counsel and the Public Defender did not meet that standard. Dawn Butorac refused to present the viable defense that the Defendant had a right to be on the property and she seemed to not be interested in winning the case – to the point of refusing meaningful discussion prior to trial and insisting on reading the newspaper and drinking coffee immediately prior to the district count trial instead of discussing the case with the Defendant as requested. The question of an indigent Defendants right to court appointed counsel vs. the Public Defenders lack of interest in defending him is an issue that can and must be addressed and which a transcript would not significantly assist in the ruling.

23. It is the Defendants position that the refusal of the public defender did not absolve the court of its responsibility to appoint counsel for the Defendant and that its lack of doing so even when specifically requested is a Due Process violation of Sixth Amendment right to counsel.

24. Had the Public Defender presented the argument that the Defendant had a legal right to be on the property and ensured the judge allowed proper examination of the witnesses and to admit relevant evidence the verdict would likely have been different and if an appeal was needed the public defender could have ensure the rules were filed to get an appeal on the merits rather than a dismissal on technical violations. As the Supreme Court explained in *Douglas*, an indigent appellant forced to proceed without the assistance of appellate counsel "has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 372 U.S. at 358.

> The guarantee of effective assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty. Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. cert. denied, 493 U.S. 872 (1989)
>
> As the Court has recognized, *see Flores-Ortega*, 528 U.S. at 486, a typical indigent plea defendant will be completely incapable of even identifying his or her meritorious appellate issues. Nor will he or she be capable of navigating the minefield of appellate procedure in order to file a coherent application for leave to appeal raising the issue. *See Evitts*, 469 U.S. at 636; *see also Martinez v. Court of Appeal of California*, 528 U.S. 152, 161 (2000)
>
> The Supreme Court has specifically recognized that those procedural hurdles are "hopelessly forbidding" to any layperson filing a first appeal. *Evitts*, 469 U.S. at 636.
>
> Every case to consider the issue had concluded that Douglas guarantees an indigent defendant the assistance of appellate counsel for a first appeal, whether that first appeal is automatic or by leave of the court. See, e.g., Bundy v. Wilson, 815 F.2d 125, 130 (1st Cir. 1987) (concluding that Douglas governs first-tier appeal by leave to New Hampshire Supreme Court); Cabaniss v. Cunningham, 143 S.E.2d 911, 913-914 (Va. 1965) (Douglas guarantees right to counsel for first-tier appeal by leave to Virginia Court of Appeals);

25. Question IV: "Does a trial judge have the ability to deprive a defendant of due process and constitutional rights because he is upset about the defendant's website?" While a transcript or statement would be helpful here the Defendant did submit exhibits as part of his petition that do show the trial judge was upset about his website in an unrelated case and that does bring up the question of why Judge Finch took the case in the first place, and why he didn't recuse himself and let an impartial judge hear the case. Given there is evidence of bias in the record and the presumption of innocent until proven guilty, Judge Finch should need to produce a transcript to show he conducted the trial appropriately rather than the other way around.

26. Question V: " Can a trial judge, without proper jurisdiction, prevent a jury from hearing/seeing evidence that would impact their decision and impeach the testimony of prosecution witnesses?" A complete record would help with this question however the record does contain enough evidence to support a ruling the judge acted improperly.

27. The record shows the Defendant filed a witness subpoena for Mr. Dale school superintendent to testify as to why the Defendant was arrested (which did not match the prosecutions case) and the record shows that the judge quashed the subpoena thus preventing the Defendant from presenting

testimony that should have affected the verdict and violating his right to confront his accusers.

28. The transmittal letter from the trial court only lists 4 Exhibits offered by the Defendant and no exhibits denied. Yet the Defendant did offer as evidence both Audio CD's and transcripts of the actual incident and the District Court trial. Per § vscr-5A:7 Record on Appeal: Contents "(a) Contents. The following constitute the record on appeal from the trial court … (3) each exhibit offered in evidence, whether admitted or not,…" The unofficial transcripts and CD's should be part of the official record and available for consideration by the Appeals Court. The fact that the trial court did not follow § vscr-5A:7 and make them part of the record even when not-admitted goes a long way to support the claim that the judge acted improperly in not admitting them for use as evidence or for impeachment. The record does show several of the exhibits the Defendant only attempted to present once and not the excluded omitted ones the Defendant tried to get admitted repeatedly and in a much more insistence fashion. The complete omission by the trial court is telling. As mentioned in the Petition For Appeal as Exhibit E the unofficial transcripts and actual recordings are available from the Defendant's website where they have been available prior to the trial. Since by § vscr-5A:7 these offered exhibits should have been part of the record, this court could and should use them to rule on this issue.

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

29. Question VI: "Can a trial court convict a defendant when the basic elements of criminal trespass have not been proven?" This question can certainly be ruled on without a transcript or statement of

facts. The Defendant filed a MOTION TO DISMISS prior to trial that the trial court never ruled on. This motion details the elements of criminal trespass and shows that the Defendant had a bona fide claim of right, as defined by O'Banion, as well as an actual right, to be present at his son's school on June 17, 2005 and thus could not be found guilty of trespass. This court could and should rule on the MOTION TO DISMISS without the need for a transcript or statement of facts.

CONCLUSION

For all of the reasons set forth above, this petition for a rehearing and a rehearing en banc must be granted and upon rehearing the decision of the trial courts must be reversed.

Respectfully submitted,
WESLEY C. SMITH
Appellant / Defendant

_____

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 to Fairfax County Commonwealth's Attorney's Office, 4110 Chain Bridge Rd., Room 123, Fairfax VA 22030-4047 on April 21, 2006.

_____
Wesley Smith