NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 2, 2018

LETTER OPINION

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Re: *Commonwealth of Virginia v. Naeem Darab*
Case No. MI-2018-378

Dear Counsel:

This cause is before the Court on appeal from the Fairfax General District Court ("District Court") for consideration of the Defendant's Motion to Dismiss his charge of

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Possession of Marijuana on grounds of Double Jeopardy. The case presents six interrelated issues for resolution, comprehending whether the District Court could vacate its written grant of a nolle prosequi motion. Having considered the evidence presented, the arguments of counsel, and the filings of the parties, and for the reasons as more fully stated herein, this Court thus holds: 1) That the order of the District Court granting the nolle prosequi was final once pronounced and noted in writing on the summons; 2) That this Court is compelled by Due Process to peer behind the mere face of the judgment of the District Court to determine whether this Court has jurisdiction and whether Jeopardy previously attached; 3) That the District Court does not have the authority to abate a previously granted nolle prosequi on its own initiative, either by virtue of its inherent authority or pursuant to Virginia Code § 8.01-677; 4) That the District Court could not reverse its grant of the nolle prosequi pursuant to Rule 1:1 of the Supreme Court of Virginia or Virginia Code § 16.1-133.1, having lost jurisdiction over the terminated proceeding; 5) That even if the District Court otherwise had the authority to reinstate the prosecution, a witness had been placed under oath prior to the entry of the nolle prosequi, and therefore the hearing thereafter constituted a separate trial barred by the Double Jeopardy clause of the United States Constitution; and 6) That the District Court Judge's prompting of the Prosecutor whether he truly wished to terminate the cause with permanence after the Court had placed a witness under oath and granted the nolle prosequi, and the ensuing vacation of the nolle prosequi, constituted an abuse of judicial discretion and an independent ground for the termination of this prosecution.

Consequently, this case must be *dismissed with prejudice* to refiling.

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BACKGROUND

On February 27, 2018, the Defendant appeared for trial in the Fairfax General District Court on a charge of Possession of Marijuana. On April 19, 2018, this Court having the matter before it de novo, considered the written notations from the District Court on the charging summons and heard testimonial evidence presented by Defendant in support of his Motion to Dismiss.

When the case was called for trial in the District Court below, the presiding Judge administered the oath to the arresting police officer appearing as a witness. The Assistant Commonwealth's Attorney ("Prosecutor") then moved the charge be entered nolle prosequi, a motion granted by the District Court. Before departing, Defense Counsel requested the District Court note on the summons upon which Defendant was tried that a witness had been sworn. The Judge marked the nolle prosequi box and interlineated in proximity thereof the words "witness sworn." After having done so, the Judge *sua sponte* addressed the Prosecutor, imparting the Judge's concern that such action might constitute Jeopardy and questioning whether the Prosecutor wished to so proceed. The Prosecutor responded, requesting the nolle prosequi be withdrawn and for trial to recommence.[1] The presiding District Court Judge reversed his prior ruling, scratched out

[1] The Assistant Commonwealth's Attorney prosecuting this cause before the Circuit Court had no involvement in the lower Court, and indeed, as is typical of misdemeanor appeals not involving jury trials in Fairfax, likely first encountered the matter the morning of its presentment before this Court. The Prosecutor conducting the trial in the District Court is no longer employed by the Fairfax Commonwealth's Attorney Office, and so the Assistant could offer little to confirm by stipulation the events as they occurred in the District Court below, necessitating the taking of evidence by this Court. In addition, the Defendant has not alleged, nor does this Court find any bad faith on the part of the Commonwealth or its Assistant in bringing forth for resolution and guidance to this Court the issues raised in this Letter Opinion. After argument on April 19, 2018, and while this matter was pending issuance of this Letter Opinion, the Assistant Commonwealth's Attorney informed this Court on April 30, 2018, that the Commonwealth had reconsidered its position and intended to seek a nolle prosequi of this case. The Commonwealth's motion to nolle prosequi the case in the Circuit Court was thereafter filed on May 1, 2018. As this Court finds the Defendant

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the "nolle prosequi" and "witness sworn" entries on the summons, and proceeded to try and convict Defendant of Possession of Marijuana.

During this Court's hearing on April 19, 2018, testimony was adduced from two witnesses. The charging police officer confirmed credibly and under oath the case had at first been entered nolle prosequi in the District Court, that the Prosecutor changed his position and elected to proceed to trial thereafter, that the officer had been sworn but did not recall if he was given the oath before or after the nolle prosequi, and that all the events of consequence happened before the same presiding District Court Judge. The Defendant testified credibly the officer was sworn before the nolle prosequi was granted, that the presiding District Court Judge mentioned to the Prosecutor, unprompted, the issue of Jeopardy attaching, that the Prosecutor then stood up and told the judge he wished to withdraw the nolle prosequi and proceed to trial, and that the District Court Judge reversed his ruling and thereafter tried the case against the Defendant.

Defense Counsel highlighted in argument it was his request to have the District Court memorialize a witness had been sworn after the charge had been entered nolle prosequi, and after entry of such notation on the summons, which caused the presiding District Court Judge to query the Prosecutor whether he wished to reconsider ending the prosecution at a time when the case had already ended with prejudice. The Defense maintains the District Court Judge, therefore, in effect, tried the Defendant without legal authority to do so. This de novo appeal ensued.

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is legally entitled to a favorable ruling on his Motion to Dismiss for the reasons stated herein, the Court declines to grant the nolle prosequi in lieu thereof.

ANALYSIS

A nolle prosequi is a unique motion available only to the Commonwealth of Virginia ("Commonwealth") and upon grant of the relief, the prosecution is ended. Va. Code Ann. § 19.2-265.3. Generally, the only way the Commonwealth can reinstate a charge which no longer exists is through the exercise of procedural Due Process mandated by statute--namely by securing a new summons, warrant or indictment, and serving it upon the defendant. The ability to modify the terms of an existing order, such as a sentencing order, must be distinguished from the District Court's ability to reinstate jurisdiction which no longer exists. In reaching resolution of this cause, this Court analyzes six distinct issues of application to the viability of the prosecution's case.

I. Whether the order of the District Court granting a nolle prosequi was final.

The District Court Judge undoubtedly entered a nolle prosequi of the charge on the summons, and further, did so after placing a witness under oath. These facts are established by the summons itself, buttressed by unrebutted and credible testimonial evidence. Virginia subscribes to the majority rule that *quasi* records and oral testimony may be used to establish the existence and terms of a final judgment. *Council v. Commonwealth*, 198 Va. 288, 293-94, 94 S.E.2d 245, 248-49 (1956). While it is unclear from the record whether the District Court Judge signed the summons at such time or after delivering a convicting verdict, this Court cannot speculate that the summons remained unsigned after entry of the nolle prosequi. The order of the lower Court contained the formalities of a final written judgment, and the testimonial evidence supports the conclusion the District Court pronounced its judgment and ended the case,

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at least temporarily, by entry of the nolle prosequi. Thus, the entry of the written nolle prosequi was a final order.

II. Whether this Court may peer behind the mere face of the judgment of the District Court to determine whether this Court has jurisdiction and whether Jeopardy attached.

The Commonwealth maintained in argument that this Court may not consider what transpired before the final judgment of conviction since the proceedings in the instant case are de novo. The Commonwealth likely draws its conclusion from the fact the Circuit Court in such matters, generally presides not in contemplation of the proceedings below, but instead in consideration of the evidence anew:

> A trial de novo in the circuit court annuls the judgment of the [district court] as completely as if there had been no previous trial . . . and . . . grants to a litigant every advantage which would have been [available to the litigant] had the case been tried originally in [the circuit] court. A court which hears a case de novo, which disregards the judgment of the court below, which hears evidence anew and new evidence, and which makes final disposition of the case, acts not as a court of appeals but as one exercising original jurisdiction.

Fairfax County Dep't of Family Servs. v. D.N., 29 Va. App. 400, 406, 512 S.E.2d 830, 832 (1999) (internal quotation marks and citations omitted).

Logically, however, not all proceedings in the District Court may be disregarded by the Circuit Court, for questions of jurisdiction and procedural faithfulness to the Constitutions of the United States and of Virginia, and to the governing statutes, overlay the prosecutorial process from institution to conclusion. If this Court blinded itself to the procedural history of the case in the Court below it would be unable to determine if the appeal was jurisdictionally proper in terms of timing and subject matter, and also could thereby enable repeated trials for the same offense in cases were Jeopardy attaches.

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This Court's conclusion is not just its own. Indeed, by way of example, the Court of Appeals of Virginia has peered into the conduct of a general district court to determine whether a de novo conviction in a circuit court was appropriate, even applying the ends of justice exception to enable it to do so, when taking "cognizance of errors though not assigned when they relate to the *jurisdiction of the court over the subject matter*, [which] are fundamental, or when such review is essential to avoid grave injustice or prevent the denial of essential rights." *See Duck v. Commonwealth,* 8 Va. App. 567, 570, 383 S.E.2d 746, 748 (1989) (*citing Cooper v. Commonwealth*, 205 Va. 883, 889, 140 S.E.2d 688, 693 (1965)) (emphasis added). As the instant case involves the essence of whether this Court has jurisdiction to try the case, this Court concludes it must peer beyond the mere face of the amended judgment of the lower Court to determine its regularity and faithfulness to controlling statutory and Constitutional principles.

III. Whether the District Court had the authority to abate the previously granted nolle prosequi by virtue of its inherent authority to correct error or pursuant to Virginia Code § 8.01-677.

It appears from the evidence adduced that the District Court, having granted a nolle prosequi, both orally and in writing, and having sworn a witness prior thereto, thereafter recognized such order of events posed a problem for the Commonwealth should it seek to reinstitute the dismissed charge. Unprompted, the District Court Judge raised the issue with the Prosecutor, who then reconsidered his position and opted to ask the Judge to allow trial to proceed. This raises the initial question whether the District Court could change its written judgment as a correctable error, either inherently or pursuant to Virginia Code § 8.01-677, which states: "For any *clerical error* or *error in fact*

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for which a judgment may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court." (Emphasis added). If any error occurred in this case, however, it was neither clerical nor in fact.

The District Court's

> power to amend should not be confounded with the power to create. *Gagnon* v. *U.S.,* 193 U.S. 451, 48 L. Ed. 745, 24 S. Ct. 510. While the power is inherent in the court, it is restricted to placing upon the record evidence of judicial action which has actually been taken, and presupposes action taken at the proper time. Under the rule the amendment or *nunc pro tunc* entry should not be made to supply an error of the court or to show what the court should have done as distinguished from what actually occurred.

Council v. Commonwealth, 198 Va. at 292, 94 S.E.2d at 248. Similarly, the District Court Judge's action in this case was not the mere correction of a fact but a change in judgment, which is not contemplated to be within the ambit of the authority conferred by Virginia Code § 8.01-677. *See Blowe v. Peyton*, 208 Va. 68, 75, 155 S.E.2d 351, 357 (1967) (change of the plea of not guilty of robbery to a plea of guilty of grand larceny *was a matter of judgment*, and not a "clerical error or error in fact").[2] The District Court, therefore, lacked the authority to vacate its judgment of nolle prosequi under the mantle of correcting error either inherently or pursuant to the authority conferred by Virginia Code § 8.01-677.

IV. Whether the District Court could reverse its grant of the nolle prosequi pursuant to its revisory power under Rule 1:1 of the Supreme Court of Virginia or Virginia Code § 16.1-133.1.

The next question arising is whether the District Court retained the authority to revise its verdict. Generally, the District Court retains revisory power over its judgments,

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[2] Former Virginia Code § 8-485 (1957) reviewed in *Blowe*, was nearly identical to the current Code § 8.01-677 stating: "For any clerical error or error in fact for which a judgment or decree may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court, or by the judge thereof in vacation."

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pursuant to Rule 1:1 of the Supreme Court of Virginia, which states: "All final judgments, orders, and decrees, irrespective of terms of court, shall remain *under the control* of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." (Emphasis added).

The argument Rule 1:1 allowed the trial of Defendant in the District Court seems logically enticing because of its plenary language. A closer reading of the Rule, however, reveals it applies to whether a judgment remains "under the control" of the Court, but does not address whether the District Court always has jurisdiction to exercise such control. The distinction is subtle but of significance. The District Court may exercise control over its orders for twenty-one days, but only when it has not otherwise been divested of jurisdiction to do so. Criminal cases in particular, differ from civil cases, for they are the object of greater statutory and Constitutional protections that may deprive the trial Court of jurisdiction even though the Court otherwise has revisory power if exercised within twenty-one days of the entry of judgment.

As a matter of statutory law the Commonwealth appears to be barred from moving a judge revise a final criminal judgment of conviction in general district courts (and in juvenile and domestic relations district courts). The Commonwealth's right to invoke the revisory power over convictions of adults in courts not of record is controlled not by rule but by statute. Virginia Code § 16.1-133.1 confers upon the District Court the authority to revise a judgment within sixty days from the date of conviction, but *only upon application by the defendant* rather than of the Commonwealth. The statute, in speaking in this area of law, appears to supplant Rule 1:1 in expanding the time limit of the District Court's

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revisory power, but also in restricting who may apply for such relief, and what relief may thereafter be granted:

> *Within sixty days from the date of conviction* of any person in a general district court or juvenile and domestic relations district court for an offense not felonious, the case *may be reopened upon the application of such person* and for good cause shown. Such application shall be heard by the judge who presided at the trial in which the conviction was had, but if he be not in office, or be absent from the county or city or is otherwise unavailable to hear the application, it may be heard by his successor or by any other judge or substitute judge of such court. If the case is reopened after the case documents have been filed with the circuit court, the clerk of the circuit court shall return the case documents to the district court in which the case was originally tried.

Virginia Code § 16.1-133.1 (emphasis added).

The common misconception appears to be general district courts retain the statutory revisory power to alter *sua sponte* a sentence within sixty days of judgment. This common belief appears to be in error. While Virginia Code § 16.1-133.1 does elongate the time of the revisory power of such courts, it does so only when application is made *by the defendant*. In addition, in excluding the Commonwealth from the ability to reopen cases, the statute appears to enjoin completely the Commonwealth from revisiting a judgment of conviction to exact an altered punishment. This Court need not, however, determine the demarcation between the District Court's intersecting revisory authority conferred by rule and statute, for this cause involves not a judgment of conviction, but a nolle prosequi. The statutory authority applies only to *convictions* not matters rendered nolle prosequi. While the District Court may retain its revisory power over criminal sentences within the time frame allotted by Rule 1:1, it is clear the General Assembly did not *statutorily* authorize the District Court, *on application of the Commonwealth*, to vacate the nolle prosequi once entered.

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A corollary question arises whether the District Court's jurisdiction was ended by the nolle prosequi, and whether such jurisdiction could be reacquired by the Court vacating its judgment under Rule 1:1. "The nolle prosequi of the original arrest warrant[] in the general district court terminated the . . . charge[], . . . as if [it] had never existed." *Armel v. Commonwealth*, 28 Va. App. 407, 410, 505 S.E.2d 378, 380 (1998) (internal quotation marks and citation omitted) (holding that appellant was not entitled to a preliminary hearing under Code § 19.2-218 because, following the entry of the nolle prosequi at the preliminary hearing, the original charges were "terminated"). When the charges against an accused are entered nolle prosequi the accused is no longer a person "whose freedom of movement and liberty" are "subject to any legal restriction," because the charges imposing the restrictions no longer exist. *See Moore v. Commonwealth*, 218 Va. 388, 394, 237 S.E.2d 187, 192 (1977). After a nolle prosequi of a charge, "the slate is wiped clean, and the situation is the same as if 'the Commonwealth had chosen to make no charge.'" *Watkins v. Commonwealth*, 27 Va. App. 473, 475, 499 S.E.2d 589, 590 (1998) (*en banc*) (quoting *Burfoot v. Commonwealth*, 23 Va. App. 38, 44, 473 S.E.2d 724, 727 (1996)). That which no longer exists is not amendable or revisable. Once a warrant or summons has been rendered nolle prosequi it no longer exists as a charge, and the Commonwealth must comply with statutory procedural Due Process if it wishes to reinstate such a charge. *See* Virginia Code § 19.2-72.

"Under Virginia procedure a nolle prosequi is a discontinuance which discharges the accused from liability on the [charging document] to which the nolle prosequi is entered. For the prosecution to proceed thereafter for the same offense, a new [charging document] is required." *See Miller v. Commonwealth*, 217 Va. 929, 935, 234 S.E.2d 269,

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273 (1977) (*citing Dulin v. Lillard, Sheriff,* 91 Va. 718, 20 S.E. 821 (1895)). This principle is not only well-settled, but its effect is to release the defendant from the terms of his bond or custody and to place him at liberty. *See Harris v. Commonwealth*, 258 Va. 576, 585, 520 S.E.2d 825, 830 (1999). There are sound common law, statutory and Constitutional reasons underlying such precedent from the Supreme Court of Virginia. A nolle prosequi is a distinctive motion available to the Commonwealth to retreat temporarily from the prosecution of a case for which it might not be ready at a given point in time. As is discernible from the cited authority, the Commonwealth cannot, however, reverse course from its decision to end temporarily the cause, and thereby reinstate the prosecution by having its nolle prosequi vacated. In this situation the Commonwealth is estopped from taking an inconsistent position after it sought a nolle prosequi and was granted such in writing.

There are sensible reasons why a nolle prosequi terminates jurisdiction of the trial Court. A plain rationale for such a rule is that the Commonwealth,

> "having agreed upon the action taken by the trial court, should not be allowed to assume an inconsistent position." *Clark v. Commonwealth*, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979), cert. denied, 444 U.S. 1049 (1980). "No litigant, even a defendant in a criminal case, will be permitted to approbate and reprobate -- to invite error . . . and then to take advantage of the situation created by his own wrong." *Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988), cert. denied, 490 U.S. 1028 (1989); *see also Sullivan v. Commonwealth*, 157 Va. 867, 878, 161 S.E. 297, 300 (1931).

Manns v. Commonwealth, 13 Va. App. 677, 680, 414 S.E.2d 613, 615 (1992). If this Court were to take upon itself the authority to disregard this well-settled principle, one could foresee disorder would follow. The Commonwealth might, empowered by this Court's persuasive authority, assert the option to render a matter nolle prosequi on one day

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because a witness did not appear, whilst returning the next day to reinstate the charges without having to comply with statutory Due Process of obtaining and serving a new summons or warrant. Conversely, defendants who disagree with the reasons for a nolle prosequi could similarly seek to place motions to rehear on the docket and impact the courts' often strained resources. The power to reverse a nolle prosequi could also wreak havoc on Clerks' offices and bondspersons if the motion was granted on a date subsequent to the original judgment. If the Court or bondsperson has refunded posted collateral, a reinstatement of the charge would be *nunc pro tunc* and restore all bond obligations, but now without posted collateral. Such circumstance could also automatically mandate the detention of the accused until collateral was reposted unless the original bond conditions were amended. The wise governing principle is therefore that litigants are entitled to the certainty that a nolle prosequi is not a mere fleeting grant of a temporary end of a prosecution easily reversed by a judge upon the whim of the moment, but instead triggers the statutory Due Process rights attendant to bringing charges anew.

To reinstitute the jurisdiction of the District Court over the Defendant, Due Process required the reinstatement of the case through recharging, assuming for the sake of argument Double Jeopardy was of no bar. The District Court having divested itself of jurisdiction over the Defendant, could not reacquire the same by vacating its divesting order. In the case of a nolle prosequi, the Commonwealth can rebring charges but as the Supreme Court of Virginia has made aptly clear, this must be done by separate process. *See Harris*, 258 Va. at 585, 520 S.E.2d at 830; *Miller*, 217 Va. at 935, 234 S.E.2d at 273; *Dulin,* 91 Va. at 718, 20 S.E. at 821. This Court could not, as the Commonwealth would have it do, deprive the Defendant of such right to be recharged properly without violating

the Due Process clause of the Virginia Constitution. *See* Va. Con. Art. 1 § 11 (1971). Consequently, even if Jeopardy were inapplicable in this cause, the case is not appropriately before this Court for prosecution as a matter of jurisdiction as it was not properly recharged after the entry of the nolle prosequi.

V. Whether even if the District Court otherwise had the authority to reinstate the prosecution after the grant of the nolle prosequi, trial was nevertheless barred by the Double Jeopardy clause of the United States Constitution.

Even if this Court were wrong in holding the District Court could not reinstate the prosecution in the instant case by vacation of the nolle prosequi, the question remains whether Jeopardy nevertheless attached barring the reinstated proceeding. As discussed herein above, a nolle prosequi ends a prosecution. There is no question that the prosecution ended in the District Court, at least at a minimum for a matter of minutes *after* a witness was sworn. When a prosecution is terminated by nolle prosequi and the Commonwealth obtains a new charge thereafter by separate process, the case becomes "two separate prosecutions arising from the same criminal conduct." *See Wright v. Commonwealth*, 52 Va. App. 690, 701, 667 S.E.2d 787, 792 (2008). It is thus the termination of the first process by nolle prosequi which separates it from the second process, albeit arising from the same conduct.

In this case, a witness was sworn in the first process, the prosecution ended, and then a new trial was held after the nolle prosequi was vacated. It is long recognized that Jeopardy attaches in the circumstance where a witness is sworn in a bench trial. *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062 (1975). Where as here the Commonwealth terminated a prosecution after Jeopardy had attached, the nolle prosequi

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acted as an acquittal for Double Jeopardy purposes, and therefore this cause must be dismissed with finality. *Rosser v. Commonwealth*, 159 Va. 1028, 1032 167 S.E. 257, 258 (1933).

VI. Whether the District Court Judge's prompting of the Prosecutor to reconsider his request for the previously granted nolle prosequi and the ensuing vacation of the same, constituted an abuse of judicial discretion.

In this cause, the General District Court granted the Commonwealth's request for a nolle prosequi after having placed a witness under oath. Implicit in the lower Court's action was that it acted for "good cause therefor shown." Va. Code Ann. § 19.2-265.3. The statute is silent as to whether a nolle prosequi can be undone. The two possible justifications for the District Court's action to do so could be the Judge wished to afford the Prosecution the option to change the exercise of his discretion or that the required "good cause" for the grant of the nolle prosequi was not present. Neither of those rationales are a proper legal basis for the District Court's decision. First, the District Court could not because of barring principles of estoppel, countenance a *judicially prompted* reprobating change of heart by the Prosecutor as a basis for vacating the approbated nolle prosequi. As already discussed, the Commonwealth may not exercise its discretion arbitrarily and inconsistently. *See Manns v. Commonwealth*, 13 Va. App. at 680, 414 S.E.2d at 615. Second, the District Court never announced in reversing its original ruling why its previous judgment was in error. The District Court Judge granted the nolle prosequi after first swearing a witness, memorialized this circumstance in writing, realized Jeopardy had attached, and *prompted* the Prosecutor to reconsider whether he wished to end the prosecution with permanence. It is discernable that the Prosecutor's attention

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was redirected to the finality of the cause by the actions of the District Court Judge, though it is unclear whether the Prosecutor felt thereby pressured by the Judge's entreaty to reinstate the prosecution. Irrespective of the motivation of the Prosecutor, to the Defendant and to any members of the public there present, it would have been readily apparent the Judge's actions caused the change in the exercise of prosecutorial discretion, and resulted in the ensuing conviction of the Defendant.

A judge has wide discretion in the conduct of trial. The discretion of a judge is, however, not unfettered, in that at a minimum it is circumscribed by the abuse of discretion standard. "[T]he abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the court does not reverse merely because [the reviewing court] would have come to a different result in the first instance." *Lawlor v. Commonwealth*, 285 Va. 187, 212, 738 S.E.2d 847, 861 (2013) (internal quotation marks and citation omitted). This Court therefore does not supplant its judgment for that of the lower Court as a matter of preference, but rather analyzes the propriety of the actions of the District Court under the applicable legal standard to determine whether the case is properly before this Court as a matter of fealty to the procedural authority conferred on the District Court:

> The three principal ways a trial court abuses its discretion are when (1) it fails to consider a relevant factor that should have been given significant weight, (2) *it considers and gives significant weight to an irrelevant or improper factor*, or (3) it considers all proper factors, and no improper ones, but, in weighing those factors, the court commits a clear error in judgment.

Id. at 213, 738 S.E.2d at 861 (emphasis added).

In the instant case it is apparent the District Court gave significant weight to an irrelevant and improper factor, namely that the Commonwealth's ability to reinstate the

charge in the future was compromised by the administration of the oath to a witness and the subsequent entry of the nolle prosequi. This concern was not voiced at the time by the Commonwealth. The Prosecutor was present for the initiation of trial, the swearing of the witness, and nevertheless chose to end the cause by opting for the nolle prosequi. It is inferable from this chain of events the Prosecutor had no intention to bring the charges anew at the time of his nolle prosequi motion, for this Court cannot assume such Prosecutor was unaware basic well-known precedent already treated in this opinion would bar retrial. The District Court's consideration whether Jeopardy had attached to its written ruling was of no relevance to whether the Commonwealth possessed "good cause" for its request for a nolle prosequi. Even if the District Court found the Commonwealth's discretion to seek the nolle prosequi was ungrounded in "good cause," the time for the District Court to state such concern was *before* it granted the request and divested itself of jurisdiction over the case.

The District Court Judge did not have the discretion to place his thumb on the scale of justice to second-guess the exercise of prosecutorial discretion of the Commonwealth already affirmed by written grant of the nolle prosequi. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Impropriety and the Appearance of Impropriety,* Canon 2 (2000). In this instance, the District Court Judge acted in a manner which may be interpreted as appearing to cross the line between prosecuting and judging the case, a circumstance adverse to promoting public confidence in the impartiality of the Judiciary. The District Court's action of taking the uninvited initiative to cause the nolle prosequi to be vacated and thereafter proceeding to trial without the formal recharging of the offense,

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constituted an abuse of judicial discretion and an independent reason this cause must be dismissed as improperly before this Court.

CONCLUSION

The Court has considered Defendant's Motion to Dismiss his charge of Possession of Marijuana on grounds of Double Jeopardy, a cause on appeal from the Fairfax General District Court. The case presents six interrelated issues for resolution, comprehending whether the District Court could vacate its written grant of a nolle prosequi motion. Having considered the evidence presented, the arguments of counsel, and the filings of the parties, and for the reasons as more fully stated herein, this Court thus holds: 1) That the order of the District Court granting the nolle prosequi was final once pronounced and noted in writing on the summons; 2) That this Court is compelled by Due Process to peer behind the mere face of the judgment of the District Court to determine whether this Court has jurisdiction and whether Jeopardy previously attached; 3) That the District Court does not have the authority to abate a previously granted nolle prosequi on its own initiative, either by virtue of its inherent authority or pursuant to Virginia Code § 8.01-677; 4) That the District Court could not reverse its grant of the nolle prosequi pursuant to Rule 1:1 of the Supreme Court of Virginia or Virginia Code § 16.1-133.1, having lost jurisdiction over the terminated proceeding; 5) That even if the District Court otherwise had the authority to reinstate the prosecution, a witness had been placed under oath prior to the entry of the nolle prosequi, and therefore the hearing thereafter constituted a separate trial barred by the Double Jeopardy clause of the United States Constitution; and 6) That the District Court Judge's prompting of the Prosecutor whether he truly wished to terminate the cause

with permanence after the Court had placed a witness under oath and granted the nolle prosequi, and the ensuing vacation of the nolle prosequi, constituted an abuse of judicial discretion and an independent ground for the termination of this prosecution.

Consequently, this case must be *dismissed with prejudice* to refiling.

The Court shall enter a further order incorporating its ruling herein and until such time, THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER