NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 24, 2020

LETTER OPINION

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Re: *Commonwealth of Virginia v. Scott Bloom*
Case No. MI-2019-1600

Dear Counsel:

This cause is before the Court on Defendant Scott Bloom's Motion to Dismiss or in the Alternative to Order a Bench Trial despite the lack of consent to Mr. Bloom's waiver

of jury trial, by the Commonwealth's Attorney. This case presents two matters of first impression: A) whether a first violation of failure to report suspected child abuse or neglect in contravention of Virginia Code § 63.2-1509 is a criminal offense; and B) whether, even if a criminal offense, the Commonwealth's Attorney is restricted from prosecuting the offense pursuant to Virginia Code § 15.2-1627. The Court finds the following: 1) a first offense of Virginia Code § 63.2-1509 is a criminal violation inasmuch as the General Assembly has manifested such intent in contrast to numerous other provisions, by failing to specify the fine imposed is a "civil" penalty; and 2) the Commonwealth's Attorney has the authority to prosecute a first offense under Virginia Code § 63.2-1509 since (a) the Virginia Constitution provides the Commonwealth's Attorney with plenary authority to prosecute any criminal offense for which a jury may be demanded by the defendant, and (b) a violation of this statute carries a penalty of $500, and Virginia Code § 15.2-1627 grants the Commonwealth's Attorney the discretion to prosecute cases "carrying" a penalty of $500 or more.

Consequently, the Court holds Defendant Scott Bloom's Motion to Dismiss or in the Alternative to Order a Bench Trial must be denied.

BACKGROUND

The Defendant, Scott Bloom, was indicted by a grand jury on December 16, 2019, accused of violating Virginia Code § 63.2-1509. Mr. Bloom is alleged to have failed to report having reason to suspect the abuse or neglect of a child perpetrated by another at the elementary school at which he was the principal. After the indictment, the matter was originally set for a four-day jury trial to begin on June 4, 2020. Due to the pending judicial

emergency product of the COVID-19 pandemic, the jury trial was removed from the docket. It was rescheduled for October, but then again removed by the Court on a preliminary ruling that Mr. Bloom was not eligible to be afforded a jury trial during 2020. As of this time, the Fairfax Circuit Court is operating under a jury trial plan necessitated by the pandemic and approved by the Supreme Court of Virginia, which prioritizes trial for those currently incarcerated for felony crimes, accounting for the stated delay in Mr. Bloom's case. Mr. Bloom is not likely to be allowed a jury trial until at least the autumn of 2021, if then, since he is not currently incarcerated and is not charged with a felony.

Mr. Bloom elected to waive his right to a jury to obtain a more proximate trial date, seeking to clear his name at trial in contemplation of a pending administrative hearing referencing his employment with the Fairfax County Public Schools. The Commonwealth's Attorney refused to consent to the jury waiver. Therefore, Mr. Bloom filed the instant Motion to Dismiss or in the Alternative to Order a Bench Trial. The motion is based on the following arguments: (1) the charge is averred not to be criminal in nature and merely subject to a civil penalty, and (2) that even if the charge were to be determined to be criminal in character, the Commonwealth's Attorney lacks the authority to prosecute this case as it is asserted to be outside the scope of the statutory power granted to the prosecution by the General Assembly. Therefore, Mr. Bloom maintains the charge must be dropped as it encompasses a mere civil penalty not proper for criminal indictment, or in the alternative, that the jury be stricken as the Commonwealth's Attorney is without authority to assert the right to withhold consent to Mr. Bloom's waiver of his right to a jury trial.

ANALYSIS

I. A First Offense Under Virginia Code § 63.2-1509, Encompassing a Penalty Range of "Not More Than $500," Nevertheless Constitutes a Criminal Offense

Virginia Code § 63.2-1509 provides for a penalty for any mandatory reporter who fails to make a report of suspected child abuse within twenty-four hours of suspecting the same. Mr. Bloom, in his capacity as principal of an elementary school, was such a mandatory reporter. A first offense carries a penalty of a fine of "not more than $500." Va. Code § 63.2-1509(D). Subsequent violations carry a penalty of a fine to be "not less than $1,000." *Id.* If the alleged unreported abuse is one of a sexual nature, the offense is classified as a Class 1 misdemeanor, which carries a penalty range of "confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both." *Id.*; Va. Code § 18.2-11.

Virginia Code § 63.2-1509(D) is notably similar but distinct from Virginia Code § 63.2-1606, which concerns failure to report suspected elder abuse. Virginia Code § 63.2-1606(H) states that "any person who fails to make a required report or notification pursuant to subsection A shall be subject to a civil penalty of not more than $500 for the first failure and not less than $100 nor more than $1,000 for any subsequent failures." Va. Code § 63.2-1606(H). This is far from the only instance in the Virginia Code where the fine imposed is labeled as "civil." *See, e.g.,* Va. Code §§ 3.2-5211 (excessive drug residue); 9.1-216 (reduced cigarette ignition propensity); 10.1-200.2 (littering in state parks); 22.1-289.050 (insurance notice requirements for family day homes); 18.2-246.14 (counterfeit cigarettes); 18.2-250.1 (possession of marijuana unlawful); 18.2-265.20 (sale or distribution of dextromethorphan to minors); 18.2-287.5 (reporting lost or

stolen firearms); 18.2-308.01 (carrying a concealed handgun with a permit); 54.1-111 (unlawful acts in professions and occupations); and 58.1-2299.7 (false or fraudulent tax return).

Punishment for an unclassified offense such as the one with which Mr. Bloom is charged "is determined by resorting to the statutory text." *Graves v. Commonwealth,* 294 Va. 196, 201 (2017) (citing Virginia Code § 18.2-14). The numerous instances of the General Assembly's use of the word "civil" in definition of the type of penalty for various violations of law lays bare the great weight to be placed on the notion that where the General Assembly intends to categorize offenses as civil, it knows well how to express such intent with specificity and has indeed done so by inserting that the penalty in question is "civil," even when the subsequent offense might be criminal. *See, e.g.*, Va. Code § 18.2-268.3 (making a first offense of unreasonable refusal of a blood or breath test a civil violation). The General Assembly intentionally defined the penalty in Virginia Code § 63.2-1606(H) as a civil penalty. Whereas, in contrast, the General Assembly omitted the term "civil" in the penalty in Virginia Code § 63.2-1509. The lack of mention of "civil" in the context of this statute, without further indication to the contrary, dictates that the penalty was intended by the General Assembly not to be civil in nature but rather criminal.

Additionally, the legislative history of amendments to the statutory scheme lends to the conclusion of purposefulness on the part of the General Assembly not to define the charge in the instant case as subject to a mere civil penalty. Prior to 2004, Virginia Code § 63.2-1606 stated that anyone who violated the statute "shall be fined not more than $500 . . ." In 2004, the General Assembly amended such Code section specifically to

change the language to a "civil penalty of not more than $500." At that time, the General Assembly did not amend the somewhat analogous sister statute of Virginia Code § 63.2-1509, which Mr. Bloom is charged with violating, to redefine the penalty as "civil." *See* Va. Code § 63.2-1509 (2004). The section was amended in 2012 to add the language of the Class 1 misdemeanor, but the penalty for a first offense was never redefined to be civil in the manner that was prominently done with respect to Virginia Code § 63.2-1606.

Further indication that the offense in the instant case is criminal in nature rather than civil can be discerned with reference to the local law-enforcement officers' responsibility to report to the Central Criminal Records Exchange any arrests pursuant to Virginia Code § 63.2-1509. Virginia Code § 19.2-390(A)(1) states that "[e]very state official or agency having the power to arrest . . . shall make a report to the Central Criminal Records Exchange . . . when any person is arrested on any of the following charges . . . (e) *any offense in violation of § . . . 63.2-1509*." (emphasis added). This section does not limit the duty to report to just the Class 1 misdemeanor offense regarding sexual abuse, but rather it states "any offense" which would include the first failure to report a suspicion of non-sexual child abuse or neglect which carries a penalty of "not more than $500."

The foregoing analysis of the statutory scheme reveals the General Assembly's specific omission of the term "civil" in defining the penalty for a first failure to report under Virginia Code § 63.2-1509, particularly when read in combination with Virginia Code § 19.2-390(A)(1), expresses the intent and notice that a first violation under Virginia Code § 63.2-1509 is a criminal offense.

II. The Commonwealth's Attorney Has the Authority to Prosecute a First Offense Violation of Virginia Code § 63.2-1509(D) in Light of Both the

Statutory Authority Afforded by Virginia Code § 15.2-1627 and the Plenary Prosecutorial Power Conferred by the Virginia Constitution on the Commonwealth's Attorney to Prosecute All Criminal Cases Wherein the Defendant Can Demand Trial by Jury

Having established that a first offense violation of Virginia Code § 63.2-1509(D) is criminal in nature, the Court must next determine whether the Commonwealth's Attorney has the authority to prosecute the offense, and thus block Mr. Bloom's waiver of his right to trial by jury. Mr. Bloom argues that Virginia Code § 15.2-1627 restricts the Commonwealth's Attorney's authority to prosecute the current case even if the penalty is criminal. However, the Virginia Constitution contemplates the plenary authority of the Commonwealth to prosecute criminal cases, even if the plain language of Virginia Code § 15.2-1627 were found not to include the pending charge as a matter which the Commonwealth's Attorney has the discretion to prosecute. In addition, Mr. Bloom's interpretation of Virginia Code § 15.2-1627 would create an absurd result and cannot be the intended meaning on the part of the General Assembly.

The Virginia Constitution states that "[i]f the accused plead not guilty, he may, with his consent *and the concurrence of the Commonwealth's Attorney* and of the court entered of record, be tried by a smaller number of jurors, or waive a jury." Va. Const. art. I, § 8 (emphasis added). This section begins with "[i]n criminal cases . . ." *Id.* If the Commonwealth's Attorney has the power to concur or conversely block the defendant's waiver of jury trial in criminal cases, it stands to reason the Commonwealth's Attorney has the constitutional right to participate in prosecution of such offenses. The Virginia Constitution—the highest written power in our Commonwealth—thus provides the Commonwealth's Attorney with plenary power to prosecute all criminal cases for which

the defendant could potentially demand a jury, whether product of direct indictment or on appeal from a court below.[1] As this Court has found in Part I of this opinion that the penalty provided in Virginia Code § 63.2-1509(D) is criminal, the Commonwealth's Attorney has the authority to prosecute the instant case, product of the plenary power conferred by the Virginia Constitution.

Moreover, Mr. Bloom misreads the scope of the Commonwealth's Attorney's statutory authority to prosecute the offense here in question. Not only does the Virginia Constitution provide the authority for the Commonwealth to prosecute the instant case, but Virginia Code § 15.2-1627(B) gives the Commonwealth the discretion to prosecute this offense.

> The attorney for the Commonwealth and assistant attorney for the Commonwealth . . . shall have the duties and powers imposed upon [them] by general law, including . . . [they] may in [their] discretion, prosecute Class 1, 2, and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine.

Va. Code § 15.2-1627(B). This section does not state that the defendant must be fined at least $500 but states instead the conviction must be of a type that "carries" a penalty "of $500 or more." The instant offense *carries* a penalty of "not more than $500," clearly meaning the Defendant could face a fine up to and including $500. Va. Code § 63.2-1509. The language in Virginia Code § 15.2-1627(B) merely identifies the offenses that may be

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[1] Defendants have the constitutional right to a jury trial in all criminal cases. Va. Con. art. 1 § 8. The Virginia Constitution further states that "[l]aws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction." *Id.* Although prosecutions of misdemeanors may thus be first tried in the lower courts before a judge in lieu of proceeding in the Circuit Courts by direct indictment, upon conviction and in implementation of the constitutional right to demand a jury, defendants are afforded trial de novo as of right before the Circuit Courts. Va. Code § 16.1-136.

prosecuted as a matter of discretion, that is like in the instant case, one where a penalty of $500 could be imposed. The purpose of this statute is to identify those offenses which the Commonwealth's Attorney must prosecute and those that need not be prosecuted as a matter of exercise of prosecutorial discretion. Based on the plain and ordinary reading of the statute, offenses that *carry* a penalty of $500 may be prosecuted by the Commonwealth's Attorney.[2] Therefore, the Commonwealth's Attorney has the discretion whether or not to prosecute this offense. The Commonwealth's Attorney has exercised his discretion to prosecute this matter and has—within the constitutional right of his office[3]—withheld his consent to waive trial by jury.

Even if Mr. Bloom were right that Virginia Code § 15.2-1627(B) does not explicitly identify the authority to prosecute a first violation of Virginia Code § 63.2-1509, which the Court already has found not to be the case, the Commonwealth's Attorney would still not

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[2] Mr. Bloom argues that a penalty of only $1 could be imposed if he is found guilty, and therefore, at the conclusion of the trial it could be possible that the Commonwealth's Attorney did not have the authority to prosecute the case. However, this stance confuses the concept of the Commonwealth's Attorney's authority to prosecute, which identifies the offense that may be charged, with the penalty that may be imposed, which is dictated by the sentencing range the defendant may face if convicted.

[3] Not only does the Commonwealth's Attorney have the right to withhold his consent to Mr. Bloom's waiver of trial by jury, but the Virginia Constitution also provides that the Court must give its consent before Mr. Bloom's waiver of jury trial is given validity. Va. Const. art. I, § 8. The undersigned judge as well as a second judge of this Court have signaled willingness to try this matter as a bench trial. However, the Court cannot compel the Commonwealth's Attorney to waive the constitutional right of his office to insist on a jury trial. The Commonwealth's Attorney asserted his desire to involve the direct voice of the community by trying the cause to a jury. Irrespective of the laudable goal of the Commonwealth's Attorney in giving the community a more direct voice in deciding this case, impaneling a jury is not currently practical in Mr. Bloom's case. He has not been provided a trial date, and it will be months, if not over a year, until Mr. Bloom will be afforded a trial by jury based on the number of pending trials given precedence for incarcerated defendants under the jury trial plan in effect because of the pandemic. The Commonwealth's Attorney is certainly not prevented by this opinion from reevaluating the balance between doing justice for both the community and Mr. Bloom. The question arises if by not giving a *timely* voice to the community, the Commonwealth's Attorney's discretion would be better exercised in favor of a *timely* trial before a judge of this Court. However, such evaluation rests within the sound discretion of the Commonwealth's Attorney, which may by definition not be compelled by this Court.

be statutorily barred from prosecuting unlisted offenses, as the alternative interpretation would create an absurd result. Virginia Code § 15.2-1627(B) states that "[t]he attorney for the Commonwealth . . . shall have the duties and powers imposed upon him by general law, including . . . ." This indicates that the Commonwealth's Attorney's authority is not limited to this Code section, but rather there are other duties imposed by law. For instance, the Code is replete with other civil responsibilities of the Commonwealth's Attorney. *See Kozmina v. Commonwealth*, 281 Va. 347, 350 (2011); *see also* Va. Code §§ 2.2-3126(B) (conflict of interest opinions); 3.2-3947(B) (enjoining pesticide violations); 3.2-4505(2) (apple injunctions); 3.2-4749 (farm produce injunctions); 8.01-622.1(B) (enjoining assisted suicide); 8.01-637(A) (instituting actions *in quo warranto*); 10.1-1320.1 (seeking fines and penalties for Air Pollution Control Board); 18.2-245(b) (enjoining continuing sales frauds in addition to any available criminal sanctions); 18.2-339 (enjoining gambling); 18.2-371.2(E) (civil actions for sale of tobacco or hemp products to minors); 18.2-384(1) (determining obscenity of books); 21-220 (enjoining pollution of tidal waters); 32.1-125.2(B) (medical care facilities and services injunctions); 40.1-49.6(A) (must represent the Commonwealth in civil matters involving enforcement of health and safety labor provisions); 48-8 (prostitution injunctions); 54.1-2964(B) (enjoining violations of laws relating to the disclosure of interest in facilities and clinical laboratories); 54.1-3943 (attorney solicitation injunctions); 55.1-1015(D) (Consumer Real Estate Settlement Protection Act injunctions); 57-23 (appointment or removal of trustees of public cemeteries); 57-25 (condemnation of land to establish local cemeteries); 57-59(C) (charitable solicitation and terrorism injunctions); 58.1-339.10(D) (assisting the State Forester in collecting taxes); 58.1-3354 (correcting assessments); 59.1-68.4 (Home

Solicitations Sales Act and deceptive trade practices injunctions); 62.1-194.1(B) (enjoining obstruction or contamination of waters); and 62.1-194.3(c) (enjoining obstruction or dumping in the Big Sandy River).

The Court need not address whether the Commonwealth's Attorney *must* or *may* prosecute any criminal offenses not listed in Virginia Code § 15.2-1627(B), as that question is not before the Court. However, the Court does find that the Commonwealth's Attorney has the authority to prosecute criminal offenses not listed in Virginia Code § 15.2-1627(B). The General Assembly enacted Virginia Code § 15.2-1627 to underline criminal duties and responsibilities of the Commonwealth's Attorney. Virginia Code § 15.2-1627(B) delineates various offenses that the Commonwealth's Attorney must or may prosecute. Defendant asks this Court to read Virginia Code § 15.2-1627(B) as a limit to the Commonwealth's Attorney's authority and find that they have no authority to prosecute any offense not therein listed. If the Court agreed with Mr. Bloom—however, it does not—that the plain meaning of the statute dictates the Commonwealth's Attorney does not have the authority to prosecute unlisted criminal offenses, the absurdity doctrine would prevent the Court from interpreting the statute in that way.

"[C]ourts apply the plain meaning of a statute unless the terms are ambiguous or applying the plain meaning would lead to an absurd result." *Boynton v. Kilgore*, 271 Va. 220, 227 (2006) (citation omitted). "An absurd result describes situations in which the law would be internally inconsistent or otherwise incapable of operation." *Covel v. Town of Vienna*, 280 Va. 151, 158 (2010) (citations omitted). In illustration of such concept, if Virginia Code § 15.2-1627(B) were to be read as Mr. Bloom would have this Court do, the

Commonwealth's Attorney would have no authority to prosecute Class 4 misdemeanors,[4] which have been a part of the Virginia Code since 1975, though they are unmentioned in the statute.[5] Va. Code § 18.2-9. This would certainly come as surprising news to prosecutors and criminal defense attorneys alike and create an absurd result as it would render part of the statutory scheme "internally inconsistent or otherwise incapable of operation." *Id.*

Mr. Bloom's interpretation of Virginia Code § 15.2-1627(B) would mean that a grand jury has the authority to indict a defendant for a Class 4 misdemeanor, the defendant has a right to have his trial heard by jury, but no representative from the Commonwealth of Virginia has the authority to prosecute the action.[6] *See* Va. Const. art. I, § 8; Va. Code § 19.2-200. Additionally, the Commonwealth's Attorney would have to provide consent to waive a jury trial but then be dispossessed of the authority to prosecute the case. *See* Va. Const. art. I, § 8. As in this case, the grand jury properly indicted Mr. Bloom on the pending charge pursuant to its authority respecting criminal offenses with fines of more than five dollars. Va. Code § 19.2-200. Mr. Bloom sought to waive his right to a jury trial pursuant to the Virginia Constitution, and the Commonwealth's Attorney has withheld his consent pursuant to that same Constitution. It would be absurd and contrary to law to find that the Commonwealth's Attorney cannot prosecute the case.

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[4] A Class 4 misdemeanor carries a penalty range of "a fine of not more than $250." Va. Code § 18.2-11.

[5] It is unclear why the General Assembly did not include an entire class of offenses in the statute, but is perhaps indicative that the focus of the statute is on its mandatory function of compelling prosecutions of felonies, rather than on circumscribing the discretion to prosecute other offenses.

[6] The Attorney General would not have the authority to prosecute the case unless the Governor specifically requested the Attorney General prosecute the offense. Va. Code § 2.2-511.

The above discussion notwithstanding, the Court did not need to resort to the absurdity doctrine in resolution of this case, since, as previously noted, the plain meaning of Virginia Code § 15.2-1627 supports that a first offense under Virginia Code § 63.2-1509 is identified by penalty to be within the prosecutorial discretion afforded the Commonwealth's Attorney, and that even if such were not the case, the Virginia Constitution gives the Commonwealth's Attorney plenary authority to prosecute criminal matters unlisted in the statute. Va. Const. art. I, § 8. Although Virginia Code § 15.2-1627 does include offenses that the Commonwealth's Attorney must prosecute or may prosecute, it does not include a list of offenses that the Commonwealth *may not* prosecute. Therefore, the plain meaning of the statute does not prohibit the Commonwealth's Attorney from prosecuting unlisted offenses. As the Commonwealth's Attorney possesses the authority and discretion to prosecute the offense with which Mr. Bloom is charged, and the constitutional right to require a jury, this Court is without authority to interfere with the Commonwealth's Attorney's current election to prosecute this cause and to do so with resort to a jury.

CONCLUSION

The Court has considered Defendant Scott Bloom's Motion to Dismiss or in the Alternative to Order a Bench Trial despite the lack of consent to Mr. Bloom's waiver of jury trial, by the Commonwealth's Attorney. The Court has evaluated the questions of whether the penalty prescribed in Virginia Code § 63.2-1509 is criminal or civil in nature, and of the scope of authority the Commonwealth's Attorney possesses to prosecute charges stemming from Virginia Code § 63.2-1509. In consideration thereof, the Court

finds as follows: 1) a first offense of failure to report suspected child abuse or neglect in contravention of Virginia Code § 63.2-1509 is a criminal violation inasmuch as the General Assembly has manifested such intent in contrast to numerous other provisions, by failing to specify the fine imposed as a "civil" penalty; and 2) the Commonwealth's Attorney has the authority to prosecute a first offense under Virginia Code § 63.2-1509 since (a) the Virginia Constitution provides the Commonwealth's Attorney with plenary authority to prosecute any criminal offense for which a jury may be demanded by the defendant, and (b) a violation of this statute carries a penalty of $500, and Virginia Code § 15.2-1627 grants the Commonwealth's Attorney the discretion to prosecute cases "carrying" a penalty of $500 or more.

Consequently, the Court holds Defendant Scott Bloom's Motion to Dismiss or in the Alternative to Order a Bench Trial must be DENIED.

This Court shall enter a separate order incorporating its ruling herein, and THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER