



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Elon Wilson v. Commonwealth*, CL-2021-0003146

Dear Counsel:

Our criminal justice system relies upon fundamental rules that act as gears in a machine to provide for the administration of justice. For the mechanism to work properly, each rule interlocks with and propels the next rule forward. When one cog fails, subsequent rules malfunction, causing a breakdown in the judicial machinery. Included in these rules are (1) the requirement of transparent and truthful testimony from police officers and (2) the finality of convictions. The facts presented in this matter highlight a systematic failure that occurs when these two rules grind against each other.

As a result of this clash, this Court must grapple with shaken public confidence and the question of what becomes of a two-year old conviction derived from a police officer's false representations. This Court recognizes the tension between the finality of a final order 21 days after it is entered and the limited exceptions in place to promote the ends of justice and bolster

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the public's faith in court judgments. With these concepts in mind, this Court is presented with the following two questions:

1. Whether Code of Virginia Section 8.01-428(D) applies in criminal matters?
2. If Section 8.01-428(D) applies, whether a fraud was committed upon the court when an officer (1) fabricated the grounds for a stop, (2) listed the false grounds in his police report, and (3) presented the grounds to a magistrate, and the Commonwealth proffered these fabricated grounds to the Court at a plea hearing?

After considering the caselaw, pleadings, and oral arguments presented by Counsel, this Court finds that Section 8.01-428(D) applies to criminal cases and that Petitioner Elon Wilson (Wilson) demonstrated by clear and convincing evidence that a fraud was committed upon the Court in obtaining Wilson's guilty plea. As a result, Wilson's Petition to Vacate Judgment is granted, and his conviction is set aside.

I. BACKGROUND

The following facts demonstrate an alarming chain of events that began with an unlawful traffic stop, continued with a fraudulent police report and misrepresentations to a magistrate and the Commonwealth's Attorney's office, and resulted in Wilson's conviction. An internal investigation and discovery disclosures revealed an extensive trail of fraud and deception.

A. The Unlawful Stop

In the early morning hours of April 3, 2018, Wilson exited a recording studio parking lot in his Jeep Grand Cherokee after picking up his minor cousin, who sat in the passenger seat. Pet'r's Ex. 2. Shortly thereafter, Officer Jonathan Freitag (Freitag) stopped Wilson claiming Wilson "touched" the solid yellow line and had "very dark-tinted windows." Pet'r's Exs. 2, 7. Contrary to his own statements and observations at the stop, his police report stated that Wilson's car "drove over the solid yellow line." Pet'r's Exs. 2-4. Relying upon the false police report, both the Commonwealth's Attorney and presentencing report's official versions noted Wilson was stopped for a traffic violation. *Id.* Upon approaching the vehicle, Freitag informed Wilson and his cousin of the alleged grounds for the stop and asked Wilson, "What took you so long to stop?" Pet'r's Ex. 7. In his report, Freitag noted he "hit [his] siren multiple times signaling for [Wilson] to stop" because of how long it took Wilson to pull over. *Id.* Soon after, Freitag asked Wilson and his cousin if they had any drugs, a dead body, or any other object Freitag should know about. *Id.* He then announced he was going to conduct a search of the vehicle because he smelled marijuana. *Id.* Upon searching the vehicle, Freitag and another officer found drugs and firearms in Wilson's glove compartment. Pet'r's Exs. 2, 7. Wilson and his cousin were arrested. Pet'r's Ex. 7. In addition to the felony drug and gun charges, Wilson was cited for 35 percent illegal window tint and failure to maintain lane control. Pet'r's Ex. 2.

B. Criminal Case Proceeds on False Representations of Officer

Both Wilson and his cousin were charged, but his cousin's charges were nolle prosequied in Juvenile Court. Pet. 2. Based on Freitag's sworn statements, a magistrate issued two felony

warrants against Wilson for possession of a controlled substance with intent to distribute and possession of a firearm while in possession of a controlled substance with intent to distribute. Pet'r's Ex. 1. Wilson's counsel filed a motion to suppress in August 2018, and the court set it for October 9, 2018. Pet. 3. He then withdrew the motion with leave to refile. *Id.* During this period, Wilson's counsel and the Commonwealth began to negotiate a plea deal. *Id.* The Commonwealth gave Wilson a choice. He could proceed with the motion to suppress and preliminary hearing, and the Commonwealth would charge him under the section that carries a five-year mandatory minimum for the firearm possession charge. *Id.* at 3-4. In the alternative, he could waive those pretrial rights and be charged under the section providing only a two-year mandatory minimum. *Id.* If Wilson were charged under the five-year mandatory minimum statute, he would risk consecutive sentences: five years as the mandatory minimum for the firearm possession charge plus a sentence between five and forty years for the drug possession charges.¹ Rather than risk the possibility of a five-year minimum sentence, Wilson entered an *Alford* plea to both charges on April 17, 2019. *Id.* at 5. Several months later, Wilson was sentenced to a total of seven years of incarceration, three years and eleven months of which were suspended. *Id.* at 5.

C. The Deception is Discovered

The Commonwealth and Wilson's counsel rooted their plea negotiations in the understanding that Freitag's police report and sworn statements accurately depicted the April 3rd incident. Unknown to Wilson's counsel and the Commonwealth at the time, video of the stop contradicted Freitag's police report that stated Wilson had crossed the solid yellow line. Pet'r's Ex. 7. It also highlighted other discrepancies in Freitag's report. *Id.*

Wilson's counsel learned in December 2019 that the Fairfax County Police Department Internal Affairs Bureau (Internal Affairs) had been investigating Freitag since September for violating police department policies and filing false reports. Pet. 5-6. Wilson's counsel moved to have the Commonwealth disclose the Internal Affairs investigation. *Id.* at 6. Dash camera video footage revealed Wilson's car never crossed the double yellow line. Pet'r's Ex. 7. Even though Freitag's report read as if Wilson had engaged Freitag in a mini pursuit, only 21 seconds elapsed between the time Freitag signaled Wilson to pull over and when Wilson stopped. Pet'r's Exs. 6-7. The video also demonstrated that Freitag never tested the window tint with a tint meter during the stop, which Freitag later admitted in an interview with Internal Affairs. *Id.* A picture of the vehicle's window tint shows that a passenger is visible in the car through the driver's side window, further challenging Freitag's conclusion that the tint was illegal. Pet'r's Ex. 9. Moreover, Freitag admitted in that same interview that the stop was pretextual. Pet'r's Ex. 6. Freitag also told investigators that a lengthy suppression hearing had occurred and that he remembered the trial in the Wilson case. *Id.* As detailed above, no suppression hearing or trial ever occurred. Pet. 5.

The Internal Affairs investigation further uncovered widespread misconduct by Freitag in numerous traffic stops. Pet. 6-8. Additionally, Internal Affairs discovered Freitag filed false

¹ It should be noted that the Court would have had discretion to suspend any amount of incarceration Wilson might have received for the drug possession charge.

reports to hide that he removed drugs from the property section. *Id.* During the course of the investigation, an Internal Affairs interview with a third party revealed that Freitag admitted to that person that he racially profiled a driver in at least one stop. Pet'r's Ex. 8. As a result of the investigation, the Office of the Fairfax Commonwealth's Attorney dismissed numerous cases where Freitag was the prime witness. Pet. 6-7.

Wilson filed a Petition to Vacate Judgment pursuant to Code of Virginia Section 8.01-428(D)² on March 3, 2021. This Court heard the Petition on April 16, 2021 and took the matter under advisement.

II. ARGUMENTS

A. Wilson's Petition and Oral Argument

Wilson contends that this Court has authority under Code of Virginia Section 8.01-428(D) (2020) to vacate Wilson's conviction because the conviction and sentence were obtained by fraud upon the court. Wilson relies on several cases, *Commonwealth v. Morris*, 281 Va. 70, 77 (2011), *Jefferson v. Commonwealth*, 269 Va. 136, 140 (2005), and *Saunders v. Commonwealth*, 62 Va. App. 793, 799 (2014) to assert that Section 8.01-428(D) applies to criminal cases. Further, Wilson argues that a fraud was committed upon the Court because Freitag misrepresented his reason for stopping Wilson. Moreover, Wilson would not have entered a plea if Wilson's counsel knew about the misrepresentation and if the Commonwealth released the exculpatory evidence.

B. Commonwealth's Response and Oral Argument

In its response, the Commonwealth supported Petitioner's Petition based on the previous actions of the Office of Fairfax Commonwealth's Attorney and the officer's fabricated basis for the stop.³

III. ANALYSIS

A. Code of Virginia Section 8.01-428(D) Applies to Criminal Cases.

At first blush, Code of Virginia Section 8.01, titled Civil Remedies and Procedure, would seem to govern only civil matters.⁴ More specifically, Section 8.01-428 largely addresses default judgments. However, within that section are two subsections that do not reference default judgments at all: Subsection 8.01-428(B) and Subsection 8.01-428(D). Subsection 8.01-428(B)

² This Court notes that a writ of habeas corpus was an available procedure in this case, but Petitioner declined to proceed in such a fashion.

³ This Court declines to consider the arguments presented in the Commonwealth's Response in Support of Defendant's Petition to Vacate Judgment that do not relate to Section 8.01-428. The Commonwealth, however, admitted the allegations in the Petition at the hearing, and the Court will treat the Commonwealth's Response as an Answer to the Petition.

⁴ Under the rules of construction, titles and section headlines often bear no weight on the interpretation of a statute. *See* Va. Code Ann. § 1-217 (2020) (noting section headlines "are intended as mere catchwords to indicate the contents of the sections and do not constitute part of the act of the General Assembly").

applies to clerical mistakes, while Subsection D permits a court to “entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in § 8.01-322, or to set aside a judgment or decree for fraud upon the court.” Va. Code Ann. § 8.01-428(D).

Courts have extensively applied Subsection 8.01-428(B) to criminal matters. *See, e.g., Jefferson v. Commonwealth*, 298 Va. 473 (2020). Thus, despite appearing in the civil remedies and procedure title, the Virginia Supreme Court has not hesitated to use Subsection B to correct sentencing and conviction orders. *Id.*

Yet, Subsection D does not have such a well-worn history. In fact, few criminal cases apply or even reference this subsection. *See Terry v. Commonwealth*, Record No. 170279, 2018 WL 1633489, at *4 (Va. Apr. 5, 2018) (noting a petitioner’s ability to collaterally attack a conviction procured by fraud without referring to Section 8.01-428); *Commonwealth v. White*, 26 Va. Cir. 244, 247 (City of Charlottesville 1992) (noting Section 8.01-428’s application to a criminal matter without discussion). The Court of Appeals made no judgment on whether subsection D applied to criminal cases. *Williams v. Commonwealth*, Record No. 0823-10-1, 2011 WL 5925046, at *1 (Va. Ct. App. Nov. 29, 2011) (reviewing a case brought under Section 8.01-428(D) without deciding whether the section applied because the petitioner failed to timely file his appeal). In another case, a circuit court opinion addressed the possibility of applying Subsection D in a criminal case. *Turner v. Commonwealth*, 90 Va. Cir. 322 (City of Norfolk 2015). That court refused to apply the portion of the subsection pertaining to relief of “a party from any judgment or proceeding” based on the historical use of that remedy in courts of equity.⁵ *Id.* at 323-25. However, the court assumed without deciding that the “fraud upon the court” provision applied to criminal cases. *Id.* at 325.

In the present case, the only applicable clause in Subsection D relates to a fraud upon the court. Therefore, this Court will limit its review to whether that clause applies when challenging criminal convictions. *Williams* and *Turner*, read together, support the interpretation that a petitioner can seek to vacate a conviction due to fraud upon the court. Further, the statute’s language places no bar on its use in criminal matters. It merely permits a “court to entertain at any time an independent action to set aside a *judgment* or decree for fraud upon the court.” Va. Code Ann. § 8.01-428(D) (emphasis added). A judgment is “[a] court’s final determination of the rights and obligations of the parties in a case.” *Black’s Law Dictionary* 1007 (11th ed. 2019). This definition does not limit the use of the term judgment to civil cases only. Rather, it also encompasses criminal cases. The term “judgment of conviction” as used to describe convictions in criminal cases further recognizes the application of the word judgment to criminal cases. *See, e.g., Woodard v. Commonwealth*, 287 Va. 276, 280 (2014). Therefore, the clause applies to criminal cases.

This Court holds that the portion of Subsection D related to fraud upon the court applies to criminal matters because (1) courts previously have applied Section 8.01-428 to criminal

⁵ This Court takes no position on whether a criminal defendant can seek relief from his conviction under this portion of Section 8.01-428(D).

cases, (2) the language in Subsection D does not restrict its use to non-criminal matters, and (3) some courts have tacitly acknowledged its application in setting aside criminal convictions. As a result, this Court must decide whether Wilson's conviction was obtained by a fraud upon the Court.

B. Wilson's Conviction Was Obtained by a Fraud upon the Court

While few courts have discussed the factors in determining whether a party committed a fraud upon the court, "a controlling factor is 'whether the misconduct tampers with the judicial machinery and subverts the integrity of the court itself.'" *State Farm Mut. Auto. Ins. Co. v. Remley*, 270 Va. 209, 217 (2005) (quoting *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 142 (1992)). Under this umbrella, a party must prove by clear and convincing evidence the traditional elements of fraud: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Batrouny v. Batrouny*, 13 Va. App. 441, 443 (1991) (quoting *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308 (1984)).

Additionally, courts distinguish between intrinsic and extrinsic fraud, noting that a party may attack extrinsic fraud directly or collaterally at any time, while intrinsic fraud can only be directly challenged. *Remley*, 270 Va. at 218. "Extrinsic fraud consists of 'conduct which prevents a fair submission of the controversy to the court.'" *Ellett v. Ellett*, 35 Va. App. 97, 100 (2001) (quoting *Jones v. Willard*, 224 Va. 602, 607 (1983)). Examples of extrinsic fraud include bribing a judge or juror, fabricating evidence, preventing adverse witnesses from appearing, intentionally failing to join a necessary party, or misleading an opposing party into thinking a court granted a continuance of a matter. *Id.* at 101; *see also Terry v. Commonwealth*, Record No. 170279, 2018 WL 1633489, at *1, *4 (Va. Apr. 5, 2018) (assuming without deciding that affidavits that made material misrepresentations to obtain warrants are extrinsic fraud upon the court, but affirming a lower court's decision that a party failed to prove fraud by clear and convincing evidence); *Gulfstream Bldg. Assocs. Inc. v. Britt*, 239 Va. 178, 180-81, 184 (1990) (upholding a lower court's finding that a property owner had committed extrinsic fraud on the court when he knowingly offered a different, conflicting plat instead of the one which controlled the property's description); *Khanna v. Khanna*, 18 Va. App. 356, 359 (1994) (holding that a husband committed fraud upon the court when he claimed in an affidavit for an order of publication that he had done due diligence to locate his wife and could not find her); *Batrouny*, 13 Va. App. at 444 (affirming a lower court's order vacating part of a final divorce decree granting child support because the wife committed fraud upon the court by claiming both children were born of the marriage when she knew one of them was not).

Freitag's fabricated grounds for the stop, police report, and warrant made under oath fundamentally tampered with the judicial machinery and subverted the integrity of the court itself. Freitag's misrepresentations tainted every part of the judicial mechanism, from the charges against Wilson, to the magistrate's probable cause determination, to the Commonwealth's plea-bargaining tactics. His false grounds for stopping Wilson contravened a key aspect of the federal Constitution, from which all states derive their power and legitimacy. Freitag's actions betrayed the public's trust in its institutions and the court.

Further, Freitag's actions demonstrably satisfy the fraud elements. Evidence showed that Wilson's vehicle did not cross the solid yellow line, and no tint test was ever done on Wilson's windows to show that the tint was illegal. These grounds for stopping Wilson are a material fact because, without either ground, Freitag's stop was unlawful. Dash camera footage shows that Freitag could not possibly have seen the car cross a solid yellow line. Further, the picture of Wilson's window tint, the time of day, and the area where the stop occurred show that Freitag's claim that the window tint was too dark was problematic at best. Freitag's statements in the Internal Affairs investigation indicate his stated grounds were merely pretext to stop Wilson's vehicle, demonstrating Freitag's intent and knowledge. No other possible justification for his statements exists other than to mislead Wilson, Freitag's superiors, the magistrate, the Commonwealth, Wilson's counsel, and the court. Moreover, Freitag's desire to mislead had the intended effect. Every party in the process, from the magistrate who made the probable cause determination to the judge who accepted Wilson's plea, made decisions in reliance on Freitag's sworn statements and police report. Lastly, the resulting damage to all misled parties is obvious. Freitag's false statements undermined judicial integrity in the public's eyes and left a man sitting in prison for almost two years.

Freitag's misrepresentations, made either directly or vicariously to the court, most closely mirror those in *Khanna* and *Batrouny*. Like those cases, where some crucial piece of evidence sworn under oath or presented to the Court falsely represented the actual nature of the claim, Freitag's fabricated grounds for the stop, police report, and misrepresentations to the magistrate perpetuated, and caused others to perpetuate, a fraud upon the court. Further, like *Terry*, material misrepresentations were made in sworn documents that provided the basis for a magistrate to issue warrants. The key distinguishing factor between *Terry* and the present case is that unlike the conflicting but speculative affidavits in *Terry*, Wilson has shown by clear and convincing evidence that Freitag committed a fraud upon this Court. Without Freitag's false statements, a case against Wilson would never have been brought.

Finally, this Court cannot overlook the coercive contribution of mandatory minimums in procuring this unjust result. Mandatory minimums give prosecutors a powerful negotiating weapon in plea bargaining, one that a defendant can rarely, if ever, defend against. In the present case, the availability of stringent mandatory minimums forced Wilson, who had a five-month-old child at the time, to decide between a minimum of three years of incarceration or face the risk of ten years. The Commonwealth leveraged the preliminary and suppression hearings, both critical pretrial stages, on threat of automatic increases in prison time if Wilson was found guilty. All of this was done without any factfinder reviewing mitigating factors. Such a forceful tool undercuts the constitutional mandate that a plea be voluntary.

Thus, this Court holds that Wilson demonstrated by clear and convincing evidence that his conviction was obtained by an extrinsic fraud on the Court.

IV. CONCLUSION

What occurred in this case exposed a failing in our criminal justice system. When the rules work together, they turn the gears of the judicial machinery towards justice. Instead, this

officer's false representations disrupted the entire mechanism, forcing the rules into conflict. Fortunately, the General Assembly and Virginia Supreme Court provided a legal release valve in Section 8.01-428(D). Yet, this case is a stark warning to parties at every critical juncture of the judicial process that they must remain vigilant to system malfunctions to ensure that justice prevails.

Accordingly, this Court concludes that it has jurisdiction under Section 8.01-428(D) to grant the Petition to Vacate Judgment because another subsection has been extended to criminal cases, some caselaw has suggested its use, and because a conviction is a judgment. Further, Wilson showed by clear and convincing evidence that Freitag's false statements in his police report and to the magistrate perpetuated a fraud upon the court.

For the foregoing reasons, Wilson's Petition to Vacate Judgment is GRANTED. Wilson's conviction is vacated, and he shall be released from prison.

Sincerely,

A large black rectangular redaction box covering the signature of Daniel E. Ortiz.

Daniel E. Ortiz
Circuit Court Judge

Cc: Mark Herring, Attorney General of Virginia
Harold Clarke, Director of the Virginia Department of Corrections

ENTERED this 20 day of April, 2021.



Judge Daniel E. Ortiz

**ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED
IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.**