



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 12, 2021

JUDGES

Mary M. Nerino, Esquire
PRICE BENOWITZ LLP
10505 Judicial Drive, Suite 101
Fairfax, VA 22030
mary@pricebenowitz.com

Re: *Commonwealth of Virginia v. Erick Arestides Estrada*
Case No. MI-2021-147

Dear Ms. Nerino:

The issue before the Court is whether it must dismiss a Reckless Driving charge because the Commonwealth's Attorney declines to represent the Commonwealth of Virginia in the prosecution. However, the Court deems this issue moot because attorneys for the Commonwealth must appear when a judge requests they do so in criminal cases reportable to the Department of Motor Vehicles, such as Reckless Driving. The Court will formally request the Commonwealth's Attorney, or a deputy or assistant, to prosecute the present case.

I. OVERVIEW.

Defendant Erick Arestides Estrada appeared in court June 24, 2021, for trial on a Summons for Reckless Driving (speeding 102 miles per hour in a 55 mile per hour zone), in violation of Virginia Code § 46.2-862(ii). The Office of the Commonwealth's Attorney announced it declined to represent Virginia, pursuant to Virginia Code § 15.2-1627(B). So, no prosecutor was present.

Before any witness was sworn to testify, Mr. Estrada, by counsel, orally made a pretrial motion to dismiss his Summons, arguing that the lack of a prosecutor made the prosecution impossible. He cited to an Opinion Letter of another judge of this Court in support of his motion. *See Commonwealth v. Sangha*, No. MI-2020-565, 2021 WL 1179859 (Va. Cir. Ct. Fairfax, Mar.

OPINION LETTER

29, 2021) (“*Sangha I*”).¹ In addition to the reasons discussed in *Sangha I*, Mr. Estrada argued that the absence of a prosecutor would force the Court to improperly condone the unauthorized practice of law by the police officer who issued the Summons if it did not dismiss the case. Obviously, under the circumstances, no lawyer was present to argue against Mr. Estrada’s motion. The Court took the matter under advisement.

Rather than decide the issue presented, however, the Court *sua sponte* elects to involve the Commonwealth’s Attorney in this prosecution, pursuant to Virginia Code § 46.2-385.²

II. THE COURT MAY COMPEL THE COMMONWEALTH’S ATTORNEY TO REPRESENT VIRGINIA IN A VARIETY OF MISDEMEANOR CASES.

The Commonwealth’s Attorney is generally responsible for prosecuting felonies in Virginia and has discretion to prosecute misdemeanors. VA. CODE ANN. § 15.2-1627(B). The statute reads in relevant part:

The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his 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. He shall enforce all forfeitures, and carry out all duties imposed upon him by § 2.2-3126. He may enforce the provisions of § 18.2-268.3, 29.1-738.2, 46.2-341.20:7, or 46.2-341.26:3.

Id. (emphasis added).

Thus, Commonwealth’s Attorneys must prosecute felonies and may prosecute misdemeanors. However, there is an exception to this general principle. Virginia Code § 46.2-385 reads in relevant part:

If requested by the judge trying the case, attorneys for the Commonwealth and all city and town attorneys whose general duties include the prosecution of offenses which are reportable by the courts to the Department under § 46.2-383, shall appear on behalf of the Commonwealth or the locality in any contested criminal

¹ *Sangha I*’s reasons for dismissing criminal cases where a prosecutor declines to represent Virginia are: (1) law enforcement officers and victims may not assume the duties of the Commonwealth’s Attorney, (2) the Court may not adjudicate cases under separation of powers principles, (3) the Court lacks the authority to call and examine witnesses, and (4) the absence of a prosecutor improperly dodges the government’s *Brady* obligations.

² The Court’s reference to “Commonwealth’s Attorney” or “Commonwealth’s Attorneys” references the Office of the Commonwealth’s Attorney. Virginia Code § 46.2-385 refers to “attorneys for the Commonwealth” and not specifically the Commonwealth’s Attorney.

case wherein a resulting conviction is required to be reported to the Department under § 46.2-383.

Thus, Virginia Code § 46.2-385 carves out a subset of misdemeanors that, on request by the Court in a contested motor vehicle-related criminal case, a Commonwealth's Attorney must appear on behalf of Virginia. The subset of misdemeanors includes misdemeanors where the "resulting conviction is required to be reported to the Department [of Motor Vehicles] under § 46.2-383." VA. CODE ANN. § 46.2-385. In a cascade of statutes, Virginia Code § 46.2-383(A) refers to § 46.2-382, which lists, *inter alia*, "a violation of any law of the Commonwealth pertaining to the operator or operation of a motor vehicle . . ." VA. CODE ANN. § 46.2-382(A)(1). Naturally, a summons for Reckless Driving inherently pertains to the operation of a motor vehicle. As a Class 1 misdemeanor, it is also a crime. VA. CODE ANN. § 46.2-868(A). Thus, the Court may request the Commonwealth's Attorney to prosecute Reckless Driving offenses.

Another judge of this Court, interpreting Virginia Code §§ 15.2-1627(B) and 46.2-385, recently held these statutes to be in conflict. *Commonwealth v. Sangha*, MI-2020-565 (Va. Cir. Ct. Fairfax, May 19, 2021) ("*Sangha I*"). *Sangha II* held that Virginia Code § 15.2-1627(B), being the more specific statute, controlled. This Court disagrees.

First, if the statutes are in conflict,³ "the more specific enactment prevails over the more general." *Eastlack v. Commonwealth*, 282 Va. 120, 126 (2011). This Court finds that Virginia Code § 46.2-385 is the more specific statute of the two. Virginia Code § 46.2-385, unlike § 15.2-1627(B), is within the same title of the Code as the Reckless Driving statute at issue, § 46.2-862. Whereas Virginia Code § 15.2-1627(B) provides the general duties of the attorneys for the Commonwealth, § 46.2-385 directly addresses the specific circumstances where a prosecutor has the duty to prosecute motor vehicle crimes upon request by a court. In this case, Mr. Estrada is charged with Reckless Driving, which is a motor vehicle-related crime, punishable as a Class 1 misdemeanor. VA. CODE ANN. §§ 46.2-862 and 46.2-868. Therefore, Commonwealth's Attorneys have a duty to appear for the hearing upon request by the court.

Second, it is hard to see how § 46.2-385 has any meaning under the holding of *Sangha II*. Virginia Code § 46.2-385 clearly does not apply to motor vehicle-related felony charges, despite the express listing of vehicular manslaughter—a felony—in Virginia Code § 46.2-382(A)(2).⁴ There would be no instance where the court would request the Commonwealth's Attorney's appearance as the office already has a mandatory duty to prosecute all felony charges. *See* VA. CODE ANN. § 15.2-1627(B). The holding in *Sangha II* would similarly render a judge's request for a Commonwealth's Attorney's appearance in Class 1, 2, and 3 misdemeanors futile as it holds that a Commonwealth's Attorney's discretion to prosecute misdemeanors controls over the

³ As discussed herein, the Court disagrees with *Sangha II* on this point and finds the statutes are not in conflict.

⁴ Virginia Code § 46.2-382(A)(2) is within the cascade of statutes detailed above. Virginia Code § 46.2-385 cites to Virginia Code § 46.2-383 which cites to Virginia Code § 46.2-382.

court's request pursuant to § 46.2-385. Therefore, § 46.2-385 would essentially have no meaning or functionality by *Sangha II*'s interpretation.⁵

Third, Virginia Code §§ 15.2-1627(B) and 46.2-385 are not in conflict and can be read in harmony. If one reads the statutes together, § 15.2-1627(B) creates the universe of cases a Commonwealth's Attorney has discretion to leave Virginia unrepresented: misdemeanors. However, § 46.2-385 carves out a small subset of cases wherein the prosecutor must prosecute some misdemeanors: crimes involving motor vehicles, upon the request of a court in a contested case. Although the court does not have to request the presence of the Commonwealth's Attorney, it has the authority to do so. If the court invokes that authority, the Commonwealth's Attorney must appear in this limited subset of cases despite the initial discretion not to prosecute the misdemeanor charge. Under the rules of statutory construction, courts have a duty to interpret statutes to give meaning to every word. *Monument Assocs. v. Arlington Cty. Bd.*, 242 Va. 145, 149 (1991). This Court's reading of the statutes gives meaning to both.

The two statutes can be read together with each given meaning. Even if they were in conflict, Virginia Code § 46.2-385 is more specific than § 15.2-1627(B). The Court disagrees with the conclusion of *Sangha II*. Commonwealth's Attorneys must represent Virginia in Reckless Driving prosecutions if requested to do so by a court.

III. CONCLUSION.

Mr. Estrada enumerated many reasons why he believes the absence of a prosecutor in his case unfairly prejudices him. His concern is unnecessary—the Court can provide a prosecutor to prosecute him as he desires. The Court holds it has authority to request the Commonwealth's Attorney appear on behalf of Virginia in this contested Reckless Driving case.⁶ It will so request and, therefore, the Motion to Dismiss will be denied as moot.

⁵ The only remaining class of offenses is Class 4 misdemeanors. See VA. CODE ANN. §§ 15.2-1627(B), 18.2-8, and 46.2-385 (traffic infractions are not included as they are not covered by § 46.2-385 since traffic infractions are not crimes per Virginia Code § 18.2-8). The duty of Commonwealth's Attorneys to prosecute Class 4 misdemeanors is unclear. Class 4 misdemeanors are wholly omitted from Virginia Code § 15.2-1627(B). This does not affect the Court's analysis for two reasons. First, it is unreasonable to assume the General Assembly chose to lead citizens through a complicated cascade of statutes, starting from Virginia Code § 46.2-385, to create a list of mostly inapplicable crimes when it could have simply stated: the court may request the presence of a prosecutor in motor vehicle-related Class 4 misdemeanors. Second, a "well-settled principle[] of statutory construction [is that] . . . statutes are to be construed so as to avoid an absurd result." *Eastlack*, 282 Va. at 125-26. Finding that Class 4 misdemeanors are the only thing giving Virginia Code § 46.2-385 meaning would create an absurd result: a court could compel the Commonwealth's Attorney to prosecute minor Class 4 misdemeanors but not the more serious misdemeanors more likely to need an active prosecutor. Also, this interpretation would be contrary to the plain language of the statute allowing a court to request the presence of a Commonwealth's Attorney for any crime reportable to the Department of Motor Vehicles under § 46.2-383. In any event, the present case concerns a Class 1 misdemeanor that is a reportable crime under § 46.2-383, which is covered by § 46.2-385.

⁶ However, really, the Commonwealth's Attorney need not prosecute this or any other case charged by a magistrate or law enforcement officer. The Commonwealth's Attorney can move for a dismissal by *nolle prosequi* to terminate an unwanted prosecution. VA. CODE ANN. § 19.2-265.3.

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An appropriate Order is attached.

Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure
cc: Steve T. Descano, Commonwealth's Attorney

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia)	
)	
v.)	MI-2021-147
)	
Erick Arestides Estrada)	
)	

ORDER

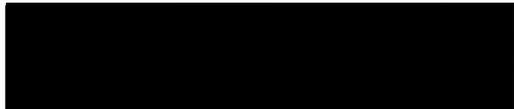
THIS MATTER came before the Court on Defendant Erick Estrada's pretrial motion to dismiss Summons argued by counsel at the June 24, 2021, trial on a Summons for Reckless Driving. And, for the reasons set forth in the accompanying Opinion Letter dated July 12, 2021, which is incorporated herein by reference; it is

ORDERED the Motion to Dismiss is DENIED as moot and the Court requests an attorney for the Commonwealth appear on behalf of the Commonwealth of Virginia at the trial set for September 3, 2021.

THIS CAUSE CONTINUES.

JUL 12 2021

Entered



Judge David A. Oblon

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. OBJECTIONS MUST BE FILED WITHIN 10 DAYS.