IN THE CIRCUIT COURT OF KING GEORGE COUNTY

COMMONWEALTH EX REL HORACE T. MORRISON V. J. SAMUEL DISHMAN

L. M. L. CHICHESTER, ACTING COMMONWEALTH'S ATTORNEY
DESIGNATED BY THE COURT

JOHN W. BUTZNER AND JOSEPH A. BILLINGSLEY, JR.
FOR THE DEFENDANT

OPINION OF THE COURT

On 13 May 1954 Horace T. Morrison as Commonwealth's Attorney filed an ouster petition against J. Samuel Dishman, Sheriff of this county pursuant to Code Section 15-700 in which he charged the Sheriff with malfeasance, misfeasance, incompetency, and gross neglect of official duty, and that he knowingly and willfully neglected to perform duties enjoined upon him by law.

Specifically he charged that

(1) On numerous occasions the Sheriff had failed to summons witnesses after summons had been asked for and placed in his hands.

(2) That in violation of Code Section 19:131 he had failed on numerous occasions to give information of the violation of penal laws to the Commonwealth's Attorney; and that he had refused to promptly investigate crimes, both misdemeanors and felonies and that such investigations as he made were usually incomplete and inefficient.

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(3) That on numerous occasions when testifying as a Commonwealth's witness he had been reluctant to testify to the facts known to him and that on some occasions the Commonwealth's Attorney had had to cross-examine the Sheriff as an adverse witness.

(4) That he had frequently given defense attorneys informa about Commonwealth cases when the Commonwealth Attorney could not get full and complete statements.

(5) That it is very difficult to find the Sheriff either in the day time or at night and that frequently when found he was either asleep or doing unofficial things.

Code Section 15-501 provides in part "The rule shall be returnable in not less than five days or more than ten days. . . . . Upon the return of the rule duly executed unless good cause shall be shown for a continuance or postponement to a later day in the term the case shall be tried on the day named in the rule taking precedence over all other cases on the docket. . ."

Therefore by agreement of all parties the case was set for trial on Saturday 29 May 1954.

On 13 May 1954 the Court entered an order requiring the Commonwealth's Attorney to file a bill of particulars itemizing the instances and dates and cases referred to in the petition and enumerated above, which bill of particulars he was ordered to file on or before 18 June 1954.

On 18 May 1954 the bill of particulars was filed.

On 22 May 1954 the defendant filed an answer in which he denied all of the allegations made against him in the petition.

On 21 May 1954 the Court entered another order requiring the Commonwealth to give certain additional particulars of the charges made against the defendant which was to be filed on or before 12:00 o'clock noon 26 May 1954.

On 18 May 1954 Mr. Morrison called the Judge at his home and told him over the telephone that as he was to be a witness against the Sheriff he was disqualifying himself and he told the Judge that he had examined Code Section 19-4 and that the only person who could designate an attorney to take his place was the Attorney General of Virginia. The Judge told him that it was his recollection that the Code Section authorized him to designate a Commonwealth's Attorney to take his place. He replied that the Judge was mistaken and only the Attorney General had such authority.

After the conversation was concluded the Judge examined Code Section 19-4, and he found that the Section reads as follows: "If the Attorney for the Commonwealth of any Circuit . . . . Court in which a prosecution is pending. . . . is connected by blood or marriage with the accused, or is so situated as to render it improper, in his opinion, concurred in by the Judge, for him to act, ... or for any other reason be unable to act or to attend to his official duties as Attorney for the Commonwealth, then upon the notification by such Attorney for the Commonwealth. . . . which fact shall be entered of record, the Judge of such Court may designate, or such Judge or Clerk of such Court shall certify the same to the Attorney General who shall designate an Attorney for the Commonwealth of some other county or city ... etc."

After reading the statute the Judge talked with the Clerk and directed him to enter an order appointing the Commonwealth Attorney for Stafford County to prosecute the case.

Thereupon Mr. Morrison issued a statement to the newspaper in which he charged that the Judge had misconstrued the statute and that he disagreed with the Judge's interpretation of this statute and he filed an exception in writing in the record to this action of the Court.

On 25 May 1954 the supplemental bill of particulars was filed.

Before the trial began the Commonwealth demanded a jury trial. The defendant opposed this motion.

Code Section 15-503 provides in part:

". . . any such officer proceeded against shall have the right to demand a trial by jury, except in cases when the officer is an appointee, in which case it shall be triable by the court without a jury . . . ."

In Warren v. Commonwealth, 136 Va. 573, 118 S. E. 125 (1923) it was held that a proceeding under the ouster statute was not a civil action and that it was a statutory proceeding which was highly penal and quasi criminal. (136 Va. 594)

In Commonwealth v. Malborn _____, 195 Va. 368, 374, S. E. 2nd (1953) the court said: "Courts have no inherent power to remove a public officer from office. Their authority is derived entirely from the provisions of the pertinent statutes. Code Section 15-500 and 15-501. . . ."

While the proceeding is highly penal in its nature it is neither a misdemeanornor a felony and the statutes relating to juries in misdemeanors and felony cases have no application to such a proceeding as we have here.

Code Section 15-503 is the only Code Section with reference to a jury applicable to such a proceeding. The section authorizes the defendant to demand a jury in certain cases but confers no corresponding right on the Commonwealth.

In Tate v. Ogg 170 Va. 95, 103, 195 S. E. 496 (1938) the court said: "The maxim "EXpressio unius est exclusio alterius", is especially applicable in the construction and interpretation of statutes. Whitehead v. Cape Henry Syndicate 105 Va. 463, 54 S. E. 306."

The case was therefore tried before the Judge without a jury.

Such charges as there are against the Sheriff rest almost wholly on the unsupported testimony of Mr. Morrison.

Reviewing these charges as set forth in the bill of particulars the first charge relates to a case in the Trial Justice/Court styled Commonwealth v. Hundley. Hundley was arrested on a warrant sworn out by the defendant as Sheriff and the accused was bailed for 8 April 1952. Mr. Morrison at 5:15 P. M. April 7, 1952 wrote a letter asking the Trial Justice to issue summons for six witnesses for the 8th and no summons if issued are among the papers in that case. On 8 April 1952 the case was continued to 15 April 1952 at which time the defendant pleaded guilty and was punished for his offense. Although Morrison claimed that the Sheriff did not investigate or report this case although he knew about it, it appears from the evidence that the Sheriff obtained a confession of guilt from this man on the night of the offense was committed and swore out the warrant against him which was executed that night.

Sheriff Dishman testified that no summons had ever been placed in his hands for the witnesses referred to by Mr. Morrison.

If the summons had been issued and placed in the Sheriff's hands they were issued too late for the Sheriff to produce the witnesses in Court the next morning at ten o'clock.

The law is well established that a witness should be summoned a reasonable time before the trial thus it is said in 22 Enc. of Pl. & Pr. 1338. "In the absence of statute or rule of court, "Service should be made in all cases within a reasonable time previous to the trial, and this time should be sufficient to permit the witness to put his own affairs in such order that his attendance upon the court will be as little prejudicial to him as possible."

Thus it was held in Chalmers v. Melville, 1 E. D. Smith(N. Y.) 502 (1852) that the service of a subpoena at noon on a Saturday returnable at half past three in the afternoon of the same day, is unreasonable, unless a longer notice is impracticable.

No explanation was given as to why the Attorney for the Commonwealth waited until 5:15 P. M. of the day before the trial to ask the trial justice to issue subpoenas for the witnesses for ten o'clock the next morning.

The same thing is true of Commonwealth v. Lorraine Thomas. On 4 May 1954 the Attorney requested summons for three witnesses for 10:00 o'clock the next day. The Sheriff had two of the witnesses in Court and he testified that he offered to go for the other witness on the 5th but the Trial Justice told him that the case was to be continued on the motion of counsel for the accused and that it was not necessary for him to go for the witness that day.

It also appears from the evidence that the witness was summoned on 6 May 1954 for the day to which the case had been continued and that no use was made of him as before that day the Attorney for the Commonwealth presented the matter to a grand jury and obtained an indictment for a misdemeanor which this Court on 27 May 1954 certified back to the Trial Justice for trial and which at the time this case was tried had not been tried.

The third charge was that the Commonwealth's Attorney had informed the Sheriff that Alexa Grimes and Aileen Jackson were selling liquor in violation of the law and that the Sheriff told him he would not act unless papers were put in his hands. The Sheriff denied this charge and said that "it was not true."

It is a well known fact that bootleggers will not sell to an officer known to them and that the only way they can be caught is for someone not known to them to be an officer to contact them. When a stranger was sent to them they were caught and convicted by this Court of selling A. B. C. liquor. Mr. Wayland, an

employee of the A. B. C. Board testified that it would have been impossible for any local officer to have obtained the evidence against Grimes and Jackson which the A. B. C. Inspectors who were unknown to them were able to obtain.

On Armistice night 11 November 1953 Morrison testified that Harry T. Berry called the Sheriff and told him that he had shot Morrison's dog which Berry claimed was molesting his sheep. The Sheriff called the Game Warden and Morrison said the Sheriff boasted that he would not answer any more calls from Berry.

The Sheriff testified that Berry called him and asked him to send the Game Warden to him which he did.

That one night about mid-night Morrison called him and told him that Berry was distrubing him by loud yelling and come up there and stop him. That he drove to Morrison's place and found the house dark and quiet and that he found Berry looking after his sheep in a quiet manner and he told Morrison that he was not going to be bothered by any more such calls.

The next charge was that the Sheriff refused to assist two A. B. C. inspectors investigate liquor sales near Owens and that after they had acquired the necessary evidence against Aileen Jackson they met the Sheriff at a filling station on Route 301 and asked him to go with them to Jacksons to execute a search warrant and he refused to go with them.

Mr. Wayland from the A. B. C. Board testified that when they asked the Sheriff to accompany them he said "if you need me I will go with you, but you have enough men to make the search and I am looking for a car reported to me to be operated by a drunk driver.

Mr. Wayland also testified that his failure to go with them occasioned them no inconvenience and that he had always received satisfactory cooperation from the Sheriff.

The next charge was that the home of N. W. Staples had been broken into in the daytime. That Staples had tried to get the Sheriff to investigate the matter to no avail and that the crime was still unsolved. Staples complained that instead of the Sheriff making the investigation himself that he left the investigation to the State Police.

The Sheriff testified that he and the State Police Officers were in the Trial Justice Court when they got the message about Staples home. That Mr. Layne, a State Police Officer, got through with his cases first and he left ahead of the Sheriff to investigate the Staples house-breaking; that he went as soon as he could; that he found Layne and Sergeant Pitzinger of the State Police there and he told Staples that the State Police were in charge of the investigation but that he would help all that he could.

Trooper Layne introduced by the prosecution fully corroborated the Sheriff as to this matter. He testified that he and Sergeant Pitzinger and a special investigator from the State Police investigated the Staples house-breaking and even secured help from the F. B. I. but were unable to solve the crime and that as a result thereof Mr. Morrison sought to have him removed from King George County.

The next charge was that in 1952 Darby's filling station had been broken into and sixteen tires stolen. That the Sheriff turned this matter over to the State Police and that the crime was still unsolved. Darby called by the prosecution testified that the Sheriff promptly came when called; that he did not have the serial numbers on the stolen tires and "I could give nothing by which to trace them."

The next charge was that Col. Cralle's residence had been broken into and that the Sheriff delayed his investigation and when he did so he and a State Trooper made a poor investigation and that the crime had never been solved.

Trooper Layne testified that he and the Sheriff investigated this crime to the best of their ability but they could find no leads at all in the Cralle case.

Mr. Bland the caretaker of the Cralle property testified that he filed his complaint with Mr. Morrison and that the Sheriff and Trooper Layne came down to investigate on 6 March and again on 10 March 1954; that he could not tell them what had been taken and that he did not know when the house had been broken into and that the Sheriff appeared to him to be interested in the case.

According to Morrison the investigation made was very poor. It would appear, however, that the best investigation the officers could make was made.

The next charge was that the Sheriff had numerous reports of criminal activities in a house owned by Missouri Berry and did nothing to properly investigate the matter and finally the

Attorney for the Commonwealth and the State Police got evidence enough to obtain an injunction closing the house.

Mr. Morrison admitted however that before he brought the injunction suit that the Sheriff made an affidavit that the house was a public nuisance (Ex. 3 D). The file in this case which was introduced in evidence showed that the Sheriff and Trooper Layne were among the chief witnesses for the Commonwealth in that case.

Both Layne and the Sheriff testified that although they had received frequent calls to suppress disturbances at that house when they arrived everything was quiet and peaceful and that they had much trouble in getting the evidence on which the injunction suit was based.

In 1951 someone stole from the yard of Henry Fitzhugh's home some cannon balls dating from the war of 1812. Morrison testified that the Sheriff made a very incomplete investigation of the matter and refused to go with him to Washington to investigate the matter. From Henry Fitzhugh's testimony he met a junk truck coming out of his drive and although he could have blocked the road with his car and searched the truck he allowed it to escape only getting the license number on the truck.

Fitzhugh testified that he got someone to call the State Police and that he called the Sheriff that night; that the Sheriff came to his house and discussed it with him.

Morrison had the owner of the truck indicted for the

larceny of these cannon balls and the jury of twelve citizens of this county acquitted this man for which the members of the jury were soundly abused by Mr. Morrison after they had been discharged and the court adjourned.

Fitzhugh testified that he did not ask the Sheriff to go to Washington with him and Morrison. And the Sheriff testified that he did not know about the trip to Washington until they returned.

He also charged that the Sheriff made incomplete or poor investigations in a store breaking in the case of one Weber; in the case of an assualt by James Ford on his wife; and in the case of Harry and Horace Long.

In the case of Weber, Layne testified that the Sheriff called Estes, a State Trooper, and that Estes called him and they called another State Policeman who came down and took some pictures through the efforts of Mr. Farmer a special police officer they got a lead which solved the crime and the man who committed it is in the State Penitentiary.

As to the Ford Case the Sheriff arrested James Ford and on the testimony of his wife and the Sheriff he was convicted of an assualt on her.

Harry and Horace Long were young boys 14 and 15 years of age. Morrison testified that the Sheriff turned the investigation of this matter to Trooper Layne and that Layne made an excellent investigation.

17 September 1952 one James Thomas Merritt died from a stroke of some kind, Morrison claimed that the Sheriff had a private physician from Stafford instead of the coroner for King George County investigate this death and that no report had been made to him of the matter.

Doctor Harris the coroner of King George County testified that the Sheriff called him and that he was sick and that he directed the Sheriff to get Dr. Lee the coroner of Stafford County to view the body and make the necessary investigation. Dr. Lee determined that the man died from a coronary thrombosis and so reported to the Chief Medical Examiner who made no objection to Dr. Lee and his report.

The report to the Attorney for the Commonwealth is required to be made by the coroner and not by the Sheriff- Code Section 19-23.

This charge is typical of the merit of complainants made against the Sheriff.

It is next charged that in the case of Commonwealth v. Earl Thomas Clift the Sheriff repeatedly evaded simply questions as to statements made by the accused. Fortunately there is a stenographic report of this trial which was introduced in evidence in this case. Examination of the Sheriff's testimony shows that this charge is wholly false.

It was further charged that in a case which the Attorney for the Commonwealth is trying to forfeit an automobile the Sheriff had said that he could not confiscate the car. Trooper Layne testified that what the Sheriff said about this car was that he thought that the lien on the car would have to be paid off before the Commonwealth got anything out of the car.

It is also claimed th t the Sheriff had stated that the car is not in his custody etc. The evidence shows that the Sheriff seized the car and delivered it to the custody of the State Police; that theAttorney for the Commonwealth removed the car from this custody and placed it in a private garage. Clearly that is no merit in this contention.

It is complained that in the case of Commonwealth v. Pryor that the Sheriff gave no assistance. In some way this case came before the Circuit Court and the man whose signature was alleged to have been forged by the accused testified that it was his signature which was signed to the note in question and the jury acquitted the accused as it properly should have done. How the Sheriff could have developed evidence for the State, as contended is not perceived. No failure on the part of the Sheriff contributed to the loss of this case. It was no part of his duty to try to get the prosecuting witness to commit prejury.

It was also claimed that on 30 April 1954 that the Attorney for the Commonwealth tried to locate the Sheriff to execute a search warrant and that after searching and calling all over the county for him that he was located in his office asleep. The Sheriff admitted the truth of this charge. Sheriff's frequently work at night and it is not unusual for them to fall asleep in the day time. Certainly no complaint can justly be made that he was in his office at the court house.

It will be observed from some of the earlier charges that the Attorney for the Commonwealth deliberately tries to cause the Sheriff to use the night hours for the purpose of summoning witnesses.

About 1 May 1954 Mr. Morrison testified that he called the Sheriff to discuss some complainants about the sale of liquor. The Sheriff was not at home and could not be located by calling other places, so Mr. Morrison left his number and asked that the Sheriff call him when he came in. The Sheriff testified that he found the number at his telephone; that he did not know whose number it was, but called and found the line busy and without calling again, went to bed; that he saw Mr. Morrison the next day and heard nothing about this matter until this case arose.

The foregoing represents a fair catalogue of the charges brought against the Sheriff.

The only testimony to support them is that of Mr. Morrison who is contradicted as to most of his charges not only by the Sheriff but by nearly all of the Commonwealth's witnesses.

Three outstanding citizens of King George County, Mr. R. A. Peed, the Commissioner of the Revenue for that county for thirty-five years, W. Dandridge Taylor, a former member of the School Board and one of the leading citizens of the county, and W. Thomas Weaver, a leading merchant of the County testified that they were acquainted with Mr. Morrison and had been for a number of years; that they were acquainted with his general reputation for truth and veracity in the community in which he lived and moved and that it was bad and that based on that reputation they would not believe him under oath.

The Commonwealth called Mr. T. D. Richardson who testified that he never heard anything derogatory to Mr. Morrison's reputation; the Commonwealth then called Mr. W. A. Spilman , one of the outstanding citizens of King George who testified that he had been acquainted with Mr. Morrison for a number of years; that he was acquainted with his general reputation in the county for truth and veracity. When asked it if was good or bad he answered "It is bad."

Mr. Morrison admitted on cross examination that he had filed charges with the Governor of Virginia seeking to have him call a Special Session of the General Assembly to investigate and remove the Judge of this county on charges preferred by him; that he wrote Major Woodson of the State Police seeking to have the two State Police Officers stationed in King George County removed from that county based in part on their failure to solve some of the crimes for which this proceeding is brought against the Sheriff. He also admitted that he had filed a Quo Warranto proceeding against the Trial Justice seeking to have him removed from his office.

Mr. Wayland from the A. B. C. Board Staff was called as a Commonwealth's witness. On cross examination he testified that Sheriff Dishman had always cooperated with the A. B. C. investigators 100 per cent as had Mr. Morrison.

Staples complained because the Sheriff left the greater part of the investigation of his house breaking to the State

Police, and similiar complaint is noted above was made by the Commonwealth's Attorney as to other breaking and entry cases.

The weight of the evidence shows that the Sheriff investigated the cases to the best of his ability in conjunction with the State Police Officers stationed in King George County and a Special Investigator from the State Police. Sergeant Pitzinger of the State Police also aided in some of these investigations.

The Sheriff like the average sheriff is not a trained police officer. He is elected by the people and he discharges his office to the best of his ability. If he seeks the aid of the State Police who are trained officers and the specialists of their department who have been trained in the F. B. I. or some similiar school in the lastest and best methods of collecting evidence in criminal cases he is not to be criticized for this. Every police department in the United States has numerous house-breaking crimes which are as yet unsolved.

One cannot read the testimnny of Trooper Layne on cross examination, who is a reputable witness, without being convinced of the frivolity of most of the charges brought against the Sheriff.

Mr. Morrison testified that in the Hundley assualt case the first he heard of it was whem Motely complained to him about it. Frank Motely testified that he never made such a complaint; that Morrison came to see him at Port Royal about the case and that he never made a complaint that the Sheriff was not properly handling the case.

George Mason who assisted in the prosecution of Commonwealth v. Ford in the Circuit Court the only one of some eight or more cases tried between the first Monday in May and 30 June 1953 in which there was a conviction by the jury, testified that the Sheriff's testimony in that case was not vital to the issues involved. He further testified that he had had occasion to work with the Sheriff and from his observation he had always performed his duties as any Sheriff should do.

The Sheriffs of Stafford, Caroline and Westmoreland counties testified that they had helped and been helped by Sheriff Dishman and that they had found him very cooperative and efficient.

Lawrence Mason the County Clerk testified that he had been acquainted with the Sheriff for 37 years and that in his opinion he was a competent sheriff.

In Warren v. Commonwealth, 136 Va. 573, 586, 118 S. E. 125, it is said that "where the thing done by the officer is purely ministerial and the officer is intrusted with no discretion in the premises, if he exceeds his authority and does an act officially for which there is not authority of law, he is guilty of malfeasance in office, although there is an entire absence of any corrupt or evil intention."

"Misfeasance in law is a wrong done; specifically the wrongful performance of a lawful act or the wrongful and improper exercise of lawful authority. New Century Diectionary Vol. L, page 1671; 23 Am. Enc. of L. (2nd Ed) 442.

Nonfeasance in law is the omission of some act which ought to have been performed. 23 Am. Eng. Enc. of L. (2nd E.) 442.

Speaking of the duties of the Sheriff, the Court said in Barbee v. Murphy 149 Va. 406, 416, 141 S. E. 237 (1928) "He must not shut his eyes, or close his ears, to what he might see and hear. He must be active and vigilant, and pursue those who he has cause to believe are violating the law, and if guilty use all proper efforts to secure their conviction. . . . ."

In Commonwealth v. Malborn 195 Va. 368, 379 S. E. (2nd) (1953), a proceeding for the removal of a Sheriff, the Court speaking through Mr. Chief Justice Hudgins said"that the proceeding being highly penal in nature the burden was upon the Commonwealth to prove by clear and convincing evidence that the defendant was guilty of one or more of the charges enumerated in the statute, and set forth in the complaint.

"In 67 C. J. S. Officers Sec. 67 (a) p. 292, it is said: The evidence in support of the complaint must be clear and convincing. IN a proceeding to remove an officer for intoxication, the evidence should be scrutinized, carefully lest the act in question be utilized as a mere means of petty persecution."

In so holding the court approved the giving of the following instructions (195 Va. 378) "The Court instructs the jury that the defendant is presumed as a matter of law, to be innocent of the charges contained in the complaint and this presumption of innocence must be overcome by a prependerance of the affirmative evidence, and must be such as to satisfy the minds of the jury that he is guilty of one or more of the charges mentioned in the complaint."

None of the proof of the charges made against the Sheriff here measure up to the requirements of the law. For the most part they are frivolous and emanate from the mind of a Commonwealth's Attorney, who is a bitter enemy of the Sheriff, and who attributes corrupt or unlawful motives to any one who disagrees with him. For the good of himself and those who he has to deal with it is unfortunate that he is so constituted.

For the foregoing reasons Sheriff Dishman is found not guilty of the charges made against him.

Counsel will prepare the necessary order carrying this opinion into effect.

Leon M. Bazile, Judge
5 June 1957