IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 061719

JOSEPH H. HARRIS, JR.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal from the Court of Appeals of Virginia

OPENING BRIEF OF APPELLANT

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Statement of the Case

Joseph H. Harris, Jr. (Harris or the defendant) was indicted by the Grand Jury of the Circuit Court of the County of Southampton for possession of a concealed weapon by a convicted felon. The case was tried on June 30, 2005, before the Honorable E. Everett Bagnell, sitting without a jury. Mr. Harris was found guilty and the case was continued pending a pre-sentence investigation.

On October 4, 2005, Mr. Harris was sentenced to four years in prison, three years and three months of which were suspended.

An appeal was perfected to the Court of Appeals. On April 20, 2006, the reviewing judge denied the petition. After a hearing before a three-judge panel, the petition was again denied "for the reasons previously stated" by order entered July 21, 2006.

Mr. Harris filed a notice of appeal in the office of the Clerk of the Court of Appeals simultaneously with the filing of this petition in the Clerk's office of this Court. The petition was granted by order entered February 23, 2007.

Assignments of Error[1]

I. The Court of Appeals erred in concluding the evidence was sufficient to support the conviction.

II. The Court of Appeals erred in concluding the circumstances surrounding the possession and intended use of an implement are irrelevant to the determination whether the implement was a proscribed weapon under Va. Code §§ 18.2-308 and 18.2-308.2.

III. The Court of Appeals erred in concluding the appellant's certificates of training and licenses were inadmissible.

IV. The Court of Appeals erred in denying the motion for a writ of certiorari.

Questions Presented

I. Whether the evidence was sufficient to support the conviction.

This question relates to the correspondingly numbered assignment of error.

II. Whether the circumstances surrounding the possession and intended use of an implement are relevant to the determination whether the implement was a proscribed weapon under Va. Code §§ 18.2-308 and 18.2-308.2.

[1] The assignments of error and questions are presented in a different order than in the petition for appeal, but their text is unchanged.

This question relates to the correspondingly numbered assignment of error.

III. Whether the appellant's certificates of training and licenses were admissible.

This question relates to the correspondingly numbered assignment of error.

IV. Whether the Court of Appeals erred in denying the motion for a writ of certiorari.

This question relates to the correspondingly numbered assignment of error.

Statement of the Facts

Deputy Douglas Otmers of the Southampton County Sheriff's Office was on duty on December 14, 2004. App. 12. He arrested Harris for being drunk in public and conducted a search incident to arrest. App. 13. Otmers found a cutting instrument in Harris' pocket. App. 14. At the time Harris told Otmers that he used the instrument for work related purposes. App. 16-17.

Yvonne Ellis, Harris' sister, testified that Harris did utility and carpentry work. App. 18. On December 13, 2004 during the late evening hours, Harris was laying carpet in Ellis's living room. App. 19. At the time he was working, he did not appear to be intoxicated. App. 22. She testified that the instrument found in Harris' pocket belonged to her and was used by Harris when he was laying the carpet. App. 19-20.

Harris testified that he was a skilled tradesman and performed carpentry, dry wall, floor covering, brick mason, electrical and plumbing work. App. 24. He was trained for this work while in the penitentiary. App. 25. He used the instrument found in his pocket for cutting carpet and roof work. App. 33. He stated that he quit working at his sister's house around 10:00 p.m. and got a ride to a friend's house. App. 32. He had put the instrument in his pocket and forgot that he had done so. *Id*.

Summary of Argument

The ruling in this case leads to absurd results. The item in question here is a "box cutter-type razor knife" or "utility knife." These items are ubiquitous as tools. Whether denominated as box cutters; carpet, linoleum or vinyl knives; a handle holding a safety razor blade; or some other type of blade, the object is a common tool.

Under the lower court's interpretations, a worker who puts the knife into his pocket or toolbox is guilty of a crime. So, too, is a purchaser with the bagged item. If a safety razor blade alone is a weapon, then anyone holding the knife in his hand is still guilty of a crime if spare blades are concealed within the handle.

The General Assembly did not intend these absurd results. The statute does not prohibit the carrying of all knives, but only certain knives principally used as weapons. The type of knife at issue here has frequent and legitimate uses. It is a tool. It is not a weapon.

Argument

I. Whether the evidence was sufficient to support the conviction.

Standard Of Review

The question here is whether Commonwealth's Exhibit No. 2 is a weapon that a convicted felon may not carry concealed, under Va. Code § 18.2-308.2 (A), and that any person may not carry concealed, under Va. Code § 18.2-308 (A).

The Court granted a motion in the nature of a petition for a writ of certiorari by order entered October 3, 2006 so the exhibit is lodged with the record in the Clerk's office. Photographs of the exhibit appear in the appendix. App. 57-58.

Whether viewed as a matter of statutory construction or as the application of law to undisputed fact, the standard of review is *de novo*. *Dowling v. Rowan*, 270 Va. 510, 519, 621 S.E.2d 397, 401 (2005), *Phelps v. State Farm Mut. Auto. Ins. Co.,* 245 Va. 1, 10, 426 S.E.2d 484, 489 (1993).

Preservation

In the trial court, in the Court of Appeals and in the petition for appeal in this Court, the question was argued in terms of the circumstances surrounding the possession and intended use of the implement in question. The reason that it was argued in this manner was due to the state of the caselaw existing at the time. Cases such as *Ohin v. Commonwealth*, 47 Va. App. 194, 622 S.E.2d 784 (2005) and *Delcid v. Commonwealth*, 32 Va. App. 14, 526 S.E.2d 273 (2000), required that the trial court must consider the circumstances surrounding possession and use.

After the petition for appeal in this case was filed, the Court decided the case of *Farrakhan v. Commonwealth*, 273 Va. 177, 639 S.E.2d 227 (2007). That decision clarified the analytical framework for deciding if a weapon is proscribed by the statute. In so doing, it noted that "the interpretative history" of the statute has been "problematic." *Id*. at 180, 639 S.E.2d 229. Indeed, trial counsel noted the conflicting nature of the decisions in his argument. App. 69 & 79-80. He did, in fact, argue that the implement is not a weapon but a tool. App. 62.

The less-than-clear state of the law constitutes good cause for any variation in the arguments as made here and those made before the decision in *Farrakhan*. *See Campbell v. Commonwealth,* 14 Va. App. 988, 996, 421 S.E.2d 652, 656 (1992) (the "good cause" exception relates to the reason why an objection was not timely made).

Moreover, because the utility knife is not a weapon proscribed under the statute, Mr. Harris has been convicted for conduct that is not criminal. That justifies invoking the ends of justice exception to the contemporaneous objection rule. *Jimenez v. Commonwealth,* 241 Va. 244, 251, 402 S.E.2d 678, 681 (1991).

Discussion

It is now clear that the first inquiry is whether the item is enumerated in the statute. If it is, then no further inquiry is necessary, and the evidence is sufficient to convict. If it is not, then the second inquiry is whether the item is a weapon. Upon a finding that it is not a weapon, no further inquiry is necessary, and the evidence is insufficient to convict. If it is a weapon, then the final inquiry is whether it is of like kind to any of the enumerated weapons. If it is, then there

may be a conviction. If it is not, then there must be an acquittal. *Farrakhan*, 273 Va. at 182, 639 S.E.2d at 230.

A. The item is not enumerated in the statute.

The trial judge found that the item is a box-cutter. App. 28. He also found that it has two "razor blades," one for use and one as a spare. App. 29-30. The defense posited that it was an "industrial knife" not proscribed under the reasoning in *Ricks v. Commonwealth*, 27 Va. App. 442, 499 S.E.2d 575 (1998). App. 30. The trial court responded that:

> This [item] also has other names, such as a utility knife. It will do a number of jobs, including I assume cutting carpet, if the carpet's not too thick. Yes, sir, this particular instrument has many, many uses, but it is commonly called a box cutter. That's what it is commonly called and used to open boxes, cardboard boxes. That's what it is commonly called.

App. 31.

An inspection of the item reveals that it is made by Stanley and bears the model number 10-499. *See* App. 58. According to the manufacturer, the item is a "utility knife." Bostitch Office Products Catalog at 15 (August 3, 2004).[2] This is just as the trial court found. App. 31.

Neither a "box cutter" nor a "utility knife" is enumerated in the statutes. The inquiry then becomes whether or not the item is a weapon. However, the trial court and the Court of Appeals did not proceed to that stage of the analysis.

[2] The catalog is available at: www.bostitch.com/default.asp?TYPE=STATIC&PAGE=literature/AD4000_OfficeCat.pdf (last viewed April 3, 2007).

Instead, the lower courts relied, App 44-45 & 86, upon a case that held that a "box-cutter [is] squarely within the definitions of 'razor' under Code § 18.2-308(A)." *O'Banion v. Commonwealth,* 33 Va. App. 47, 60, 531 S.E.2d 599, 605 (2000). That is, however, manifestly not so. A box cutter or utility knife is simply not a razor.

The *O'Banion* court quoted the dictionary definition of razor as, "a keen-edged cutting instrument made with the cutting blade and handle in one (as a straight razor) or with the cutting blade inserted into a holder (as a safety razor or electric razor) and used chiefly for shaving or cutting the hair." *Id*. (quoting *Webster's Third New International Dictionary* 1888 (1981)).

The problem with the court's reasoning is that it focused solely on the physical characteristics of the definition and ignored the *raison d'etre* of the tool, namely that it is "used chiefly for shaving." One cannot shave with a box cutter or a utility knife any more than one can shave with a sharp kitchen knife or pocket knife. That is to say, it may be theoretically possible to shave with any of those items in a make shift way, but that does not make them razors. A box cutter or utility knife looks nothing like the objects depicted to illustrate the definition of razor. *See Webster's Third New International Dictionary* 1888 (1981).

The court said that a box cutter is a razor. However, ignoring the generally intended purpose of the object and focusing upon its physical characteristics suggests that what the Court of Appeals was really doing was saying that a box cutter is like in kind to a razor. This was not the proper inquiry. Since a box cutter or utility knife is not a razor, the next inquiry is whether it is a weapon.

1. A razor blade is not a razor.

Before proceeding to the inquiry whether a box cutter or utility knife is a weapon, it should be noted that a portion of the Court of Appeals opinion relies upon a case that held, "'*O'Banion* essentially held that the statute did not simply proscribe a razor blade, but was expansive enough to include an object that incorporated a razor.'" App. 86 (quoting *Sykes v. Commonwealth,* 37 Va. App. 262, 271-272, 556 S.E.2d 794, 799 (2001). Since the opinion in *O'Banion* had focused on the handle, *Sykes* further expanded the word "razor" so as not to require any handle. *Id*. Again, this mode of analysis amounts to the court finding that a razor blade is of like kind to a razor. However, again, the crucial inquiry whether the item is a weapon was skipped. This pattern of expanding the statute beyond its clearly intended objects is exactly the practice disapproved in *Farrakhan.* 273 Va. at 181, 639 S.E.2d at 230.[3]

A razor blade is simply not a razor. It is a part of a safety razor. Moreover, the word "razor" in the statute must be understood to be a straight razor or a cut-throat razor. An electric razor is a razor, but it is plain that the General Assembly did not intend to prohibit the carrying of electric razors. The same may be said of a safety razor. A comparison of the depictions of a straight razor and a safety razor used to illustrate the definition shows that the one is a fearsome cutting in-

[3] Another infirmity in the *Sykes* opinion, and one shared with the opinion in this case, is that both claim that *O'Banion* held that a steak knife was a weapon. *See Sykes*, 37 Va. App. at 272, 556 S.E.2d at 799 & App. 86. In fact, *O'Banion* expressly declined to decide whether a steak knife was a weapon. *See O'Banion,* 33 Va. App. at 60, n.3, 531 S.E.2d at 605, n.3.

strument and the other is not. *See Webster's Third New International Dictionary* 1888 (1981).

This understanding of the terms is also supported historically. It was in 1838 that the concealed weapons statute was enacted. 1838 Va. Acts c. 101. It was not until 1884 that it was amended to include the word "razor." 1884 Va. Acts c. 143. However, at that time, the word "razor" meant "straight razor" or "cutthroat razor" and not safety razor. We know that because safety razors did not come into general usage until later. The safety razor was invented by King Camp Gillette who began producing the razors and blades in 1904. *See*, 5 New Encyclopædia Britannica, p. 268 (15th ed. 1997); *K.C. Gillette Dead; Made Safety Razor*, New York Times, July 11, 1932, at p. 13. It is clear then that the word razor means "razor" means "straight razor" or "cutthroat razor."

2. The blades in the exhibit are not razor blades.

Finally, before proceeding to the inquiry whether a box cutter or utility knife is a weapon, it is worth noting that the exhibit does not actually contain any razor blades. The trial court held that the exhibit contained two razor blades. App. 29-30. Mr. Harris did not object to this. The parties referred to the blades as "razor blades." Nevertheless, the blades are obviously and demonstrably not razor blades.

An inspection of the blades contained in the exhibit demonstrates that they are not razor blades. A safety razor blade is rectangular in shape as the depiction used to illustrate the definition shows. *See Webster's Third New International Dictionary* 1888 (1981). The blades in the exhibit are trapezoidal in shape. That

is to say they have only two parallel sides. Manifestly, the blades in evidence are not razor blades since they will not fit in a safety razor.

In addition, the blades in the exhibit are thicker than razor blades and not as "keen-edged." In other words, one would not want to shave with these blades even if a holder for them could be devised. These blades are not adapted to shaving.

The blades are apparently utility knife blades sold by the manufacturer of the exhibit as part number 11-921 as shown in the manufacturer's catalog. Bostitch Office Products Catalog, *supra* n. 1, at 16.

This argument was not made to the Court of Appeals because the Court of Appeals denied the motion for certiorari. App. 89. Hence the exhibit was not available for observation. In any event, the trial court's finding that the blades are razor blades is not entitled to deference here. The parties are in agreement that the exhibit was recovered from Mr. Harris. This Court is in just as good a position as the trial court to observe and evaluate the nature of the blades. *Phelps,* 245 Va. at 10, 426 S.E.2d at 489.

B. The item is not a weapon.

"Clearly, the General Assembly did not intend all bladed items to fall within the proscription of Code § 18.2-308(A)." *Farrakhan,* 273 Va. at 182, 639 S.E.2d at 230. "[I]n order to be a 'weapon' within the definition of 'weapon of like kind,' the item must be designed for fighting purposes or commonly understood to be a 'weapon.'" *Id*.

A utility knife was designed as a tool and not as a weapon. It is not commonly understood to be a weapon. As was the case with the kitchen knife in *Farrakhan*, a box cutter or utility knife is not a weapon. It is a tool. This ends the inquiry and an acquittal is required. There is no occasion to inquire whether the implement is of like kind to any of the items enumerated in the statute. *Id*.

C. The item is not of like kind to any enumerated in the statute.

Even if the Court were to inquire if the exhibit is of like kind to any enumerated in the statute, the answer is that it is not. It is not long-bladed like a dirk, bowie knife, or machete. It has no way to mechanically deploy the blade as does a switchblade knife or ballistic knife. It has nothing in common with a throwing star as it has but a single point. As previously argued, it is not a razor because you cannot shave with it. Moreover, it is not of like kind to a razor.

The exhibit as a whole has a handle like a straight razor, but the blade is not configured like a straight razor. That blade has an exposed straight edge without a point. *See Webster's Third New International Dictionary* 1888 (1981). The exhibit has *only* a short point with no length of straight edge exposed.

The blade taken out of the exhibit is not of like kind to a razor because it has no handle. The handle is crucial to the ability of the holder to use the instrument, and as to the blade alone, it is absent.

Thus, even if it were proper to inquire into whether or not the exhibit is of like kind to any item enumerated in the statute, it is not.

D. The General Assembly did not intend the result reached below.

Statutes that are "penal in nature . . . must be strictly construed against the state and limited in application to cases falling clearly within the language of the statute." *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). In addition, the accused "is entitled to the benefit of any reasonable doubt about the construction of a penal statute." *Martin v. Commonwealth*, 224 Va. 298, 300-01, 295 S.E.2d 890, 892 (1982). A court must not add to the words of the statute nor ignore the words of the statute and must strictly construe the statute and limit its application to cases falling clearly within the statute. *Turner*, 226 Va. at 459, 309 S.E.2d at 338.

The Court of Appeals has previously noted with respect to this statute, that "[i]t is generally agreed that in using such terms [as those enumerated in the statute], legislatures intend to exclude from concealed weapons statutes innocuous household and industrial knives which may be carried for legitimate purposes." *Richards v. Commonwealth*, 18 Va. App. 242, 246, n.2, 443 S.E.2d 177, 178, n. 2 (1994) (Koontz, J.).

The more recent decisions of the Court of Appeals have seemed to focus more on the danger posed by the implement. However, cases arising under these statutes are “concerned with what is proscribed by statute as unlawful, and not simply what may be dangerous.” *Farrakhan,* 273 Va. at 183, 639 S.E.2d at 230. There can be no doubt that the box cutter or utility knife or blade here in issue is dangerous, but certainly less so than the knife in *Farrakhan*.

Moreover, the decisions reached by the trial court and the Court of Appeals lead to absurd results. Everyone knows that one cannot take box cutter or utility knife or blade onto a commercial airliner or into a courthouse. No one knows that putting such an item in their pocket while working renders them a criminal. The Court was concerned with such results in evaluation the legislative intent of this statute:

> If a chef concealed the same ordinary kitchen knife and carried it to a restaurant, surely it was not the intention of the legislature to criminalize such conduct. The same difficulty occurs with other ordinary items as well. For example, does the office worker who purchases a letter opener and "conceals" it in the bag provided by the store violate the statute because of the item's resemblance to a "dirk?"

Id.

These examples apply directly in this case. Surely the General Assembly did not intend to criminalize the worker who puts the knife into his pocket or toolbox. Nor was it intended that a purchaser leaving a store with a bagged box cutter or utility knife would be guilty of a crime. What is more, the situation is even worse with the exhibit here in issue. If a safety razor blade alone is a weapon as was indicated in *Sykes*, and if indeed the blades in the exhibit are razor blades, then one cannot even pick up this item without committing a crime because of the spare blades concealed within the handle.

The General Assembly did not intend any of this. The item is not a razor. It is not a weapon. It is a common tool. It is not within the ambit of the statute.

II. Whether the circumstances surrounding the possession and intended use of an implement are relevant to the determination whether the implement was a proscribed weapon under Va. Code §§ 18.2-308 and 18.2-308.2.

III. Whether the appellant's certificates of training and licenses were admissible.

Standard of Review

The admissibility of evidence is committed to the sound discretion of the trial court. *Coe v. Commonwealth,* 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986). But "an appellate court should not simply rubber stamp every discretionary decision of a trial court. To the contrary, we have an obligation to review the record and, upon doing so, to reverse the judgment of the trial court if we find a clear abuse of discretion." *Walsh v. Bennett,* 260 Va. 171, 175, 530 S.E.2d 904 (2000). Moreover, "a trial court `by definition abuses its discretion when it makes an error of law.'" *Shooltz v. Shooltz,* 27 Va. App. 264, 271, 498 S.E.2d 437, 441 (1998) (quoting *Koon v. United States,* 518 U.S. 81, 100 (1996)).

Preservation

In the instant case, Harris contended that the object found in his pocket did not meet the statutory definition of a concealed weapon pursuant to Va. Code § 18.2-308.2. During the course of the trial, Harris argued that the trial court should consider the circumstances, intent and purpose of carrying an implement. App. 25 & 41-44. The Commonwealth argued that the purpose for carrying a knife was immaterial. App. 28 & 29.

The trial court seemed to hold that testimony regarding the circumstances surrounding the possession and use of the exhibit were admissible. App. 24.

However, it held that the certificates of training and licenses were inadmissible. App. 25.[4] There is no question, though, that the trial judge thought the circumstances surrounding the possession and use of the exhibit were irrelevant. App. 20 & 30. This was error.

This issue seems to have been squarely presented to the trial court and to the Court of Appeals. However, to the extent that it was not, as previously argued, the recent refinement in the law constitutes good cause for any variation in the arguments as made here and those made before the decision in *Farrakhan*.

Discussion

The Court of Appeals erred in concluding the circumstances surrounding the possession and intended use of an implement are irrelevant to the determination whether the implement was a proscribed weapon under the statute. The Court of Appeals further erred in concluding the appellant's certificates of training and licenses were inadmissible.

"'Evidence is relevant if it tends to prove or disprove, or is pertinent to, matters in issue.'" *Hodges v. Commonwealth,* 272 Va. 418, 436, 634 S.E.2d 680, 690 (2006) (quoting *Clay v. Commonwealth*, 262 Va. 253, 546 S.E.2d 728 (2001)). Plainly the facts that he had been using the knife to lay carpet, that he was carrying the knife as a result of that work, that he commonly used such knives for construction work, that he was taught construction work by the Department of Corrections and that he was licensed to do construction work, all had some tendency to prove that the exhibit was a tool and not a weapon.

[4] The certificates and licenses themselves are not a part of the record.

IV. Whether the Court of Appeals erred in denying the motion for a writ of certiorari.

Harris made a motion for a writ of certiorari in the Court of Appeals. The motion was denied by order entered July 21, 2006. App. 89. This was error.

It would seem that it scarcely requires citation to authority for the proposition that in order to determine the sufficiency of the evidence, it is necessary to review the evidence. Indeed, "[t]he appellate court has the duty to review the evidence…." *Commonwealth v. Duncan,* 267 Va. 377, 384, 593 S.E.2d 210 (2004). The actual exhibit is necessary to the decision when the inquiry is whether the item is enumerated in the statute, whether it is a weapon at all or whether it is of like kind to an enumerated weapon. The Court of Appeals should have granted the motion.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court reverse the judgment of the Court of Appeals with instructions to reverse the judgment of conviction of October 4, 2005 and enter final judgment of acquittal.

Respectfully submitted,

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Certificate

I, Joseph R. Winston, a member of the Bar of this Court, hereby certify:

(a) The appellant is Joseph H. Harris, Jr., defendant below. Appellee is the Commonwealth of Virginia.

(b) The names, addresses, and telephone numbers of counsel are:

Counsel	***Party Represented***
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(c) that on April 4, 2007, I served three copies of the foregoing document on the foregoing counsel, which include all of the parties required to be served, by depositing it in a United States mailbox with first class postage prepaid and addressed as listed above.

(d) Appellant desires to state orally and in person the reasons why the judgment below should be reversed.

_____
Joseph R. Winston