Question	No. of Justices after 6 months	No. of Justices after 1 year
11. If you think the staff work has made a significant difference in this connection, state precisely how:		
"By screening and identifying cases which are patently frivolous."		
"The staff has had more time to devote to cases than law clerks. Therefore their memos are more comprehensive and more carefully prepared."		
"I think any decision made after a thorough review is bound to be a sounder one, thus of higher quality."		
"The in-depth research of the principles of law involved."		
"The staff memoranda have been thorough and well prepared. I have used many as the basis of my opinions. The memoranda are often more thorough and comprehensive than the briefs of counsel."		
"It has increased the speed and efficiency of disposition of cases."		
"It has accelerated the disposition of cases, and has given our law clerks more time to work on cases assigned to them."		
"Staff Memos obviate much research effort and the time saved has enabled us to concentrate more intensely on obscure issues."		

Question	No. of Justices after 6 months	No. of Justices after 1 year
12. In preparing memoranda for me my personal law clerk		
relies exclusively on the statements of fact and law which appear in the briefs	____	____
occasionally checks the accuracy of statements of fact or law by references to the transcript or record and by cite checks	____	____
usually checks the accuracy of statements of fact or law by references to the transcript and by cite checks	6	7
13. The memoranda prepared by my personal law clerk		
involve little or no independent research of the legal issues presented	____	____
sometimes involve independent research of the legal issues presented	3	1
usually involve independent research of the legal issues presented	3	6

APPENDIX D[1]

Note to the reader: The names and dates in this prehearing report have been changed.

Virginia Appellate Justice Project

PREHEARING REPORT

JOHN Q. DOE CONSTRUCTION COMPANY, INC.,

and

SMITH CASUALTY AND SURETY COMPANY,
Appellants

v.

COMMONWEALTH OF VIRGINIA
FRANK A. JONES, JR. COMPTROLLER
Appellee

A CIVIL CASE

on appeal from the

CIRCUIT COURT OF THE CITY OF CENTRAL

Prepared by: Thomas V. Chorey, Jr.
Date Picked up: 3-13-73
Date Returned: 3-29-73

The Hon. A.B. Morris, Jr. presiding

Counsel for Appellant:

[Name and address of counsel are provided here]

Counsel for Appellee:

1. JURISDICTION AND PRESERVATION OF ERRORS

Proper.

2. ISSUE PRESENTED

Whether a valid contract existed between John Q. Doe Construction Company, Inc. and the Commonwealth of Virginia.

3. STATEMENT OF THE CASE AND FACTS

This is an appeal from a judgment holding John Q. Doe Construction Company, Inc. and the Smith Casualty and Surety Company jointly and severally liable for the amount of a bid bond which was properly signed by each of them. The following facts were stipulated by the parties. On August 10, 1971 the Commonwealth, through the Department of Colleges, advertised for bids for the construction and related site development of a building at a Virginia College (P. 9).

The advertisement for bids contained the following provisions:

> 6. Each bidder must deposit with his proposal bid security in the amount and form and subject to the conditions provided in the GENERAL CONDITIONS.
>
> 8. No bidder may withdraw his bid within thirty days after the actual date of the opening thereof.
>
> (Rec. 7).

The GENERAL CONDITIONS contained the following paragraph:

> 8. Bid Guarantee (a) Bids shall be accompanied by a bid guarantee of not less than five percent (5%) of the amount of the bid. . .or a Bid Bond of six percent (6%) of the amount of the bid made payable to the Owner. Such Bid Bond or check shall be submitted with the understanding that it shall guarantee that the bidder will not withdraw his bid during the period of thirty (30) days following the opening of bids; that if his bid is accepted, he will enter into a formal contract with the owner. . .and that the Standard Performance Payment Bond will be given; and that in the event of the withdrawal of said bid within ten (10) days after he has received

notice of acceptance of his bid, the bidder shall be liable to the Owner for the full amount of the Bid Guarantee as representing the damage to the Owner on account of the default of the bidder in any particular hereof.

9. Withdrawal or Modification of Bids. Bids may be withdrawn or modified by written or telegraphic notice received from bidders prior to the time fixed for bid opening. Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal or modification of the bid after it has been opened.

11. Errors in Bid. Obvious errors appearing in any proposal must be brought to the attention of the Owner and be reconciled prior to the award of contract to the successful bidder in accordance with Section 8 of these General Conditions. Any claim for adjustment due to an obvious error will not be considered after the award of contract to the successful bidder.

14. The Award of Contract. (a) Contract will be awarded as soon as possible to the lowest responsible bidder; provided his bid is reasonable and it is to the interest of the owners to accept it (Rec. 52-53).

The bid submitted by Doe contained the following statement:

> The Bidder agrees that this bid shall be good and may not be withdrawn for a period of 30 calendar days after the scheduled date and closing time for receiving bids. (Rec. 10)
>
> Upon receipt of written or telegraphic notice of the acceptance of this bid, Bidder will execute a written contract on contract form attached within 10 days and deliver a surety bond or bonds as required by Conditions of the Contract.
>
> The bid security attached in the sum of five percent of the amount bid (5%) is to become the property of the Owner in the event the Contract and Bond are not executed within the time above set forth, as liquidated damages for the delay in additional expense to the Owner caused thereby. (Rec. 11).

Doe submitted its bid only minutes before 1:00 p.m., September 7, 1971, the time set for the bid opening (Rec., 6; P, 12). Immediately prior to this time, Mr. Harry Cooper, the representative of the Architect, who developed the plans for the state, asked if any bidder had any questions concerning the bid. Mr. C.D. Whipple, Doe's estimator and representative at the bid opening, was present and made no response. Neither was any request made on the part of Doe to withdraw or modify its bid prior to the time fixed for the bid opening (P, 11, 12).

By approximately 1:20 p.m., shortly after the bids were opened, Mr. Whipple, Doe's representative, had learned that their base bid was low by $100,000 due to an arithmetical error. He immediately informed the architect and the College representative of this fact (P, 13). At that time no determination had been made of who would receive the contract award.

On September 21, 1971, Richard Coleman, Associate Director for Administration Finance for the Department of Colleges wrote Doe notifying it that it had been awarded the contract and requesting Doe to sign, attest, and return within ten days six copies of the Form of Agreement and a Performance and Payment Bond (P, 16). Doe refused to execute these documents within ten days after receipt, and wrote a letter to Coleman explaining that its intended bid was $1,400,000 instead of the $1,300,000 figure which it submitted; that a representative of the College was informed of this fact immediately after the bid opening and before any offer of contract was made on behalf

of the College; and that there was consequently no meeting of the minds as to the $1,300,000 figure (P, 16-17).

4. JUDGMENT BELOW

The trial judge, acting without a jury, found the John Q. Doe Construction Company, Inc. and the Smith Casualty and Surety Company jointly and severally liable for the amount of the bid bond (Rec. 128, 129).

5. ANALYSIS AND SUMMARY OF ARGUMENTS

Doe takes the position that although the state is involved here, common law contractual percepts control (Petition for Appeal, 18-19). Noting that both the architect and the Department of Colleges independently recommended rejection of the Doe bid, Doe argues that the legal effect of this recommendation was an acknowledgment that the bid was not its intended offer, and thus it was not bound under the contract (P, 19-20). Doe then reviews the facts of Moffett, et al. v. City of Rochester, 178 U.S. 373 and City of Newport News, etc. v. Doyle and Russell, Inc., et. al., 211 Va. 603, arguing that Moffett should control here since Newport News is distinguishable factually (P, 20-26). Doe points out that in Newport News the relevant clause in the contract was materially different from that in the present controversy (P, 25). Doe further distinguishes the cases relied upon by this Court in Newport News (P, 26-27). Finally, Doe contends that even if Newport News were factually on point,

Moffett should control since it has been accepted in nearly all of the Federal Jurisdictions and in nearly half of the States (P, 28).

Appellee takes the position that this Court is not bound by Moffett since Moffett was a decision of the United States Supreme Court, which merely interpreted New York common law (Brief in Opposition, 3). The Commonwealth notes that in Newport News the issue raised was identical to that raised here and thus that case is directly on point (B, 3-5). Appellee supports this conclusion by noting that no contention is made in this case (as it was in Newport News) that there were obvious errors appearing on the submitted bids (B, 5).

In Newport News v. Doyle and Russell, Inc., 211 Va. 603 (1971) (I'Anson, J.), the facts were strikingly similar to those in the case at bar. There, a clerical error in the proposed bid resulted in making Doyle and Russell's bid low by $100,000. It was not until the bids were opened that the mistake was discovered. At that time, the contractor immediately advised the City officials and sent back-up sheets to prove that the amount submitted in the bid was a mistake. Eleven days later the City accepted Doyle and Russell's low bid.

In the Russell case the official bid form contained the following provisions:

> Proposals may be withdrawn before the date of opening thereof, but no Bidder may withdraw his Proposal within 30 days after the date of opening bids.

***

> No plea of mistake in the bid shall be available to the Bidder for the recovery of his deposit or as a defense to any action based upon the neglect or refusal to execute a contract.

On the basis of these facts, this Court held that the quoted language was dispositive and thus it was within the contemplation of the parties that the risk of mistake in the bid was to be borne by the bidder (Id., 607).

In the case at bar the pertinent language is as follows:

> Withdrawal or modification of bids -- Bids may be withdrawn or modified by written or telegraphic notice received from Bidders prior to the time fixed for bid opening. Negligence on the part of the Bidder in preparing the bid confers no right for the withdrawal or modification of the bid after it has been opened.

The evidence shows that Doe made no attempt to withdraw or modify its bid until after the bid was opened. Thus by the terms of its own contract and in accordance with Russell, Doe had no right to withdraw or modify the bid as it alleges.

There is no claim on behalf of Appellant that the bid contained an obvious error. For this reason, paragraph 11 of the General Conditions is inapplicable. Furthermore, even if errors were obvious, it was the bidder's (Doe's) responsibility to discover them prior to opening.

Moffett v. City of Rochester, 178 U.S. 373 (1900), relied on by Appellant, is not dispositive since it appears to be most realistically viewed as an interpretation of the New York common law at that early point in time. The reasoning of the

Russell case is entirely sound and this Court's resolution of the issue appears to be controlling in the present case.

6. CONCLUSION AND RECOMMENDATION

The writer believes the appeal should be denied. However, due to the conflict in authority on the issue and the substantial amount of money involved, it is felt that oral argument should be held.

APPENDIX D[2]

Note to the Reader: The names in this prehearing report have been changed. After this prehearing report was completed, the United States Supreme Court decided Schneckloth v. Bustamonte, 412 U.S. 218 (1973) which is relevant to the factual situation of this case, but which would not dictate a contrary result.

VIRGINIA APPELLATE JUSTICE PROJECT

PREHEARING REPORT

JOHN DOE	Appellant	A CRIMINAL CASE ON APPEAL from the CIRCUIT COURT OF THE CITY OF CENTRAL
v.		
COMMONWEALTH OF VIRGINIA	Appellee	

PREPARED BY: Timothy Oksman
DATE RECEIVED: 5-9-73
DATE RETURNED: 5-31-73

The Honorable A. B. Morris presiding

COUNSEL FOR APPELLANT:

COUNSEL FOR APPELLEE: [name and address of counsel are provided here]

1. JURISDICTION AND PRESERVATION OF ERROR

   Proper.

2. ISSUES PRESENTED

   A. Sufficiency

   B. Whether the purple shirt was obtained through an unreasonable search and seizure

   C. Whether it was proper to give Instruction 5 to the jury

   D. Whether it was error to admit into evidence the photographic identification of Appellant

3. STATEMENT OF FACTS

This case is a direct appeal from a conviction of attempted rape.

At approximately 9:00 a.m. on the morning of July 3, 1972, the Prosecutrix, Alice B. Smith, age 19, and her cousin, Mary Jones, age 12, were walking towards downtown Central (Transcript, 11, 47). The Prosecutrix's two aunts were following some distance behind (T, 8-9). When the girls passed by some woods, the Appellant allegedly ran out of the woods, grabbed the Prosecutrix, threatened her with a knife, and forced her into the woods where he raped her and then fled (T, 12-15, 32-34). She stated that her assailant was wearing a purple button-up shirt with a big, pointed collar and a tear on the left shoulder (T, 17).

On August 10, 1972, Appellant was placed under arrest following his identification by the Prosecutrix in a chance encounter at a local shopping center (T, 51-52). When the Appellant was taken to jail, his clothing was taken for analysis and for possible use as evidence, and he was given some "fairly ragged prison clothing" (Transcript of Suppression Hearing, 27-28, 35). Appellant was told that he was going to court the next day and he complained that he had no appropriate clothing (T of S.H., 8). Appellant described the clothing the officers provided him as follows:

A. "Well, there was a pair of brown penitentiary pants, the legs was ripped out of them and all,

and the shirt was -- looked like it was about a 17. It was too big, and it was a little ragged. That's all they give me."

Q. Did they give you any shoes at all?

A. No, sir.

Q. Alright. They had taken your shoes?

A. Yes, sir.
(T of S.H., 9).

Appellant then telephoned his girlfriend and requested that she bring him clothing. She told him that she could not. He then requested Detective Coleman, the arresting officer, to take him to his (Appellant's) house to get some clothing. Detective Coleman at first refused, but later, at about midnight, granted Appellant's request (P, 5-6). Coleman, the Appellant, and another officer went to Appellant's house (T of S.H., 11, 17). Coleman already had the key to the house, which he had obtained from Appellant's personal belongings in the jail (T of S.H., 17). Appellant never objected to his having the key (Id., at 18). Coleman tried to unlock the door, but couldn't (Id., at 11). Appellant then took the key, unlocked and opened the door, and Coleman entered the house (Id.). Coleman told Appellant to stay outside with the other officer while he "checked the house out to see if there was any knives or guns or something laying around that I could get to" (Id.). At no time prior to or during these sequence of events did Coleman or any other officer mention that a search and/or seizure might be made in Appellant's house for possible incriminating evidence (Id., at 12,36).

Soon after Coleman had entered the house, Appellant and the other officer went in (Id., at 12). Coleman asked Appellant where his clothes were and Appellant said they were in the bedroom (Id., at 11, 22). Coleman entered the bedroom and Appellant told him from the living room that he wanted a pair of pants and a shirt (Id. at 19,22). The following exchange occurred during the Suppression Hearing:

> A. They (Appellant's clothes) was on the floor in a sheet.
>
> * * * * * * * * * *
>
> Q. Did you tell him (Coleman) where they were -- laying on a sheet?
>
> A. Yes, sir. Well, you couldn't miss 'em when you walked in the door (to the bedroom), they was in front of you.
>
> (Id., at 19-20)

Appellant then entered the bedroom and observed that Coleman was holding a purple shirt from among those laying on the floor on a sheet (Id., at 11, 20-21). Since Detective Coleman already knew that the victim of the alleged rape previously stated that her assailant had worn a purple shirt (Id., at 36), he seized the shirt and it was introduced as evidence during the trial (T, 50, 55).

Following the defendant's arrest and appointment of counsel, seven photographs were sent to the Police Department in Camden, N.J., the home of Mary Jones, for a possible identification by that witness (T, 42-43). Counsel for the Appellant was not advised that this procedure was taking place and was not present,

nor was any other attorney present, to represent the Appellant (P, 6; T, 35). On August 28, 1972, Mary Jones was asked by Sargeant Hack of the Camden, N.J. Police Department if she could recognize the picture of the man that raped her cousin (T, 44). She answered yes and was given the seven pictures, one of which was a picture of the Appellant, and she made a positive identification of Appellant (T, 36-37, 44).

Appellant raised an alibi defense at trial by testifying that he was with his family and girlfriend on the entire day of the alleged rape (T, 153-160). His testimony was corroborated by his mother and his sister (P, 7; citing T, 106-114, 126-129). A second sister testified that she spoke to the Appellant over the phone at his mother's house at approximately 10 a.m. on the day of the alleged rape (P, 7; citing T, 148). The evidence is uncontradicted that the Appellant lived approximately 6.4 miles from the scene of the attack (T, 96-97). There was testimony that Appellant and his mother drove to a nearby store at approximately 9:00 a.m., on July 3, 1972 (T, 109-110, 127, 154), the same time during which the alleged rape occurred (T, 11, 47).

4. DECISION BELOW

A suppression hearing was held during which the Appellant attempted to suppress the purple shirt (See T of S.H.). This attempt was unsuccessful (T of S.H., 38, 45, 46, 49). Appellant was tried by a jury. One instruction, Instruction 5, which was granted, reads as follows:

> The court instructs the jury that you may convict the defendant on the evidence of the prosecuting witness, Alice B. Smith, alone, although such evidence may be uncorroborated in whole or may be corroborated in part, if the jury believes from such evidence that the defendant is guilty, beyond a reasonal [sic] doubt. (Record, 27).

The jury found Appellant guilty and fixed his sentence at fifteen years in the State Penitentiary (R, 38 A). Apparently, no pre-sentence report was prepared in this case. The trial judge affirmed and imposed the sentence set by the jury (R, 40-41). This appeal followed.

5. ARGUMENTS AND ANALYSIS

A. SUFFICIENCY

The first issue is whether the evidence is sufficient to sustain the conviction. On this issue, Appellant argues that there was conflict between different witnesses about what Appellant wore at the scene of the crime and his whereabouts at that time (P, 8), and asserts in conclusory terms that it was error to submit the question of guilt to the jury.

This argument is insubstantial, for the Prosecutrix made a clear and unequivocal identification of the Appellant and she was corroborated by Mary Jones, who identified Appellant from photographs. No error.

B. SEARCH AND SEIZURE

The next issue is whether the purple shirt was obtained through an unlawful search and seizure. Appellant argues that he did not "consent" to a search of his house, for he was psychologically coerced into requesting that the police take him to his house after they had seized his clothing and left him with only ragged prison clothes for his court appearance the next day (P, 9-10). He cites Phelper v. Decker, 401 F. 2d 232, 236 (5th Cir. 1968), for the principle that "any consent must be voluntary and uncoerced, either physically or psychologically" and claims that the seizure of the purple shirt was the result of psychological coercion practiced upon the Appellant by the police (P, 11).

Appellee's response is that, in effect, there was a proper consent to the events preceding the seizure of the shirt (Brief in Opposition, 6), and that the shirt was in plain view and thus was legally seized (B, 7). Harris v. United States, 390 U.S. 234 (1968); Carter v. Commonwealth, 209 Va. 317 (1968). Appellee also argues that there was no "search" of the house (B, 8) and there is no evidence of any trickery by the police which brought about Appellant's request for clothing (B, 8-9).

It appears clear that the seizure of the shirt was valid if and only if Appellant consented to the police entry of his house. This is so because if there was no valid consent, then the sequence of events in question would have to be characterized as a warrantless search and seizure. As such, it would not fall within any of the exceptions to the warrant requirement

and thus would be impermissible (the search was not "incident to arrest" for Appellant had already been under arrest for several hours; search could not be upheld on "probable cause" because police may not make their own determination of probable cause to search a residence).

If there was valid consent, then the seizure of the shirt falls within the "plain view" doctrine. This doctrine holds that an officer has a right to seize evidence which is in plain view when the officer has a right to be in the position to view it. Harris v. United States, 390 U.S. 234, 236 (1968). If Appellant gave a voluntary consent to the police to enter his house, then they had a right to be there, and may invoke the plain view doctrine to uphold the seizure. If he did not, then they may not.

In short, the validity of the seizure hinges on the voluntariness of the consent. The standard which has been enunciated for a consent search is that:

> [C]onsent to a search is not to be lightly inferred, but should be shown by clear and convincing evidence. . .Any consent must be voluntary and uncoerced, either physically or pyschologically.
> Phelper v. Decker, 401 F. 2d 232, 236 (5th Cir. 1968).

Several cases roughly similar to the present case have upheld the voluntariness of a consent to search despite certain facts which suggested a small degree of coercion, or at least suggestion, to give consent to search.

For example, in Phelper, supra, the voluntariness of a consent was upheld despite the facts that the defendant was in

police custody when he signed the consent, and that his arrest by the police was illegal.

Similarly, a consent was upheld in Government of Virgin Islands v. Berne, 412 F. 2d 1055 (3rd Cir. 1969) even though the defendant was in police custody and had been requested by the police to consent to a search of his car (Compare the present case, where the initial request came from the defendant rather than from the police).

The facts of the present case indicate that the consent was voluntary. The author reaches this conclusion because the police had a valid reason for seizing Appellant's clothes (even though this seizure may have had the collateral effect of Appellant requesting the trip to his house) and because there is no evidence of any intentional effort by the police to physically or psychologically pressure Appellant into consenting to a search. The initial request to go to the house came from Appellant, not the police, and the police actually turned down this request once before finally acceding to it. The fact that the seizure of his clothing ultimately resulted in the trip to his house, and the seizure of the purple shirt, appears to be wholly unanticipated and coincidental, and free from any improper police motive or action.

For the foregoing reasons, there does not appear to be error on this issue.

C. INSTRUCTION 5

Appellant next argues that it was incorrect for the trial court to grant jury instruction 5, quoted at page 5, supra. His main contention is that the instruction implies that a jury may completely disregard a defendant's exculpatory evidence and consider the prosecution's inculpatory evidence exclusively in determining the guilt or innocence of the accused. (P, 12-13). See United States v. Robert Jack Smith, 303 F. 2d 341 (4th Cir. 1962).

Appellee's response is that no corroboration is necessary in a rape case, for the uncorroborated testimony of a Prosecutrix may be sufficient to sustain a conviction (B, 10). Poindexter v. Commonwealth, 213 Va. 212 (1972) (Harrison, J.). Appellee also argues that other instructions which were given cured any possible defect in Instruction 5 with regard to excluding testimony other than that of the Prosecutrix (B, 11).

Appellant's argument on this issue appears to be without substance. Instruction 5 permitted a conviction if the jury believed "from such evidence" (the testimony of the Prosecutrix) that the defendant was guilty beyond a reasonable doubt. It is Appellant's position that this instruction would permit the jury to disregard all exculpatory evidence. This is a doubtful construction of the language, but even if the instruction is construed as Appellant urges, several other jury instructions make it clear that all evidence is to be considered and weighed. For example, Instruction 1 (R, 21) instructed the

jury to "confine your consideration to the evidence introduced by the Commonwealth and the defense" (emphasis added) and stated, "if, upon a consideration of all the evidence beyond a reasonable doubt, then you shall find him guilty" (emphasis added); Instruction 3 (R, 24) and Instruction 6(b) (R, 29) referred to a finding based on "the evidence" (emphasis added), presumably all the evidence, including that of Appellant; Instruction 7 (R, 31) permitted a conviction based on circumstantial evidence if "from all the evidence the Jury believes the guilt of the defendant. . ." (emphasis added); See also Instructions A (R, 32), B (R, 33), and F (R, 37).

Because any possible error in Instruction 5 has been thoroughly neutralized by the other instructions in this case, there is no error on this issue.

D. PHOTOGRAPHIC IDENTIFICATION

The final issue is whether it was error to permit Mary Jones to identify Appellant from the photographs without the presence of counsel.

Appellant's position on this issue is that there is a right to counsel at a line-up (P, 15) and that this right has been extended to photographic identification. United States v. Ash, 461 F. 2d 92 (D.C. Cir. 1972); Thompson v. State, 85 Nev. 134, 451 P. 2d 704, cert. den. 396 U.S. 893 (1969).

This position was recently rejected by the Virginia Supreme Court in Drewry v. Commonwealth, 213 Va. 186 (1972) (Carrico, J.) where it was held that:

> We join in the view that counsel is not required at out-of-court photographic identifications.

No error.

6. CONCLUSION AND RECOMMENDATION

Because no reversible error has been shown, appeal should be denied. Appellant has requested oral argument.

END