



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

August 16, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Scott A. Surovell
Member, House of Delegates
Post Office Box 289
Mount Vernon, Virginia 22121

Dear Delegate Surovell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a Commonwealth's Attorney is authorized under § 16.1-69.25:1 to submit in a district court a motion for a bill of particulars seeking the factual basis of a defendant's motion to suppress evidence.

Response

It is my opinion that a Commonwealth's Attorney is authorized to request that a bill of particulars be ordered in a district court where a motion to suppress evidence has been filed but includes no factual basis for the motion.

Applicable Law and Discussion

A bill of particulars supplies the party seeking it with additional information concerning the matter at issue.¹ In criminal cases, defendants often seek a bill of particulars to acquire sufficient information to enable them to be fully informed of the offenses with which they are charged, and the decision whether to grant such a bill is within the court's discretion.²

Section 16.1-69.25:1 provides district courts with the authority to direct the filing of a bill of particulars, and provides as follows:

Upon request of either party, a judge of a district court may direct the filing of a written bill of particulars at any time before trial and within a period of time specified in the order so requiring. Motions for bills of particulars in criminal cases before general district courts shall be made before a plea is entered and at least seven days before the day fixed for trial.³

¹ See *Tasker v. Commonwealth*, 202 Va. 1019, 1023, 121 S.E.2d 459, 462 (1961).

² See *Quesinberry v. Commonwealth*, 241 Va. 364, 372, 402 S.E.2d 218, 223 (1991).

³ VA. CODE ANN. § 16.1-69.25:1 (2010) (emphasis added).

Section 16.1-69.25:1 makes no distinction between the parties with respect to requests for bills of particulars other than to provide a time limit for such requests in criminal cases before general district courts. Because the language in the statute is clear and unambiguous, there is no reason to look further to determine its meaning. “[T]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction”⁴ Further, as the Virginia Supreme Court has noted,

If language is clear and unambiguous, there is no need for construction by the court; the plain meaning and intent of the enactment will be given it. When an enactment is clear and unequivocal, general rules for construction of statutes . . . do not apply. Therefore, when the language of an enactment is free from ambiguity, resort to legislative history and extrinsic facts is not permitted⁵

Accordingly, a Commonwealth’s Attorney may seek a bill of particulars in response to a motion to suppress.

You state that a defendant does not need to have a factual basis to support his motion to suppress evidence and, therefore, it would be inconsistent with Virginia law to interpret § 16.1-69.25:1 as authorizing a district court to direct a defendant to file a bill of particulars to provide the factual basis for his suppression motion. In support of the assertion that a defendant is not required to have a factual basis for filing a motion to suppress evidence, you cite Rule 3.1 of the Virginia Rules of Professional Conduct (hereinafter “Rule 3.1”); however, your interpretation of Rule 3.1 is incorrect.

Rule 3.1 provides that:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

While Rule 3.1 does allow a criminal defense attorney to rely on the well-established principle that the Commonwealth must prove all of the elements of an offense, it does not authorize the defense to file motions for which the attorney has no basis in fact or law. Construing the second sentence to permit a criminal defendant to file a motion to suppress evidence in a factual vacuum is inconsistent with the first sentence of the Rule and with the case law applicable to the suppression of evidence in criminal cases.

Specifically, Rule 7A:8(a) of the Rules of the Supreme Court of Virginia establishes that counsel’s “tendering a pleading gives assurance that it is filed in good faith and not for delay.” Furthermore, Virginia’s sanctions statute provides that “every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name”⁶ The statute further provides that, by affixing his signature, an attorney is certifying

⁴ *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)) (internal quotation marks omitted).

⁵ *Brown v. Commonwealth*, 284 Va. 538, 543, 733 S.E.2d 638, 640 (2012) (quoting *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)).

⁶ VA. CODE ANN. § 8.01-271.1 (Supp. 2013).

that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.^{7]}

Filing a motion without having a good faith belief, formed after reasonable inquiry, that the motion is well-grounded in fact subjects the attorney to a mandatory sanction.⁸

In short, Virginia law does not authorize a criminal defense attorney to file motions for which he does not have a good faith basis, and therefore, one of the central premises of your inquiry is simply incorrect.⁹ Although, as to warrantless searches,¹⁰ it is true that the Commonwealth bears the ultimate burden of justifying the challenged invasion of privacy “by proving that it was reasonable under all the facts and circumstances. . . ,”¹¹ that does not transform the suppression issue into an element of the underlying offense. In mounting such a motion, the defendant bears a threshold “burden of proving he had a reasonable expectation of privacy in the place searched.”¹² Further, as the Virginia Court of Appeals has stated, “[the defendant’s burden] is not a mere burden of production, requiring only a going forward with the evidence; it is a ‘burden of persuasion,’ requiring the defendant to prove to the satisfaction of the factfinder the existence of those facts upon which a legal conclusion can be drawn.”¹³

Finally, interpreting § 16.1-69.25:1 to authorize the Commonwealth to seek a bill of particulars in a district court is not inconsistent with § 19.2-266.2(C), which deals with the procedures for suppression motions and permits only the defendant to seek such a bill. Section § 19.2-266.2(C) provides:

To assist the defense in filing such motions or objections in a timely manner, the circuit court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230. The circuit court shall fix the time within which such

⁷ *Id.*

⁸ *Id.* (“If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction.” (emphasis added)).

⁹ That the sanctions statute is found in the civil procedure section of the Code does not alter the analysis. In a recent case involving lawyer discipline, the Virginia Supreme Court cited to the obligations imposed by § 8.01-271.1 on a lawyer who filed a pleading in a criminal case. *Livingston v. Virginia State Bar*, 286 Va. 1, 15, ___ S.E.2d ___, __ (2013).

¹⁰ Regarding a motion to suppress evidence seized pursuant to a search warrant, the defendant “bears the burden of proving the search warrant invalid.” *Redmond v. Commonwealth*, 57 Va. App. 254, 260, 701 S.E.2d 81, 84 (2010) (citation and footnote omitted).

¹¹ *See United States v. Lilly*, 576 F.2d 1240, 1245 (5th Cir. 1978); *Commonwealth v. Ealy*, 12 Va. App. 744, 751, 407 S.E.2d 681, 685-86 (1991).

¹² *Sharpe v. Commonwealth*, 44 Va. App. 448, 455, 605 S.E.2d 346, 349 (2004).

¹³ *Logan v. Commonwealth*, 47 Va. App. 168, 171 n.2, 622 S.E.2d 771, 772 n.2 (2005) (en banc) (citation omitted) (quoting *United States v. Lewis*, 40 F.3d 1325, 1333 (1st Cir. 1994)). The imposition of this burden on a defendant does not violate the Due Process Clauses of the Federal or State Constitutions. *See United States v. Cruz Jimenez*, 894 F.2d 1, 5 (1st Cir. 1990) (citing *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978)). Moreover, “[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both.” *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005).

bill of particulars is to be filed. Upon further motion of the defendant, the circuit court may, upon a showing of good cause, direct the Commonwealth to supplement its bill of particulars. The attorney for the Commonwealth shall certify that the matters stated in the bill of particulars are true and accurate to the best of his knowledge and belief.

It is a well-established rule of statutory construction that “[w]hen ‘two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed [legislative] intention to the contrary, to regard each as effective.’”¹⁴ While the plain language of § 19.2-266.2(C) makes clear that it applies only to the authority of a circuit court,¹⁵ the plain language of § 16.1-69.25:1 similarly makes clear that it applies only to the authority of a district court. Therefore, both § 19.2-266.2(C) and § 16.1-69.25:1 may be read together in harmony, each containing distinct provisions regarding motions for bills of particulars, respectively, in courts of record and courts not of record.

Thus, with regard to your specific inquiry, I necessarily must conclude that the Commonwealth lawfully may make a timely request of a district court to order a defendant to produce a bill of particulars providing a factual basis for his motion to suppress.

Conclusion

Accordingly, it is my opinion that a Commonwealth’s Attorney is authorized to request that a bill of particulars be ordered where a motion to suppress evidence is filed in a district court.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and written in cursive.

Kenneth T. Cuccinelli, II
Attorney General

¹⁴ See *Seaton v. Commonwealth*, 42 Va. App. 739, 758-59, 595 S.E.2d 9, 18 (2004) (quoting *FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 304 (2003)).

¹⁵ A prior opinion of this Office previously concluded that the requirements of § 19.2-266.2 apply only to proceedings in circuit courts. 2005 Op. Va. Att’y Gen. 86, 87-88. Moreover, as quoted above, the express terms of § 19.2-266(C) *require* a circuit court to direct the Commonwealth to file a bill of particulars on motion of the defense, in order to facilitate timely filing of defense motions or objections. It specifically references the more general grant of *discretionary* procedural authority in § 19.2-230 to circuit courts to direct the filing of bills of particulars in criminal cases, and in so doing, that statute’s language does not differentiate between the defense and the prosecution.