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TWELFTH JUDICIAL CIRCUIT

September 6, 2022

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Re: Commonwealth v. Sprouse

Dear Counsel:

Thank you all for your outstanding work in presenting your positions in the above-styled matter. Your briefs and oral arguments were well thought out and were considered thoroughly in arriving at this decision.

The sole issue before the Court is whether malfeasance in office is a crime in the Commonwealth of Virginia at this time. The Commonwealth argues that it is a crime under English Common Law, and relies heavily on *Warren v. Commonwealth*, 136 Va. 573, 118 S.E. 125 (1923), to support his argument. In *Warren*, the aggrieved Mr. Warren was brought before the court to show cause why he should not be removed from office for malfeasance, misfeasance, and neglect of office. *Id.*, 136 Va. at 576. After trial by jury, Mr. Warren was found not guilty of any of the charges. Upon motion of the Commonwealth, the Court set aside the jury verdict, and found him guilty of the charges, and ordered him removed from Office.

On appeal, the Supreme Court concluded that the circuit court was in error in setting aside the verdict and entering judgment because the cause of action was "quasi criminal" and "which, although *not a criminal case*, is one highly penal in its nature." *Warren*, 136 Va. at 592-94 (emphasis added). Therefore, while the trial court was correct in setting aside the verdict on two

counts, it was in error in not awarding a new trial and instead entering judgment. (The Supreme Court included a lengthy discussion in its decision regarding malfeasance, and finding, clearly, that Mr. Warren had committed malfeasance of office in two of the three counts brought against him. *See Warren*).

The *Warren* case was cited with approval more recently for the same proposition in *Townes v. Virginia State Board of Elections*, 299 Va. 34, 843 S.E.2d 737 (2020). There, the circuit court in a trial for the removal of two members of the electoral board for the City of Hopewell determined the standard of proof for removal was preponderance of the evidence. The Supreme Court held that “because removal proceedings are quasi-criminal in nature due to the high penalty they impose . . . the correct burden of proof is clear and convincing evidence.” *Id.*, 299 Va. 51 (citations omitted).

The Court of Appeals has recently opined that a malfeasance in office is “. . . not a crime that would subject the violator to arrest.” *Brown v. Commonwealth*, 74 Va. App. 721, 736, 872 S.E.2d 204, 211 (2022). While the code section implicated specific civil sanctions or damages, the language of the Court of Appeals is no less clear. It did not state that a malfeasance was not a crime in this instance because there are specific remedies in the Code; it said simply and clearly that malfeasance in office is not a crime. *Id.*

The proposition that malfeasance itself is not a crime in Virginia is further demonstrated by the use of the term in the Code of Virginia. For instance, the Conflict of Interest Act (§§2.2-3102 – 2.2-3119 of the Code of Virginia, 1950, as amended) indicates in §2.2-3120 that knowing violation of the act by any person is a Class 1 misdemeanor, or in certain circumstances, a Class 3 felony. §2.2-3122 of the Code of Virginia then adds that a knowing violation of the Act constitutes a malfeasance in office and subjects the offender to forfeiture of such office. §2.2-3122, Code of Virginia, 1950, as amended. If malfeasance were, in and of itself, a criminal offense, then §2.2-3120 would be entirely redundant.

The Commonwealth states that other Common Law Offenses remain crimes in Virginia, notably, trespass. He notes that there are jury instructions in the Model Jury Instructions which govern the Common Law of trespass. And he is correct. However, as was pointed out by counsel for Mr. Sprouse, there are no criminal jury instructions regarding malfeasance.

The Commonwealth also relies on Article 4, Section 17 of the Constitution of the Commonwealth of Virginia. However, that Article specifically limits the judgment of the impeachment panel in a case of malfeasance to removal from office and disqualification from holding any office of “honor, trust or profit under the Commonwealth.” Article 4, Section 17, Constitution of the Commonwealth of Virginia. Only upon further trial for criminal actions may a person be criminally punished. *Id.*

Finally, the Rule of Lenity requires that any ambiguity in a criminal statute be resolved in the defendant’s favor, “reducing exposure to criminal liability.” *Morris v. Commonwealth*, 75 Va. App. 257, 273, 876 S.E.2d 182, 190 (2022)(citations omitted). Therefore, to the degree there is doubt that malfeasance of office is a criminal offense, that doubt must be resolved in the favor of the defendant.

While malfeasance of office may have been a Common Law Crime in England, it has not remained so in the Commonwealth at present. To rule otherwise would result in several instances of absurdity and redundancy in the Code of Virginia. Rather, it is a definition of a misbehavior in office that can lead, in a quasi-criminal proceeding, to the removal from office of the malfeasant.

Respectfully yours,

M. Duncan Minton Jr.

The Hon. M. Duncan Minton, Jr.