In The

Court of Appeals

Of Virginia

Brian David Hill,

Appellant,

v.

Commonwealth of Virginia, City of Martinsville

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF MARTINSVILLE

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Brian David Hill, ("Appellant") files this Reply Brief pursuant to Rule 5A:22 of this Court, and this reply is to the Appellees'/Commonwealth's filed "BRIEF OF THE COMMONWEALTH", filed on October 28, 2022.

Appellant is not a lawyer and has no legal representation at the time of this filing, so Appellant does not have an answer on whether opposing counsel desires to waive oral argument or not.

The Rule 5A:22 specifically says in-part: "…reply brief, if any, must contain argument in reply to contentions made in the brief of appellee." (Citation partially omitted).

Appellant has reviewed over the Appellees' "BRIEF OF THE COMMONWEALTH" and had found it to be defective in different aspects. Appellant would exceed the word limit to argue every defect found in it.

CITATION of Rule 5A:21. Requirements for Brief of Appellee or Guardian Ad Litem. ("(b) A statement of the case if the appellee disagrees with the statement presented by the appellant and a statement of any additional assignments of error the appellee wishes to present with a clear and exact reference to the page(s) of the transcript, written statement, record, or appendix where each additional assignment of error was preserved in the trial court.")

The Appellees did not directly respond to every "Assignment of Error"

presented in Appellant's opening brief in both appeal cases no. 0289-22-3 and 0290-22-3.

See Rule 5A:20. Requirements for Opening Brief of Appellant. ("(1) Effect of Failure to Assign Error. **Only assignments of error listed in the brief will be noticed by this Court.** If the brief does not contain assignments of error, the appeal will be dismissed."). (Citation being referenced here in bold character and highlighted to point to this exact rule reference).

The Appellees did not address every assignment of error submitted in both Appellant's opening briefs for both appeal cases no. 0289-22-3 and 0290-22-3.

Instead, they seem to be focused on their own interpretations based on the record. However, the original opening briefs did point to the record and pointed to every issue preserved for appeal.

The Appellees' argued in page 2 of their brief that: "Moreover, Hill failed to properly invoke any exception to Rule 1:1." There is an exception by the case law precedents set by *Tweed v. Commonwealth*, 36 Va. App. 363, 550 S.E.2d 345 (Va. Ct. App. 2001) and *Odum v. Commonwealth*, 225 Va. 123, 301 S.E.2d 145 (Va. 1983). Also, there is no statute of limitations or time-bar for "Rule 3A:15 - Motion to Strike or to Set Aside Verdict; Judgment of Acquittal or New Trial". Even if there was, it is not time barred for new evidence.

The Supreme Court of Virginia had ruled in countless case law precedential authorities for decades that "NEW EVIDENCE" justifies disturbing a final judgment

in pushing for setting aside a judgment for a new trial by jury. That a judge does have the authority and jurisdiction to overturn a final judgment if the adverse party files new evidence that meets the four or five standards for warranting disturbing a final judgment of conviction for a criminal charge/case.

> Tweed v. Commonwealth, 36 Va. App. 363, 371 (Va. Ct. App. 2001) (""Motions for new trials based upon after-discovered evidence are addressed to the sound discretion of the trial judge, are not looked upon with favor, are considered with special care and caution and are awarded with great reluctance." Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E.2d 145, 149 (1983) (citation omitted). Because such a motion is addressed to the sound discretion of the trial court, a ruling thereon will be reversed only upon a showing of an abuse of discretion. See Mundy v. Commonwealth, 11 Va. App. 461, 481, 390 S.E.2d 525, 536, aff'd on reh'g en banc, 399 S.E.2d 29 (1990).
>
> Because of the need for finality in court adjudications, four requirements must be met before a new trial is granted based upon an allegation of newly-discovered evidence: (1) the evidence was discovered after trial; (2) it could not have been obtained prior to trial through the exercise of reasonable diligence; (3) it is not merely cumulative, corroborative or collateral; and (4) is material, and as such, should produce an opposite result on the merits at another trial.")

This exact issue of asking for a new trial based on new evidence was preserved in both denied motions for New Trial and/or Judgment of Acquittal by citation of Rule 3A:15. Appellees claimed : "Moreover, Hill failed to properly invoke any exception to Rule 1:1."

The issue was already argued in the motion itself, using Va. R. Sup. Ct. 3A:15.

Rule 1:1 was passed by the Supreme Court's rule-making authority but that same rule-making authority also passed Va. R. Sup. Ct. 3A:15. That rule does not specify that Rule 1:1 bars a request for a new trial on the basis of new evidence.

Rule 1:1 is in a conflict of law with the authorities of *Tweed v. Commonwealth*, 36 Va. App. 363, 550 S.E.2d 345 (Va. Ct. App. 2001) and *Odum v. Commonwealth*, 225 Va. 123, 301 S.E.2d 145 (Va. 1983). Rule 1:1 is in conflict with the Due Process of Law clause of both the Fourteenth Amendment of the United States Constitution and the Virginia Constitution's Article I. Bill of Rights, Section 11. Due process of law.

Nobody reasonable in the Judicial System is going to be expected to find new evidence and investigate newly discovered evidence 21 days after the final judgment of guilt in a criminal case. Rule 1:1 is inconsistent with Va. R. Sup. Ct. 3A:15, violates Due Process of Law, and conflicts with Odum standards and Tweed standards for new trials on the basis of newly discovered evidence or newly available evidence not allowed legally at trial prior to the change of admissibility standards. New evidence always comes at a later time, and 21 days is not enough time to find new evidence material to negate the guilt or proves innocence of a criminal defendant. When new evidence surfaces, when evidence which couldn't be used and could not be secured for use at trial is made available years after a wrongful conviction, then usually a court grants a motion for a new trial based upon the agreed standards set by the Virginia Supreme Court or the United States Supreme Court.

A conflict of laws arises here and the Appellees have shown this conflict of laws. Many courts all over the United States of America, both state and federal usually honor requests for a new trial when there is qualified new evidence under the standards set by the U.S. Supreme Court, by the State Supreme Courts and the appellate courts of all levels. Usually new evidence is not time barred when obtaining this evidence, discovering this evidence, and presenting this evidence is done under due diligence. The Appellees' have not made a mention of the Tweed and Odum standards set by the Supreme Court of Virginia.

Those cases have not been overturned on future appeals even with Rule 1:1; the Supreme Court of Virginia has not overturned those cases.

Also see Tucker v. Commonwealth, No. 0553-21-2, 5 (Va. Ct. App. Apr. 26, 2022) ("A motion for a new trial based on after-discovered evidence "is a matter submitted to the sound discretion of the circuit court" and will be granted only under unusual circumstances after particular care and caution has been given to the evidence presented. Bagley v. Commonwealth, 73 Va.App. 1, 22 (2021) (quoting Orndorff v. Commonwealth, 279 Va. 597, 601 (2010); see Johnson v. Commonwealth, 41 Va.App. 37, 43 (2003)").

The appellees did not address any issues in the below referenced Assignments of Error in Opening Brief under RECORD NO. 0289-22-3:

> "Assignment of error 7. The Circuit Court erred as a matter of law in its order (Record pages 2266-2266) by holding that it lacked jurisdiction because Rule 1:1 does not apply to a final

conviction when the ground of new evidence (See Paragraphs 3 and 9, Statement of the Facts) is submitted to the Court in support of a Motion for a New Trial or Judgment of Acquittal (Record pages 1880-2088).” (citation omitted)

Assignment of error 4. The Circuit Court erred as a matter of law in its order (Record pages 2266-2266) by holding that it lacked jurisdiction because that decision is unconstitutional under procedural due process and substantive due process under U.S. Const. amend. XIV and the Virginia Constitution’s Article I., Section 11 due process clauses’. The issue of due process was brought up in the Trial Court record and was preserved in the Trial Court (See Record pages 1915, 2274, 2275, 2276). It is unconstitutional because the Court had wrongfully ignored all of the new evidence (See Paragraphs 3 and 9, Statement of the Facts) in support of the Appellant’s post-conviction motion for a new trial or judgment of acquittal (Record pages 1880-2088).

Assignment of Error 3 (“The Circuit Court erred because of permanently holding an innocent man convicted of a crime on a legal technicality of having no jurisdiction due to Rule 1:1 which the new evidence draws into question his guilt or his innocence. Rule 1:1 should not apply to somebody with new evidence proving innocence. The Trial Court did not mention Rule 1:1 when it claimed that it had no jurisdiction (Record pages 2266-2266) but the judge does not cite the exact rule or statute. However, that issue (issue of invoking claim of not having jurisdiction) was held by the judge at the Trial Court since he made his ruling to be interpreted at the Appeals Court…”)

Assignment of Error 1. (“The Circuit Court erred as a matter of law in its order (Record pages 2266-2266) by holding that it lacked jurisdiction to have considered the new evidence (Record pages Evidence #1: 1555-1606; pages Evidence #2: 1609-1670; pages Evidence #3: 2089-2251, See paragraphs 3 and 9 of Statement of the Facts) in support of the motion and that very motion (Record pages 1880-2088) on its merits without even an evidentiary hearing. See Record pages 2266-2266 of the Order. The issue of new evidence (Record pages Evidence #1: 1555-1606; pages Evidence #2: 1609-1670; pages Evidence #3: 2089-2251) was held in the Trial Court because it is new due to the

> passage of this new law cited in the motion (Record pages 1880, 1555, 1609, 2089). Under the standards of Odum v. Commonwealth, 225 Va. 123, 124 (Va. 1983) and Commonwealth v. Tweed, 264 Va. 524, (Va. 2002); the Trial Court may consider a post-conviction motion for a New Trial at the sound discretion of the Court for new evidence. See paragraph 15 of Statement of the Facts. This judgment is an error of law. Sound discretion was not even used because the new evidence (See paragraphs 3 and 9 of Statement of the Facts) was not even considered due to the holding of lacking jurisdiction.")

Also, there was a lot of evidence and a lot of arguments made in the motions which were denied. Brought up in the STATEMNET OF THE FACTS by Appellant.

Appellant will also cite the errors in Appellees' response brief as they point to areas of the record that do not properly point to what is being argued here.

> **Appellees argued in part:** "All citations to the record are to the record contained in case number 0289-22-3. With the exception of the final orders in each case, all cited documents are contained in the record in both cases. However, as the records are not ordered the same, the Commonwealth cites to only the record in case number 0289-22-3 to attempt to alleviate any confusion."

Then the Appellees' pointed to the areas of the record which point to a single page and did not point to the areas of the record which supports the claims made by Appellees'. They kept pointing to page 73 of the record, which shows a blank page with an arrow pointing to the word "CLERK" with the stamp of the date and time the pleading was filed with the Clerk's office.

PAGES 2 and 3 of APPELLEES' BRIEF: "On September 21, 2018, Sergeant Jones of the Martinsville Police Department responded to a report of a naked white male running from Church Street to Hooker Street. (R. 73). As other officers responded to Hooker Street, Sergeant Jones looked for the individual on the Dick and Willie Trail. (R. 73). Sergeant Jones encountered Hill, who was completely naked except for his shoes and socks. (R. 73). Hill fled down the Dick and Willie trail, over a bank, and into an adjacent creek. (R. 73).

After being detained, Hill claimed that a "black male in a hoodie made him get naked and take pictures of himself." (R. 73). He was later transported to the hospital due to complaints of knee pain. (R. 73). While there, Hill gave another officer permission to view his camera roll and told them that he was alone when he took the photos of himself. (R. 73). There were several photographs of Hill naked around the city on his camera roll. (R. 73). Hill was later medically and psychologically cleared and released from the hospital. (R. 73). He was subsequently arrested for indecent exposure. (R. 73)." Citations omitted)

Page 4 of Appellees' brief also mentioned two appeals which were not the final criminal case direct appeals, so anything where Appellees argue this in their response brief is erroneous, clerical error here.

CITATION of PAGE 4 OF COMMONWEALTH'S/APPELLEES' BRIEF:

Hill noted two appeals of that order. (See R. 531–32). Both appeals were dismissed by this Court. Brian Hill v. Commonwealth, Rec. Nos. 0128-20-3 & 0129-20-3 (Va. Ct. App.

July 31, 2020).

Actually, that was not the final appeals. The appeals under Rec. Nos. 0128-20-3 & 0129-20-3 were dismissed because the former Assistant Attorney General, John Ira Jones, IV, who was appointed by the court as the appellate counsel for Appellant's direct criminal case appeals, had not filed any opening brief and admitted under Affidavit that he screwed up those appeals by not complying with the Court's Order to file the opening brief. Filed motions for delayed appeals and both motions were unopposed by the Commonwealth of Virginia and City of Martinsville. The motions were granted by the Court of Appeals of Virginia, and NOTICES OF APPEAL were filed again in direct appeal of the criminal conviction (see Record 936 through 940). The two direct appeals were allowed to be relitigated under cases no. 1294-20-3 and 1295-20-3 and both Petitions for Appeal at that time were denied on September 2, 2021 (1294-20-3), and on September 2, 2021 (1295-20-3).

The argument by Appellees' mainly focuses on interpreting Appellant's motions in one way or another. While the Appellees' interpret Appellant's motion as being possibly asserted under Virginia Code § 8.01-428(D) when that code was not used in the Motions in the record, then claim that citation of Rule 3A:15 aka "Hill's cited authority is of no import." The Supreme Court of Virginia (SCV) is aware of Rule 1:1 since 2010, and yet even the SCV or Court of Appeals still creates case law as far as 2021 allowing motions for new trials in criminal cases to disturb

final judgments upon new evidence.

> CITATION of Response brief page 15: D. Hill's cited authority is of no import.
>
> In his motion, Hill cited three authorities he contends authorize the filing of his motion: Code § 19.2-271.6, Rule 3A:15, and Schlup v. Delo, 513 U.S. 298, 327–28 (1995). Hill's reliance is misplaced. None of those authorities establish a valid procedure for Hill to present his claims nor grant the trial court subject matter jurisdiction to adjudicate them.

Rule 1:1 isn't barring criminal defendants in most recent Supreme Court of Virginia and CAV cases of asking for a new trial to disturb a final judgment: See Tucker v. Commonwealth, No. 0553-21-2, 5-6 (Va. Ct. App. Apr. 26, 2022) ("Bagley v. Commonwealth, 73 Va.App. 1, 22 (2021) (quoting Orndorff v. Commonwealth, 279 Va. 597, 601 (2010); see Johnson v. Commonwealth, 41 Va.App. 37, 43 (2003) ("Motions for new trials based upon after-discovered evidence . . . are awarded with great reluctance." (quoting Odum v. Commonwealth, 225 Va. 123, 130 (1983)"). Citations omitted.

The Circuit Court did err, and the Assignments of Error were correct in both opening appeal briefs in being argued, because recent cases in both this court and in cases of the Supreme Court of Virginia allow requests aka motions for new trials without being time barred by Rule 1:1. It is ridiculous to expect a criminal defendant to discover new evidence 21 days after a final judgment by a court. New evidence is always used as a mechanism to give a criminal defendant a second chance at

acquittal if failed at the first. Rule 1:1 is not supposed to bar criminal defendants from discovering new evidence exonerating them and finding them innocent at a new trial by jury. The Appellees are arguing backwards towards the stone age at a time when there was no INNOCENCE PROJECT, when there wasn't any organizations fighting to get innocent people out of prison or off Probation by finding new evidence and discovering new evidence favorable to a wrongfully convicted criminal defendant.

The Trial Court must be remanded by this Court of Appeals to hold an evidentiary hearing to determine if Appellant meets the criteria for his filed successive motion requesting a New Trial based on his attached supportive evidence to his motions for New Trial and Judgment of Acquittal. The evidence is new, because of the passage of Virginia Code § 19.2-271.6. That changed the evidence admissibility law of using AUTISM, PSYCHOSIS, and OCD as evidence favorable to the criminal defendant being not guilty and could use that to persuade a new trial to find Appellant not guilty as a matter of law. That law was created in 2021, and was not existent during the jury trial in 2019. So, it would meet the material evidence standard as Defendant lives with Autism and OCD every day, it is material to the guilt or innocence determination at a jury trial. It would produce a different result at trial. Appellant did argue the Assignments of Errors correctly and did appropriately preserve the issues for appeal in the original motions being denied by court orders which are being appealed here.

CONCLUSION

The Appellee's brief has defective arguments and not correct references to certain record areas. Did not address every Assignment of Error and how every Assignment of Error was arguably incorrect.

The trial court was not correct in holding that it lacked subject matter jurisdiction to adjudicate Appellant's motions due to the Supreme Court of Virginia's new trial standards which both the Supreme Court of Virginia and Court of Appeals of Virginia have case law even as recent as 2021. Rule 1:1 existed when Tucker v. Commonwealth was case law, and so a motion for new trial is not time barred by Rule 1:1.

> See Tucker v. Commonwealth, No. 0553-21-2, 5-6 (Va. Ct. App. Apr. 26, 2022) ("Bagley v. Commonwealth, 73 Va.App. 1, 22 (2021) (quoting Orndorff v. Commonwealth, 279 Va. 597, 601 (2010); see Johnson v. Commonwealth, 41 Va.App. 37, 43 (2003) ("Motions for new trials based upon after-discovered evidence . . . are awarded with great reluctance." (quoting Odum v. Commonwealth, 225 Va. 123, 130 (1983))). "Because the granting of such a motion is addressed to the sound discretion of the trial court, that decision will not be reversed absent an abuse of discretion." Johnson, 41 Va.App. at 43. To preserve finality in court adjudications, a new trial will only be granted based upon newly-discovered evidence if "(1) the evidence was discovered after trial; (2) it could not have been obtained prior to trial through the exercise of reasonable diligence; (3) it is not merely cumulative, corroborative or collateral; and (4) is material, and as such, should produce an opposite result on the merits at another trial." Id. (quoting Mundy v. Commonwealth, 11 Va.App. 461, 480, aff'd on reh'g en banc, 399 S.E.2d 29 (1990)). "The burden is on

the moving party to show that all four of these requirements have been met in order to justify a new trial." Id.")

Therefore, the Appellant asks that the Commonwealth respond to every Assignment of Error and explain how Rule 1:1 somehow time bars motions for new trial based on newly discovered evidence. The Appellees' arguments are in conflict with the laws of the Supreme Court of Virginia.

The Appellees are deceptively ignoring the new trial standards and are attempting to assert that no jurisdiction exists when there is jurisdiction for motions for a new trial, based on new evidence, based on the qualifying standards set by the Supreme Court of Virginia.

Appellant asks that this Court disregard the erroneous claims made in Appellees' defective brief or order that Appellees' correct their defective brief where they are wrongfully requesting dismissing Appellant's appeals.

REQUEST FOR ORAL ARGUMENT

The Appellant does not desire to waive oral argument.

Respectfully Filed/Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Rule 5A:19(a) regarding the type-volume limits (3,500 words limit or 20 pages limit), excluding the parts of the document exempted by Rule 5A:19(a) (appendices, the cover page, table of contents, table of authorities, signature blocks, or certificate):

   This brief contains [3,500] words, and is
   [14] pages.

2. This brief complies with the typeface and type style requirements because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2013*] in [*14pt Times New Roman*]; *or*

Brian D. Hill
Signed
Brian D. Hill

Dated: October 29, 2022

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of October, 2022, I caused this amended "REPLY BRIEF OF APPELLANT" to be delivered by email service by Assistant/Filing-Representative Roberta Hill using rbhill67@comcast.net or rbhill67@justiceforuswgo.nl to the Commonwealth of Virginia and City of Martinsville through the Commonwealth Attorney's Office of Martinsville City; as well as to the named counsel for the Office of the Attorney General; and the original was filed with the Clerk of the Supreme Court of Virginia by Virginia Court eFiling System (VACES) through Assistant/Filing-Representative Roberta Hill which shall satisfy proof of service as required by Rule 5:1B(c) stating that "*Service on Other Parties by Email. – An electronic version of any document filed in this Court pursuant to Rule 5:1B(b) must be served via email on all other parties on the date the document is filed with the Court or immediately thereafter, unless excused by this Court for good cause shown. An e-filed document must contain a certificate stating the date(s) of filing and of email service of the document.*" And the proof that such pleading was delivered will be filed together with this "Petition for Appeal" shall satisfy the proof of service was required by Rule 5:17(b):

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The reason why Brian David Hill must use such a representative/Assistant to serve such pleading with the Clerk on his behalf is because Brian is currently still under the conditions of Supervised Release for the U.S. District Court barring internet usage without permission. Brian's Probation Officer is aware of Roberta Hill using her email for conducting court business concerning Brian Hill or court business with the Probation Office in regards to Brian David Hill. Therefore, Roberta Hill is filing the pleading on Brian's behalf for official court business. Brian has authorized Roberta Hill to file the pleading.

If the Court wishes to contact the filer over any issues or concerns, please feel free to contact the filer Brian David Hill directly by telephone or by mailing. They can also contact Roberta Hill at rbhill67@comcast.net and request that she forward the message and any documents or attachments to Brian David Hill to view offline for his review.

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