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Circuit Court of the City of Norfolk, Virginia

February 17, 2017, Decided

Civil No.: CL16-13221

Reporter

2017 Va. Cir. LEXIS 24 *

IN RE: PETITION TO SUSPEND AND REMOVE ANTHONY L. BURFOOT, TREASURER OF THE CITY OF NORFOLK

Prior History: Burfoot v. May4thcounts.com, 2010 Va. Cir. LEXIS 189, 80 Va. Cir. 306 (2010)

Core Terms

convicted, felony, suspension, forfeiture of office, right to appeal, sentence, forfeiture, terminated, suspended, forfeit, postponement, statutes, judicial proceeding, final conviction, forfeiture statute, public official, public office, indicted, removal

Case Summary

Overview

HOLDINGS: [1]-In a case where a treasurer was indicted for several felonies, a dismissal was not warranted because Va. Code Ann. § 24.2-235 did not apply only to citizen initiated petitions under Va. Code Ann. § 24.2-233; [2]-The plain meaning of Va. Code Ann. § 24.2-231 postponed

the forfeiture of office during the pendency of appeals only for convictions under the laws of Virginia; the postponement provision did not apply to a conviction under the laws of the United States; [3]-Va. Code Ann. § 24.2-236 did not always require a conviction in the strict sense before a suspension in a judicial proceeding; [4]-Suspension did not violate the separation of powers under Va. Const. art. III, § 1; [5]-The treasurer was suspended after his conviction of six felonies, and his compensation was deposited in a separate account during this period.

Outcome

The officer was suspended from the office of treasurer.

LexisNexis® Headnotes

Governments > Local Governments > Employees & Officials

HN1 Virginia's forfeiture statutes have never required forfeiture of office upon merely being found guilty. The statutes have required imposition of sentence or termination of appeal rights. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > Registration

HN2 Va. Code Ann. § 9.1-902 requires registration for a number of felonies under Virginia law (and to that extent its inclusion in Va. Code Ann. § 24.2-231 is redundant), but it also includes, inter alia, several misdemeanors under Virginia law involving sexual acts and children, any similar offense under the laws of any foreign country, the United States and any political subdivision of either, and any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted. The inclusion of Va. Code Ann. § 9.1-902 greatly expands the class of crimes for which a public officer will forfeit his office if convicted. It also allows the class of such crimes to be expanded further by the legislatures of our sister states and the law-making authorities of foreign countries. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

HN3 The plain meaning of Va. Code Ann. § 24.2-231 postpones forfeiture of office during the pendency of appeals only for convictions under the laws of Virginia. The postponement provision does not apply to a conviction under the laws of the United States. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Appeals > Right to Appeal

HN4 The Due Process Clause does not guarantee a right of appeal of a criminal conviction. An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. If an appeal in a criminal case is not an element of due process of law, due process can hardly require postponement of forfeiture of office until the expiration of appellate rights it does not guarantee. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

HN5 Forfeiture of office is final; suspension is temporary. Suspension, if it is to exist, must therefore precede forfeiture. Va. Code Ann. § 24.2-236 thus cannot always require "conviction" in the strict sense before a suspension in a judicial proceeding under Va. Code Ann. § 24.2-231. If it did, the remedy of suspension would not exist for felony guilty verdicts under federal law, or the laws of other states, or for findings of guilt under other non-Virginia statutes made disqualifying by Va. Code Ann. § 9.1-902, because "conviction" in those instances causes forfeiture of office by operation of law, and there would then be no need for a suspension. The remedy would be nugatory in all cases except those under Virginia law. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Constitutional Law > Separation of Powers

HN6 When court speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, this maxim is in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

HN7 Suspending an officer hardly constitutes an exercise by the judiciary of the whole power of the executive. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

HN8 Va. Code Ann. § 24.2-236 does not provide a standard for a court to use in determining whether to suspend a public officer. The Virginia Supreme Court has described the proceeding as quasi-criminal. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Governments > Local Governments > Employees & Officials

HN9 Va. Code Ann. § 24.2-236 requires such salary as an officer may accrue after suspension to be kept in a separate account and paid to him if the judicial proceedings result in his favor. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Opinion

[*1] ORDER

This matter again came to be heard February 15, 2017. The petitioner, Ronald Batliner, Esq., appeared in person. The respondent, Anthony L. Burfoot, appeared in person and by counsel, Andrew M. Sacks, Esq. The Court received evidence and argument of counsel.

Recusal

All the judges of this Court recused themselves in a related action filed by the "Citizens Recall Committee" on February 1, 2016. Civil Action No. CL16-1077 (the "Citizens' Action"). This judge did not recuse himself in this action, and stated the reasons at the hearing on January 6, 2017. As the public will not have access to the transcript of that hearing, and so it may have confidence that this matter is being conducted impartially, a written explanation is warranted.

In short, the facts in each action are different and what must be proved is different.

When the Citizens' Action was filed, Burfoot had been indicted for several felonies, but he had not been tried. Virginia judges routinely instruct juries in criminal cases: "The fact that the defendant has been indicted by a grand jury is not evidence against him, and you should not consider it." Virginia Model Jury Instructions (Criminal) No. 2.330.

The Citizens' Action **[*2]** seeks Burfoot's removal pursuant to *Code* § 24.2-233(1) for "neglect of duty" and "misuse of office." This could be a subjective determination. Furthermore, if press reports

are to be believed, the Commonwealth's Attorney prosecuting the Citizens' Action has expressed doubts about the relevance of Burfoot's conduct while a councilman to his removal as Treasurer. That could well be a most significant evidentiary ruling the trial judge would have to make. If neither side demanded trial by jury, the trial judge would have to determine the credibility of the witnesses and the weight of the evidence. Given the many subjective determinations the trial judge might have to make, this judge believed both sides should have a judge from outside Norfolk.

Batliner filed his petition under *Code* § 24.2-231, herein sometimes referred to as the forfeiture statute, which provides, as applicable: "Any person holding any public office...who is convicted of a felony...and for whom all rights of appeal under Virginia law have expired, shall by such final conviction forfeit his office...." This is a most objective determination; indeed, forfeiture occurs by operation of law. The only determination to make is when forfeiture occurs.

The actions **[*3]** also differed at the time of their filings on the evidence to suspend Burfoot. The Citizens' Action requested he be suspended based upon unproven allegations. Batliner requests suspension based upon a jury's verdict finding Burfoot guilty of six felonies.

Motion to Dismiss

Burfoot seeks dismissal of this proceeding claiming *Code* § 24.2-235 only applies to citizen initiated petitions under *Code* § 24.2-233, and not to proceedings, such as this, under *Code* §§ 24.2-231 and 24.2-236.

All these statutes are contained within Article 7 of Chapter 2 of Title 24.2 of the *Code*: "Removal of Public Officers from Office." The General Assembly apparently contemplated a scenario in which a public officer in criminal difficulty would not resign, as *Code* § 24.2-236, herein sometimes referred to as the suspension statute, provides: "In the event of a judicial proceeding under § 24.2-231...the circuit court may enter an order suspending the officer...." How then is the "judicial proceeding" to be commenced?

Code § 24.2-230, which is part of Article 7, provides: "This article shall apply to all elected...constitutional...officers." The last sentences of each paragraph of *Code* § 24.2-235 do seem to apply only to petitions brought under *Code* § 24.2-233, but the remainder of that statute could apply to proceedings such as this. Some **[*4]** procedure must exist, and as the General Assembly placed the statutes in the same article, that contained in *Code* § 24.2-235 must be proper. Burfoot claims that after his sentencing, if it occurs, Batliner could file a petition under *Code* § 24.2-231 and request the issuance of a rule to show cause. However, that statute has no procedural component. To dismiss the petition on this ground, even assuming dismissal is warranted, would exalt form over substance. The motion to dismiss is DENIED.

Ripeness

The motion to dismiss questions how the judicial proceeding is to be commenced. In his amended demurrer, Burfoot questions when the judicial proceeding is to be commenced. He argues Batliner's petition is premature and must be dismissed because he has not been "convicted" within the meaning of *Code* § 24.2-231. He claims that regardless of the common understanding of the word, one is not "convicted" for purposes of a statute removing him from office until sentence is imposed and judgment entered. This was the holding in *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922).

Smith was prosecuted in federal court for transporting a woman in interstate commerce for "debauchery." A jury found him guilty. The state court proceeding to remove Smith from office began and concluded while there was **[*5]** a motion before the federal court to set aside the guilty verdict. The removal action was pursuant to *Code* (1919) § 2705, which is similar to present *Code* § 24.2-233, except in 1919 it also allowed an officer to be removed for other acts, including conviction "of any act constituting a violation of any penal statute involving moral turpitude." The *Code* of 1919 also contained a statute, § 292, causing forfeiture of office upon sentencing for a felony, but that procedure could not have been used against Smith as he had not been sentenced.

Batliner notes "convicted" can mean simply being found guilty by a jury. Blackstone wrote: "But if the jury find him guilty, he is then said to be *convicted* of the crime whereof he stands indicted." 4 *Commentaries on the Laws of England* 362 (1769) (emphasis in the original). Our Supreme Court

gave this definition to "conviction" when construing the Governor's power to pardon. *Blair v. Commonwealth*, 66 Va. (25 Gratt.) 850 (1873).

Batliner also claims that changes in the law since *Smith* allow one to be "convicted" before entry of judgment. There have certainly been changes in the law since 1922, but, as it applies to this case, the Court finds there are more similarities than differences between the law then and now.

Batliner also **[*6]** draws a distinction between "conviction" and "final conviction" in the forfeiture statute. He claims the former can be a finding of guilt and the latter the entry of judgment. The Court does not find this persuasive because "final conviction" is immediately preceded by "such," the antecedent of which is "conviction." They are the same thing.

As will be shown within, ***HN1*** Virginia's forfeiture statutes have never required forfeiture of office upon merely being found guilty. The statutes have required imposition of sentence or termination of appeal rights.[1] Furthermore, given the similarities between the statutes of 1919 and today, the General Assembly's placement of *Code* §§ 24.2-231 and 24.2-233 in the same article, their common object, and the presumption that the General Assembly is familiar with the Supreme Court's interpretation of statutes, "conviction"[2] in *Code* § 24.2-231 ought to be given the same construction "convicted" received in *Smith*.

However, the *Code* of 1919 did not contain a suspension statute,[3] which now allows the suspension of an officeholder. To construe the suspension statute, it is necessary to construe the forfeiture statute, and doing so is not rendering an advisory opinion. The two statutes are intertwined. **[*7]**

It appears Virginia's earliest statute requiring forfeiture of a public office for a felony conviction was enacted in 1849. It provided that a public officer "who may be sentenced for felony by any court of this state or of the *United States*, shall, by such sentence, forfeit his post...." (italics in the original). This version of the statute, with minor modifications, was in force for more than a century.[4]

In 1966, the General Assembly amended the statute to remove "or of the United States," thus limiting forfeiture of office to felony convictions under the laws of Virginia.[5] In 1975, the General Assembly amended the statute thus:

> Any person holding any public office of honor, profit or trust in this State who may be convicted for commission of a felony by the courts of this State and all rights of appeal have terminated, shall by such final conviction forfeit his office or post....[6]

Forfeiture of office was still limited to a felony under Virginia law, but the forfeiture did not occur until "all rights of appeal have terminated."

In 1993, the General Assembly expanded the felonies for which forfeiture of office would **[*8]** occur, but it retained the postponement of the forfeiture until the termination of appeal rights.

> Any person holding any public office of honor, profit, or trust in this Commonwealth who is convicted of a felony and for whom all rights of appeal have terminated, shall by such final conviction forfeit his office or post....[7]

Thus felony convictions under the law of Virginia, the United States, and other states would cause a forfeiture of office, but the forfeiture would not occur until the termination of all rights of appeal.

In 2007, the General Assembly adopted the present version of *Code* § 24.2-231.

> Any person holding any public office of honor, profit, or trust in this Commonwealth who is convicted of a felony or any offense for which registration is required as defined in § 9.1-902 and for whom all rights of appeal under Virginia law have expired, shall by such final conviction forfeit his office or post....[8]

It added as convictions causing a forfeiture of office "any offense for which registration is required as defined in § 9.1-902" and it changed "all rights of appeal have terminated" to "all rights of appeal under Virginia law have expired."

HN2 *Code* § 9.1-902 requires registration for a number of felonies **[*9]** under Virginia law (and to that extent its inclusion in *Code* § 24.2-231 is redundant), but it also includes, *inter alia*, several

misdemeanors under Virginia law involving sexual acts and children, "any similar offense" under the laws of any foreign country, the United States and any "political subdivision" of either, and "any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted."

The inclusion of *Code* § 9.1-902 greatly expands the class of crimes for which a public officer will forfeit his office if convicted. It also allows the class of such crimes to be expanded further by the legislatures of our sister states and the law-making authorities of foreign countries. Perhaps with such an expansion in mind, and being unfamiliar with the appellate procedures of foreign countries, the General Assembly chose to restrict postponement of forfeiture of office during the pendency of appeal to crimes under Virginia law. Had the General Assembly intended to allow appellate postponement of forfeiture of office to apply to federal convictions, it could simply have added "or federal" after "Virginia." Had it intended **[*10]** to allow appellate postponement of forfeiture of office to apply to any conviction, it could have left the second clause of the sentence ("and for whom...") in the 1993 version of the statute unchanged. It did neither. The addition of "under Virginia law" must have some meaning.

The Court finds that ***HN3*** the plain meaning of *Code* § 24.2-231 postpones forfeiture of office during the pendency of appeals only for convictions under the laws of Virginia. The postponement provision does not apply to a conviction under the laws of the United States. 9

HN5 Forfeiture of office is final; suspension is temporary. Suspension, if it is to exist, must therefore precede forfeiture. *Code* § 24.2-236 thus cannot always require "conviction" **[*11]** in the strict sense before a suspension in a judicial proceeding under *Code* § 24.2-231. If it did, the remedy of suspension would not exist for felony guilty verdicts under federal law, or the laws of other states, or for findings of guilt under other non-Virginia statutes made disqualifying by *Code* § 9.1-902, because "conviction" in those instances causes forfeiture of office by operation of law, and there would then be no need for a suspension. The remedy would be nugatory in all cases except those under Virginia law. The Court does not believe the General Assembly intended that. The Court OVERRULES the amended demurrer on this ground.

Separation of Powers

At the hearing, Burfoot for the first time claimed his suspension by the Court would violate article III, § 1 of the *Constitution of Virginia*, which provides: "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time...."

In construing this provision, the Supreme Court of Virginia held:

> ***HN6*** When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to **[*12]** understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution . . . .

Baliles v. Mazur, 224 Va. 462, 472, 297 S.E.2d 695, 700 (1982), quoting Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) 393.

HN7 Suspending an officer hardly constitutes an exercise by the judiciary of the whole power of the executive. Furthermore, as a suspension statute has been in force since 1937, to find a violation of the separation of powers the Court would have to conclude that several governors and generations of legislators and judges were unmindful of their oaths to support the Constitution of Virginia.

Suspension

HN8 *Code* § 24.2-236 does not provide a standard for a court to use in determining whether to suspend a public officer. In proceedings to remove an officer under a previous version of *Code* § 24.2-235, the Supreme Court described the proceeding as quasi-criminal. **[*13]** *Commonwealth ex rel. Davis v. Malbon*, 195 Va. 368, 78 S.E.2d 683 (1953).

The evidence from three witnesses at the hearing, which was not contradicted, establishes that the Treasurer's Office has operated well since Burfoot was indicted. An audit the City of Norfolk conducted on the office found the office has adequate management controls to prevent loss of funds and Burfoot did not have the opportunity to circumvent those controls. Respondent's Exh. 1 (Feb. 15, 2017).

Upon his pleas of not guilty and after a five week trial, a jury found Burfoot guilty of six felonies: two counts of perjury, two counts related to "honest services wire fraud," and two counts related to "obtaining property under color of official right." Petitioner's Exh. 3 (Jan. 6, 2017). Upon a review of the indictment, Petitioner's Exh. 2 (Jan. 6, 2017), it appears the latter four federal crimes would be similar to bribery under Virginia law. *See Code* § 18.2-439. Burfoot's sentencing in federal court is presently scheduled for April 17, 2017. (Petitioner's Exh. 4, Jan. 6, 2017). Burfoot has filed a number of motions to set aside the convictions (Respondent's Exh. 2, Feb. 15, 2017), which the Court has read.

Unless Burfoot can persuade the United States District Court to set aside *all six* guilty verdicts, **[*14]** he will, as discussed above, forfeit his office by operation of law upon the district judge's entry of his sentencing order. This would occur on or shortly after April 17, 2017.

If Burfoot is suspended from office he will suffer some additional embarrassment, and he will not be able to collect his salary as it is paid. However, ***HN9*** *Code* § 24.2-236 requires such salary as he may accrue after suspension to be kept in a separate account and paid to him if "the judicial proceedings result in his favor." If he ultimately forfeits his office he will never receive that money.

If Burfoot is not suspended from office the public will continue to pay a substantial salary to one convicted (in the liberal sense) of crimes of dishonesty. More importantly, as Batliner urges, there will be further erosion of the trust the residents of the City of Norfolk ought to have that honest men and women administer their government. The Court finds this the most compelling consideration.

It is therefore ORDERED that Anthony L. Burfoot, Treasurer of the City of Norfolk, be SUSPENDED from office effective at 5:00 p.m. on February 20, 2017 through April 21, 2017, or until further order of this Court or the Supreme Court of Virginia. **[*15]** It is further ORDERED pursuant to *Code* § 24.2-236 that the City of Norfolk establish a separate account and deposit therein all compensation to which Anthony L. Burfoot would otherwise be entitled during the period of his suspension.

The Court has caused copies of this Order to be delivered to Ronald Batliner, Esq., Andrew M. Sacks, Esq., and to the Honorable Kenneth C. Alexander, Mayor of the City of Norfolk.

Endorsements are waived pursuant to Rule 1:13. And this matter is continued.

ENTER: February 17, 2017

Footnotes

1 The 2007 amendment to *Code* § 24.2-231 now requires forfeiture before the termination of appeal rights in many cases, but the Court does not believe the amendment was intended to change the meaning of "conviction."

2 "Conviction" first appeared in the forfeiture statute in 1975. See fn. 6, *infra*.

3 That authority was added by 1936-7 Ex. Sess. *Acts of Assembly*, pg. 54, amending *Code* (1919) § 2705.

4 *Code* (1849), title 5, chapter 12, § 4, p. 85; *Code* (1860), title 5, chapter 12, § 4, p. 100; t*Code* (1873), itle 5, chapter 11, § 4, p. 174; *Code* (1887) § 165; *Code* (1919) § 292; former *Code* (1950) § 2-32.

5 1966 *Acts of Assembly*, c. 677; former *Code* § 2.1-36.

6 1975 *Acts of Assembly*, cc. 515, 595; former *Code* § 24.1-79.3.

7 1993 *Acts of Assembly*, c. 641.

8 2007 *Acts of Assembly*, c. 175.

9 In this amended demurrer Burfoot claims this construction would deny him due process of law. It does not. ***HN4*** The due process clause does not guarantee a right of appeal of a criminal conviction.

> An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

McKane v. Durston, 153 U.S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867 (1894). *See also Halbert v. Michigan*, 545 U.S. 605, 610, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Thomas v. State Highway Com'r.*, 166 Va. 512, 186 S.E. 172 (1936). If an appeal in a criminal case is not an element of due process of law, due process can hardly require postponement of forfeiture of office until the expiration of appellate rights it does not guarantee.

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