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Charles E. Friend

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THE RULES OF EVIDENCE IN PRELIMINARY HEARINGS IN VIRGINIA

CHARLES E. FRIEND*

Although the rules of evidence in criminal *trials* in Virginia have received extensive and detailed attention in the Virginia Code,¹ in the decisions and rules of the Supreme Court of Virginia,² and in Virginia treatises and law review articles,³ little or no legislative, judicial, or scholarly attention has been given to the question of the rules of evidence applicable in preliminary hearings. Confronted with a lack of direction from either the legislature or the Supreme Court of Virginia regarding the conduct of preliminary hearings, many Virginia judges and lawyers have in the past quite naturally assumed that the complex rules applicable at the trial stage do not apply at preliminary hearings, or that at least these rules are relaxed considerably in such proceedings.

In recent years, however, there has been increasing concern as to the propriety of the use at preliminary hearings of evidence that would not be admissible at trial. The importance of the issue has been underscored by two decisions of the Supreme Court of the United States which have dealt squarely with the constitutional status of the preliminary hearing and its incidents. In these cases, *Gerstein v. Pugh*⁴ and *Coleman v. Alabama*,⁵ the Supreme Court has drawn a constitutional distinction between hearings in which a determination is made as to *whether there is probable cause for the*

* B.A., George Washington University; B.F.T., American Graduate School of International Management; J.D., Marshall-Wythe School of Law, College of William and Mary; Professor, Campbell University School of Law.

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1. The portions of the Virginia Code which deal specifically with evidentiary matters are concerned almost exclusively with the trial stage. *E.g.*, VA. CODE ANN. §§ 8.01-385 to -420.1, 19.2-267 to -282 (1950 & Supp. 1978).

2. The numerous Virginia appellate decisions on points of evidence likewise refer, almost without exception, to rulings made at the trial itself. The applicable rules of court are found in Part 3A of the Rules of the Supreme Court of Virginia.

3. Treatises include M. MARSHALL, J. FITZHUGH, JR. & J. HELVIN, *THE LAW OF EVIDENCE IN VIRGINIA AND WEST VIRGINIA* (1954); and C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* (1977). As to law review articles, see, for example, the periodic surveys of Virginia evidence law in the *University of Virginia Law Review*.

4. 420 U.S. 103 (1975).

5. 399 U.S. 1 (1970).

detention of the accused, and hearings in which the issue is *whether or not the accused should be prosecuted* (either by proceeding to trial upon information or by seeking a grand jury indictment).

According to the *Gerstein* decision, the first type of hearing, although constitutionally mandated at least in the case of a warrantless arrest, is not an adversary proceeding, and the magistrate's or judge's determination may be based on hearsay evidence.⁶ Under the holding in *Coleman*, as further explained in *Gerstein*, a preliminary hearing to determine whether the evidence justifies going to trial upon information or presenting the case to the grand jury is *not* a constitutional requirement; but when a state *chooses* to establish such a procedure, it is a "critical stage" of the criminal process—an adversary proceeding in which all of the familiar constitutional safeguards are applicable, including the right to counsel and the right to confront and cross-examine witnesses.⁷

Although *Coleman* and *Gerstein* do not expressly cover the point, the decisions, when read together, seem to some observers to imply that in a proceeding to determine whether there is probable cause to *prosecute*, the "adversary safeguards"⁸ demanded by the *Coleman* case may include the requirement that the rules of evidence applicable to criminal trials must be observed in the preliminary proceeding. Because the preliminary hearing required by the Virginia Code⁹ appears to be of the "probable-cause-to-prosecute" type, it now becomes particularly important for us to examine the status of the rules of evidence as they are currently applied in preliminary hearings in Virginia.

The Current Practice in Preliminary Hearings in Virginia

There is no express requirement under Virginia law at present that the rules of evidence be observed in preliminary hearings. By the same token, there is no express authorization for the relaxation of the rules in such proceedings. The applicable statutes, found in chapter 12 of title 19.2 of the Code of Virginia,¹⁰ provide no direct

6. 420 U.S. at 120.

7. 399 U.S. at 9-10. See also C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 259-60 (1978) ("Thus, the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses—should be provided when the hearing involves a determination whether to prosecute.").

8. 399 U.S. at 7.

9. VA. CODE ANN. §§ 19.2-183 to -190 (1950 & Supp. 1978).

10. *Id.*

guidance. The judge at a preliminary hearing is required by statute to advise the accused of his right to counsel, to appoint counsel if the accused is indigent, and to hear witnesses for and against the accused.¹¹ The statute also states that the accused is entitled to cross-examine witnesses and to take the stand in his own behalf.¹² These provisions appear to comply with the mandate of *Coleman v. Alabama*.¹³ There is, however, no reference in the statute to the rules of evidence, if any, applicable to the proceedings.

The Rules of Court follow a similar pattern: rule 3A-5(b)¹⁴ provides for the right to counsel and the right to call and cross-examine witnesses, but no reference is made to the rules of evidence per se.

The Supreme Court of Virginia does not appear to have dealt expressly with the issue in its decisions either. Although there are many reported cases dealing with various aspects of the preliminary hearing, none of the opinions address the evidentiary question directly.¹⁵

The only express references to evidentiary matters in preliminary hearings of the probable-cause-to-prosecute type appear in sections 19.2-187 and 19.2-188¹⁶ of the Code of Virginia, which permit the admission into evidence of certificates of laboratory analysis and reports of medical examiners, respectively. No reference to other rules of evidence is found in these sections, however, and any support in these sections for the proposition that the rules must otherwise be applied in preliminary hearings is purely inferential.¹⁷

In view of the lack of authority in Virginia on the question, an attempt was made to determine whether, in actual practice, the rules of evidence are or are not currently being applied in preliminary hearings in Virginia's district courts. To this end, questionnaires were mailed or delivered to 102 district court judges in various sections of the Commonwealth. Sixty-three responses were re-

11. *Id.* § 19.2-183.

12. *Id.*

13. See note 5 & accompanying text *supra*.

14. VA. SUP. CT. R. 3A:5(b).

15. It has been suggested to the author that a few Virginia opinions support or deny the applicability of the evidentiary rules by implication or inference. The cases so far cited to the author appear at best to be related only very distantly to the point at issue, but some of these decisions are, nevertheless, discussed below. See note 20 & accompanying text *infra*.

16. VA. CODE ANN. §§ 19.2-187 to -188 (1950 & Supp. 1978).

17. It is arguable that these sections, which provide in effect for the admission of certain types of written hearsay, thereby imply that the hearsay rule is otherwise applicable. This contention is discussed further below. See text accompanying note 29 *infra*.

ceived. Fifty-five of these respondents stated that they apply *all* of the standard rules of evidence in preliminary hearings, while six indicated that they admit *hearsay* evidence at preliminary hearings but otherwise adhere generally to the standard rules of evidence.¹⁸ However, conversations with a number of judges, as well as the language of some of the survey responses, suggests that many of the judges who *do* apply all of the rules of evidence in preliminary hearings do so because they feel they are obligated by law to do so, and not out of personal preference.

It therefore appears that, while the rules of evidence are in fact now being applied in preliminary hearings in a majority of Virginia's lower courts, there is at least some variation in practice among the districts in the state. Furthermore, it appears that this variation in approach is accompanied by sharp differences in opinion among the district court judges as to which approach is the more desirable and proper.¹⁹

In view of this disparity of viewpoint in the courts, it may be helpful to examine some of the arguments that are advanced both for and against the application of the rules in preliminary hearings.

Arguments Against Application of the Rules of Evidence in Preliminary Hearings

As noted above, neither the legislature nor the Supreme Court of Virginia has imposed any express requirement that the rules be observed in preliminary hearings. This silence is construed by some to indicate that the rules are not applicable, or at least that the matter is within the discretion of the judge. Some Virginia decisions, it has been argued, contain language which at least implies that application of the rules is not required, but those cases cited to the author either dealt solely with related but separate issues, such as the extent to which a preliminary hearing may be used as a discovery device,²⁰ or simply did not refer to preliminary hearings at all.

18. Two judges declined to respond to the questions because their courts heard only civil matters. The author is deeply grateful to the judges who took the time to respond to these inquiries and extends his thanks and the thanks of the *William and Mary Law Review* to the respondents for their courtesy and interest.

19. Many of the responding judges made comments in support of their respective procedures. Some of these arguments are discussed below.

20. *E.g.*, *Foster v. Commonwealth*, 209 Va. 326, 163 S.E.2d 601 (1968); *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

Emphasis frequently has been placed upon the fact that the preliminary hearing is not a trial to determine guilt or innocence, but rather is a proceeding to determine probable cause only, thereby rendering inappropriate and unnecessary the observation in it of the strict evidential standards imposed at trial. One survey respondent observed:

Hearsay evidence is usually sufficient for probable cause to issue a warrant and is usually sufficient before [a] grand jury for a true bill. Therefore there is no reason for it not to be admissible to estab[lish] probable cause at [a preliminary hearing].²¹

This argument regarding the inapplicability of the hearsay rule in grand jury proceedings has often been made in support of the inapplicability of the rules of evidence at preliminary hearings. The use in grand jury proceedings of evidence which would not be admissible at trial has been approved by the Supreme Court of the United States²² and, by inference at least, by the Supreme Court of Virginia.²³ This lends some weight to the argument that no stricter standard should be required at the preliminary hearing, which occurs prior to the grand jury deliberations.²⁴

It also has been argued that to enforce the strict rules of evidence at preliminary hearings would greatly prolong such hearings, turning them into lengthy, full-fledged trials. In view of the power of the Commonwealth's attorney to seek an indictment even if no probable cause is found at the preliminary hearings,²⁵ this additional expenditure of time and effort is certainly questionable. Furthermore, it

21. The identity of the judge has been withheld in accordance with the terms of the survey.

22. *Costello v. United States*, 350 U.S. 359 (1956).

23. *Wadley v. Commonwealth*, 98 Va. 803, 35 S.E. 452 (1900). See also Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 488 (1959); Note, *The Grand Jury in Virginia*, 22 WASH. & LEE L. REV. 325, 336 (1965).

24. In support of the decision to make hearsay admissible at preliminary hearings conducted under the Federal Rules of Criminal Procedure, the Advisory Committee on Rules stated:

A grand jury indictment may properly be based on hearsay evidence This being so, there is practical advantage in making the evidentiary requirements for the preliminary examination as flexible as they are for the grand jury. Otherwise there will be increased pressure upon United States Attorneys to abandon the preliminary examination in favor of the grand jury indictment.

FED. R. CRIM. P. 5.1, Notes of Advisory Committee on Rules. Although the Virginia procedure, of course, is not the same as the Federal procedure, the point made by the Committee has some relevance to the present inquiry.

25. *Moore v. Commonwealth*, 218 Va. 388, 237 S.E.2d 187 (1977).

has been suggested that the transformation of the preliminary hearing into a full-scale trial may enable counsel to use the preliminary hearing as a discovery device—a tactic which the Supreme Court of Virginia has specifically disapproved.²⁶

Arguments in Favor of Application of the Rules of Evidence in Preliminary Hearings

Numerous arguments are advanced for enforcing the rules of evidence in preliminary hearings. The district judges responding to the survey argued variously (and vigorously) that an accurate determination of probable cause requires full application of the rules of evidence; that there is no justification for admitting, at the district court level, evidence which will not be admissible in the circuit court; and that the preliminary hearing has, due to counsel's fear of inadequate representation writs, already evolved into a formal trial anyway.

Several of the responding judges pointed out that because the Virginia preliminary hearing clearly is intended to be an adversary proceeding, with the rights of counsel, cross-examination, etc., attached, it is only logical that the rules of evidence should apply as well. Because the preliminary hearing may result in a misdemeanor trial in the same district court,²⁷ at least one district judge felt that the application of the rules of evidence at the preliminary hearing is a necessity if the accused is to be assured of a fair trial on the misdemeanor charge.²⁸

The most concrete argument in favor of the applicability of the rules centers around the implications to be drawn from the language of sections 19.2-187 and 19.2-188 of the Code of Virginia. As noted

26. *Foster v. Commonwealth*, 209 Va. 326, 163 S.E.2d 601 (1968); *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

27. VA. CODE ANN. § 19.2-186 (1950).

28. This argument may have been weakened somewhat by the holding in *Moore v. Commonwealth*, 218 Va. 388, 237 S.E.2d 187 (1977). In discussing the question of whether jeopardy attached at the preliminary hearing because of the power of the district court to try the accused on a lesser included offense under VA. CODE ANN. § 19.2-186, the court in *Moore* noted that the district courts are not required by statute to try an accused *immediately* on such a lesser offense. 218 Va. at 391-92, 237 S.E.2d at 190-91. Thus, where a district court finds no probable cause on the felony charge but elects to try the accused for a misdemeanor, the misdemeanor trial may be held at a later date (and, presumably, before a different judge), if it appears that any evidence has been received in the preliminary hearing which would be inadmissible at a trial and that such evidence would prejudice the defendant if an immediate trial were held.

earlier in this discussion, these statutes provide for the admissibility in preliminary hearings of certificates of laboratory analysis and certificates of medical examiners. It is certainly arguable that by creating these statutory exceptions to the rules of evidence, the legislature was recognizing by implication that the rules of evidence are otherwise applicable. The 1975 edition of *Defending Criminal Cases in Virginia* states:

Although there appears to be no Virginia statute or case prescribing the evidentiary rules for a preliminary hearing, the logical view is that the hearing should be governed by the same rules of evidence applicable at the trial. Evidently, it is the opinion of the General Assembly that the rules of the trial obtain, since by special statute it recently made admissible at the preliminary hearing certain certificates of analysis otherwise violative of the hearsay rule.²⁹

Irrespective of the foregoing arguments, the issue may be resolved for Virginia and for all other jurisdictions by the constitutional interpretations of the Supreme Court of the United States. As discussed at the beginning of this article, in the cases of *Coleman v. Alabama*³⁰ and *Gerstein v. Pugh*³¹ the Court has stated flatly that preliminary hearings of the probable-cause-to-prosecute type are subject to the constitutional safeguards of right to counsel and right to cross-examine witnesses, among others. Although no specific mention of the rules of evidence was made in these opinions, it seems arguable that the requirement that adversary safeguards, including the right to cross-examine, be observed may in turn necessitate the application of the full array of evidentiary rules in preliminary hearings of the probable-cause-to-prosecute type. If this is in fact the view held by the Justices of the Supreme Court of the United States, it certainly is not unrealistic to expect that Court to render, sooner or later, a decision to that effect.³² To date, however,

29. *DEFENDING CRIMINAL CASES IN VIRGINIA* 142 (P. Manson ed. 1975) (published by the Joint Committee on Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association).

30. 399 U.S. 1 (1970).

31. 420 U.S. 103 (1975).

32. This result is by no means certain. Application of the entire system of common law evidentiary rules is not necessarily mandated by due process requirements. For example, it has been held that the statutory exceptions to the hearsay rule created by the legislature, VA. CODE ANN. §§ 19.2-187 to -188, do not violate the right of confrontation. *Robertson v. Cox*, 320 F. Supp. 900 (W.D. Va. 1970).

no such decision has been forthcoming, leaving us to speculate as to what the Supreme Court's position will be.

The Practice in Other Jurisdictions

In the absence of any definitive decision, statute, or rule in Virginia, a brief look at the situation in neighboring jurisdictions may be of interest.

The most common statutory reference to the applicability of the rules of evidence to preliminary hearings involves the hearsay rule. The Federal Rules of Criminal Procedure permit the use of hearsay in probable-cause-to-prosecute type preliminary hearings. Rule 5.1 states, "The finding of probable cause may be based upon hearsay evidence in whole or in part."³³ The Federal Rules of Evidence expressly exclude preliminary hearings from their coverage.³⁴ North Carolina, on the other hand, specifically prohibits a finding of probable cause based upon hearsay evidence in the type of hearing under discussion here. The North Carolina statute provides that:

The State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause³⁵

Among Virginia's immediate neighbors, only West Virginia seems to have a legislative enactment that squarely confronts the issue of the use of the other evidentiary rules at preliminary hearings. The West Virginia Code states:

Witnesses shall be examined and evidence introduced for the State under the rules of evidence prevailing in criminal trials generally.³⁶

These examples illustrate that the diversity of viewpoint found within Virginia is duplicated elsewhere. It would be difficult to say what the majority rule is nationally, but McCormick's hornbook on evidence states that:

The general rule seems to be that the exclusionary rule does not apply to preliminary hearings.³⁷

33. FED. R. CRIM. P. 5.1(a).

34. FED. R. EVID. 1101.

35. N.C. GEN. STAT. § 15A-611(b) (Rep. Vol. 1978).

36. W. VA. CODE § 62-1-8 (Rep. Vol. 1977).

37. C. MCCORMICK, EVIDENCE 167, at 369 n.36 (2d ed. 1972).

Conclusion

In summary, it may be said that (1) there is presently no mandate, statutory or otherwise, which either requires or prohibits the use of the standard rules of evidence in preliminary hearings in Virginia; (2) the actual practice in the state district courts varies from district to district, with a large majority applying the rules of evidence in whole or part; and (3) the matter eventually may be settled by the Supreme Court of the United States if it is not first resolved by action of the Supreme Court of Virginia or the Virginia General Assembly.

In the absence of any such mandate, however, it appears to the author that the arguments against full application of the rules of evidence in preliminary hearings have the greater weight. This conclusion is based primarily upon the following considerations:

1. *The limited objective of the proceeding.* The preliminary hearing in Virginia is intended only as a screening device. There is no determination of guilt or innocence; the sole purpose of the hearing is to determine whether the matter should be presented to the grand jury for further consideration. A full-scale trial for this limited purpose seems unnecessary, and indeed may not serve the best interests of either the Commonwealth or the accused. At best, such an approach must necessarily cause delay and contribute to the congestion of court dockets—a problem that is already of great concern to the judiciary, the bar, and the public.

2. *The ability of the Commonwealth's attorney to seek an indictment regardless of the outcome of the preliminary hearing.* Even if the preliminary hearing results in a finding of "no probable cause," the Commonwealth's attorney still may present the case to the grand jury.³⁸ Thus the preliminary hearing is not only restricted to the narrow question of probable cause, but is not even finally determinative of the limited issue. It seems wasteful to impose all of the cumbersome evidentiary requirements upon a preliminary determination of a preliminary issue.

3. *The inapplicability of the rules of evidence in grand jury proceedings.* As noted, the preliminary hearing was designed as a screening device to determine what matters would be presented to the grand jury, which is the ultimate arbiter of probable cause in Virginia. Because the rules of evidence are not applicable in grand

38. See note 25 & accompanying text *supra*.

jury proceedings, it seems incongruous to require the district courts to apply all of those rules in a proceeding that occurs prior to the grand jury hearing, and that can be nullified or overridden by the action of the grand jury.³⁹

In light of these factors, it appears to the author that to require application of the full panoply of evidence rules in a preliminary hearing is to impose them in a situation for which they were not designed and in which their application is unnecessary. By the same token, however, it appears to the author that practical considerations necessitate the retention of at least some restrictions upon the material which may be presented at the preliminary hearing. While the rules of evidence are, of course, designed in part to ensure a fair trial for the accused, they also serve to protect the court from being inundated by irrelevant, repetitive, or otherwise useless information. The retention of some portion of the rules is surely necessary to enable the judge to retain control of the proceedings and to reach a prompt decision.

It therefore seems probable that the best solution to the problem is to suspend, selectively, those evidentiary rules which are not necessary in light of the nature of the preliminary hearing and its place in our legal system, while retaining those rules which are essential to ensure the accused due process and to prevent unlimited admission of irrelevant or otherwise useless evidence. The decision of some of our judges (and some of our neighboring jurisdictions) to admit hearsay in preliminary hearings while otherwise applying the rules of evidence in those proceedings is clearly an attempt to accomplish just such a result. This position appears to the author preferable, on balance, to either full application or complete abrogation of the rules in these preliminary proceedings.

This conclusion implies no criticism whatsoever of the courts which have elected to apply all of the rules of evidence in preliminary hearings in their courts. The arguments favoring such application have undoubted force and may quite reasonably be regarded by many as persuasive. In addition, as noted earlier, it appears that some of the district courts that have elected to apply all of the rules in preliminary hearings may have done so simply because they feel

39. The author expresses no opinion as to the effectiveness of the grand jury, the propriety of its present position in Virginia's criminal justice system, or the appropriateness of the rules under which it presently performs its functions. Changes in the grand jury system itself, of course, would affect any conclusions reached herein regarding the preliminary hearing.

that they are required to do so, or perhaps solely because of caution generated by the complete lack of authoritative guidance on the point; in these instances, the application of the rules may be contrary to the individual judge's personal feelings in the matter.⁴⁰

In any event, and whatever the reasons involved, the fact that the vast majority of district judges responding to the survey questionnaire indicated that they are presently applying all of the rules of evidence must be given considerable weight; a consensus of Virginia's active trial judges cannot and should not be ignored and may indeed prove decisive upon the point if the legislature or the Supreme Court of Virginia chooses to address the matter directly. And, finally, it should be noted that recent nationwide trends in criminal justice generally would seem to favor full application of the rules; regardless of the weight of the arguments against such application.

In the absence of a binding decision by the Supreme Court, or federal legislation mandating full application, it would seem that it might be appropriate for Virginia's judiciary and/or legislature to conduct a formal study of the problem to determine just which rules should or should not be applied in preliminary hearings. It may be that certain rules (including, but not necessarily limited to, the hearsay rule) can indeed be relaxed at the preliminary stages of criminal proceedings without undue prejudice to any participant, but the matter requires careful consideration before any state-wide solution is attempted.

Regardless of the ultimate conclusion reached, however, action by the Supreme Court or the General Assembly would ensure one advantage—consistency among the various districts, which most would agree is in itself a desirable end. But until the question is resolved by the Court or legislative action, the issue will remain one upon which reasonable judges and lawyers may (and will) continue honestly and honorably to differ.

40. Note also that this discussion, and the author's conclusions, refer only to the application of evidentiary rules in *preliminary hearings*; the use of evidentiary rules in *trials* in the district courts is an entirely different matter.