

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 4th day of January, 2018.

Antoine J. Spain,

Appellant,

against

Record No. 170451

Court of Appeals No. 0738-16-1

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Norfolk shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee

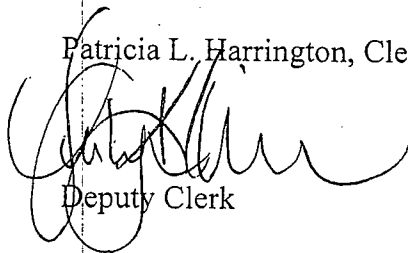
\$850.00 plus costs and expenses

A Copy,

Teste:

By:

Patricia L. Harrington, Clerk


Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 3rd day of October, 2016.

Antoine Jerome Spain,

Appellant,

against

Record No. 0738-16-1

Circuit Court No. CR15000054-00

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Norfolk

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. and II. Appellant contends the trial court erred in finding him guilty of possessing cocaine with the intent to distribute and sentencing him, in accordance with Code § 18.2-248(D), as a person who participated in the offense as an accommodation.¹ “When considering on appeal the sufficiency of the evidence presented

¹ In its brief in opposition, the Commonwealth assigns as cross-error that “[t]he trial court erred in finding . . . Mr. Spain met the burden for establishing the mitigation defense of accommodation.” Rule 5A:13, which governs the form and content of a brief in opposition in this Court, does not provide for assignment of cross-error by the Commonwealth in a criminal case. Compare Rule 5:18(c). Article 6, § 1 of the Constitution of Virginia provides in part:

The General Assembly may allow the Commonwealth the right to appeal in all cases, including those involving the life or liberty of a person, provided such appeal would not otherwise violate this Constitution or the Constitution of the United States.

Subject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts of the Commonwealth.

The trial court’s decision to sentence appellant as one who participated as an accommodation is not one of the limited instances in which the General Assembly has permitted the Commonwealth to appeal in a criminal case. See Code § 19.2-398(A) through (C). Accordingly, this Court has no jurisdiction to consider the assignment of cross-error raised by the Commonwealth on appeal. See Campbell v. Commonwealth, 246 Va. 174, 187, 431 S.E.2d 648, 656 (1993).

below, we 'presume the judgment of the trial court to be correct' and reverse only if the trial court's decision is 'plainly wrong or without evidence to support it.'" Kelly v. Commonwealth, 41 Va. App. 250, 257, 584 S.E.2d 444, 447 (2003) (*en banc*) (quoting Davis v. Commonwealth, 39 Va. App. 96, 99, 570 S.E.2d 875, 876-77 (2002)). "On appeal, we will consider the evidence in the light most favorable to the Commonwealth, as it prevailed in the trial court." Whitehurst v. Commonwealth, 63 Va. App. 132, 133, 754 S.E.2d 910, 910 (2014).

On September 26, 2014, Investigator Randall Gillespie of the Norfolk Police Department was working undercover in an area known for crime and drug activity. As he was driving in an unmarked truck, Gillespie saw appellant standing on a street corner. Gillespie stopped his vehicle near appellant and engaged him in conversation, asking for directions to Vernon Street and whether appellant knew a person named "D-Block." Appellant said he did not know "D-Block," but directed Gillespie to Vernon Street. Gillespie drove away.

Gillespie drove up to appellant a second time within a few minutes. He asked if appellant "knew anybody." Appellant asked if Gillespie was "looking for hard." "Hard" is a street term for crack cocaine. Gillespie said he was looking for forty dollars' worth of "hard." Appellant indicated that he would find someone who could get it, and directed Gillespie to a location for him to park his vehicle. Appellant then walked down the street to a group of people gathered on a corner. Appellant spoke to a person who later was identified as Torio Benns. After a brief conversation, appellant lifted his arm and pointed in Gillespie's direction.

Following this interaction, Benns ran to Gillespie's truck, got inside, and handed him a plastic bag containing cocaine. Gillespie paid Benns forty dollars, and asked for more cocaine. Benns produced a second bag of cocaine, for which Gillespie paid twenty dollars.

After the transaction was completed, police officers arrested both Benns and appellant.

Appellant introduced testimony that he conversed with Gillespie on the street, but did not gesture in Gillespie's direction. One witness said he did not see appellant speak with Benns prior to the arrest.

At the conclusion of the Commonwealth's evidence, appellant moved to strike the evidence on the charge of possession of cocaine with the intent to distribute. Although arguing that the evidence was insufficient to support *any* conviction under Code § 18.2-248, he asked the trial court to find that he had participated in the incident as an accommodation. The trial court denied the motion at that juncture. After all the evidence was presented, the trial court found appellant guilty but concluded that he was "guilty as an accommodation."²

The trial court credited the Commonwealth's evidence, and rejected appellant's defense. "[D]etermining the credibility of the witnesses and the weight afforded the testimony of those witnesses are matters left to the trier of fact." Parham v. Commonwealth, 64 Va. App. 560, 565, 770 S.E.2d 204, 207 (2015).

To sustain appellant's conviction of possessing drugs with the intent to distribute, the Commonwealth could have proven his guilt either as a principal in the first degree or a principal in the second degree. See generally Dunn v. Commonwealth, 52 Va. App. 611, 665 S.E.2d 868 (2008) (*en banc*) (affirming appellant's convictions for possession of drugs with the intent to distribute as a principal in the second degree). "A principal in the first degree is the actual perpetrator of the crime. A principal in the second degree, or an aider or abettor as he is sometimes termed, is one who is present, actually or constructively, assisting the perpetrator in the commission of the crime." Muhammad v. Commonwealth, 269 Va. 451, 482, 619 S.E.2d 16, 33 (2005) (quoting Jones v. Commonwealth, 208 Va. 370, 372, 157 S.E.2d 907, 909 (1967)). As this Court has held on numerous occasions, a "principal in the second degree may be indicted, tried, convicted and punished as if a principal in the first degree." Allard v. Commonwealth, 24 Va. App. 57, 62, 480 S.E.2d 139, 141 (1997). Although the Commonwealth must prove that the offense was committed by the principal in the first degree in order to sustain a conviction of a principal in the second degree, Sutton v.

² Although he had raised such a finding in his motion to strike, appellant, at sentencing, argued that the trial court erred in convicting him of possession with intent to distribute as an accommodation. Because we find the evidence sufficient to sustain a conviction under Code § 18.2-248, we express no opinion as to whether appellant is precluded from challenging the trial court's sentencing under the more lenient accommodation provisions of Code § 18.2-248(D), which the trial court described as "unwarranted grace."

Commonwealth, 228 Va. 654, 665, 324 S.E.2d 665, 671 (1985), proof of "actual participation in the commission of the crime is not necessary" "to make a person a principal in the second degree," Muhammad, 269 Va. at 482, 619 S.E.2d at 33 (quoting Jones, 208 Va. at 372, 157 S.E.2d at 909).

To support a conviction under this theory, the Commonwealth must prove that the accused was present at the scene of the crime and shared the criminal intent of the perpetrator or committed some act in furtherance of the offense. Allard, 24 Va. App. at 62, 480 S.E.2d at 141.

While mere presence at the scene of a crime or knowledge that a crime is going to be committed does not constitute aiding and abetting, accompanying a person with full knowledge that the person intends to commit a crime and doing nothing to discourage it bolsters the perpetrator's resolve, lends countenance to the perpetrator's criminal intentions, and thereby aids and abets the actual perpetrator in the commission of the crime.

Pugliese v. Commonwealth, 16 Va. App. 82, 94, 428 S.E.2d 16, 25 (1993); see Foster v. Commonwealth, 179 Va. 96, 99, 18 S.E.2d 314, 315-16 (1942) ("Every person who is present at the commission of a [crime], encouraging or inciting the same by words, gestures, looks or signs, or who in any way, or by any means, countenances or approves the same is, in law, assumed to be an aider and abettor" (quoting Brown v. Commonwealth, 130 Va. 733, 736, 107 S.E. 809, 810 (1921))).

The Commonwealth's evidence proved that appellant conversed with Gillespie about Gillespie's desire to purchase drugs. Appellant said he would find someone who could get it, and directed Gillespie where to park. Appellant immediately went to Benns and pointed to Gillespie's vehicle. Benns ran to Gillespie's car and gave him a bag of cocaine, and Gillespie paid Benns for the drugs. Considering these facts and circumstances, the evidence proved beyond a reasonable doubt that appellant participated as a principal in the second degree to Benns' possession of cocaine with the intent to distribute.

Pursuant to Code § 18.2-248(D), if a defendant

proves that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II only as an accommodation . . . and not with intent to profit thereby from any consideration received or expected nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony.

"An accommodation defense is a defense that pertains only to the penalty imposed on one found guilty of drug distribution." Foster v. Commonwealth, 38 Va. App. 549, 555, 567 S.E.2d 547, 550 (2002). It is for the finder of fact at the penalty phase of trial to determine whether a defendant has sufficiently proven the defense of accommodation. Id. at 556, 567 S.E.2d at 550; see also Brown v. Commonwealth, 215 Va. 753, 755, 213 S.E.2d 764, 766 (1975) (holding that the determination of whether a drug distribution was committed as an accommodation was within the province of the jury). "[A] defendant who invokes an accommodation defense has the burden of proving the elements of that defense by a preponderance of the evidence." Heacock v. Commonwealth, 228 Va. 397, 406, 323 S.E.2d 90, 95 (1984).

There was no evidence that appellant intended to profit or would be compensated for his participation in Benns' drug offense. Accordingly, we find no error in the trial court's decision to sentence appellant pursuant to Code § 18.2-248(D).

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, pursuant to those rules the demand shall include a statement identifying how this order is in error.

The trial court shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

This Court's records reflect that Emily M. Munn, Esquire, is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Attorney's fee \$400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:



Deputy Clerk

VIRGINIA: In the Circuit Court for the City of Norfolk

THE COMMONWEALTH OF VIRGINIA

v.

ANTOINE JEROME SPAIN

DOB: 10/26/76

SSN: 225-17-6927

Indictment for:

Distribution of a Schedule I or II
Controlled Substance

(Felony)

January 21, 2015

The Grand Jury charges that:

On or about September 26, 2014, in the City of Norfolk, ANTOINE JEROME SPAIN did knowingly, intentionally, and feloniously manufacture, sell, give, or distribute a Schedule I or II controlled substance.

Va. Code § 18.2-248(C).

Grand Jury Witness:

T. BURKE

VICE NARCOTICS

Norfolk Police Department

True Bill



Not a True Bill



Grand Jury Foreperson Signature

(For Administrative Purposes Only)

NCC Case # CR15000054-00

Ramin X Fatehi

VC Code: NAR-3042-F9

VIRGINIA: In the Circuit Court for the City of Norfolk

THE COMMONWEALTH OF VIRGINIA

Indictment for:

v.

Conspiracy to Distribute a Schedule
I or II Controlled Substance

ANTOINE JEROME SPAIN

DOB: 10/26/76

(Felony)

SSN: 225-17-6927

January 21, 2015

The Grand Jury charges that:

On or about September 26, 2014, in the City of Norfolk, ANTOINE JEROME SPAIN did knowingly, intentionally, and feloniously conspire to manufacture, sell, give, distribute, or possess with the intent to manufacture, sell, give, or distribute a Schedule I or II controlled substance.

Va. Code §§ 18.2-256/18.2-248

Grand Jury Witness:

T. BURKE

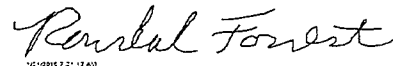
VICE NARCOTICS

Norfolk Police Department

True Bill



Not a True Bill



Grand Jury Foreperson Signature

(For Administrative Purposes Only)

NCC Case # CR15000054-01

Ramin X Fatehi

VC Code: NAR-3042-C9

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

FEDERAL INFORMATION PROCESSING

STANDARDS CODE: 710

Hearing Date: **February 12, 2016**Court Reporter - **D. Harbour**Judge: **Everett A. Martin, Jr.**Court Clerk - **KC**

COMMONWEALTH OF VIRGINIA

v.

ANTOINE JEROME SPAIN, DEFENDANT

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, **Benjamin Hamlet**. The Commonwealth was represented by **Ramin Fatehi**.

On **March 16, 2015**, the defendant was found guilty of the following offense(s):

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M) (VCC CODE)	OFFENSE DATE	VA. CODE SECTION
CR15000054-00	Possession with Intent to Distribute a Schedule I or II Controlled Substance as an Accomodation (lesser included felony) (NAR-3035-F5)	F 09/26/14	18.2-248

And the following charge was **dismissed**:

CR15000054-01	Conspiracy to Distribute F A Scheduled I or II Controlled Substance	09/26/14	18.2-256/
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The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code Section 19.2-299.

Pursuant to the provisions of Code Section 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **4 years** for **Possession with Intent to Distribute a Schedule I or II Controlled Substance as an Accomodation**, the lesser included **felony under Indictment #1**. The total sentence imposed is **4 years**.

This sentence shall run **consecutively** with all other sentences.

The Court recommends the active period of incarceration imposed this date be served in a therapeutic community facility.

Post Release Supervision. In addition to the above sentence to incarceration, the Court imposes an additional sentence of **3 years** of incarceration and suspends this sentence conditioned upon the defendant being placed on **3 years** post release supervision, under the supervision and review of the Virginia Parole Board pursuant to 19.2-295.2(B) and 53.1-165, which shall commence upon his release from incarceration. The defendant shall comply with all the rules and requirements set by the Virginia Parole Board.

The defendant's driver's license shall be suspended for **6 months** from the date of judgment and the defendant shall surrender his license to the Court.

Fines/Costs/Restitution. The following amounts are due and payable at the time of sentencing. If the total payment is not made on the date of sentencing, the defendant shall enter into an Installment Agreement Plan with the Circuit Court Clerk's Office and a judgment entered therein. All payments are to be made payable to the Clerk, Norfolk Circuit Court. Payments shall be made no less than the minimum rate of \$50.00 per month beginning on the first day of the first month following conviction or beginning within 90 days of the release from incarceration.

➤ Fines:	<u>\$-0-</u>
➤ Costs:	<u>\$1,938.00</u>
➤ Restitution:	<u>\$-0-</u>
➤ TOTAL:	<u>\$1,938.00</u>

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187.

Notice of Destruction of Exhibits. The Clerk hereby gives notice to the defendant and the attorney for the Commonwealth that any and all exhibits introduced in this matter may be destroyed pursuant to Virginia Code Section 19.2-270.4.

The defendant, by counsel, advised the Court that the defendant desires to appeal the judgment rendered, and accordingly the Court suspends execution of the sentence for a period of **30 days**, until the said appeal is acted upon.

And it appearing that the defendant is still indigent, the Clerk is Ordered to have the record transcribed free of charge.

And the Court appoints **Emily M. Munn**, an able and competent attorney-at-law to represent the defendant in said appeal.

Distribution of Copies. The Clerk shall send a copy of this order to the:

Sheriff

Department of Corrections-sent electronically

Sentencing Guideline Commission

Office of the Commonwealth Attorney-sent electronically

Circuit Court Appeals Clerk

Virginia Parole Board

ENTER:

Everett A. Martin, Jr.

Everett A. Martin, Jr., Judge
Mar 03 2016 02:34 PM

DEFENDANT IDENTIFICATION: ANTOINE JEROME SPAIN, DEFENDANT
SSN: 225-17-6927 DOB: 10/26/76 Sex: MALE

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: 4 YEARS

TOTAL SENTENCE SUSPENDED: NONE