

VIRGINIA:

IN THE CIRCUIT COURT FOR CAROLINE COUNTY

COMMONWEALTH OF VIRGINIA

v.

Case Nos. CR09000415-00 & 416-00

BENJAMIN E. BOYD

RESPONSE TO DEFENDANT'S MOTIONS

COMES NOW the Commonwealth, by counsel, and respectfully responds as follows to the Defendant's Motion to Quash the Indictments, Motion in Limine to Exclude Defendant's Prior Employment Applications from Being Introduced into Evidence, and Motion in Limine to Allow Introduction into Evidence Defendant's Prior Convictions for Limited Purpose Only:

Statement of Facts

In 1990, a postal clerk in Salem, Virginia, notified local police that the defendant, Benjamin E. Boyd, was sending express-mail packages with incorrect return addresses. In August 1990, Salem police arrested Mr. Boyd at his hair salon after obtaining search warrants on a package and the salon. Police found 300 tablets of Oxandrolone Spa, three boxes labeled Primobolan Depot, one vial labeled Testosterone Cypionate, three vials labeled Nandrolone Deconoate, 210 hypodermic needles, \$860 cash, and a handwritten note.

On September 21, 1990, Mr. Boyd was indicted in the United States District Court for the Western District of Virginia (the "Federal Court") on two felony counts of distributing anabolic steroids.

Pursuant to a plea agreement, Mr. Boyd pled guilty in the Federal Court on January 25, 1991, to two reduced charges, both misdemeanors:

Misdemeanor No. 1: Mr. Boyd pled guilty to the misbranding of a drug in interstate commerce in violation of 21 U.S.C. 331(b), a misdemeanor punishable by up to one year in prison.

Misdemeanor No. 2: Mr. Boyd pled guilty to the delivery into interstate commerce of a misbranded drug in violation of 21 U.S.C. 331(a), a misdemeanor punishable by up to one year in prison.

On April 7, 1991, the Federal Court sentenced Mr. Boyd on his convictions of the two misdemeanors, as follows: eighteen (18) months probation, with special conditions that he was not to use, possess or procure steroids and that he submit to urinalysis or other chemical testing to monitor compliance, and fines and assessments totaling \$250.

Almost eleven months later, on a Petition on Probation and Supervised Release, the Federal Court ordered on February 28, 1992, that Mr. Boyd be discharged from probation.

Five years later, in an application to Greenville County Schools dated May 5, 1997, Mr. Boyd was asked the following question: "Have you ever been convicted of a violation of law other than a minor traffic violation? (If yes, explain on back)." Mr. Boyd answered, "No."

In an application to Gloucester County Public Schools dated January 15, 1999, Mr. Boyd was asked the same question: "Have you ever been convicted of a violation of law other than a minor traffic violation? (If yes, explain on back)." Mr. Boyd again answered, "No."

Mr. Boyd was not asked the same question when he applied to Franklin County Public Schools in May 2000, and Franklin County school officials were unaware of Boyd's two Federal misdemeanor convictions until September 25, 2006, when the school board's and high school principal's offices received envelopes containing copies of the Roanoke Times article that reported the convictions in April 1991.

On October 11, 2006, the Roanoke Times published an article entitled, "Criminal Record Doesn't Cost Boyd," on the front page of the Sports section. The article went into great detail regarding the facts surrounding Mr. Boyd's two misdemeanor convictions. Among other details, the article reported that Mr. Boyd "had been found guilty of 1991 federal misdemeanor charges of misbranding and illegally dispensing anabolic steroids" and that he "was sentenced to 18 months probation and fined \$250."

In another article, "Boyd Quits as Football Coach," in January 2009, the Roanoke Times again reported that Mr. Boyd "had been found guilty of 1991 federal misdemeanor charges of misbranding and illegally dispensing anabolic steroids" and that he received "18 months probation and a \$250 fine."

In an application to Caroline County Public Schools dated March 9, 2009, Mr. Boyd was asked: "Have you ever been convicted (as guilty or not innocent) of a violation of law other than a minor traffic violation? (If yes, attach explanation)." Mr. Boyd answered "Yes" and wrote "misdemeanor 1990 – 6 mths. probation \$250 fine."

Analysis

Virginia Code Section 18.2-168 provides, in pertinent part:

If any person forge a public record, ... or utter, or attempt to employ as true, such forged record, ... knowing the same to be forged, he shall be guilty of a Class 4 felony.

Va. Code § 18.2-168.

For purposes of Section 18.2-168, a “public record” means

recorded information that documents a transaction or activity by or with any public officer, agency or employee of an agency. Regardless of physical form or characteristic, the recorded information is a public record if it is produced, collected, received or retained in pursuance of law or in connection with the transaction of public business.

See Va. Code §42.1-77; *Hines v. Commonwealth*, 39 Va. App. 752, 758, 576 S.E.2d 781

(2003); *Koch v. Commonwealth*, Record No. 3078-05-4 (Va. App. 01/09/2007). The application by Mr. Boyd to Caroline County Public Schools dated March 9, 2009, was “produced, collected, received or retained in pursuance of law or in connection with the transaction of public business” and was therefore a “public record” for purposes of Section 18.2-168.

To prove that Mr. Boyd violated Section 18.2-168, the Commonwealth must establish beyond a reasonable doubt that, on his application to Caroline County Public Schools dated March 9, 2009, Mr. Boyd made a false writing with intent to defraud. See *Reid v. Commonwealth*, 16 Va. App. 468, 471, 431 S.E.2d 63 (1993).

Mr. Boyd’s writing was clearly false:

(1) He wrote “misdemeanor” when he in fact had twice as many misdemeanor convictions;

(2) He wrote “1990” when he in fact was convicted in 1991; and

(3) He wrote “6 mths. probation” when in fact he was sentenced to 18 months probation and was not released from probation for almost 11 months.

In light of the fact that Mr. Boyd clearly made a false writing in a public record, the only issue for a jury to decide is whether the Commonwealth can prove beyond a reasonable doubt that Mr. Boyd had the intent to defraud.

Mr. Boyd has filed a motion in limine to exclude his prior employment applications from being introduced into evidence. The Commonwealth would respectfully submit that Mr. Boyd's prior employment applications are highly relevant to prove his intent to defraud in this case.

Evidence is admissible if it is “relevant, for any purpose *other than* to show a mere propensity or disposition on the part of the defendant to commit the crime.”

Thomas v. Commonwealth, 44 Va. App. 741, 757 n. 8, 607 S.E.2d 738, *adopted upon reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005) (citation omitted).

“[E]very fact, ‘however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant.’” *Thomas*, 44 Va. App. at 753 (quoting *Va. Elec. & Power Co. v. Dungee*, 258 Va. 235, 260, 520 S.E.2d 164 (1999) (citation omitted)). “Put another way, evidence has relevance if it ‘tends to cast any light’ on any material point.” *Thomas*, 44 Va. App. at 753; *Seaton v. Commonwealth*, 42 Va. App. 739, 752, 595 S.E.2d 9 (2004); *Ricks v. Commonwealth*, 39 Va. App. 330, 334, 573 S.E.2d 266 (2002).

“It is its *tendency* to prove or disprove — not its sufficiency, standing alone, to satisfy the ultimate burden of proof — that makes a fact relevant.” *Thomas*, 44 Va. App. at 754. “It is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Thomas*, 44 Va. App. at 754 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). “This standard

entrusts juries with the task of weighing evidence of all probative gradations and gives them the freedom to accept or reject what they will.” *Thomas*, 44 Va. App. at 754.

It is the Commonwealth’s theory in this case:

(1) that Mr. Boyd, in his past applications to public schools, had denied completely his criminal history, indicating an awareness and a concern on his part that he would not be hired if the truth about his criminal convictions were known;

(2) that, despite his prior denials, Mr. Boyd’s criminal history was revealed and made very public in the Roanoke area in the last three years;

(3) that, when he applied to Caroline County Public Schools in March 2009, Mr. Boyd was aware and concerned *both* that he would not be hired if the truth about his criminal convictions were known *and* that, if he were to completely deny any criminal history as he had done in Greensville and Gloucester Counties, his criminal past might later be revealed in Caroline County as it was in the Roanoke area, and he might get fired or worse; and

(4) that he settled on filing a false writing that did not constitute a complete denial of any criminal history but which so significantly misled as to the truth of his criminal history that it would not, he hoped, garner any attention in the hiring process.

The defendant argues that Mr. Boyd’s complete denials of his criminal history in his past applications to public schools are inadmissible “prior bad acts.” In fact, Mr. Boyd’s complete denials of his criminal history in his past applications to public schools indicate an awareness and a concern on his part that he would not be hired if the truth about his criminal convictions were known, and they are therefore admissible in the instant case to prove his intent, to show his motive, to establish his guilty knowledge, and to negate his good faith.

“Ultimately, the question whether to admit evidence of other crimes involves the same considerations as any other circumstantial evidence.” *Spencer v. Commonwealth*, 240 Va. 78, 90, 393 S.E.2d 609 (1990). “[S]ettled Virginia law ... follows an ‘inclusionary approach’ to the uncharged misconduct doctrine by admitting such evidence ‘if relevant, for any purpose *other than* to show a mere propensity or disposition on the part of the defendant to commit the crime.’” *Thomas*, 44 Va. App. at 757 n. 8 (quoting Sinclair, Kearfott, Sheridan & Imwinkelried, *Virginia Evidentiary Foundations* § 6.4[A], at 165 (1998) (emphasis in original)). Thus, evidence of other bad acts has been admissible when such evidence was relevant to prove intent, to show motive, to establish guilty knowledge, or to negate good faith. See, e.g., *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272-73, 176 S.E.2d 802 (1970); *Traish v. Commonwealth*, 36 Va. App. 114, 130, 549 S.E.2d 5 (2001); *Shifflett v. Commonwealth*, 29 Va. App. 521, 529-30, 513 S.E.2d 440 (1999); *Lafon v. Commonwealth*, 17 Va. App. 411, 417-18, 438 S.E.2d 279 (1993).

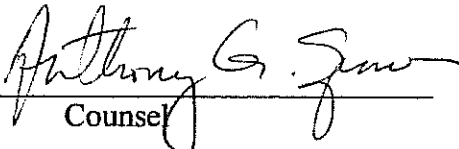
For the reasons stated herein, the Commonwealth respectfully requests that this Honorable Court deny Mr. Boyd’s Motion in Limine to Exclude Defendant’s Prior Employment Applications from Being Introduced into Evidence.

The Commonwealth further submits that, as stated herein, the indictments in this case do allege a violation of Section 18.2-168, and it is respectfully requested that this Honorable Court deny Mr. Boyd’s Motion to Quash the Indictments.

The Commonwealth has no objection to Mr. Boyd’s Motion in Limine to Allow Introduction into Evidence Defendant’s Prior Convictions for Limited Purpose Only.

Respectfully submitted,


COMMONWEALTH OF VIRGINIA

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CERTIFICATE

I hereby certify that, on this 8th day of September, 2009, a true and exact copy of this Motion was hand-delivered to counsel for the defendant


Anthony G. Spencer