

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the  
City of Richmond on Friday the 13th day of February, 2015.*

Kemisha J. Hodge, Appellant,

against Record No. 140588  
Court of Appeals No. 0894-13-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a  
judgment rendered by the Court  
of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that the Court of Appeals did not err when it ruled that the Commonwealth was not required to prove that a special conservator of the peace was carrying his badge to prove that he was acting as a "law-enforcement officer" for purposes of Code § 18.2-460(A). Therefore, we will affirm the judgment.

On October 26, 2012, Scott Allen ("Allen") was on patrol in Chippenham Place Apartments in the City of Richmond pursuant to his employment with a private security firm.<sup>1</sup> He heard yelling inside an apartment, and he went to the apartment to investigate.

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<sup>1</sup> On February 2, 2011, the Circuit Court of the City of Richmond appointed Allen as a special conservator of the peace pursuant to Code § 19.2-13, which permits a circuit court judge to appoint a qualified individual upon receiving an application from the sheriff or chief of police of any locality, a corporation authorized to do business in the Commonwealth, the owner or proprietor "of any place within the Commonwealth," or any museum owned and managed by the Commonwealth. Once appointed, the individual possesses "all the powers, functions, duties, responsibilities and authority of any other conservator of the peace." Code § 19.2-13(A). The section

The appellant, Kemisha J. Hodge ("Hodge"), opened the apartment door after Allen identified himself as "police." When Hodge opened the door, Allen smelled marijuana. After confirming that Hodge was okay, Allen inquired about the marijuana odor. Hodge replied that she and her guest had been smoking, and she gestured towards a coffee table in the living room. Allen observed what appeared to be a marijuana cigarette on the table. Before he could inquire further, he was called away to assist another security guard. As he left, he told Hodge "to stay right there" and that he "would be back."

When Allen returned to Hodge's apartment, he encountered her leaving. He asked her about the marijuana, and she told him that she had "flushed" it. Allen arrested Hodge and issued a summons charging her with obstruction of justice in violation of Code § 18.2-460(A).

The General District Court of the City of Richmond found Hodge guilty of obstruction of justice, fined her \$100, and sentenced her to thirty days imprisonment with thirty days suspended for three years. Hodge appealed her conviction to the Circuit Court of the City of Richmond.

In a bench trial, the Commonwealth moved into evidence the Order of Appointment issued by the circuit court appointing Allen as a special conservator of the peace pursuant to Code § 19.2-13(A). The Order of Appointment recites that Allen "shall be

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also provides that special conservators of the peace who have completed certain training may make arrests "using up to the same amount of force as would be allowed to a law-enforcement officer employed by the Commonwealth or any of its political subdivisions."  
Id.

considered to be a 'Law Enforcement Officer'" for the purpose of various Code sections. The Order of Appointment also states:

[T]he powers of the special conservator of the peace appointed herein shall be exercised only when the Proposed Appointee either (i) carries on his person a [sic] identification card signed by the Clerk of the Court . . . or (ii) wears or carries a badge, which identifies him or her as a Special Conservator of the Peace

. . . .

The circuit court convicted Hodge and imposed an identical sentence as the general district court. Hodge filed a petition for appeal with the Court of Appeals, contending that the Commonwealth failed to prove that Allen was carrying his badge as required by the court order that appointed him a special conservator of the peace. Hodge argued that the Commonwealth therefore failed to prove that Allen was acting as a "law-enforcement officer" at the time. Hodge also argued that the evidence was insufficient to prove that she was guilty of obstructing justice.

By per curiam order, the Court of Appeals denied her petition. Hodge v. Commonwealth, Record No. 0894-13-2 (December 30, 2013). The Court of Appeals found that Allen was a law-enforcement officer pursuant to his Order of Appointment and Code § 19.2-13, and the Commonwealth was not required to prove that Allen was carrying his badge to prove his status. Id., slip op. at 7. The Court of Appeals also found that the evidence was sufficient to prove beyond

a reasonable doubt that Hodge was guilty of obstructing justice in violation of Code § 18.2-460(A).<sup>2</sup> Id., slip op. at 9-10.

On appeal to this Court, Hodge contends that the Commonwealth failed to prove that Allen was a "law-enforcement officer," because the Commonwealth presented no evidence that Allen was carrying his badge as required by the court order appointing him as a special conservator of the peace.

Hodge is correct that the Commonwealth failed to present any evidence that Allen was carrying his badge during the incident. However, her argument is premised on a misreading of the Order of Appointment. That order makes Allen a special conservator of the peace and imbues him with certain law enforcement authority. Though it provides that he may exercise his authority "only" when he "wears or carries a badge," that language goes to the question of whether Allen lawfully exercised his authority. The language does not have any bearing on whether Allen is or is not a "law-enforcement officer" for purposes of Code § 18.2-460(A). Indeed, the Order of Appointment constitutes evidence that Allen was a "law-enforcement officer." When coupled with evidence that he was on patrol pursuant to his employment, it is sufficient to show that he was acting as such during the incident.

Moreover, the Commonwealth was not required to prove that Allen was acting in compliance with the Order of Appointment to prove each element of the offense beyond a reasonable doubt. The

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<sup>2</sup> Code § 18.2-460(A) provides that "any person without just cause [who] knowingly obstructs . . . any law-enforcement officer . . . in the performance of his duties as such . . . shall be guilty of a Class 1 misdemeanor."

Court of Appeals correctly noted that Code § 18.2-460(A) does not qualify the "performance of [an officer's] duties" with the term "lawful," as do the separate offenses under Code § 18.2-460(B) and (C). Consequently, the "lawful" performance of duties is not an affirmative element of the offense under Code § 18.2-460(A) that the Commonwealth must prove. See Zinone v. Lee's Crossing Homeowners Ass'n, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011) ("[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional."); accord Brown v. Commonwealth, 284 Va. 538, 545, 733 S.E.2d 638, 641 (2012).

Rather, under Code § 18.2-460(A), the lawfulness of an officer's actions relates to whether the defendant had "just cause" to obstruct the officer. Hodge presented no evidence that any alleged failure on the part of Allen to wear or carry his badge led Hodge to obstruct him while he performed his duties. Hodge acknowledged that the burden to prove "just cause," as with other affirmative defenses, lies with the defendant. See Taylor v. Commonwealth, 260 Va. 683, 690, 537 S.E.2d 592, 596 (2000) (interpreting "without legal justification" as used in Code § 18.2-47 at the time).

For these reasons, we affirm the judgment of the Court of Appeals. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

Justice Kelsey took no part in the consideration of this case.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Richmond.

A Copy,

Teste:

*John L. Hamilton*

Clerk