

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Thursday, the 8th day of June, 2006.

Commonwealth of Virginia, Appellant,

against Record No. 060138
Court of Appeals No. 2209-04-1

Holly Jo South, Appellee.

From the Court of Appeals of Virginia

Upon the petition of the Commonwealth of Virginia and a review of the record, pleadings and the argument of appellant's counsel, the Court finds no merit to assignments of error I and II and refuses the petition as to those assignments of error. The appellee, however, concedes that appellant is correct as to its third assignment of error, which reads as follows:

III. Assuming *arguendo* that the trial court erred in convicting the defendant under the felony provisions of the assault and battery statute, the Court of Appeals erred in remanding the case for a new trial, instead of simply remanding the case for a new sentencing proceeding on the lesser included offense for which the petitioner was validly convicted.

Accordingly, the petition is granted as to assignment of error III, that part of the judgment of the Court of Appeals remanding the case for a new trial is reversed, and the case is remanded to the Court of Appeals with instruction to remand to the trial court

for a new sentencing proceeding on the lesser-included offense of assault and battery, a Class 1 misdemeanor.

Justices Keenan and Lemons did not participate in the consideration of this case.

This order shall be published in the Virginia Reports and shall be certified to the Court of Appeals of Virginia and the Circuit Court of the City of Norfolk.

A copy,

Teste:

Patricia L. Harrington, Clerk