

Virginia State Crime Commission

Misdemeanor Arrest

2008

MISDEMEANOR ARREST

Background

Crime Commission staff was asked to brief the Commission on the anticipated decision by the U.S. Supreme Court in Virginia v. Moore and its effect on Code of Virginia § 19.2-74.

Analysis

Virginia Code § 19.2-74 restricts law enforcement to the issuance of a summons for class 1 or 2 misdemeanors, and does not allow them to make an arrest unless one of the following three exceptions applies: (1) the person fails/refuses to discontinue the unlawful act; (2) the person is believed by the arresting officer to be likely to disregard the summons; or, (3) the person is reasonably believed by the arresting officer to pose a threat to himself or others. There is no statutory remedy available for a defendant if an officer makes an arrest in lieu of issuing a summons.

The Supreme Court of Virginia applied the Fourth Amendment exclusionary rule to violations of § 19.2-74 in Moore v. Commonwealth. In Moore the defendant was pulled over by police for driving on a suspended license, a Class 1 misdemeanor. Instead of being issued a summons, as required by § 19.2-74, he was arrested. Pursuant to a search incident to arrest, the arresting officer found crack cocaine in his jacket pocket. The defendant was later indicted for possession of a controlled substance, with intent to distribute. The defendant argued at his suppression hearing that the violation of § 19.2-74 was grounds to exclude the evidence against him, since it was not obtained through a search incident to a valid arrest. The trial court denied his motion to suppress and he was convicted.

A three judge panel of the Court of Appeals of Virginia reversed the conviction, for the reasons the defendant argued at his suppression hearing. The full, *en banc* panel, of the Court of Appeals later reversed the three judge panel's decision. The Supreme Court of Virginia then reversed the *en banc* decision of the Court of Appeals, holding

that the arrest in lieu of a summons violated Moore's Fourth Amendment rights.

The U.S. Supreme Court, in Virginia v. Moore, unanimously overturned the Virginia Supreme Court's decision, holding that the Fourth Amendment is inapplicable to state arrest laws of this nature. In its decision, the U.S. Supreme Court stated that, in a long line of cases, "when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt... the arrest is constitutionally reasonable." It also noted that states are free to develop rules that provide greater protection than what is permitted in the Fourth Amendment, but it cannot utilize the Fourth Amendment to enforce those greater protections.

Conclusion

The U.S. Supreme Court's decision in Virginia v. Moore removes the ability of defendants in the Commonwealth to apply the Fourth Amendment to violations of Va. Code § 19.2-74 by law enforcement. Without a statutory remedy available, evidence gathered in violation pursuant to an arrest that violates Va. Code § 19.2-74 will not be excluded for trial. Alternatively, if the Commonwealth wishes to ensure that any such evidence be admissible, the result of Virginia v. Moore eliminates the need to modify Va. Code § 19.2-74 with new legislation.