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SENATE BILL NO. 1134

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 2, 2003)

(Patron Prior to Substitute—Senator Norment)

A BILL to amend and reenact §§ 8.01-675.3, 19.2-398, 19.2-400 through 19.2-406, 19.2-408 and 19.2-409 of the Code of Virginia, relating to Commonwealth's right to appeal in criminal cases.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-675.3, 19.2-398, 19.2-400 through 19.2-406, 19.2-408 and 19.2-409 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-675.3. Time within which appeal must be taken; notice.

Except as provided in § 19.2-400 for *pretrial* appeals by the Commonwealth in criminal cases and in § 19.2-401 for cross appeals by the defendant in such cases *pretrial appeals* a notice of appeal to the Court of Appeals in any case within the jurisdiction of the court shall be filed within ~~thirty~~ 30 days from the date of any final judgment order, decree or conviction. When an appeal from an interlocutory decree or order is permitted, the appeal shall be filed within ~~thirty~~ 30 days from the date of such decree or order, except for *pretrial* appeals pursuant to § 19.2-398.

For purposes of this section, § 17.1-408, and an appeal pursuant to § 19.2-398, a petition for appeal in a criminal case or a notice of appeal to the Court of Appeals, shall be deemed to be timely filed if (i) it is mailed postage prepaid by registered or certified mail and (ii) the official postal receipt, showing mailing within the prescribed time limits, is exhibited upon demand of the clerk or any party.

§ 19.2-398. When appeal by the Commonwealth allowed.

A. A ~~petition for~~ *In a felony case a pretrial* appeal from a circuit court may be taken by the Commonwealth ~~only in felony cases, before a jury is impaneled and sworn in a jury trial, or before the court begins to hear or receive evidence or the first witness is sworn, whichever occurs first, in a nonjury trial.~~

The appeal may be taken from:

1. An order of a circuit court dismissing a warrant, information or indictment, or any count or charge thereof on the ground that a statute upon which it was based is unconstitutional; or

2. An order of a circuit court prohibiting the use of certain evidence at trial on the grounds such evidence was obtained in violation of the provisions of the Fourth, Fifth or Sixth Amendments to the Constitution of the United States or Article I, Section 8, 10 or 11 of the Constitution of Virginia prohibiting illegal searches and seizures and protecting rights against self-incrimination, provided the Commonwealth certifies that the appeal is not taken for purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.

B. A petition for appeal may be taken by the Commonwealth in a felony case from any order of release on conditions pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title.

C. A petition for appeal may be taken by the Commonwealth in a felony case after conviction where the sentence imposed by the circuit court is contrary to mandatory sentencing or restitution terms required by statute.

D. Nothing in this chapter shall affect the Commonwealth's right to appeal in civil matters or cases involving a violation of law relating to the state revenue or appeals pursuant to § 17.1-411 or subsection C of § 19.2-317.

§ 19.2-400. Appeal lies to the Court of Appeals; time for filing notice.

An appeal taken pursuant to § 19.2-398, including such an appeal in a capital murder case, ~~will~~ shall lie to the Court of Appeals of Virginia.

No appeal shall be allowed the Commonwealth pursuant to ~~this chapter~~ *subsection A of § 19.2-398* unless within ~~seven~~ 7 days after entry of the order of the circuit court from which the appeal is taken, and before a jury is impaneled and sworn if there is to be trial by jury or, in cases to be tried without a jury, before the court begins to hear or receive evidence or the first witness is sworn, whichever occurs first, the Commonwealth files a notice of appeal with the clerk of the trial court. If the appeal relates to suppressed evidence, the attorney for the Commonwealth shall certify in the notice of appeal that such evidence is essential to the prosecution. All other requirements related to the notice of appeal shall be governed by Part Five A of the Rules of the Supreme Court. Upon the filing of a timely notice of appeal, the order from which the *pretrial* appeal is taken and further trial proceedings in the circuit court, except for a bail hearing ~~pursuant to § 19.2-403~~, shall thereby be suspended pending disposition of the appeal.

An appeal by the Commonwealth pursuant to subsection C of § 19.2-398 shall be governed by Part Five A of the Rules of the Supreme Court.

§ 19.2-401. Cross appeal; when allowed; time for filing.

The defendant shall have no independent right of appeal pursuant to § 19.2-398. If the Commonwealth appeals, the defendant may cross appeal from any orders from which the Commonwealth may appeal, pursuant to § 19.2-398. The defendant shall be under no obligation to defend an appeal filed by the Commonwealth. However, when an appeal is taken by the Commonwealth, and the defendant wishes to defend or cross appeal, the circuit court shall, where the defendant is indigent, appoint counsel to represent the defendant on appeal. The remuneration to be awarded appointed counsel shall be governed by § 19.2-326.

In pretrial appeals, the defendant shall file a notice of cross appeal with the clerk of the circuit court within ~~seven~~ 7 days following the notice of appeal filed by the Commonwealth.

Any brief on cross appeal shall be consolidated with the defendant's brief as appellee, if any.

§ 19.2-402. Petition for appeal; brief in opposition; time for filing.

A. When a notice of appeal has been filed pursuant to § 19.2-400, the Commonwealth may petition the Court of Appeals for an appeal pursuant to § 19.2-398. The Commonwealth shall be represented by the attorney for the Commonwealth prosecuting the case.

B. *The provisions of this subsection apply only to pretrial appeals.* The petition for a *pretrial* appeal shall be filed with the clerk of the Court of Appeals not more than ~~fourteen~~ 14 days after the date that the transcript or written statement of facts is filed, or if there are objections thereto, within ~~fourteen~~ 14 days after the judge signs the transcript or written statement. The accused may file a brief in opposition with the clerk of the Court of Appeals within ~~fourteen~~ 14 days after the filing of the petition for *pretrial* appeal. If the accused has filed a notice of cross appeal, he shall file a petition for cross appeal to be consolidated with, and filed within the same time period as, his brief in opposition. The Commonwealth may file a brief in opposition to any petition for cross appeal within ~~ten~~ 10 days after the petition for cross appeal is filed. Except as specifically provided in this section, all other requirements for the petition for *pretrial* appeal and brief in opposition shall conform as nearly as practicable to Part Five A of the Rules of the Supreme Court of Virginia.

§ 19.2-403. Procedures on petition for pretrial appeal.

The procedures on ~~an~~ a *pretrial* appeal to the Court of Appeals by the Commonwealth pursuant to § 19.2-398, and on a cross appeal of a *pretrial* appeal by the accused pursuant to § 19.2-401, shall be governed by the provisions of subsections C and D of § 17.1-407. The Court of Appeals, however, shall grant or deny the petition for a *pretrial* appeal, and the petition for cross appeal, if any, not later than ~~thirty~~ 30 days after the brief in opposition is timely filed or the time for such filing has expired.

No petition for rehearing may be filed in any *pretrial* appeal pursuant to this chapter. If the petition for a *pretrial* appeal pursuant to this chapter is denied, the Court's mandate shall immediately issue and the clerk of the Court of Appeals shall return the record forthwith to the clerk of the trial court.

§ 19.2-404. Procedures on awarded pretrial appeal.

This section applies only to pretrial appeals. If the Court of Appeals grants the Commonwealth's petition for a *pretrial* appeal, the Attorney General shall thereafter represent the Commonwealth during that appeal.

The Commonwealth shall file its opening brief in the office of the clerk of the Court of Appeals within ~~twenty-five~~ 25 days after the date of the certificate awarding the appeal. The brief of the appellee shall be filed in the office of the clerk of the Court of Appeals within ~~twenty-five~~ 25 days after the filing of the Commonwealth's opening brief. The Commonwealth may then file a reply brief, including its response to any cross appeal, in the office of the clerk of the Court of Appeals within ~~fifteen~~ 15 days after the filing of the brief of the accused. With the permission of a judge of the Court of Appeals, the time for filing any brief may be extended for good cause shown. Four copies of each brief shall be filed and ~~three~~ 3 copies shall be mailed or delivered to opposing counsel on or before the date of filing. Except as specifically provided in this section, all other requirements of the brief shall conform as nearly as practicable to Part Five A of the Rules of the Supreme Court of Virginia. The Court of Appeals shall accelerate the appeal on its docket and render its decision not later than ~~sixty~~ 60 days after the filing of the appellee's brief or after the time for filing such brief has expired.

When the opinion is rendered by the Court of Appeals, the mandate shall immediately issue and the clerk of the Court of Appeals shall return the record forthwith to the clerk of the trial court. No petition for rehearing may be filed.

§ 19.2-405. Pretrial appeals; record on appeal; transcript; written statement; time for filing.

This section applies only to pretrial appeals. The record on appeal shall conform, as nearly as practicable, to the requirements of Part Five A of the Rules of the Supreme Court for the record on appeal, except as hereinafter provided. The transcript or written statement of facts shall be filed by the Commonwealth with the clerk of the circuit court from which the appeal is being taken, within ~~twenty-five~~ 25 days following entry of the order of the circuit court. Upon motion of the Commonwealth, the Court of Appeals may grant an extension of up to ~~forty-five~~ 45 days for filing the transcript or written statement for good cause shown. If the Commonwealth files a transcript or written statement, it

~~must~~ *shall* also file with the clerk of the circuit court a notice, signed by the attorney for the Commonwealth, who is counsel for the appellant, identifying the transcript or written statement and reciting its delivery to the clerk. There shall be appended to the notice a certificate by the attorney for the Commonwealth that a copy of the notice has been mailed or delivered to opposing counsel.

Any party may object to the transcript or written statement on the ground that it is erroneous or incomplete. Notice of the objection specifying the errors alleged or deficiencies asserted shall be tendered to the trial judge within ~~ten~~ 10 days after the transcript or written statement is filed in the office of the clerk. The trial judge shall, within ~~three~~ 3 days after the filing of such objection, either overrule the objection, or take steps deemed necessary to make the record complete or certify the respect in which the record is incomplete, and sign the transcript or written statement to verify its accuracy. The clerk of the trial court shall forthwith transmit the record to the clerk of the Court of Appeals.

§ 19.2-406. Bail pending pretrial appeal.

This section applies only to pretrial appeals. Upon a pretrial appeal being taken by the Commonwealth pursuant to § 19.2-398, if the defendant moves the trial court for release on bail, that court shall promptly, but in no event later than ~~three~~ 3 days after the Commonwealth's notice of appeal is filed, hold a hearing to determine the issue of bail. The burden shall be upon the Commonwealth to show good cause why the bail should not be reduced or the accused released on his own recognizance. If it is determined that the accused shall be released on bail, bail shall be set and determined in accordance with Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title.

§ 19.2-408. Finality of decision of the Court of Appeals in pretrial appeals.

The decision of the Court of Appeals shall be final for purposes of ~~an~~ a pretrial appeal pursuant to § 19.2-398, or a cross appeal of a pretrial appeal taken pursuant to § 19.2-401, and no further pretrial appeal shall lie to the Supreme Court.

§ 19.2-409. Exclusion of pretrial appeal period from time within which accused must be tried; reconsideration of issues after conviction.

This section applies only to pretrial appeals. The provisions of § 19.2-243 shall not apply to the period of time commencing when the Commonwealth's notice of pretrial appeal is filed pursuant to this chapter and ending when the Court of Appeals or Supreme Court issues its mandate disposing of the pretrial appeal. Such finality of the Court of Appeals' decision shall not preclude a defendant, if he is convicted, from requesting the Court of Appeals or Supreme Court on direct appeal to reconsider an issue which was the subject of the pretrial appeal.