VIRGINIA:

IN THE CIRCUIT COURT FOR ARLINGTON COUNTY

Commonwealth of Virginia	)	
	)	
v.	)	CR 19-1103 (00)
	)	
Eric Dewayne Kelly, Jr.,	)	
Defendant.	)	

MEMORANDUM OPINION

The issues presented address whether the Court should grant the Commonwealth's motion to *nolle prosequi* the criminal charge in this case of possession of marijuana, second or subsequent offense.

On September 30, 2019, a grand jury empaneled by the Court returned an indictment, charging that on November 29, 2018, in the County of Arlington, Defendant Eric Dewayne Kelly, Jr. "knowingly or intentionally possessed marijuana after having been previously convicted of violating Virginia Code § 18.2-250.1.". Indictment ¶ 1. A trial by jury was set for January 8, 2020, to hear the charge of possession of marijuana, second or subsequent offense. Before then, the Commonwealth's Attorney requested the Court to advance the matter to January 7, 2020.

On January 7, 2020, when the case was called, the Commonwealth's Attorney made a motion for the Court to enter an order *nolle prosequi* pursuant to Va. Code § 19.2-265.3, that provides: "*Nolle prosequi* shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown." (Emphasis added). Once good cause is shown, the Court can then exercise its discretion. On January 7, the Court inquired of the "good cause" as the motion was being considered. The Commonwealth could not articulate the good cause, so the Court took the motion under advisement, instead of denying the motion for failure to then

show good cause. The Defendant's attorney neither suggested a basis for the Court to find good cause nor requested the Court to dismiss the charge with prejudice. The Court then required the Commonwealth to file a memorandum in support of good cause and a briefing schedule order was subsequently entered. The Court has reviewed and fully considered the Commonwealth's pleadings, the filing by Defendant and the entire record, and the Court heard and considered oral argument on June 26, 2020.

The Court interprets the term "good cause" as substantial grounds for the relief requested, as determined on a case-by-case basis, upon the record then established. 5 Shirelle Phelps & Jeffrey Lehman, *West's Encyclopedia of American Law*, 113 (2d ed. 2005); *Good Cause*, *Black's Law Dictionary* (11th ed. 2019). Once a prosecution is initiated and placed under the Court's jurisdiction, it is the Court, not the Commonwealth's Attorney, that must determine whether the pending charge should be dismissed. Va. Code § 19.2-265.3; Va. Code § 19.2-265.6; Va. Sup. Ct. R. 3A:8(c). This is a long-established rule of law of the Commonwealth of Virginia—over 200 years of established law. According to the Court of Appeals in Virginia, the prosecutor does not have "carte blanche to request a *nolle prosequi* without providing a trial court with a rationale amounting to 'good cause' for doing so." *Moore v. Commonwealth*, 59 Va. App. 795, 812–13 n.9, 722 S.E.2d 668, 676–77 n.9 (2012).

The Supreme Court of Virginia again recited this principle as recently as last year in *In re: Gregory Underwood, Commonwealth's Attorney for the City of Norfolk, Petitioner*, Record Nos. 19049798 and 190498 (May 2, 2019), a petition for a writ of mandamus against the Circuit Court for Norfolk that sought to compel entry of a dismissal order in a marijuana possession case. There the Supreme Court, in denying the petition, provided:

> For over 200 years, Virginia has required the Commonwealth to obtain judicial consent to the dismissal of a charge by *nolle prosequi*. *See Duggins v.*

> *Commonwealth*, 59 Va. App. 785, 790-91 (2012) *citing Anonymous*, 3 Va. (1 Va. Cas.) 139, 139 (1803). The advent of Code § 19.2-265.3 in 1979 codified that requirement and added that a Commonwealth's Attorney must establish "good cause" before a court may grant a "*nolle prosequi.*" *See id. Citing* (1979 Va. Acts ch. 641). These requirements are presumptively constitutional, and we have found no support for the contention that they permit the judiciary to improperly invade a Commonwealth's Attorney's constitutional or statutory authority to exercise prosecutorial discretion. *See Etheridge v. Medical Ctr. Hosp.*, 237 Va. 87, 94 (1989) (statutes are presumed constitutional). As we have explained, the constitutional requirement that the "great departments of the government" remain "separate and distinct from each other" is not an "absolute and unqualified . . . maxim." *In re Phillips*, 265 Va. 81, 86-87 (2003). To the contrary, it permits "that either department may exercise the powers of another to a limited extent" so long as "the whole power of one of these departments should not be exercised by the hands which possess the whole power of either of the departments." *Id.* Judicial oversight of a Commonwealth's Attorney's ability to dismiss a pending charge certainly does not occupy the whole of the executive power to exercise prosecutorial discretion regarding the timing and selection of charges.

In re Underwood, No. 190497-98 (Va. May 2, 2019).

In this case, the Commonwealth's Attorney submitted the bases upon which she relies for good cause. The Court has fully considered the Commonwealth's rationale and the entire record of this case to now make a finding as to whether good cause exists, and whether in the Court's discretion an order granting a *nolle prosequi* should be entered. Based on the rationale provided, analysis requires the Court to consider whether a court has the authority to dismiss a case upon a prosecutor's determination that a law passed by the Virginia legislature is not worthy of prosecution upon public policy grounds.

The Commonwealth's Attorney, in her filing, first argues interpretation of legal principles and then provides four distinct factual bases for the Court to find good cause to grant the motion to *nolle prosequi*: (1) prosecution of simple marijuana possession is not an efficient use of limited resources; (2) the current state of forensic testing significantly hampers the Commonwealth's ability to prosecute cases of simple marijuana possession; (3) there is no credible evidence that, absent aggravating factors, simple marijuana possession poses a public

safety risk; and (4) the Virginia Legislature was considering changes to the marijuana related statutes, expecting the decriminalization of simple possession. Mem. Supp. Commw.'s Mot. Nolle Prosequi 10.

The Commonwealth's first and third arguments are rejected by the Court on constitutional grounds. The Court will not enter an order that is inconsistent with the provisions of the Virginia Constitution. Essentially, the Commonwealth argues public policy as the reason to disregard a criminal statute that was fully considered, voted on and passed by both chambers of the Virginia General Assembly and as the reason the Court should grant a motion to *nolle prosequi*. As determined by the legislative branch of Virginia, it was unlawful for a person to knowingly or intentionally illegally possess marijuana within the Commonwealth of Virginia after having been so convicted.

The Constitution of Virginia, Art. III, § 1 provides in relevant part: "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others . . . ." A public policy basis for a *nolle prosequi* requested of a court by the executive branch is nothing less than a fundamental disagreement with the criminalization of marijuana, thus, it invades the determination by the legislative branch. When the Virginia General Assembly granted any prosecutor the option to request a court of law to dismiss without prejudice—*nolle prosequi*—a criminal charge pending before the Court, it conditioned that opportunity with judicial determination of good cause, consistent with centuries of proper checks and balances. Here, the Court finds that the decision by the executive branch to effectively nullify a statute passed by members of the Virginia General Assembly, who were duly elected by the citizens, fails to constitute good cause. A court should not do that which is impermissible under the law. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[The judiciary]

must of necessity expound and interpret that rule [of law]."). *Marbury* is the bedrock of American jurisprudence.

It is the province of the legislature to decide public policy and pass laws, the obligation of the executive to enforce the law, and the responsibility of the judiciary to interpret the law. Va. Const., art. IV, §§ 1, 14; *id.* art. V, § 7; *id.* art. VI, § 1; *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'). In *Allen v. Wright*, 468 U.S. 737, 761 (1984) the United States Supreme Court, addressing separation of powers, expressed that "[T]he Executive Branch . . . [has] the duty to 'take Care that the Laws be faithfully executed."

A keystone principle of our constitutional form of government is that only the legislative branch shall decide and pass laws for the public good. *In re Phillips*, 265 Va. 81, 86, 574 S.E.2d 270, 272 (2003) ("Any judgment concerning the wisdom or propriety of a statute remains solely a legislative function . . . ."); *Bryce v. Gillespie*, 160 Va. 137, 146, 168 S.E. 653, 656 (1933) ("The legislative department has the power to determine . . . what public convenience and public welfare require."); 16A Am. Jur., 2d Constitutional Law § 238 ("The principle of the separation of powers distributes the power to make law to the legislature, the power to execute law to the executive, and the power to interpret law to the judiciary.").

Any prosecutor, elected by a proper percentage of a voting community, may support partisan enforcement of the laws of the Commonwealth, as opposed to enforcing all criminal laws of the Commonwealth. The Court will take no role in that process. James Madison, in *The Federalist Papers, No. XLVII*, observed "[W]here the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamentals of a free constitution are subverted." *The Federalist No. 47*, at 246–47 (James

Madison) (Ian Shapiro ed., 2009). Mr. Madison cited to the Virginia Constitution, *supra*. Subsequently, in *Federalist Papers, No. XLVIII*, Mr. Madison observed that the three branches of government, again citing to Virginia's Constitution, "ought not to be intermixed" and that "no one could transcend their legal limits, without being effectively checked and restrained by the others." *The Federalist No. 48*, at 253–54 (James Madison) (Ian Shapiro ed., 2009). These principles underpin the long-standing rule of law that the Court must determine if good cause exists to dismiss a pending charge. By its very nature, the decision that a law passed by the Virginia Legislature never should have been passed, and therefore should not be enforced because it achieves nothing (*See* Mem. Supp. Commw's Mot. Nolle Prosequi 15-16), is anathema to the founding principles of the Virginia Constitution. Furthermore, the Court should not adopt a legal stance based on partisan policy concerns because avoiding external partisan influence is central to judicial independence, integrity, and impartiality.

According to Canons of Judicial Conduct 3(B)(2), "[a] judge shall not be swayed by partisan interests, public clamor, or fear of criticism." Va. Sup. Ct. R. pt. 6, § III, Canon 3(B)(2). This prohibition is meant to further the central mission of the Canons, which is to "uphold the integrity and independence of the judiciary." Va. Sup. Ct. R. pt. 6, § III, Canon 1. A judge therefore has a duty to avoid the inappropriate outside influence of partisanship and public opinion. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446–447 (2015); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 120–121 (2015) (Thomas, J. concurring).

Discourse on judicial independence highlights the importance of avoiding external influence, especially from political organizations and the public. *See* Va. Sup. Ct. R. pt. 6, § III, Canon 1, Comment.; Alfini et al., supra, § 1.02. Judicial independence is defined in Judicial Conduct and Ethics as "a judge's capacity to decide cases according to the facts and law without

interference from the other branches of government, special interests, the general public, or the parties themselves." Alfini et al., supra, § 1.02. This sentiment is further reflected in the actual commentary to the Canons, which states that "[t]he integrity and independence of judges depends in turn upon their acting without fear or favor." Va. Sup. Ct. R. pt. 6, § III, Canon 1, Comment.

In discussing the proper methods of judicial decision-making, the courts have promoted the exclusion of external influences, especially the partisan and political. *See Williams-Yulee*, 575 U.S at 446–447; *Perez*, 575 U.S. at 120-121 (2015) (Thomas, J. concurring); *Republican Party v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J. dissenting) ("Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties . . . they must strive to do what is legally right, all the more so when the result is not the one 'the home crowd' wants."); *Commodity Futures Trading Com v. Schor*, 478 U.S. 833, 860 (1986) (Brennan, J. dissenting) ("[A] principal benefit of the separation of . . . powers [is] the protection of individual litigants from decision makers susceptible to majoritarian pressures."); *see also Chisom v. Roemer*, 501 U.S. 380, 400 (1991) ("[P]ublic opinion should be irrelevant to the judge's role"); *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J. concurring) ("[T]he independence of the judiciary is jeopardized when courts . . . assume primary responsibility in choosing between competing political, economic, and social pressures."); *Judiciary Inquiry & Review Comm'n v. Shull*, 274 Va. 657, 674, 651 S.E.2d 648, 658 (2007) ("[J]udicial decisions must be based on the evidence and pertinent law"); *Ex parte Bouldin*, 33 Va. 639, 661 (1836) (Scott, J. concurring) ("[I]ndependence, which will lift [judges] above the prejudices and passions of the day . . . [is] the only safe guaranty for an honest and fearless administration of the laws."). The Court will not sanction an executive's opinion that a law

passed by the Virginia legislature is an ineffectual law, for in doing so the Court would be partisan and thus violate the Judicial Canon prohibiting partisan consideration when rendering an opinion or judgment of the Court.

A judge's disregard of partisanship and public opinion is critical to maintain public confidence in the integrity, impartiality and independence of the judiciary. *See Williams-Yulee*, 575 U.S. at 446–447. In *Williams-Yulee* the United States Supreme Court evaluated Florida's rule prohibiting judges from personally soliciting campaign funds. *Id.* at 439. The Court described the importance of separating political and partisan influence from the judicial sphere: "Judges are not politicians . . . Politicians are expected to be appropriately responsive to the preferences of their supporters . . . A judge must instead 'observe the utmost fairness,' striving to be 'perfectly and completely independent . . . .'" *Id.* The United States Supreme Court determined that the potential vulnerability of judges to external influence was a significant threat to the integrity and impartiality of the judiciary. *Id.* at 447. Avoiding the influence of partisanship is also central to judicial independence, as described in Justice Thomas's concurring opinion in *Perez*, 575 U.S. at 120–121 (Thomas, J. concurring). "Independent judgment require[s] judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through . . . the political branches, the public, or other interested parties." *Id.*

It is this separation from partisan pressure that distinguishes the judiciary from the executive and legislative branches: "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is dutybound to exercise independent judgment in applying the law." *Id.* at 123. This is especially important when the partisan

interpretation and the written law conflict; "If a case involved an executive effort to extend the law beyond its meaning, judges would have a duty to adhere to the law that had been properly promulgated under the Constitution." *Id.* The same axiom applies when an executive wishes a court to dismiss a criminal charge believing it should not be enforced on public policy grounds.

The Court should not adopt an interpretation of the law based on partisan ideas because doing so would undermine judicial independence, integrity, and impartiality. The Canons of Judicial Conduct, relevant legal commentary, and applicable caselaw all demonstrate a duty to avoid external partisan influence, and to instead rely solely on evidence and relevant law. *See Williams-Yulee*, 575 U.S. at 446–447; *Perez*, 575 U.S. at 120-121; Va. Sup. Ct. R. pt. 6, § III, Canon 1, Canon 3(B)(2); Alfini et al., supra, § 1.02. Intentionally adopting a partisan position, especially when that position directly conflicts with the law, would undermine these fundamental principles. Therefore, in order to conform to current ethical and legal standards of judicial conduct, the Court should avoid partisan influence, and should not be swayed by any prosecutor's opinion of the ineffectiveness of a criminal statute as a basis to dismiss an indicted crime pending before the Court.

Having rejected the first and third bases submitted by the Commonwealth's Attorney for a court order granting a *nolle prosequi* of the grand jury indictment, the Court turns to the Commonwealth's second basis. This involves the question of whether there is sufficient evidence to prosecute the indicted crime.

In her filing, the Commonwealth's Attorney represented that the current state of forensic testing significantly hampers the Commonwealth's ability to prosecute cases of simple marijuana possession. When this motion was argued before the Court on June 26, 2020, the Commonwealth represented that at the time this case would have proceeded to trial, the Commonwealth would

only have been able to proceed with a field test of the suspected marijuana as permissible under Va. Code Sec. 19.2-188.1, and that such a field test does not distinguish between marijuana and legal hemp. The Commonwealth's Attorney then represented that she did not have a forensic lab test result, which could have been sufficient evidence to prove the confiscated substance was marijuana. Proceeding with only a field test result could very well be a hurdle to proving the alleged offense beyond a reasonable doubt.

The Commonwealth is vested with the determination of the evidence to proceed at trial since the Commonwealth carries the burden of proof for each required element of a crime beyond a reasonable doubt. The Court accepts the Commonwealth's representation of insufficiency of the evidence, not because the current state of forensics impairs the Commonwealth's burden of proof, but because the Commonwealth only had a field test result and according to the Commonwealth's Attorney that would be insufficient for a conviction at trial. For this reason and since the Defendant has not moved for a dismissal with prejudice upon the Commonwealth's acknowledgment of insufficiency of the evidence, the Court finds good cause to grant the motion for *nolle prosequi*, without having to consider the fourth and final basis for the motion.

An appropriate order incorporating by reference the Court's opinion will follow.

July 10, 2020

Daniel S. Fiore, II, Judge
17th Judicial Circuit Court