

OP. NO. 05-013

**CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON –
ASSAULTS AND BODILY WOUNDINGS.**

No authority for courts to grant ‘general continuance’ as alternative to plea or finding of guilt for an adult charged with first offense of assault and batter against family or household member.

The Honorable Michael J. Valentine
Judge, Juvenile and Domestic Relations District Court
Nineteenth Judicial District
March 31, 2005

Issue Presented

You ask whether a court may grant a “general continuance” for up to a year without a plea by the defendant or a finding of facts by the court that would justify a finding of guilt as an alternative to § 18.2-57.3, which provides for deferred judgments when an adult is charged with a first offense of assault and battery against a family or household member under § 18.2-57.2.

Response

It is my opinion that courts do not have the authority to grant a “general continuance” as an alternative to § 18.2-57.3 for cases involving an adult charged with a first offense of assault and battery against a family or household member under § 18.2-57.2.

Background

You relate that courts have granted “general continuances” in cases involving persons charged with domestic violence offenses.¹ In these cases, you note that the defendants have not entered pleas, nor have the courts made a finding of fact that would justify a finding of guilt. You also relate that courts have continued such cases for up to a year to be dismissed and that some dismissals contain an order prohibiting contact with the victim. Finally, you relate that counsel for the prosecution and defense have agreed to the “general continuances” that have been granted by the court. You inquire whether the courts have authority for these practices.

Applicable Law and Discussion

The General Assembly has expressly authorized trial courts to defer a judgment of guilt for the first offense of certain criminal offenses.² Upon a guilty plea or a finding of facts by the court that would justify a finding of guilt, § 18.2-57.3 allows the court, without entering a judgment, to place first time offenders of assault and battery against a family or household member under § 18.2-57.2 on probation. Further, § 18.2-57.3 authorizes the court to add conditions to the probation that require the accused to enter an education or treatment program or other community-based probation programs. The statute allows courts to determine an appropriate course of action for the accused to foster rehabilitation while ensuring accountability for criminal behavior. Even when the court does not order supervised probation, § 18.2-57.3 provides that “the court shall order the defendant to be of good behavior for a period of not less than two years following the finding of facts that would justify a finding of guilt.”

Despite the rehabilitative qualities of § 18.2-57.3, the General Assembly treats violations of § 18.2-57.2 with great concern. A 2004 opinion of the Attorney General concludes that a deferred finding of guilt is considered a conviction for purposes of applying § 18.2-57.3 in subsequent proceedings and for purposes of the concealed weapons statute during a defendant's term of probation.³ Additionally, charges dismissed pursuant to this section are ineligible for expungement under § 19.2-392.2. Taken together, the language of the statute indicates that "the General Assembly intended that a person is to be afforded one chance only to avoid a conviction."⁴

"When a legislative enactment limits the manner in which something may be done, the enactment also evinces the interest that it shall not be done another way."⁵ The Court of Appeals of Virginia has addressed this issue:

Except in those instances where the General Assembly has expressly authorized a trial court to defer a finding of guilt even though the proof has established the guilt of the defendant beyond a reasonable doubt, trial courts may not defer a factual finding of guilt or acquittal or a judgment of guilt or acquittal.[⁶]

Accordingly, the General Assembly expressly granted trial courts the authority to defer judgment in cases involving persons charged with a first offense under § 18.2-57.2 as prescribed in § 18.2-57.3 and in no other way. Granting a "general continuance" employs an unauthorized manner, and it undermines the clear intent of the General Assembly, which is to afford first time offenders of assault and battery against a family or household member only one chance to avoid a conviction while giving them an opportunity for rehabilitation. At a minimum, the General Assembly has mandated courts to: (a) order offenders of such crimes to be of good behavior for no less than two years following a finding of guilt; (b) ensure that offenders would not have the same access to weapons as other citizens; and, (c) ensure that their charges would not be expunged.⁷ The plain and unambiguous language of a statute must be given effect.⁸ To do otherwise would be to say "that the General Assembly did not mean what it actually has stated."⁹

The fact that trial courts have the general authority to grant continuances does not authorize the courts to use a continuance as an alternative to § 18.2-57.3. The authority to grant a continuance is one of broad and general discretion of the court, but the court's discretion is not without limitation. Specifically, where the parties and witnesses are present and prepared for trial, the court may grant a continuance "only upon a showing that to proceed with the trial would not be in the best interest of justice."¹⁰ Section 18.2-57.3, however, expressly prescribes the manner in which trial courts may handle cases involving first time offenders of assault and battery against a family or household member under § 18.2-57.2. To the extent that any conflict or variance exists between a rule of the Supreme Court and a statute, the terms of the statute must prevail.¹¹ Furthermore, it is clear that continuances were not intended to be granted to avoid giving full effect to a statute or to evade trial.¹²

Conclusion

Accordingly, it is my opinion that courts do not have the authority to grant a "general continuance" as an alternative to § 18.2-57.3 for cases involving an adult charged with a first offense of assault and battery against a family or household member under § 18.2-57.2.

¹For purposes of this opinion, I limit the context of domestic violence to a first offense of an adult or a person treated as an adult as mandated by § 18.2-57.3 for offenses committed under § 18.2-57.2.

²See, e.g., VA. CODE ANN. § 18.2-57.3 (LexisNexis Repl. Vol. 2004) (assault and battery against a family or household member); § 18.2-251 (LexisNexis Repl. Vol. 2004) (possession of controlled substances); VA. CODE ANN. § 19.2-303.2 (LexisNexis Repl. Vol. 2004) (misdemeanor crimes against property).

³2004 Op. Va. Att'y Gen. 96, 96 (forthcoming July 2005), *available at* <http://www.vaag.com/media%20center/Opinions/2004opns/04-066w.htm>.

⁴*Id.* at 98.

⁵Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982), *quoted in* Powell v. Commonwealth, 36 Va. App. 231, 235, 548 S.E.2d 926, 928 (en banc) (2001) (Humphreys, J., concurring).

⁶Powell, 36 Va. App. at 235, 548 S.E.2d at 928 (footnote omitted) (Humphreys, J., concurring).

⁷See § 18.2-57.3.

⁸See Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E. 357, 358 (1944), *cited in* 1996 Op. Va. Att'y Gen. 88, 89.

⁹Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003), *quoted in* 2004 Op. Va. Att'y Gen., *supra* note 3, at 97.

¹⁰VA. SUP. CT. R. pt. 8, 8:14(d) (2004).

¹¹See Op. Va. Att'y Gen.: 1996 at 23, 23; 1992 at 155, 156-57; *see also* Waterman v. Halverson, 261 Va. 203, 206, 540 S.E.2d 867, 868 (2001) (noting that to extent of conflict or variance between Supreme Court rule and statute, terms of subsequent statute prevail).

¹²See, e.g., Carter v. Commonwealth, 39 Va. App. 735, 745, 576 S.E.2d 773, 778 (2003) (determining whether real purpose in moving for continuance is to delay or evade trial and not to prepare for it).

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