

OP. NO. 05-065

**CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES –
BAIL.**

Appeal of determination of bond from general district court to circuit court is civil in nature; fees and costs for appeal should be calculated, taxed, and collected as civil proceeding.

The Honorable Michael D. Wolfe
Clerk of the Circuit Court of Alleghany County
October 4, 2005

Issue Presented

You ask whether, pursuant to § 19.2-124, an appeal of a determination of bond from a general district court to a circuit court should be treated as a civil or a criminal matter for purposes of filing and calculating the appropriate fees and costs.

Response

It is my opinion that an appeal of a determination of bond from a general district court to a circuit court is civil in nature; therefore, the fees and costs for such appeal should be calculated, taxed, and collected as a civil proceeding.

Background

You advise that your office has treated an appeal pursuant to § 19.2-124 as a civil matter while other circuit court clerks' offices do not. You note that, while the underlying misdemeanor case is still pending in general district court, other clerks' offices consider such an appeal to be part of the misdemeanor case and charge no fee for the appeal. You state that the other clerks' offices treat the appeal in this manner even though the underlying criminal case is pending and may never be appealed to the circuit court.

Applicable Law and Discussion

Since Title 19.2 is titled "Criminal Procedure," the natural reaction is to conclude that any statute in Title 19.2 concerns a criminal matter. While the vast majority of the statutes in Title 19.2 do involve matters of criminal procedure, there are chapters, which are associated with the underlying criminal proceeding, that are not criminal in nature. For instance, forfeiture proceedings,¹ which generally are the result of criminal conduct and convictions, are civil in nature.² Likewise, expungement proceedings,³ which are based upon the dismissal of criminal charges, are civil in nature.⁴

Similar to other chapters of Title 19.2, a determination of bond⁵ is associated with a pending criminal matter. Unlike criminal matters, however, bond forfeiture proceedings, which have a lower burden of proof that shifts to the defendant once the Commonwealth establishes a *prima facie* case, are treated as civil in nature.⁶ Although issues regarding proceedings on bonds have arisen in different contexts over time, the Supreme Court of Virginia consistently has treated such proceedings as civil rather than criminal matters.⁷ In one such instance, the Supreme Court noted that "from a practical standpoint, appellate issues relating to bail are routinely handled separately from the issues in the criminal prosecution and are often the subject of separate petitions for appeal."⁸

At the time the Virginia Supreme Court issued the *Smith* opinion,⁹ the Commonwealth did not have the right to appeal in criminal matters.¹⁰ The Commonwealth's right to appeal criminal matters did not occur until 1998.¹¹ The Commonwealth, however, did have the right to appeal determinations of bond.¹² Indeed, it is the Commonwealth's right to pursue a petition for appeal that the Virginia Supreme Court routinely has relied upon in finding an action was civil in nature.¹³ "Thus, a bail proceeding is not an integral part of the guilt-innocence determination. Rather, it is ancillary to the criminal prosecution."¹⁴

Given the ancillary nature of bail and bond proceedings, and their consistent characterization as civil by the Virginia Supreme Court, an appeal pursuant to § 19.2-124 from a general district court to a circuit court of a bail or bond determination would also be treated as a civil matter and ancillary to the underlying criminal proceedings. Such an appeal should be treated as a civil matter for the purposes of filing and calculating the appropriate fees and costs by the clerk of the circuit court.¹⁵

Conclusion

Accordingly, it is my opinion that an appeal of a determination of bond from a general district court to a circuit court is civil in nature; therefore, the fees and costs for such appeal should be calculated, taxed, and collected as a civil proceeding.

¹ See *generally* Va. Code Ann. ch. 22, §§ 19.2-369 to 19.2-386; ch. 22.1, §§ 19.2-386.1 to 19.2-386.14; ch. 22.2, §§ 19.2-386.15 to 19.2-386.31 (LexisNexis Repl. Vol. 2004 & Supp. 2005).

² See *Commonwealth v. Lincoln Auto.*, 212 Va. 597, 598, 186 S.E.2d 279, 280 (1972).

³ See *generally* ch. 23.1, §§ 19.2-392.1 to 19.2-392.4 (LexisNexis Repl. Vol. 2004).

⁴Section 19.2-392.2(G) provides that the Commonwealth is to be made the party defendant in the case and that "[a]ny party aggrieved by the decision of the court may appeal, as provided by law in civil cases." Another example of the Commonwealth's right to appeal matters associated with criminal cases is found in Title 18.2 (Crimes). The Supreme Court of Virginia has rejected challenges to the Commonwealth's right to appeal adverse decisions in the trial court of unreasonable refusal judgments because such matters are civil. See *Commonwealth v. Rafferty*, 241 Va. 319, 323-24, 402 S.E.2d 17, 20 (1991); see also *City of Va. Beach v. Siebert*, 253 Va. 250, 253-54 483 S.E.2d 214, 216 (1997) (holding that municipality is allowed to appeal adverse judgment in unreasonable refusal proceeding). This is so even though the unreasonable refusal proceedings are based upon a violation of Title 18.2. See Va. Code Ann. §§ 18.2-268.3, 18.2-268.4 (LexisNexis Supp. 2005). I note, however, that under § 18.2-268.3(D), a first offense for refusing to submit to testing is a civil offense and subsequent violations are criminal offenses.

⁵See generally ch. 9, §§ 19.2-119 to 19.2-152.7 (LexisNexis Repl. Vol. 2004 & Supp. 2005).

⁶See e.g., *Heacock v. Commonwealth*, 228 Va. 235, 241, 321 S.E.2d 645, 648 (1984) (quoting *Collins v. Commonwealth*, 145 Va. 468, 471, 134 S.E. 688, 689 (1926)).

⁷See, e.g., *Heacock*, 228 Va. at 242, 321 S.E.2d at 649 (noting that proceedings to forfeit bail bonds are civil in nature); *McGhee v. Commonwealth*, 211 Va. 434, 437, 177 S.E.2d 649, 652 (1970) (noting that bond forfeiture proceedings are civil rather than criminal matters); see also *Commonwealth v. Smith*, 230 Va. 354, 357, 337 S.E.2d 278, 279 (1985) (noting that post conviction bail proceeding is ancillary to criminal prosecution and is not part of criminal judgment of conviction).

⁸See *Smith*, 230 Va. at 357, 337 S.E.2d at 279.

⁹*Id.* at 354, 337 S.E.2d 278.

¹⁰Since December 1, 1986, the Commonwealth has had a limited right to appeal certain pretrial rulings in criminal cases. See 1985 Va. Acts ch. 510, at 820, 820-21, (adding Chapter 25, § 19.2-398, to Title 19.2); see also, e.g., *Commonwealth v. Brown*, 8 Va. App. 41, 43, 378 S.E.2d 623, 624 (1989) (noting Commonwealth's right to appeal does not include all allegedly erroneous pretrial rulings).

¹¹In 1998, the General Assembly expanded the Commonwealth's right to appeal in criminal cases to include the appeal of adverse decisions by the Court of Appeals of Virginia to the Virginia Supreme Court. See 1998 Va. Acts ch. 872, at 2128, 2189 (adding § 17.1-411).

¹²See *Smith*, 230 Va. at 358, 337 S.E.2d at 280.

¹³See Va. Dept. of Corrs. v. Crowley, 227 Va. 254, 262-63, 316 S.E.2d 439, 443-44 (1984) (recognizing Commonwealth could appeal denial of motion to vacate invalid order entered in criminal case after judgment became final because proceeding was not part of criminal prosecution); Smyth v. Godwin, 188 Va. 753, 759-60, 51 S.E.2d 230, 233 (1949) (noting prohibition against Commonwealth appealing in criminal proceeding did not apply to habeas proceeding challenging judgment entered in criminal matter because habeas proceedings are civil in nature).

¹⁴See *Smith*, 230 Va. at 357, 337 S.E.2d at 279.

¹⁵Of course, an indigent party may apply to proceed without the payment of fees or costs. See Va. Code Ann. § 17.1-606 (LexisNexis Repl. Vol. 2003).

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