Elliott, Richard v. Commonwealth, 267 Va. 464, 593 S.E.2d 263 (2004)

IN THE SUPREME COURT OF VIRGINIA

RICHARD J. ELLIOTT
v.
COMMONWEALTH OF VIRGINIA

Record No. 003014

JONATHAN O'MARA
v.
COMMONWEALTH OF VIRGINIA

Record No. 010038
Decided: March 5, 2004

Present: Hassell, C.J., Lacy, Koontz, Kinser, Lemons, and Agee, JJ., and Compton, S.J.

In a proceeding remanded by the United States Supreme Court involving the constitutionality of Virginia's cross-burning statute, Code § 18.2-423, it is held that the prima facie evidence provision of the statute is unconstitutionally overbroad under the First Amendment and Article I, § 12 of the Constitution of Virginia. The statute is severable and the core provisions of the statute that remain are constitutional. The convictions of two defendants for cross burning are affirmed.

Criminal Law and Procedure — Cross Burning — Constitutional Law — Overbreadth of Criminal Statutes — Statutory Construction (Code § 1-17.1 and § 18.2-423) — Severability of Statutory Provisions — Federal and Virginia Freedom of Speech Provisions

One of the defendants pled guilty to the crime of attempted cross burning under Code § 18.2-423, and the other was convicted of that crime in a trial by jury. In that trial no instruction was given concerning the prima facie evidence provision of the statute. In *Black v. Commonwealth*, 262 Va. 764, 553 S.E.2d 738 (2001), a consolidated appeal, it was held that § 18.2-423 was facially invalid as selective regulation of speech based upon content. The United States Supreme Court vacated that judgment, concluding that the core provisions of § 18.2-423 were constitutional, but that the prima facie evidence provision was unconstitutional. The matter was remanded for further determinations.

1. Code § 18.2-423 provides that it shall be unlawful to cause a cross to be burned on the property of another, a highway or other public place, with the intent of intimidating any person or group of persons. The statute also provides that any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons. **[Page 465]**

2. A violation of Code § 18.2-423 is punishable as a Class 6 felony.

3. No one jury instruction contains all of the applicable law in a given case. The law applicable to the case is contained in multiple instructions which, taken collectively, give proper instruction to the jury.

4. Taken in context of other instructions, the jury instruction concerning the prima facie evidence provision of Code § 18.2-423 was a correct statement of Virginia law. Even with proposed modifications the jury instruction and the statute it was based on are unconstitutional.

5. The statutory provision concerning prima facie evidence of intent to intimidate reaches both protected and unprotected speech, and consequently, is overbroad. It permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

6. The provision as so interpreted would create an unacceptable risk of the suppression of ideas. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. That same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross.

7. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute — and potentially convict — somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

8. Accordingly, the prima facie evidence provision of Code § 18.2-423 is overbroad.

9. Code § 1-17.1, first enacted in 1986, provides that the provisions of all statutes are severable unless (i) the statute specifically provides that its provisions are not severable; or (ii) it is apparent that two or more statutes or provisions must operate in accord with one another. If the General Assembly intended for § 1-17.1 to apply only to statutes passed after 1986, it could have included such language in the section. Instead, the statute refers broadly to "the provisions of statutes in this Code," without reference to dates of enactment.

10. Code § 18.2-423 does not fall within either of the exceptions to the rule of severability established in § 1-17.1. The cross burning statute does not contain language stating that its parts are not severable, nor is the prima facie evidence provision necessary to the operation of the remainder of the statute. The fact that the provision is not inextricably intertwined with the rest of the statute is illustrated by the fact that the cross burning statute, now codified at § 18.2-423, existed for 16 years, from 1952 to 1968, without the prima facie evidence provision.

11. Code § 18.2-423 was and can be effective in punishing intimidation without the prima facie evidence provision. Therefore, the prima facie evidence provision is severable. **[Page 466]**

12. The Commonwealth has not waived the issue of severability by failing to raise it prior to the appeal to the United States Supreme Court. It would be incongruous to place the burden of raising

severability on the Commonwealth in this case when neither of these defendants relied specifically on the unconstitutionality of the prima facie evidence provision prior to the Commonwealth's appeal to the United States Supreme Court.

13. Severability, as codified in § 1-17.1, is a rule for judicial construction of statutes. As a tool of judicial construction of statutes, the possibility of severance cannot be waived by a party to a suit by failure to raise it. Rather, it is the duty of the Court, faced with a constitutional challenge to a statute, to consider *sua sponte* whether or not an invalid portion of a statute may be severed to permit the continued operation of the constitutional portion of the statute.

14. The prima facie evidence provision of Code § 18.2-423 is severable from the remainder of the statute.

15. The impact of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) was briefed before the Supreme Court in *Virginia v. Black.* The Court's holding that a ban on cross burning carried out with the intent to intimidate is proscribable under the First Amendment makes it inconceivable that the Supreme Court had any concerns about failure to meet the *Brandenburg* tests.

16. Article I, § 12 of the Constitution of Virginia is coextensive with the federal First Amendment. Consequently, consistent with the plurality opinion of the United States Supreme Court in *Virginia v. Black*, after severance of the provision concerning prima facie evidence of intent. Code § 18.2-423 does not violate the First Amendment or Article I, § 12 of the Constitution of Virginia.

17. Retrial is not required under the procedural posture of the first defendant's case. The jury that convicted this defendant did not receive an instruction regarding the prima facie evidence provision of Code § 18.2-423, and he was convicted by the jury as if the provision was not in the statute. He cannot now be heard to complain about the unconstitutionality of a provision of this statute, found severable, that played no part in his trial.

18. Likewise, retrial is not required under the procedural posture of the second defendant's case. The second defendant admitted his guilt, while reserving the right to appeal the constitutionality of Code § 18.2-423. He did not challenge the prima facie evidence provision in his direct appeal, and has waived any claim of error based upon the unconstitutionality of that provision.

19. The second defendant has not argued that he is entitled to be retried, or that he has the right to withdraw his guilty plea. He has also not prevailed on any issue he raised on appeal.

20. For the reasons discussed above, the prima facie evidence provision of Code § 18.2-423 is unconstitutionally overbroad under the First Amendment and Article I, § 12 of the Constitution of Virginia. The statute is severable and the core provisions of the statute that remain do not violate the First Amendment or Article I, § 12 of the Constitution of Virginia. There is no necessity to order retrials; consequently, the convictions of these two defendants will be affirmed. **[Page 467]**

On Remand from the Supreme Court of the United States.

Affirmed.

James O. Broccoletti (Zoby & Broccoletti, on briefs), for appellant. (Record No. 003014)

William H. Hurd, State Solicitor (Jerry W. Kilgore, Attorney General; Maureen Riley Matsen, Deputy State Solicitor; William E. Thro, Deputy State Solicitor, on brief), for appellee. (Record No. 003014)

Kevin E. Martingayle (Stallings & Richardson, on briefs), for appellant. (Record No. 010038)

William H. Hurd, State Solicitor (Jerry W. Kilgore, Attorney General; Maureen Riley Matsen, Deputy State Solicitor; William E. Thro, Deputy State Solicitor, on brief), for appellee. (Record No. 010038)

JUSTICE LEMONS delivered the opinion of the Court.

On remand from the Supreme Court of the United States, we consider the proper construction of the prima facie evidence provision of Code § 18.2-423 and the severability of the provision from the core provisions of the statute. Additionally, we consider whether the convictions of the defendants should be vacated and dismissed, vacated with the opportunity for the Commonwealth to retry the defendants, or whether the convictions should be affirmed.

I. Facts and Proceedings Below

On the night of May 2, 1998, Richard J. Elliott, ("Elliott") and Jonathan S. O'Mara ("O'Mara") erected a cross in the yard of James S. Jubliee, Elliott's next-door neighbor, and attempted to ignite it. According to the record, Elliott conceived of the cross burning as revenge against Jubliee because Jubliee had complained to Elliott's mother about gunfire in Elliott's backyard. Elliott convinced two friends, O'Mara and David Targee, to aid him in the burning.

The Commonwealth prosecuted Elliott and O'Mara for attempted cross burning and conspiracy to commit cross burning under Code §§ 18.2-423, 18.2-16, and 18.2-22. O'Mara pled guilty to attempted cross burning and conspiracy to commit cross burning but conditioned his plea upon the reservation of his right to challenge the constitutionality of Code § 18.2-423 on appeal. Elliott chose to be tried by a jury. The trial court instructed the jury that in order to find Elliott guilty of attempted cross burning, "The Commonwealth must prove beyond a reasonable doubt . . . [t]hat the defendant had the **[Page 468]** intent of intimidating any person or group of persons." No instruction based upon the prima facie evidence provision of Code § 18.2-423 was given. A jury found Elliott guilty of attempted cross burning but acquitted him of conspiracy to commit cross burning.

In *Black v. Commonwealth*, 262 Va. 764, 553 S.E.2d 738 (2001), an appeal consolidating the Elliott and O'Mara cases with a third case involving Barry E. Black ("Black"), who was charged under § 18.2-423 for burning a cross at a Ku Klux Klan rally, we held that § 18.2-423 was facially invalid as selective regulation of speech based upon content. Our ruling was premised upon the language of the statute and our interpretation of the United States Supreme Court's ruling in *R.A.V. v. City of St. Paul*, 505 U.S. 377

(1992). We held that the statute was underinclusive, because it singled out "a particular form of intimidating symbolic speech" for punishment while leaving other forms unregulated. *Black v. Commonwealth*, 262 Va. at 773-76, 553 S.E.2d at 743-45. Additionally, we held that the language of the prima facie evidence provision of the statute was overbroad because of its chilling effect upon the exercise of free speech under the First Amendment. *Id.* at 777-78, 553 S.E.2d at 746.

The Commonwealth appealed our decision to the United States Supreme Court. In a plurality opinion authored by Justice O'Connor, the Supreme Court held that the Commonwealth may engage in content discrimination "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Virginia v. Black*, 538 U.S. 343, 361 (2003). Thus, the Commonwealth may prohibit cross burning with intent to intimidate, even though it fails to prohibit the burning of other objects, because cross burning is significantly more likely to intimidate. *Id.* at 363.

Although it concluded that the core provisions of Code § 18.2-423 were constitutional, the Supreme Court held that the prima facie evidence provision of the statute was unconstitutional because it "strips away the very reason why a State may ban cross burning" — the intent to intimidate. *Id.* at 365. Using the language of the jury instruction given in the case involving Black as the interpretation of the prima facie evidence provision, the Supreme Court held that the provision "as interpreted by the model jury instruction" was unconstitutionally overbroad. *Id.* at 364.

The Supreme Court vacated the judgment in *Black v. Commonwealth*, dismissed the case against Black, and remanded the *Elliott* and *O'Mara* cases to this Court to determine whether the jury **[Page 469]** instruction given in Black's trial was the proper interpretation of the prima facie evidence provision, whether the prima facie evidence provision could be severed from the statute if a constitutional interpretation could not be found, and the proper disposition of the cases against Elliott and O'Mara. *Virginia v. Black*, 538 U.S. at 367-68.

II. Analysis

A. Constitutionality of the Prima Facie Evidence Provision

[1-2] Code § 18.2-423, in effect at the time defendants committed the offenses, provided:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn or cause to be burned, a cross on the property of another, a highway or other public place . . .
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

A violation of this section is punishable as a Class 6 felony.

In *Black v. Commonwealth*, we held that the prima facie evidence provision "sweeps within its ambit for arrest and prosecution, both protected and unprotected speech." 262 Va. at 778, 553 S.E.2d at 746. We based our holding directly on the language of the statute, not the language of the jury instruction used at Black's trial, because the statute itself was the common thread among the three procedurally and factually distinct cases.

[3] Although the Commonwealth suggests an alternate interpretation for the prima facie evidence provision,* we hold that the instruction given at Black's trial properly interprets the prima facie evidence provision of Code § 18.2-423. The instruction provided: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." Of course, no one jury instruction contains all of the applicable law in a given case. The law applicable to the case is contained in multiple instructions which, taken collectively, give proper guidance to the jury. *See Van Duyn v. Matthews*, 181 Va. 256, 261, **[Page 470]** 24 S.E.2d 442, 444 (1943); *Adamson v. Norfolk & Portsmouth Traction Co.*, 111 Va. 556, 561, 69 S.E. 1055, 1058 (1911).

[4] The subject instruction must be read in context with the general instructions given in virtually every criminal jury trial in Virginia concerning reasonable doubt, presumption of innocence, and the credibility of witnesses. These additional instructions reflect general principles of criminal law and procedure including that the defendant is not required to produce any evidence, that the Commonwealth bears the burden of proof beyond a reasonable doubt on every element of the offense, that the jury must give impartial consideration to all the evidence presented, and that the jury must weigh the credibility of witnesses but may not arbitrarily disregard believable testimony. Taken in context of the other instructions, the subject instruction concerning the prima facie evidence provision of Code § 18.2-423 properly interprets the provision, but it does not save the provision from unconstitutionality.

[5-8] In *Black v. Commonwealth*, 262 Va. at 777-78, 553 S.E.2d at 745-46, we held that the statutory provision concerning prima facie evidence of intent to intimidate affects both protected and unprotected speech, and consequently, is overbroad. The plurality in *Virginia v. Black* agreed:

> The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.
>
> It is apparent that the provision as so interpreted "'would create an unacceptable risk of the suppression of ideas.'" The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will

> prosecute — and potentially convict — somebody engaging **[Page 471]** only in lawful political speech at the core of what the First Amendment is designed to protect.

538 U.S. at 365 (citations omitted). The plurality opinion in *Virginia v. Black* properly noted that we "had the opportunity to expressly disavow the jury instruction." 538 U.S. at 364. We did not disavow it then and we do not accept the invitation to do so now. Accordingly, we affirm our prior holding that the prima facie evidence provision of Code § 18.2-423 is overbroad.

B. Severability of the Prima Facie Evidence Provision

Elliott and O'Mara have argued that the unconstitutional prima facie evidence provision cannot be severed from the remainder of the statute and that, even if it is otherwise possible to sever the prima facie evidence provision, the procedural history of these cases prevents us from severing the provision on remand. We reject both arguments.

1. Severability

[9] Code § 1-17.1, first enacted in 1986, provides that "[t]he provisions of all statutes are severable unless (i) the statute specifically provides that its provisions are not severable; or (ii) it is apparent that two or more statutes or provisions must operate in accord with one another." Prior to the enactment of this statute, "[a]bsent a severability provision, a legislative act [was] presumed to be non-severable." *Board of Sup. of James City County v. Rowe*, 216 Va. 128, 147, 216 S.E.2d 199, 214 (1975). Code § 1-17.1 changed that rule and provided a rule of construction for the courts to apply to interpret even statutes passed prior to 1986. If the General Assembly intended for § 1-17.1 to apply only to statutes passed after 1986, it could have included such language in the section. Instead, the statute refers broadly to "[t]he provisions of statutes in this Code," without reference to dates of enactment.

[10-11] Code § 18.2-423 does not fall within either of the exceptions to the rule of severability established in § 1-17.1. The cross burning statute does not contain language stating that its parts are not severable, nor is the prima facie evidence provision necessary to the operation of the remainder of the statute. The fact that the provision is not inextricably intertwined with the rest of the statute is illustrated **[Page 472]** by the fact that the cross burning statute, now codified at § 18.2-423, existed for 16 years, from 1952 to 1968, without the prima facie evidence provision. *See* Code § 18.1-365 (Supp. 1968). The statute was and can be effective now in punishing intimidation without the prima facie evidence provision. Therefore, we hold that the prima facie evidence provision is severable.

2. Waiver of Severability

[12] Elliott and O'Mara argue in this proceeding that the Commonwealth waived the issue of severability by failing to raise it prior to the appeal to the United States Supreme Court. We disagree.

First, it would be incongruous to place the burden of raising severability on the Commonwealth in this case when neither Elliott nor O'Mara relied specifically on the unconstitutionality of the prima facie evidence provision prior to the Commonwealth's appeal to the United States Supreme Court. The Commonwealth properly responded to the arguments raised by Elliott and O'Mara in their briefs to this Court, which revolved around the unconstitutionality of banning cross burning as a general matter.

[13-14] A more elemental flaw in the waiver argument advanced by Elliott and O'Mara is that it presumes that severability is an issue that must be raised by one of the parties. Severability, as codified in § 1-17.1, is a rule for judicial construction of statutes. As such, the possibility of severance cannot be waived by a party to a suit by failure to raise it. Rather, it is the duty of the Court, faced with a constitutional challenge to a statute, to consider *sua sponte* whether an invalid portion of a statute may be severed to permit the continued operation of the constitutional portion of the statute. The Court cannot be forced to accept a flawed construction of a statute or prevented from saving a statute from invalidity simply because of an oversight or tactical decision by one or both of the parties. For these reasons, we hold that the prima facie evidence provision of Code § 18.2-423 is severable from the remainder of the statute.

C. Application of the *Brandenburg* Standard

[15] Because we held that Code § 18.2-423 was unconstitutional for other reasons in *Black v. Commonwealth*, we found it unnecessary to address challenges to the constitutionality of the statute based upon *Brandenburg v. Ohio*, 395 U.S. 444, (1969). Nonetheless, the parties addressed *Brandenburg* issues before the United States Supreme Court. The plurality opinion of the United States Supreme **[Page 473]** Court is silent concerning *Brandenburg*; however, the language of the opinion precludes any consideration of *Brandenburg* on remand.

The oft-cited case of *Brandenburg v. Ohio* involved a Ku Klux Klan rally not unlike the facts presented in Black's case. The United States Supreme Court held that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447.

Elliott and O'Mara argue that because we chose not to address *Brandenburg* challenges in *Black v. Commonwealth* and the United States Supreme Court plurality opinion in *Virginia v. Black* is silent concerning *Brandenburg*, that we should consider such a challenge on remand. We disagree.

Clearly, *Brandenburg* addresses First Amendment concerns. Equally clearly, the United States Supreme Court plurality opinion in *Virginia v. Black* held that "[a] ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment." 538 U.S. at 363. With the *Brandenburg* issues before the Supreme Court of the United

States, it is inconceivable that the Court could make such a clear statement about cross burning with the intent to intimidate being "proscribable under the First Amendment" if it had any concerns about failure to meet the *Brandenburg* tests.

D. Constitutionality of § 18.2-423
under the Virginia Constitution

[16] In *Black v. Commonwealth*, 262 Va. at 778 n.10, 553 S.E.2d at 746 n.10, we declined to address claims that Code § 18.2-423 violates Article I, § 12 of the Constitution of Virginia. On remand, quoting *Robert v. City of Norfolk*, 188 Va. 413, 420, 49 S.E.2d 697, 700 (1948), Elliott and O'Mara argue that the "Constitution of Virginia is broader than that of the United States in providing that — 'any citizen may freely speak, write and publish his sentiments on all subjects.'" Elliott and O'Mara accurately recite the statement from *Robert*; however, it is dictum. We take this opportunity to declare that Article I, § 12 of the Constitution of Virginia is coextensive with the free **[Page 474]** speech provisions of the federal First Amendment. Consequently, consistent with the plurality opinion of the United States Supreme Court in *Virginia v. Black*, we hold that, after severance of the provision concerning prima facie evidence of intent, Code § 18.2-423 does not violate the First Amendment or Article I, § 12 of the Constitution of Virginia.

E. Disposition of Elliott and O'Mara's Convictions

[17-18] In the trial court, Elliott was tried by a jury; however, no jury instruction involving the prima facie evidence provision was given. In the trial court, O'Mara pled guilty, reserving his right to challenge the constitutionality of Code § 18.2-423 on appeal. In its remand, the Supreme Court of the United States "[left] open the possibility that . . . Elliott and O'Mara could be retried under § 18.2-423." 538 U.S. at 367. Elliott and O'Mara argue that retrial would violate the Double Jeopardy Clause of the Fifth Amendment. It is not necessary to address their concerns regarding retrial because we hold that retrial is not required under the procedural postures of these cases.

Elliott was convicted by a jury that did not receive an instruction regarding the prima facie evidence provisions. He was convicted by the jury as if the provision was not in the statute. He cannot be heard to complain about the unconstitutionality of a provision of the statute, found severable, that played no part in his trial.

O'Mara's plea agreement in the trial court recites in part:

> Pursuant to Section 19.2-254 of the Code of Virginia, the Commonwealth consents to allowing the defendant to plead guilty to both charges, conditioned upon the reservation of right to appeal the ruling . . . regarding the constitutionality of Section 18.2-423 of the Code of Virginia. If the defendant prevails at the conclusion of the appeal process, he shall be allowed to withdraw his plea.

Additionally, a written Stipulation of Facts was signed by O'Mara, his counsel, and the attorney for the Commonwealth that stated:

> On May 2, 1998, David Targee had approximately fifteen individuals, including Jonathan O'Mara and Richard Elliott, at his residence in Virginia Beach. They were all consuming alcohol. Elliott complained to Targee and O'Mara about his neighbor and about how he wanted to "get back" at him. It was suggested **[Page 475]** (not by O'Mara) that they burn a cross in Elliott's neighbor's yard. O'Mara and Targee agreed, and they all went to Targee's garage where a cross was built. They all got in Targee's truck and drove to Munden Point Road in Virginia Beach. Targee was driving, with O'Mara in the front passenger seat and Elliott in the back seat. Once there, Elliott handed the cross to O'Mara, who also grabbed a can of lighter fluid and went outside and placed the cross in the yard of Elliott's neighbor. He then poured lighter fluid on the cross, set it on fire, and ran back to the car. Targee drove them back to his house. The next morning, Elliott's neighbor, James Jubilee, came out of his house and observed the partially burned cross in his yard. He broke the cross and placed [it] in the garage. He later called the police.

Lastly, on the form entitled "Questions Asked the Defendant Before the Court Accepts a Plea of Guilty," O'Mara answered "yes" to the written question, "Are you entering the plea of guilty because you are, in fact, guilty of the crime(s) charged?"

[19] On appeal to this Court from the trial court, O'Mara never argued that the prima facie evidence provision of the statute rendered the statute unconstitutional. His claim of unconstitutionality was based upon arguments related to the *R.A.V.* case and the *Brandenburg* case. The prima facie evidence provision clearly played no part in his plea agreement and no part in his appeal to this Court. O'Mara has waived any claim of error based upon the unconstitutionality of the prima facie evidence provision. Rule 5:25.

Finally, in our order of August 29, 2003, we directed the parties to address certain issues on remand from the United States Supreme Court. One of those issues concerning the prima facie evidence provision was:

> If the final sentence is not amenable to an interpretation that would render it constitutional, but it is severable, could Richard J. Elliott and/or Jonathan O'Mara be retried under § 18.2-423? More specifically, should the Court order (a) that Elliott's and/or O'Mara's convictions stand with no right to retrial, (b) that Elliott's and/or O'Mara's convictions are vacated, but the Commonwealth may retry either or both appellants, or (c) that Elliott and/or O'Mara's convictions are vacated, but the Commonwealth may not retry either or both defendants? **[Page 476]**

In response, O'Mara only argued that his conviction should be vacated and that he should not be retried. We note that O'Mara does not assert that he has the right to withdraw his guilty plea. Further, we note that O'Mara has not prevailed on any issue he raised on appeal.

III. Conclusion

[20] For the reasons discussed above, we hold that the prima facie evidence provision of Code § 18.2-423 is unconstitutionally overbroad under the First Amendment and Article I, § 12 of the Constitution of Virginia. We hold that the statute is severable and that the core provisions of the statute that remain do

not violate the First Amendment or Article I, § 12 of the Constitution of Virginia. There is no need to order retrials; consequently, the convictions of Richard J. Elliott and Jonathan S. O'Mara will be affirmed.

Affirmed.

FOOTNOTES

* The Commonwealth argues that adding a statement to the instruction explaining to the jury that prima facie evidence is rebuttable would properly interpret the statute and remove all concerns regarding constitutionality.