

Hackett v. Commonwealth

Hackett v. Commonwealth was decided on July 25, 2023, by the Virginia Court of Appeals.

Issue:

Whether the officer had the immediate physical ability to arrest the suspect as required by § 18.2-460(E)?

Facts:

An officer attempted to arrest the defendant on a felony arrest warrant when the defendant was standing 20 to 25 yards away. After making eye contact with the officer, however, the defendant took off running. The officer told the defendant to stop and said he was under arrest, but the defendant kept running. The defendant escaped into the woods. About an hour later, the officer found the defendant again and from about 50 yards away, the officer told him to stop, but the defendant again ran away escaped again. Police later arrested the defendant and charged him with misdemeanor fleeing from a law-enforcement officer under § 18.2-460(E).

At trial, the defendant moved to strike, arguing that the Commonwealth had failed to prove under § 18.2-460(E)(ii) that the officer had the “immediate physical ability” to arrest him. The trial court denied the motion and found the defendant guilty.

Held:

Reversed. The Court found that, since the statute requires that the defendant flee from the officer’s immediate span of control, under *Joseph* and *Peters*, the Commonwealth failed to satisfy that close-proximity requirement here. In this case, the Court noted that, although the defendant here knowingly fled from a law-enforcement officer attempting to arrest him, the officer got no closer than 20 yards. Finding as a matter of law that this distance is too great to satisfy the statutory proximity requirement, the Court reversed the defendant’s conviction. The Court examined § 18.2-460(E), which makes it a Class 1 misdemeanor to knowingly flee from a law-enforcement officer attempting to make a lawful arrest if the officer “applies physical force to the person” or has “the immediate physical ability to place the person under arrest.” The Court repeated that under *Peters* and *Joseph*, this subsection requires flight from the officer’s “immediate span of control.” The Court examined the text, context, and drafting history of § 18.2-460(E), as well as the caselaw construing this statute and its predecessor, and concluded that the officer did not have the “immediate physical ability” to arrest the defendant because, at 20 yards away, the defendant was outside of the officer’s “immediate span of control.”

Bottom Line:

The Court pointed out that Virginia appears to be unique in requiring—as an element of the offense—that the officer have the “immediate physical ability” to arrest the defendant. The Court reasoned that “Virginia’s statute presumably” includes that element “because our legislature made a policy decision . . . to include it.”

The Court also explained that “This case does not require that we identify an outer limit. Just as 100 yards would be too great a distance as a matter of law, we are satisfied that 20 yards—60 feet—is also too far away as a matter of law to satisfy the “immediate” proximity requirement.” **This opinion applies primarily to foot chases.**

Full Case at: <https://www.vacourts.gov/opinions/opncavwp/1218223.pdf>