

COURT OF APPEALS OF VIRGINIA

Before: Chief Judge Moon, Judges Baker, Benton, Coleman,
Koontz,* Willis, Elder, Bray and Fitzpatrick
Argued at Richmond, Virginia

KENNETH LINWOOD AWKARD

v. Record No. 2267-93-2

COMMONWEALTH OF VIRGINIA

OPINION
BY JUDGE JOSEPH E. BAKER
SEPTEMBER 5, 1995

UPON A REHEARING EN BANC

FROM THE CIRCUIT COURT OF ALBEMARLE COUNTY
Paul M. Peatross, Jr., Judge

Francis McQ. Lawrence (Ronald M. Huber; St. John,
Bowling & Lawrence, on brief), for appellant.

Leah A. Darron, Assistant Attorney General
(James S. Gilmore, III, Attorney General, on brief),
for appellee.

By opinion dated February 14, 1995,¹ a panel of this Court reversed Kenneth Linwood Awkard's (appellant) felony sentence imposed upon him by the Circuit Court of Albemarle County (trial court) and remanded the case to the trial court for a re-sentencing pursuant to the misdemeanor provisions of Code § 46.2-357, as amended. This Code section became effective after appellant was convicted but prior to the date of his sentencing hearing. The facts as stated in the panel majority and dissent are complete and need not be restated here.

*Justice Koontz participated in the hearing and decision of this case prior to his investiture as a Justice of the Supreme Court of Virginia.

¹See Awkard v. Commonwealth, 19 Va. App. 605, 454 S.E.2d 18 (1995).

Upon rehearing en banc, we hold that whether the felony or misdemeanor punishment should have been imposed in this case was a matter committed to the discretionary power of the trial court.

Because the sentence given was within the statutory limits prescribed by Code § 46.2-357, to which appellant pled guilty, we find no abuse of discretion.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Fitzpatrick, J., with whom Benton, Koontz and Elder, J.J., join,
dissenting.

I would reverse appellant's felony conviction and remand for
re-sentencing for the reasons stated in the majority opinion of
the panel decision. See Awkard v. Commonwealth, 19 Va. App. 605,
454 S.E.2d 18 (1995).