COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Annunziata and Overton
Argued at Richmond, Virginia

ROBERT DALE WEBB

v. Record No. 2705-95-2

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE NELSON T. OVERTON
FEBRUARY 11, 1997

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND
Donald W. Lemons, Judge

Cullen D. Seltzer, Assistant Public Defender (David J. Johnson, Public Defender, on briefs), for appellant.

Kathleen B. Martin, Assistant Attorney General (James S. Gilmore, III, Attorney General, on brief), for appellee.

Robert Dale Webb was convicted in a bench trial on two counts of sodomy against a minor child and two counts of aggravated sexual battery. He appeals on the ground that the trial court erred by denying his motion for a jury trial. We agree and reverse his convictions.

The parties are fully conversant with the record in the cause, and because this memorandum opinion carries no precedential value, no recitation of the facts is necessary.

From the preliminary hearing in late February 1995 to the ultimate trial on August 31, 1995, Webb had approximately ten appearances before the court, either in person or by counsel. In early appearances, Webb's counsel represented to the court that

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

Webb was not asking for a jury trial and she later confirmed that it was to be a non-jury trial. Assuming arguendo that counsel's statements constituted a knowing and voluntary waiver, but see Carney v. Cochran, 369 U.S. 506, 516 (1962), Webb withdrew that waiver at a hearing on May 10. At that time, the judge accepted that withdrawal, and stated that the court would not waive a jury either. See Thomas v. Commonwealth, 218 Va. 553, 555, 238 S.E.2d 834, 835 (1977) (stating that permission to withdraw a waiver of jury trial is within the discretion of the court).

Webb did not personally appear after that date. The record indicates no subsequent waiver of his right to a jury in any form. Any off-the-record agreements that the Commonwealth and counsel for the defense made cannot bind the defendant to a waiver. Even if it existed in fact, such a situation would not be a knowing and voluntary waiver. See Carney, 369 U.S. at 516. Denying the defendant's motion for a jury trial on August 31 was thus reversible error.

When a defendant succeeds in persuading a court to set aside his conviction, the government may retry that defendant, unless the conviction was reversed because of the insufficiency of the evidence. See Karim v. Commonwealth, 21 Va. App. 652, 669, 466 S.E.2d 772, 780-81 (1996); see also North Carolina v. Pearce, 395 U.S. 711, 719-20 (1969). We therefore remand the case to be retried if the Commonwealth be so advised.

Reversed and remanded.