

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 13th day of August, 2010.

Kevin Lamont Newby, Appellant,

against Record No. 091247
Court of Appeals No. 0250-08-1

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is error in the judgment of the Court of Appeals.

Kevin Lamont Newby was charged by a warrant with a misdemeanor in the City of Hampton. The warrant charged that Newby "within this city or county, on or about 10/17/2007 did unlawfully in violation of Section 18.2-374, Code of Virginia: knowingly prepare for the purpose of sale or distribution, or print, copy, manufacture, produce or reproduce for purposes of sale or distribution an obscene item as defined in § 18.2-373."

Newby was tried on the warrant in the General District Court and was found "guilty as charged." He appealed the conviction to the Circuit Court of the City of Hampton. At a bench trial, the Commonwealth presented evidence that an envelope containing obscene photographs was received in the mail at a place of business in Hampton, addressed to a person who was working in the Norfolk office of the business at the time. The envelope was forwarded, unopened, to the Norfolk office where it was received and opened by

the addressee. The envelope bore Newby's name and return address in Surry County. Its postmark showed that it had been mailed in Richmond.

At the conclusion of the Commonwealth's evidence, Newby moved the court to strike the evidence on the ground that no evidence had been presented to show that he had committed any of the criminal acts charged in the warrant within the City of Hampton. The court denied the motion. The charge, as stated in the warrant, was never amended.* The circuit court entered a final order that recites: "After hearing all of the evidence, the Court found the defendant GUILTY of Distribute obscene material, as charged in violation of § 18.2-374." The court imposed a sentence of twelve months in jail, six months suspended.

A panel of the Court of Appeals affirmed Newby's conviction by an unpublished opinion entered May 19, 2009 and we awarded him an appeal. Newby preserved his objection to the circuit court's denial of his motion to strike the Commonwealth's evidence in the Court of Appeals and in this Court.

Newby was charged with preparation of obscene material, a violation of Code § 18.2-374(1), in the City of Hampton. No evidence was presented that he committed any of the acts which would have supported a finding of guilt of that offense. Instead, he was found guilty of distributing obscene material, a violation of Code § 18.2-374(3), in the City of Hampton. Never having been charged with that offense, he had no opportunity to prepare a defense. Accordingly, the circuit court erred in denying Newby's motion to strike and the Court of Appeals erred in affirming the conviction.

* On the Commonwealth's motion, the court amended the date of the offense to read "10-1-07 to 10-31-07." The defendant had no objection to that amendment.

The judgment of the Court of Appeals is reversed, the conviction is vacated and the warrant is dismissed. This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of the City of Hampton.

JUSTICE KINSER dissents.

A Copy,

Teste:

*original order signed by the
Clerk of the Supreme Court of
Virginia at the direction of the
Court*