

This summary of Virginia appellate case law addresses five topics: the availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts permitting upward departure or increasing the minimum sentence, and other important appellate sentencing decisions.

1. Availability of and General Standards for Appellate Review.

Virginia state law contains a provision directing that the court utilize the sentencing guidelines in determining the appropriate sentence.¹ But this same provision also states that failure to follow such procedures “shall not be reviewable on appeal or on the basis of any other post-conviction relief.”² As such, the guidelines have been held not to be binding on the court, and are viewed instead as a “tool designed to assist the judge in fixing an appropriate sentence.”³ Therefore, a failure to follow the guidelines is not a basis for appeal, as a sentence will not be disturbed on appeal if it is within the statutory range set by the legislature.⁴ However, an individual convicted of a crime may appeal the final conviction in certain other circumstances.⁵ The prosecution may only appeal a felony conviction if a mandatory sentence is not followed.⁶

2. Standards and Allowable Grounds for Departure.

The Virginia Sentencing Guidelines are entirely voluntary, and a judge may depart for any reason. The guidelines do require that a departing judge explain the rationale behind such departure, but failure to do so is not reviewable error.⁷

3. Constitutional Requirements for Proof of Facts Permitting Upward Departure.

While *Blakely* has no effect on Virginia's guidelines because of their voluntary nature,⁸ the Virginia Supreme Court has considered whether its scheme of imposing post release supervision violates *Apprendi v. New Jersey* and *Blakely*. In *Alston v. Commonwealth*, the offender argued that the imposition of post release supervision constituted an unconstitutional enhancement of the jury's sentence.⁹ The Virginia Supreme Court dismissed this contention, holding that the post release statute did not require the finding of any facts beyond the existence of a conviction, and that once a conviction is found, the choice as to the duration of the post release supervision period “was a matter within the inherent discretion of the court in imposing a sentence.”¹⁰

Virginia Courts have also ruled that consistent with *Ring*,¹¹ aggravating circumstances related to past convictions are not subject to *Apprendi's* requirement of jury deliberation.¹²

¹ Va. Code Ann. §19.2-298.01 (2019).

² *Id.*

³ See *Hunt v. Com.*, 488 S.E.2d 672, 677 (Va. Ct. App. 1997) (explaining that misapplication of the sentencing guidelines is not grounds for appellate review).

⁴ *Woodard v. Com.*, 754 S.E.2d 309, 312-13 (Va. 2014). A defendant requested resentencing because the criminal history score used to calculate sentences for his two current drug convictions included a past felony murder conviction that was subsequently reversed. Although the guidelines would recommend a different sentence if this past conviction was not considered, the Virginia Supreme Court held that no remediable injury was done to the defendant because the guidelines are merely advisory. Therefore, the defendant could not be resentenced under Va. Code Ann. §19.2-298.01(F) (2019).

⁵ Va. Code Ann. §17.1-406(A) (2019) (detailing when an individual may present an appeal to the Court of Appeals).

⁶ Va. Code Ann. §19.2-398(C) (2019).

⁷ See Va. Code Ann. §19.2-298.01 (2019).

⁸ See, e.g., *Barnes v. Com.*, 2006 Va. App. LEXIS 506, *7-8 (Va. App. 2006) (the recommended guidelines maximum is different from the statutory maximum for *Apprendi* purposes), *Myers v. Com.*, 2008 Va. App. LEXIS 385, *10 (Va. App. 2008) (Note that this is an unreported case; there may be limitations on its citation under court rules).

⁹ *Alston v. Com.*, 652 S.E.2d 456, 463-64 (Va. 2007).

¹⁰ *Id.* at 464.

¹¹ *Ring v. Arizona*, 536 U.S. 584, 597 (2002).

¹² *Totten v. Commonwealth*, 2006 Va. App. LEXIS 178, *13 (Va. App. 2006) (Note that this is an unreported case).

4. Constitutional Requirements for Proof of Facts that Increase the Minimum Sentence.

There are no Virginia cases that address *Alleyne's* constitutional requirement of a jury finding all facts necessary to increase a mandatory minimum sentence.

In fact, the Virginia Court of Appeals has indicated that because juries decide both guilt and punishment in Virginia, *Apprendi* and *Alleyne* are generally inapplicable to criminal cases in the Commonwealth.¹³

5. Other Important Sentencing Decisions

In 1999, the Virginia General Assembly requested that the Virginia Sentencing Commission develop a risk assessment instrument for utilization in the sentencing guidelines specifically for sex offenses.¹⁴ The Commission developed a new risk assessment designed to predict recidivism among sex offenders and to allow for upward adjustment of sentences in light of high sex offender risk assessment scores.¹⁵ A 2001 Virginia Attorney General opinion found that the new sex offender assessment did not violate the U.S. or Virginia Constitution.¹⁶ The opinion held that under the U.S. Constitution there is no apparent impediment to “using predictions of dangerousness in legal proceedings, up to and including those that may result of liberty or death.”¹⁷ The Attorney General also noted that the Supreme Court of Virginia had previously upheld the use of predictions of future dangerousness, even those based upon un-adjudicated crimes, in death penalty proceedings.¹⁸

The upward adjustments based upon the sex offender risk assessment have also survived court challenges. For example, in *Brooks v. Commonwealth*, a defendant convicted of a sex offense argued that a trial court erred in considering negative risk assessment factors and imposing a lengthier sentence as a result. However, because the sentencing guidelines are not binding on a trial judge and the sentence was still below the statutory limits set by the legislature, the sentence was upheld.¹⁹

In *Luttrell v. Commonwealth*, the defendant appealed a sentence based on the sex offender risk assessment. The defendant argued that the assessment had not been in place when the offense was committed several years earlier, and thus violated the constitutional prohibition against ex post facto laws.²⁰ The court held that the guidelines are not enacted by the legislature and are “flexible guideposts for the trial judge to consider” rather than law.²¹ Thus, a trial court could use the new guidelines to impose a sentence that was within the statutory range that was in place when the offense occurred.²² Luttrell also argued that the risk assessment was an unreliable instrument for measuring recidivism. Here, the court held that “a trial judge’s failure to correctly apply the sentencing guidelines” is unreviewable on appeal.²³ Thus, the trial court’s consideration of a risk assessment (reliable or otherwise) is not grounds for relief.

In *Butler v. Commonwealth*, the Virginia Court of Appeals held that the constitutional requirements of jury findings of aggravating sentencing factors, under *Apprendi* and *Alleyne*, do not apply to cases where the defendant waived his right to a jury trial and was convicted in a bench trial.²⁴

¹³ *Butler v. Com.*, 763 S.E.2d 829, 832 (Va. App. 2014).

¹⁴ Va. Criminal Sentencing Comm’n, *Assessing Risk Among Sex Offenders in Virginia* (2001), http://www.vcsc.virginia.gov/sex_off_report.pdf (referencing 1999 Virginia Senate Joint Resolution 333).

¹⁵ See, e.g. Va. Criminal Sentencing Comm’n, *Assessing Risk Among Sex Offenders in Virginia* (2001).

¹⁶ Va. Atty’ Gen. Op. 01-002 (Apr. 24, 2001).

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 3.

¹⁹ 2004 Va. App. LEXIS 29, *3 (Va. Ct. App. 2004) (Note that this is an unreported case).

²⁰ 592 S.E. 2d 752 (Va. Ct. App. 2004).

²¹ *Id.* at 754.

²² *Id.* at 754-55.

²³ *Id.* at 755.

²⁴ 763 S.E.2d at 832.