IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091299

CHAD CRAWFORD ROBERSON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

The defendant, Chad Crawford Roberson, was charged with driving under the influence (DUI) and speeding and was convicted of those offenses by the General District Court of the City of Virginia Beach on September 11, 2007. The DUI warrant and summons referenced § 21-1 of

the Code of the City of Virginia Beach and § 18.2-266 of the Code of Virginia. (App. 1, 2). Roberson noted an appeal of the judgment.

He was tried by the Virginia Beach Circuit Court, sitting without a jury, on November 1, 2007. The court dismissed the speeding charge. The court convicted Roberson of DUI and fixed his penalty at 60 days in jail, suspended, and a fine of $350. The court suspended Roberson's operator's license for 12 months, but permitted a restricted license to be issued for the defendant, conditioned upon his successful completion of the ASAP program. (App. 7).

The final judgment order in circuit court was styled "City of Virginia Beach v. Chad Crawford Roberson." The order referenced Code § 18.2-266.

Roberson noted an appeal to the Court of Appeals of Virginia. The Court granted the appeal. The Court's order was styled "Chad Crawford Roberson v. Commonwealth of Virginia/City of Virginia Beach."

By motion filed September 26, 2008, the Commonwealth, by undersigned counsel, asked the Court of Appeals of Virginia for leave for the circuit court to correct an error in the final judgment order in the case. The motion noted that the final order convicted the defendant of violating §

18.2-266 of the State Code, but the style of the case reflected that it was a prosecution under the city ordinance. (App. 24-25).

By order dated December 9, 2008, the Court of Appeals of Virginia granted leave to the trial court "to consider a motion to correct" an alleged clerical error in the final order. (App. 27). Judge Shadrick, who had presided over the trial, entered an order on December 15, 2008, in which he concluded that an order of correction was "not needed." (App. 28). The court ruled:

> The defendant was charged under a local warrant in violation of Sections 21-1/18.2-266. Section 21-1 is a local ordinance adopting and incorporating by reference State Code § 18.2-266 *et. seq*. pursuant to authority of Virginia Code § 46.2-1313. By referencing Section 21-1 in the warrant the defendant is being charged under the City ordinance for his violation of State law § 18.2-266.[1]

(App. 28).

The appeal was set for oral argument before a panel of the Court of Appeals sitting in Chesapeake on January 15, 2009. On January 14, 2009, Judge Lowe of the Circuit Court of the City of Virginia Beach granted Roberson's motion to reconsider Judge Shadrick's order of December 15,

[1] The trial judge noted in a footnote in the order that "[b]y charging the defendant under the City ordinance, any fine imposed is payable to the locality." (App. 28).

2008.[2] The new order stated that the order of December 15, 2008 was "vacated," and "amended" to read "Commonwealth of Virginia v. Chad Crawford Roberson, Defendant." (App. 42). The order referenced "Code § 8.10-428(B)" [sic]. (App. 42).

The Court of Appeals, by published opinion issued March 31, 2009, dismissed the appeal. (App. 46-50). The Court ruled that Judge Shadrick's order of December 15, 2008, "clarified that the City of Virginia Beach was the proper plaintiff in the case at trial." (App. 50). The Court of Appeals concluded that Roberson did not join the City of Virginia Beach in his appeal and by failing to do so, Roberson deprived Court of Appeals of Virginia "of jurisdiction to consider the appeal." (App. 50). The Court of Appeals held that the order entered by the trial court on January 14, 2009, was "null and void." (App. 49).

The Court of Appeals amended the style of the matter to read "Chad Crawford Roberson v. City of Virginia Beach." (App. 46). The Court of Appeals denied rehearing *en banc* in the matter by order dated May 25,

[2] Appellate counsel for the Commonwealth did not receive prior notice of a hearing held before Judge Lowe on January 14, 2009. Although Roberson asserts on page 17 of his brief that presumably Assistant Commonwealth's Attorney Jason Miyares spoke by telephone to appellate counsel for the Commonwealth prior to the hearing on January 14, 2009, in fact, appellate counsel for the Commonwealth did not learn of the hearing until it had been concluded. (See App. 95).

2009. (App. 85). The Court also denied Roberson's post-opinion motion to correct error and petition for rehearing *en banc* of the denial of that motion. (App. 76, 86).

Roberson then appealed the case to this Court. Roberson filed a motion in this Court requesting leave for the trial court to correct a clerical error as to the name of the appellee. (App. 87-92). The Commonwealth filed a response to the motion. (App. 93-109). The Court denied the motion by Order entered August 19, 2009. (App. 110).

This Court, by Order dated September 11, 2009, awarded Roberson an appeal from the judgment rendered by the Court of Appeals of Virginia. The Court's Order was styled "Chad Crawford Roberson v. Commonwealth of Virginia." The Court directed the City of Virginia Beach to appear to address whether it is a party to the appeal. The Court directed the Commonwealth of Virginia to appear to address whether it was a proper party before the Court of Appeals.

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRONEOUSLY DISMISSED THIS APPEAL FOR FAILURE TO JOIN A NECESSARY PARTY, SINCE THE COMMONWEALTH WAS THE REAL PARTY IN INTEREST IN THE APPEAL.

II. THE COURT OF APPEALS ERRONEOUSLY RULED THAT THE MOTION FOR LEAVE TO CORRECT A CLERICAL ERROR IN THE TRIAL COURT WAS FILED UNTIMELY, SINCE THERE IS NO DEADLINE IN THE CODE OF VIRGINIA OR THE RULES OF COURT FOR THE FILING OF MOTIONS, AND THE COURT OF APPEALS STILL HAD JURISDICTION OVER THE CASE WHEN THE MOTION WAS FILED.

III. THE COURT OF APPEALS ERRONEOUSLY FAILED TO REVERSE THE TRIAL COURT'S DECISION OVERRULING ROBERSON'S MOTION TO DISMISS THE DUI FOR AN IMPROPER STOP OF ROBERSON'S MOTOR VEHICLE.

IV. THE COURT OF APPEALS ERRONEOUSLY FAILED TO REVERSE THE TRIAL COURT'S DECISION FINDING ROBERSON GUILTY OF DUI DUE TO INSUFFICIENCY OF THE EVIDENCE.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN DISMISSING ROBERSON'S APPEAL FOR FAILURE TO JOIN THE CITY OF VIRGINIA BEACH AS AN INDISPENSIBLE PARTY?

II. WAS THE COMMONWEALTH OF VIRGINIA A PROPER PARTY IN THE CASE BEFORE THE COURT OF APPEALS?

III. DID THE COURT OF APPEALS ERR IN DENYING AS UNTIMELY ROBERSON'S MOTION FOR LEAVE TO CORRECT A CLERICAL ERROR IN THE FINAL TRIAL COURT ORDER?

IV. DID THE TRIAL COURT ERR IN DENYING ROBERSON'S MOTION TO DISMISS THE DUI CHARGE BASED ON AN IMPROPER STOP OF HIS VEHICLE BY OFFICER SANDERS?

V. WAS THE EVIDENCE SUFFICIENT TO SUSTAIN ROBERSON'S CONVICTION FOR DUI?

STATEMENT OF FACTS

The Offense

Virginia Beach police officer R. Sanders observed the defendant's vehicle at 2:11 a.m. on May 19, 2007. (App. 15).[3] Officer Sanders paced the Roberson vehicle for 2/10 of a mile and determined he was traveling 61 miles per hour in a 45 mile per hour zone. (App. 15).

Officer Sanders activated her emergency lights, but Roberson continued driving. He pulled into the parking lot of a 7-11 store and parked partially in a handicap parking spot. (App. 15-16).

When Sanders had contact with the defendant she noticed that he had a strong odor of alcohol, his speech was slurred, and his eyes were

[3] A Statement of Facts was filed in lieu of a transcript in this case.

watery and glassy. (App. 16). As Roberson stood and walked, he was "swaying." (App. 16).

Officer Sanders administered field sobriety tests. Roberson exhibited a lack of smooth pursuit in both eyes during the Horizontal Gaze Nystagmus test. (App. 16). On the "walk and turn" test the defendant began too soon, took the wrong number of steps on the initial test, and raised his arms for balance. (App. 16). When asked to stand on one leg, Roberson put his other foot down and used his arms for balance. (App. 16).

Following a preliminary breath test, the defendant was arrested for DUI. (App. 16-17). Officer Sanders advised the defendant of the Implied Consent Law. (App. 17). A breath test was conducted. (App. 17).

The Trial

Roberson was tried by the circuit court on November 1, 2007. (App. 15). Officer Sanders testified for the Commonwealth concerning the stop and arrest of the defendant. (App. 15-17). [4] She also testified that a breath

[4] When she testified concerning her question to the defendant at the scene as to what time it was, the court sustained the defense objection. (App. 16). The court ruled that, because the Commonwealth had advised the defense in discovery that Roberson had made no statements, the officer was prohibited from testifying as to any statements Roberson had made. (App. 16).

test was administered. (App. 17). When the blood alcohol certificate was offered as an exhibit, the defense asked "that it be admitted strictly for identification purposes." (App. 17).

The defense cross-examined Officer Sanders. Sanders testified during that examination that initially she was traveling in the opposite direction from Roberson, but made a U-turn and followed his vehicle. (App. 17). Defense counsel questioned Sanders about the lack of information in her written police report. (App. 17).

Sanders said that during the Horizontal Gaze Nystagmus test she had held the stylus a few inches closer to Roberson's face than the recommended 12 to 15 inches found in the National Highway Traffic Safety Administration's standards. (App. 18). Counsel further questioned the officer about details of Roberson's performance on the field sobriety tests (App. 18).

Following the Commonwealth's case, Roberson testified that he had measured the distances involved with the case and filmed the path with his telephone camera. (App. 19). The court declined to watch the video but allowed the defendant to testify about the facts. (App. 19). Roberson denied speeding and claimed that he performed well on the field sobriety tests. (App. 19).

Roberson moved to strike the evidence based on an improper stop of his vehicle by the police. Although the Statement of Facts reflects that the defendant made the motion to strike following the Commonwealth's case, the Statement of Facts also recites that the defendant argued facts in support of the motion which were presented during the defense case. (App. 19-20). Roberson argued that based on his measurements, it was "impossible" that Sanders had paced his vehicle for 2/10 of a mile. (App. 20). The court denied the motion to strike and found that the officer had probable cause to stop the vehicle. The court dismissed the speeding charge. (App. 20).

The defendant moved to dismiss the DUI charge. He urged the court to disregard the field sobriety test results and find the evidence of DUI insufficient. (App. 20-21). The court convicted Roberson of DUI. (App. 21).

ARGUMENT

I. IN LIGHT OF THE CLARIFYING ORDER OF THE JUDGE WHO TRIED THE CASE IN THE CIRCUIT COURT, THE COMMONWEALTH WAS NOT A PARTY TO THE CASE IN THE COURT OF APPEALS AND THAT COURT CORRECTLY DISMISSED THE APPEAL.

In response to the direction of this Court in its Order of September 11, 2009, the Commonwealth responds that the Commonwealth of Virginia was not a proper party to the action in the Court of Appeals. Rather, the proper appellee was the City of Virginia Beach.

The Commonwealth, by counsel, initially believed that the final order of November 5, 2007, contained a clerical error in the style of the case. The final order referenced a violation of Virginia Code § 18.2-266, but also named the City of Virginia Beach as the prosecuting entity. Therefore, the Commonwealth filed a motion in the Court of Appeals, pursuant to Virginia Code § 8.01-428(B), for leave for the trial court to correct the style of the order to reflect that the Commonwealth of Virginia, not the City of Virginia Beach, was the proper party. (App. 24-26).

Upon direction of the Court of Appeals, the trial judge who tried the matter considered the motion and declined to correct the order. Instead, the judge issued an order stating that the defendant was charged under a

"local warrant in violation of Sections 21-1/18.2-266." (App. 28).[5] The court further noted in the order that "[s]ection 21-1 is a local ordinance adopting and incorporating by reference State Code § 18.2-266 *et seq.* pursuant to the authority of Virginia Code § 46.2-1313." (App. 28). The court stated that, "[b]y referencing Section 21-1 in the warrant the defendant is being charged under the City ordinance for his violation of State law § 18.2-266." (App. 28).[6]

The defendant argues on appeal in this Court that the Court of Appeals erred in dismissing the appeal based on his failure to join the City of Virginia Beach as a party on appeal. Roberson contends that the prosecution and defense "consistently" referred to the Commonwealth as the prosecuting party. (Def. Br. at 19). He argues that the pleadings and orders prepared by both counsel "indicate a common and mutual understanding that the Commonwealth of Virginia was the party in interest." (Def. Br. at 23). He contends that a defendant must be able to rely on pleadings and orders prepared by the Commonwealth's Attorney with

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[5] The "local" arrest warrant referenced by the trial judge is included in the Appendix. (App. 2-3, 47). As the Court of Appeals noted in its opinion below, the summons issued in the case also indicates that the charge was brought under the City code. (App. 1, 46).

[6] The circuit court judge noted in a footnote in his order of December 15, 2008, that "[b]y charging the defendant under the City ordinance, any fine imposed is payable to the locality." (App. 28).

regard to the proper identity of the parties." (Def. Br. at 23-24). Although he complains that the trial court's final order is not circulated to parties, (Def. Br. at 22-23), nothing in the record suggests that defense counsel was unable to examine the order before noting the appeal.

The arguments presented by the defendant presuppose that the error in failing to name a necessary party in the notice of appeal is not jurisdictional. However, the failure to join an indispensable party is a jurisdictional defect which deprives the appellate court of authority to consider an appeal. See Asch v. Friends of Mt. Vernon Yacht Club, 251 Va. 89, 91, 465 S.E.2d 817, 818-19 (1996). See also Vaughn v. Vaughn, 215 Va. 328, 329-30, 210 S.E.2d 140, 141-42 (1974). Indeed, in Asch, the Court held that the fact that an indispensable party "has notice that an appeal has been perfected against another litigant is not sufficient to confer [the appellate court's] jurisdiction over the indispensable party against whom no appeal has been properly perfected." Id. at 93, 465 S.E.2d at 819.

In Woody v. Commonwealth, 53 Va. App. 188, 670 S.E.2d 39 (2008), the Court of Appeals addressed an issue of jurisdiction nearly identical to

the one in the instant case.[7] In Woody, the defendant was convicted of DUI and refusal. The Court of Appeals granted an appeal on the DUI conviction. "Because of inconsistencies in the trial court's final order [the Court of Appeals] directed the trial court to clarify whether Woody was convicted under Amherst County Code § 9.1 or Virginia Code § 18.2-266." Id. at 193, 670 S.E.2d at 42. The trial court clarified that Woody had been convicted in violation of the Amherst County Code. See Id.

Woody had timely filed his notice of appeal, but had failed to name Amherst County, which was an indispensable party. See id. at 197, 670 S.E.2d at 44. Citing Asch, 251 Va. at 91, 465 S.E.2d at 818-19, and Watkins v. Fairfax County Dep't of Family Services, 42 Va. App. 760, 765, 595 S.E.2d 19, 21-22 (2004), the Court of Appeals in Woody concluded that "[b]oth this Court and our Supreme Court have unequivocally held that failure to join an indispensable party is a jurisdictional defect that requires dismissal of the appeal." Id. at 199, 670 S.E.2d at 45.

[7] This Court refused the appeal in Woody on May 22, 2009. (Record No. 090229).

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING ROBERSON'S POST-OPINION MOTION FOR LEAVE TO CORRECT A CLERICAL ERROR IN THE FINAL ORDER OF THE TRIAL COURT.

During the pendency of the appeal in the Court of Appeals, the Commonwealth, by counsel, moved the Court of Appeals for leave, pursuant to Virginia Code § 8.01-428(B), for the trial court to correct an apparent clerical error in the final order entered November 5, 2007. (App. 24-26). See Lamb v. Commonwealth, 222 Va. 161, 279 S.E.2d 389 (1981).

The Court of Appeals granted leave for the trial court to consider the Commonwealth's motion to correct the final order, *nunc pro tunc*. Pursuant to that order of the Court of Appeals, the trial court ruled that the final order did not need to be corrected. (App. 28). Following the published opinion issued by the Court of Appeals on March 31, 2009, Roberson, on April 14, 2009, filed a motion requesting the Court of Appeals to grant leave for the circuit court to correct a clerical error "in the name of the appellee." (App. 70). The Court of Appeals denied the motion.[8] Subsequently, the *en banc* Court of Appeals denied the motion.

[8] The Court of Appeals did not dismiss the motion. The Order of April 24, 2009, reflects that the motion was "denied" because it was not timely.

The Court of Appeals did not abuse its discretion in denying the motion as untimely after the trial court already had ruled that there was no error in the final order and the appeal had been dismissed. A motion under Code § 8.01-428(B) does not lie for a court to *reconsider* an issue, only to correct an error. The trial judge had determined that no correction was required in the instant case.

While this Court noted in Lamb, 222 Va. at 166, 279 S.E.2d at 392, regarding leave under Code § 8.01-428(B), that "there is no time limit within which leave of [an appellate court] may be granted," that case did not involve a request for a *second* ruling by the trial court regarding an alleged error; nor did it involve a request for leave following issuance of the opinion by the appellate court.

Although Roberson had filed a petition for rehearing *en banc* in the Court of Appeals, asking the full Court to reconsider the dismissal of the case, the Court was not *required* to permit Roberson to seek correction under Code § 8.01-428(B). Indeed, when Roberson filed a similar motion in this Court after filing his petition for appeal to this Court, the Court denied the motion. (App. 87-92, 110).

III. THE TRIAL COURT CORRECTLY FOUND THAT THE OFFICER PROPERLY STOPPED THE VEHICLE AND THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION FOR DUI.

Should this Court determine that the Commonwealth is the proper party in interest in the case and address the merits of Roberson's substantive Assignments of Error, the Commonwealth responds to those issues below.

A. The Stop of the Vehicle

Roberson argues that the trial court erred in denying his motion to dismiss the charge based on an improper stop of his vehicle by the police officer. He alleges that the officer's testimony was inherently incredible. He contends that it was legally and factually impossible that events occurred as she testified at trial. Roberson argues that because the trial court dismissed the speeding charge it should not have concluded that the officer had probable cause to stop his vehicle. (Def. Br. at 27-32). The defendant did not properly preserve all of these arguments at trial. Furthermore, the court did not err in refusing to grant the motion to dismiss.

To the extent that the defendant argues that the officer lacked probable cause to stop the vehicle and the court erred in denying his motion based on an alleged lack of probable cause for the stop (Def. Br. at

31), such a motion must be brought prior to trial. See Code § 19.2-266.2. Roberson, however, made such an argument at the conclusion of the evidence at trial. (App. 19-20).

The trial court concluded that the officer indeed had probable cause to stop Roberson's vehicle. (App. 20). Clearly, the officer's testimony that Roberson was driving 61 miles per hour in a 45-mile-per-hour zone, ignored the officer's emergency lights, and improperly parked his vehicle in the store parking lot provided probable cause for a stop. The level of suspicion required for such a stop, moreover, was reasonable suspicion that criminal activity may be afoot, not probable cause. See United States v. Arvizu, 534 U.S. 266, 273 (2002).[9]

Roberson's argument that "it is intuitive that if the Speeding charge was dismissed pursuant to an improper stop, then the DUI should have been dismissed too" (Def. Br. at 31), is without merit. The record does not reflect that the court dismissed the speeding charge based on a finding of an improper stop. In fact, the record reveals that the court found there was

[9] The defendant testified that he did not stop his vehicle in response to the officer's emergency lights, but that the officer activated the lights after he had parked his vehicle, with the engine off. (App. 19). Under those circumstances, no level of suspicion would have been required for the officer to engage the defendant in conversation. See White v. Commonwealth, 267 Va. 96, 104, 591 S.E.2d 662, 666 (2004).

probable cause for the stop. (App. 20). Certainly a court may dismiss a speeding charge for any number of reasons having nothing to do with the validity of the stop.

The defendant contends that Officer Sanders' testimony was inherently incredible because she acknowledged on cross-examination that initially she was traveling in the opposite direction from Roberson, made a U-turn, and then paced his car. Roberson further notes that Sanders' report did not contain some of the facts about which she testified at trial. Roberson argues that in light of his own testimony about the distances involved the court should have rejected the officer's testimony. (Def. Br. at 30-31).[10]

The defense cross-examined Officer Sanders regarding the distances involved in her pursuit of the defendant's vehicle and her written report. The court permitted the defendant to testify about the measurements he had made using the video camera in his cellular telephone.[11]

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[10] The record indicates that the officer referred to the 5600 block of Wesleyan Drive, whereas the defendant referred to 5600 Wesleyan Drive.

[11] The court ruled that it would consider Roberson's testimony but did not admit the videotape. (App. 19).

While the evidence presented by the officer and the defendant about facts surrounding the pursuit and stop of the vehicle differed, the trial court clearly did not find that the officer was inherently incredible. Even assuming that the officer inaccurately testified concerning some factual matters, the court was not required to accept the defendant's testimony and reject the officer's testimony *in toto.* See Durham v. Commonwealth, 214 Va. 166, 169, 198 S.E.2d 603, 606 (1973). The court, therefore, could rely on whatever portion of the testimony the court found to be credible.

Unless this Court concludes that the trial judge was required to reject a witness' testimony as inherently incredible, the Court must "defer to the credibility determinations of 'the fact finder[,] who has the opportunity of seeing and hearing the witnesses.'" Sawyer v. Commonwealth, 43 Va. App. 42, 53, 596 S.E.2d 81, 86 (2004) (citation omitted). The trial court did not err in finding that the officer properly stopped the defendant's vehicle.

B. Sufficiency of the Evidence

The defendant argues that the evidence presented at trial was insufficient to sustain his conviction for DUI. He argues that the trial court erred in considering the results of "compromised" field sobriety tests and asserts that without those results and without the results of a blood alcohol

test, there was not sufficient to evidence to support the conviction. (Def. Br. at 32-33).

Standard of Review

When addressing a claim that the evidence was insufficient, an appellate court is required to consider the evidence and all inferences fairly deducible therefrom in the light most favorable to the Commonwealth. See Riner v. Commonwealth, 268 Va. 296, 303, 601 S.E.2d 555, 558 (2004); Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). That principle requires an appellate court to "discard the evidence of the accused in conflict with that of the Commonwealth and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom." Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980) (citation omitted).

"The appellate court has the duty to examine the evidence that tends to support the conviction and uphold the conviction unless it is plainly wrong or without evidence to support it." McCain v. Commonwealth, 261 Va. 483, 492-93, 545 S.E.2d 541, 547 (2001). As this Court has reiterated, the issue on appeal is "whether the record contains evidence from which any 'rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.'" Young v. Commonwealth, 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008) (citation omitted).

Where there is evidence to support a conviction, a reviewing court must not substitute its own judgment, "even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial." Commonwealth v. Taylor, 256 Va. 514, 518, 506 S.E.2d 312, 314 (1998). It is "the province of the [fact-finder], rather than an appellate court," to weigh the facts and judge the credibility of witnesses. Commonwealth v. Presley, 256 Va. 465, 470, 507 S.E.2d 72, 75 (1998).

Furthermore, "circumstantial evidence is competent and is entitled to as much weight as direct evidence, provided that the circumstantial evidence is sufficiently convincing to exclude every reasonable hypothesis except that of guilt." Dowden v. Commonwealth, 260 Va. 459, 468, 536 S.E.2d 437, 441 (2000). "Circumstantial evidence is not viewed in isolation. While no single piece of evidence may be sufficient, the combined force of many concurrent and related circumstances, each insufficient in itself, may lead a reasonable mind irresistibly to a conclusion." Muhammad v. Commonwealth, 269 Va. 451, 479, 619 S.E.2d 16, 32 (2005), cert. denied, 547 U.S. 1136 (2006) (citation omitted).

Driving Under the Influence

Code § 18.2-266 prohibits driving while intoxicated.[12] The statute reads, in pertinent part:

> It shall be unlawful for any person to drive or operate any motor vehicle . . . (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as demonstrated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle . . . or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive . . . .

To establish the requisite degree of intoxication, the Commonwealth need only show the defendant has consumed sufficient intoxicants to "observably affect his manner, disposition, speech, muscular movement, general appearance or behavior." Leake v. Commonwealth, 27 Va. App. 101, 110, 497 S.E.2d 522, 526 (1998) (citing § 4.1-100); see Thurston v. City of Lynchburg, 15 Va. App. 475, 483, 424 S.E.2d 701, 705-06 (1992).

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[12] Section 21-1 of the Virginia Beach City Code incorporates Title 46.2 of the Code of Virginia and Article 2 (§ 18.2-266 et seq.) of Chapter 7 of Title 18.2 of the Code of Virginia.

"Test results from a breath or blood test are not necessary or required to prove driving under the influence of alcohol or drugs." Oliver v. Commonwealth, 40 Va. App. 20, 24, 577 S.E.2d 514, 516 (2003) (citing § 18.2-268.10). Rather, the trier of fact must determine the defendant's guilt or innocence from all of the evidence of his condition, with or without a blood analysis. See Code § 18.2-268.10.

Analysis

Even though the defendant argues that the trial court should not have considered the field sobriety test results, those test results are part of the record evidence before the Court. When addressing a claim of insufficiency of the evidence, the Court considers all of the evidence in the record. See Hargraves v. Commonwealth, 37 Va. App. 299, 312-13, 557 S.E.2d 737, 743 (2002). The officer's testimony indicated that Roberson did not successfully complete the tests. (App. 16).

In addition to the field sobriety tests, Officer Sanders testified that Roberson had a "strong" odor of alcohol about his person, had red and watery eyes and slurred speech. The officer also noted that when walking or standing, the defendant swayed. (App. 16). These indicators of intoxication supported the trial court's conclusion that Roberson was guilty of DUI. See Leake, 27 Va. App. at 109-10, 497 S.E.2d at 526-27; see also

Brooks v. City of Newport News, 224 Va. 311, 315, 295 S.E.2d 801, 804 (1982).

CONCLUSION

For these reasons the judgment appealed from the Court of Appeals of Virginia and the Circuit Court of the City of Virginia Beach should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF TRANSMISSION AND SERVICE

On November 16, 2009, the required copies of this brief were hand-delivered to the Clerk's Office of this Court for filing and 3 copies were mailed to John D. Hooker, Jr., JOHN D. HOOKER, JR., & ASSOCIATES, P. C., 1206 Laskin Road, Suite 110, Virginia Beach, VA 23451, counsel for the appellant, Natalie P. Mann, Assistant City Attorney, 2401 Courthouse Drive, Virginia Beach, VA 23456, and Robert W. Jones, Assistant Commonwealth's Attorney, 2425 Nimmo Parkway, Bldg. 10B, Virginia Beach, VA 23456. An electronic copy of the brief was sent to the Court at scvbriefs@courts.state.va.us.

The Commonwealth desires to present oral argument in this case.

_____

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