IN THE

Supreme Court of Virginia

RECORD NO. 091299

CHAD CRAWFORD ROBERSON,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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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 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. WAS IT ERROR FOR THE COURT OF APPEALS TO DISMISS THIS APPEAL FOR FAILURE TO JOIN THE CITY OF VIRGINIA BEACH AS AN INDISPENSIBLE PARTY WHERE THE ONLY INDICATION IN THE TRIAL COURT THAT THE CITY OF VIRGINIA BEACH WAS THE PROSECUTING AUTHORITY WAS THE STYLE OF

THE SENTENCING ORDER, WHERE EVERY OTHER PLEADING, DOCUMENT AND PAPER FILED IN THE MATTER LISTED THE COMMONWEALTH OF VIRGINIA AS THE PROSECUTING AUTHORITY AND WHERE THE COMMONWEALTH OF VIRGINIA WAS THE REAL PARTY IN INTEREST IN THE APPEAL? (Error 1)

II. WAS IT ERROR FOR THE COURT OF APPEALS TO DISMISS ROBERSON'S MOTION FOR LEAVE TO CORRECT THE CLERICAL ERROR IN THE TRIAL COURT AS BEING UNTIMELY WHEN THERE IS NO DEADLINE IN THE CODE OF VIRGINIA OR THE RULES OF THE SUPREME COURT FOR THE FILING OF MOTIONS, AND WHEN THE COURT OF APPEALS STILL HAD JURISDICTION OVER THE CASE WHEN THE MOTION WAS FILED? (Error 2)

III. WAS IT ERROR FOR THE TRIAL COURT TO OVERRULE ROBERSON'S MOTION TO DISMISS THE DRIVING UNDER THE INFLUENCE CHARGE ON THE GROUNDS OF AN IMPROPER STOP WHERE THE TRIAL COURT DISMISSED THE SPEEDING CHARGE WHICH WAS THE BASIS FOR THE STOP AND WHERE THE EVIDENCE OF THE DRIVING UNDER THE INFLUENCE WAS INSUFFICIENT AS A MATTER OF LAW FOR A FINDING OF GUILT BEYOND A REASONABLE DOUBT? (Errors 3 and 4)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT AND COURT OF APPEALS

This is an appeal of a Driving Under the Influence conviction from the Circuit Court, of the City of Virginia Beach. The Court of Appeals granted an appeal, but never ruled of the substantive merits of the appeal, rather, the Court of Appeals dismissed the

appeal, concluding that the Appellant had failed to join an indispensable party, finding that the prosecuting agency below was the City of Virginia Beach and not the Commonwealth of Virginia, whom the Appellant named as Appellee in the appeal (App. 46). Appellant subsequently filed simultaneously a petition for an en banc hearing of his appeal and a motion pursuant to Virginia Code § 8.01-428 seeking leave to permit the filing of a request in the trial court to correct a clerical error in that court clarifying the Commonwealth was the appropriate Appellee (App. 51,70). The Court of Appeals denied the motion on April 24, 2009, leaving the petition for rehearing still pending (App. 76). The stated reason for the denial of the motion was that it was untimely. Appellant then petitioned for rehearing *en banc* of his motion for leave to petition the trial court to correct the clerical error (App. 77), which said petition for rehearing was denied by the Court of Appeals in its Order of May 29, 2009 (App. 85). The Court of Appeals

simultaneously issued an Order denying the motion for rehearing en banc of the dismissed appeal (App. 86). There are certain documents that are the subject of a pending petition for writ of certiorari that have been added to the appendix.

STATEMENT OF FACTS

On May 19, 2007, the Accused, Chad Crawford Roberson (hereinafter referred to as "Roberson", "Accused" or "Defendant"), was stopped by Virginia Beach Police Officer, R. Sanders, and was ultimately arrested for Driving Under the Influence (hereinafter referred to as DUI) and Speeding 61/45. This matter was tried in the Circuit Court of the City of Virginia Beach, Virginia, as a bench trial on November 1, 2007, with the Honorable Thomas S. Shadrick presiding (App. 15-21).

Mr. Roberson entered pleas of not guilty to each of the charges of DUI and Speeding 61/45.

The Commonwealth called as its first and only witness, Officer R. Sanders (hereinafter referred to as "Officer" or "Sanders").

The Officer testified that the offense occurred on May 19, 2007, in the City of Virginia Beach, Virginia. Her first observation occurred at 2:11 a.m. at the 5600 block of Wesleyan Drive, whereby she began a pace of the Roberson for over 2/10 of a mile at a speed of 61 miles per hour in a 45 mile per hour zone. She stopped Roberson at 2:12 a.m. She testified that she activated her emergency equipment lights, but Roberson continued driving straight and then turned into the 7-11 parking lot, located at the intersection of Wesleyan Drive and Diamond Springs Road, and pulled into a parking space with one half of his tires in a handicap parking space.

Her testimony was that his speech was slurred, he had a strong odor of alcohol, his eyes were watery and glassy, his ability to walk and stand were swaying, he was cooperative, and did not have any medical

issues. When she asked him as to the time he responded that it was approximately 2:10 a.m.

She further testified that she administered the following field sobriety tests (hereinafter referred to as FST): Horizontal Gaze Nystagmus, Walk and Turn Test, and the One Leg Stand Test.

On the Horizontal Gaze Nystagmus test the Officer testified that Roberson had a lack of smooth pursuit in both the left and right eyes and the onset of nystagmus prior to 45 degrees.

On the Walk and Turn test, she indicated that he started too soon and that he took 10 steps on the first 9 steps and 9 steps on the second 9 steps. On the first 9 steps she stated he missed heel-to-toe, stepped off the line, and raised his arms for balance. On the second 9 steps she stated he missed heel-to-toe, stepped off the line, and used his arms for balance.

On the One Leg Stand, she said that he swayed while balancing, put his foot down, and used his arms to balance.

Roberson was ultimately arrested and submitted to a breath test. The results of the Blood Alcohol Certificate were offered and defense counsel requested that it be admitted strictly for identification purposes.

The Commonwealth never moved for admission of the blood alcohol certificate into evidence.

The above facts were testified to on direct examination and the following facts are a result of cross examination:

The Officer was shown a copy of a document titled Sworn Report of DUI Arrest and admitted that was her signature on the document, signed under oath before the magistrate. The Officer confirmed that in paragraph 3, which is titled "During observation period, I observed the vehicle: (circle) weaving, speeding, running off the road, other (explain)" that the line was totally blank without any remarks whatsoever, despite her testimony on direct that she paced the Defendant at 61 in a 45 zone. Furthermore,

she testified during direct examination that he ignored her lights, and during cross examination of paragraph 6 of her sworn report, which stated "I had these problems in stopping the vehicle" she did not mention Roberson disregarding her lights, but simply stated that he pulled into the parking lot and parked half of his vehicle in a handicap parking spot and half in a non-handicap parking spot.

When questioned on the field sobriety tests she admitted that these field sobriety tests were developed by the National Highway Traffic Safety Administration (NHTSA), that she had training on those tests, and in the administration of those tests. As to the Horizontal Gaze Nystagmus test, she testified that she performed the test by holding the stylus six to eight inches in front of his eyes. She was then cross examined on the NHTSA instruction manual pertaining to the proper procedure for administering the Horizontal Gaze Nystagmus test and she admitted that it requires the stylus to be held 12 to 15 inches from the

suspect's nose and slightly above the nose. The officer concurred that she did not administer the test to NHTSA standards.

During cross examination of the Walk and Turn test, she could not state how many times the Roberson missed heel-to-toe, how many times he raised his arms, or how many times he stepped off of the line on neither the first 9 steps nor the second 9 steps. Upon further cross examination of the Walk and Turn test pursuant to NHTSA standards, she agreed that the testing officer cannot score a missed heel-to-toe unless the person missed by more than ½ inch and she could not testify that Roberson missed any heel-to-toe by more than ½ inch, and that the testing officer cannot score a clue against a person for raising their arms unless the arms were raised more than 6 inches from their side and she could not testify that his arms were raised more than 6 inches from his side. On the One Leg Stand, she admitted on cross examination that Mr. Roberson did in fact count to the required number 30.

After the Commonwealth rested its case, Mr. Roberson testified as follows:

That he was on his way home and was proceeding on Wesleyan Drive and crossed over Diamond Springs Road and it was his intent to pull into the 7-11 parking lot, which he did, and parked properly in a spot with the exception that his tires were slightly touching one of the lines of a handicap parking space. It was not until after he pulled into the spot, turned off his engine, and was stepping out of his car that he first observed the lights of the police car as it was pulling into the parking lot of the 7-11.

Furthermore, he testified that he had returned to the area in question and retraced his steps. Roberson testified that he used a camera phone to video-record his path of travel, speed zones, and the distance as measured on his odometer and in-car GPS Navigation system. The Commonwealth had previously viewed the video and did not object to its admission into evidence or content. However, the Court stated

that it did not need to see the video, but allowed Roberson to testify to those facts that were recorded by video. Mr. Roberson testified that the distance from 5600 Wesleyan Drive into the actual 7-11 parking lot space in question was precisely a distance of 2/10 of a mile.

Roberson further testified that, other than being nervous, he performed the field sobriety tests with little or no difficulty. He testified to exactly where he had been, where he was going, and his consumption of alcohol. Roberson denied any speeding and testified that he was within the posted speed limit. He denied that the Officer could have paced him for over 2/10 of a mile as she previously testified. In fact, he testified that she was not even behind him at all, and that she did not activate her lights until he was already in the 7-11 parking lot with his engine off and stepping out of his vehicle.

At the conclusion of the Commonwealth's evidence, the defense made a motion to strike the

Commonwealth's evidence and dismiss the case as the stop of Mr. Roberson was improper and was in fact a physical and factual impossibility under the testimony of the Police Officer, and on the unrebutted, unrefuted and uncontradicted evidence by Roberson. Defense counsel argued that it was impossible to pace the vehicle for over 2/10 of a mile, because the Officer testified that she first observed Roberson's vehicle proceeding in the opposite direction of her at the 5600 block of Wesleyan Drive travelling at a speed of 61 miles per hour in a 45 mile per hour zone, she then made a U-turn, caught up with him, and began a pace for over 2/10 of a mile that began at the 5600 block of Wesleyan drive until Roberson pulled into the 7-11 parking lot located at the intersection of Wesleyan Drive and Diamond Springs Road. However, defense counsel argued, testimony and video showed that it was exactly 2/10 of a mile from 5600 Wesleyan Drive to the actual 7-11 parking space in question located at the intersection of Wesleyan Drive and Diamond Springs

Road. The Court overruled that motion and found that the Officer had probable cause to stop the vehicle, but dismissed the speeding charge.

The defense then moved to dismiss the case on reasonable doubt and asked the Court to disregard all Field Sobriety Tests because the Horizontal Gaze Nystagmus test was improperly administered, which compromised the integrity of the test, and the Officer could not testify that Roberson did not perform the Walk and Turn test properly as she so concurred on cross examination that she did not administer the test pursuant to NHTSA standards. Defense counsel argued, that the Officer admitted, during cross examination of the One Leg Stand test, that Roberson was able to count to 30, understand his rights, and locate his operator's license and registration and handle them without any problems with dexterity.

In light of the above, Roberson's counsel asked the court to find Mr. Roberson not guilty. The Court overruled that motion and found Mr. Roberson

guilty of the DUI and imposed a fine of three hundred and fifty dollars, a 60 day jail sentence, which was suspended condition upon Mr. Roberson being of good behavior for two years, he was ordered to attend the Alcohol Safety Action Program (ASAP), a suspension of his privilege to operate a motor vehicle in the Commonwealth of Virginia for a period of 12 months and issued him a restricted license to allow him to drive to, from and during work, and to and from the ASAP program.

Roberson filed a Notice of Appeal (App. 4) and petitioned the Virginia Court of Appeals for an appeal of this conviction in the Virginia Beach Circuit Court. The appeal was granted. However, it became evident while the appeal was pending before the Court of Appeals that there was a discrepancy as to the proper Appellee.

On September 26, 2008, the Office of the Attorney General filed a Motion to Correct Trial

Court's Final Order, which counsel for Roberson did not oppose (App. 24).

On December 15, 2008, The Honorable Thomas S. Shadrick (Ret.) of the Virginia Beach Circuit Court denied the Commonwealth's Motion to Correct Trial Court's Final Order (App. 28). Counsel for Roberson did not receive a copy of the order until December 30, 2008 via facsimile that was sent by the Attorney for the Commonwealth.

On December 30, 2008, the Court of Appeals rendered its opinion in the case of *Woody v. Commonwealth*. On or about the same date, counsel for Roberson called and spoke to counsel for the Commonwealth and with knowledge and agreement from the counsel for the Commonwealth, defense counsel wrote a letter and mailed it to The Honorable Thomas S. Shadrick stating that defense counsel agreed with the motion that was made by counsel for the Commonwealth and set forth the reasons why and with the letter defense counsel attached a copy of the final order,

entered on November 5, 2007, a copy of the statement of proceedings and a copy of the statement of facts. Defense counsel sent a copy of this letter to counsel for the Commonwealth and Jason S. Miyares, Esq., with the Virginia Beach Commonwealth's Attorney. Knowing that Judge Shadrick was retired and having not heard from Judge Shadrick, a representative with the office of defense counsel contacted the Virginia Beach Judge's Office to ensure that Judge Shadrick would receive a copy of the letter prior to the Court of Appeals oral argument on January 15, 2009 and was reassured that Judge Shadrick would be back in the office prior to that date. Judge Shadrick did not return to the Virginia Beach Circuit Court prior to January 15, 2009.

On January 13, 2009, the office of defense counsel received a phone call from the Virginia Beach Circuit Court and was told to communicate with Jason S. Miyares, Esq., with the Virginia Beach Commonwealth's Attorney's Office on January 14, 2009 to attempt to resolve the issue.

On January 14, 2009, Mark A. Andrews, Esq., an associate of defense counsel gave Jason S. Miyares, Esq. the phone number of counsel for the Commonwealth. Miyares left and returned sometime later after presumably speaking with counsel for the Commonwealth. Mark A. Andrews, Esq. and Jason S. Miyares, Esq. discussed the matter and having been assured incorrectly that Judge Shadrick would return before January 15, 2009, they then went before the duty judge (The Honorable Frederick B. Lowe) and an order was entered clarifying the November 5, 2007 Order (App. 42). A clerk with the Virginia Beach Circuit Court was supposed to send a copy of the order to the Court of Appeals. A copy of the order was faxed by counsel for Roberson to counsel for the Commonwealth on January 14, 2009. It was determined on January 15, 2009 at the Court of Appeals oral argument that the Virginia Beach Circuit Court Clerk's Office did not notify the Court of Appeals of the order.

In its review of the appeal, a panel of the Court of Appeals held that the proper Appellee is the City of Virginia Beach and therefore the appeal was dismissed citing lack of jurisdiction for failure to join an indispensable party.

Roberson then filed a petition for rehearing en banc and also filed a motion pursuant to Rule 5A:2, Rules of Virginia Supreme Court and § 8.01-428 of the Code of Virginia seeking leave to move the Circuit Court, of the City of Virginia Beach for an order correcting the clerical mistake and the name of the Appellee.

In a per curiam opinion dated April 14, 2009, the Court of Appeals denied Roberson's motion to correct a clerical error on the grounds that the motion was not timely filed (App. 76). However, Roberson's petition for a rehearing *en banc* of the dismissal of appeal was still pending before the Court of Appeals. Roberson then petitioned for a rehearing en banc of his motion for leave to petition the trial court to correct

a clerical error. On May 29, 2009, the Court of Appeals issued simultaneous orders denying all requests for *en banc* rehearings, and dismissing the appeal.

ARGUMENT

I. WAS IT ERROR FOR THE COURT OF APPEALS TO DISMISS THIS APPEAL FOR FAILURE TO JOIN THE CITY OF VIRGINIA BEACH AS AN INDISPENSIBLE PARTY WHERE THE ONLY INDICATION IN THE TRIAL COURT THAT THE CITY OF VIRGINIA BEACH WAS THE PROSECUTING AUTHORITY WAS THE STYLE OF THE SENTENCING ORDER, WHERE EVERY OTHER PLEADING, DOCUMENT AND PAPER FILED IN THE MATTER LISTED THE COMMONWEALTH OF VIRGINIA AS THE PROSECUTING AUTHORITY AND WHERE THE COMMONWEALTH OF VIRGINIA WAS THE REAL PARTY IN INTEREST IN THE APPEAL?

Citing *Woody v. Commonwealth*, 53 Va. App. 188, 198, 670 S.E.2d 39, 44 (2008), the Court of Appeals dismissed Roberson's appeal for Roberson's failure to join the City of Virginia Beach as an indispensable and necessary party, the reviewing panel being of the opinion that the City of Virginia Beach was the prosecuting authority at the trial.

However, Roberson and the Commonwealth's Attorney have consistently, throughout both the trial and the appeal process, commencing from the pre-trial

discovery motions, through filing petitions and briefs, styled the Appellee as the Commonwealth of Virginia. In fact, all of the motions, orders, and responses filed by both the prosecution and the defense in the Virginia Beach Circuit Court in this cause were styled in the name of the Commonwealth of Virginia as the party in interest with the sole exception of the sentencing order, which was prepared by the court. Those orders, motions, and responses include:

1. The motion for discovery prepared by defense counsel (App. 5)

2. The discovery order prepared by the Commonwealth's Attorney(See Appendix to Opening Brief, page i) (this order was prepared, but not submitted to the trial court for entry.)

3. The discovery response prepared by the Commonwealth's Attorney (See Appendix to Opening Brief, page ii) (Commonwealth's response was sent to defense counsel, but not filed with the trial court.)

4. The statement of facts for the petition for appeal (signed by the trial judge after entry of the sentencing order listing the City of Virginia Beach as the party in interest)(App. 15).

5. The order staying the execution of sentence (prepared by the court and signed by the trial judge who entered the sentencing order. (App. 22)

6. The notice and motion to stay execution of sentence (undated and prepared by defense counsel, (App. 8,12)

7. Notice of appeal to the Court of Appeals, dated November 21, 2007 (App. 4)

8. Notice and motion for stay of execution, dated November 21, 2007 (App. 8)

9. Order of the Circuit Court, dated December 5, 2007 denying sentence modification (App. 12)

10. Criminal Continuance Order, dated August 2, 2008 (App. 23)

11. Criminal Continuance Order, dated January 5, 2009 (App. 44)

12. Criminal Continuance Order, dated March 5, 2009 (App. 45)

13. Order of Virginia Beach Circuit Court, dated January 14, 2009 (App. 42)

The arrest warrant issued by the Magistrate commands the arresting officer "In the name of the Commonwealth of Virginia" to arrest the Accused (App. 2).

The only pleading or order containing the style of this cause while pending in the trial court and which reflects the City of Virginia Beach as being a party in interest is the sentencing order (App. 7). The sentencing order makes no other reference to the City of Virginia Beach or local ordinances. Rather, the Order indicates the defendant as having violated only state code 18.2-266. This order is the court's internal document for the court's own purposes. This

document does not get generated and forwarded to either the Commonwealth or defense.

It is evident by the pleadings and orders prepared by defense counsel and prepared by the counsel for the prosecution that all of the pleadings and orders indicate a common and mutual understanding that the Commonwealth of Virginia was the party in interest. It was error for the Circuit Court judge, in an order that the court prepared, to substitute parties in interest such that the City of Virginia Beach was reflected as the prosecuting authority. In a footnote of Judge Shadrick's order denying the Attorney General's request to correct the sentencing order, the trial judge indicated that the reason to list the City of Virginia Beach as the party in interest was so the city could receive revenue.

In styling the orders and pleading in the case, both in the trial court and the Court of Appeals, the Defendant/Appellee should be able to rely upon the pleadings and orders prepared by the Commonwealth's

Attorney with regard to the proper identity of the parties. In this case, the Commonwealth's Attorney prepared a discovery order that was presented to defense counsel. The Commonwealth's Attorney prepared a response that was styled in the same fashion, also which was sent to defense counsel and relied upon by the parties and the court. Presumably the Commonwealth's Attorney knows who he is representing and the Defendant should not be penalized in have his appeal dismissed by an unintentional procedural default without having the merits of his case considered by the Appellate court.

Admittedly, while the appeal was pending defense counsel in attempting to correct the mistake did not adhere precisely to the requirements of §8.01-428 inasmuch as leave was not first sought from the Court of Appeals to correct the matter in the trial court. However, it is abundantly clear that both the Attorney General and Roberson's counsel were in agreement regarding the matter as, indeed, the Attorney

General first sought to correct the sentencing order on her own motion.

Moreover, it is unduly prejudicial to the Defendant to deny him the opportunity to correct the matter before the trial court on the grounds that the motion to correct the clerical error, once correctly filed, was filed untimely when there was no time limit or deadline in the rules of the Virginia Supreme Court. The Court of Appeals went to great lengths to dismiss Roberson's appeal on an unintended and unwarranted procedural default without ever considering the real merits of his appeal.

II. WAS IT ERROR FOR THE COURT OF APPEALS TO DISMISS ROBERSON'S MOTION FOR LEAVE TO CORRECT THE CLERICAL ERROR IN THE TRIAL COURT AS BEING UNTIMELY WHEN THERE IS NO DEADLINE IN THE CODE OF VIRGINIA OR THE RULES OF THE SUPREME COURT FOR THE FILING OF MOTIONS, AND WHEN THE COURT OF APPEALS STILL HAD JURISDICTION OVER THE CASE WHEN THE MOTION WAS FILED?

The per curiam order asserts that Roberson's motion was untimely filed. But the rules do not specify a time limit for filing a motion; Rule 5A:2 provides a time frame for a *response* to a motion, but

does not require that a motion be filed by any particular date. All that is required is that the case still be pending before this Court, so that the Court still retains jurisdiction to consider the motion. Since the motion was filed contemporaneously with a timely petition for *en banc* rehearing, this Court clearly retains jurisdiction over the appeal, and the motion is not untimely.

In addition, the rules specify the four mandatory and jurisdictional deadlines in this court, and the filing of a motion is not one of those. Rule 5A:3(a). Assuming *arguendo* that the motion were untimely, this Court should not summarily refuse to consider it because of a nonjurisdictional defect. Compare *Jay v. Commonwealth*, 275 Va. 510, 520, 659 S.E.2d 311, 317 (2008) (error for court to dismiss appeal based on nonjurisdictional defect). But since the motion was, in fact, timely filed, it is not required that the Court address this issue in order to grant rehearing on the motion.

III. WAS IT ERROR FOR THE TRIAL COURT TO OVERRULE ROBERSON'S MOTION TO DISMISS THE DRIVING UNDER THE INFLUENCE CHARGE ON THE GROUNDS OF AN IMPROPER STOP WHERE THE TRIAL COURT DISMISSED THE SPEEDING CHARGE WHICH WAS THE BASIS FOR THE STOP AND WHERE THE EVIDENCE OF THE DRIVING UNDER THE INFLUENCE WAS INSUFFICIENT AS A MATTER OF LAW FOR A FINDING OF GUILT BEYOND A REASONABLE DOUBT?

The trial court erred by not granting Roberson's motion to dismiss the charges for the improper stop of Roberson's motor vehicle. When the sufficiency of the evidence is challenged on appeal, this Court reviews the evidence "in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom." Bright v. Commonwealth, 4, Va.App. 248, 250, 356 S.E.2d 443, 444 (1997). Furthermore, it is well settled that the "credibility of a witness, the weight accorded the testimony, and the inferences to be drawn from proven facts are matters solely for the fact [ ]finder's determination." Keyes v. City of Virginia Beach, 16 Va.App. 198, 199, 428 S.E.2d 766, 767 (1993). " 'The credibility of witnesses and the weight accorded their

testimony are matters solely for the fact finder who has the opportunity of seeing and hearing the witnesses.' " Collins v. Commonwealth, 13 Va.App. 177, 179, 409 S.E.2d 175, 176 (1991) (quoting Schneider v. Commonwealth, 230 Va. 379, 382, 337 S.E.2d 735, 736-37 (1985)). The fact finder may consider the appearance and manner of the witness, his intelligence, his opportunity for knowing the truth, his interest in the outcome of the case, his bias, and, if any, his prior inconsistent statements. However, "where a fact is equally susceptible of two interpretations one of which is consistent with the innocence of the accused, [the trier of fact] cannot arbitrarily adopt that interpretation which incriminates the accused." Littlejohn v. Commonwealth, 24 Va.App. 401, 411, 482 S.E.2d 853, 858 (1997).

The Officer testified that her first observation of Roberson occurred at 2:11 a.m. at the 5600 block of Wesleyan Drive, whereby she began a pace of the Roberson for over 2/10 of a mile at a speed of

61 miles per hour in a 45 mile per hour zone. She testified that she activated her emergency equipment lights, but Roberson continued driving straight and then turned into the 7-11 parking lot, located at the intersection of Wesleyan Drive and Diamond Springs Road, and pulled into a parking space with one half of his tires in a handicap parking space. However, cross examination of the Officer revealed that she was proceeding in the opposite direction of Roberson when she first observed Roberson's vehicle at the 5600 block of Wesleyan Drive the Officer made a U-turn, caught up with Roberson, and then began a pace of Roberson. The undisputed evidence was that the exact distance from 5600 Wesleyan Drive into the 7-11 parking lot space in question was precisely a distance of 2/10 of a mile. The Commonwealth had previously viewed the video and did not object to its admission into evidence, content, or Roberson's testimony regarding the content in lieu of playing the video at the Court's request.

The Officer also testified to facts that were not noted in her sworn report.

This Court's standard for review of witness testimony admitted by the trial court is well settled: To be "incredible, [testimony] must be either so manifestly false that reasonable men ought not to believe it, or it must be shown to be false by objects or things as to the existence and meaning of which reasonable men should not differ." Cardwell v. Commonwealth, 209 Va. 412, 414, 164 S.E.2d 699 701 (1968) (*quoting* Burke v. Scott, 192 Va. 16 23, 63 S.E.2d 740, 744 (1951). Should that same standard be applied to the Officer's testimony, it is hard to imagine that reasonable men would not believe that it was a legal and factual impossibility for the Officer to have paced Roberson for over 2/10 of a mile, because the Officer testified that she first observed Roberson's vehicle proceeding in the opposite direction of her at the 5600 block of Wesleyan Drive, the Officer then made a U-turn, caught up with Roberson, and began

a pace for over 2/10 of a mile that began at the 5600 block of Wesleyan drive until Roberson pulled into the 7-11 parking lot located at the intersection of Wesleyan Drive and Diamond Springs Road. Testimony and a video showed that it was exactly 2/10 of a mile from 5600 Wesleyan Drive to the 7-11 parking space in question located at the intersection of Wesleyan Drive and Diamond Springs Road.

The Court's dismissal of the speeding charge and then ruling that the Officer had probable cause to stop the vehicle for the DUI was error, as there was not probable cause to initiate a stop. Based on the Officer's inconsistent statements from her testimony and sworn report, and the factual and legal impossibility of the pace, the stop of Roberson's vehicle was improper. It is intuitive that if the Speeding charge was dismissed pursuant to an improper stop, then the DUI charge should have been dismissed too. Therefore, both charges should have been

dismissed because of the improper stop of Roberson's motor vehicle.

The evidence introduced at the trial of driving under the influence was insufficient for a finding of guilty beyond a reasonable doubt. Even in viewing the sufficiency of the evidence in a light most favorable to the Commonwealth, it is evident that the validity and integrity of the field sobriety tests were compromised because the field sobriety tests were not properly administered and should have been disregarded by the court. Indeed, the officer admitted on cross-examination that she did not perform the horizontal gaze nystagmus to NHTSA standards and she also testified that she did not correctly administer the walk and turn test pursuant to the NHTSA standards.

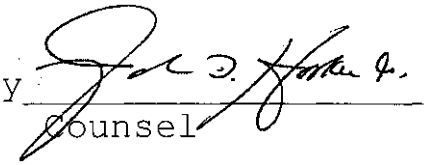
Moreover, in addition to two of the three field sobriety tests not being properly administered, the blood alcohol certificate was never properly admitted into evidence. Hence, the evidence in the case was field sobriety test results that were questionable and

no certificate of blood alcohol. There was, therefore, insufficient evidence upon which to convict Roberson of DUI. Under the totality of all of the circumstances, the evidence was insufficient as a matter of law to find Roberson guilty beyond a reasonable doubt of driving under the influence of alcohol.

CONCLUSION

Wherefore, petitioner respectfully prays that his conviction will be reversed and ultimately determine that the Commonwealth of Virginia was the correct party in interest and therefore his appeal should not have been dismissed for failure to join a necessary party and, that there was insufficient evidence as a matter of law to find him guilty beyond a reasonable doubt of driving under the influence of alcohol and that he be permitted to brief these points of error for oral argument before this Court.

Chad Crawford Roberson,

By 
Counsel

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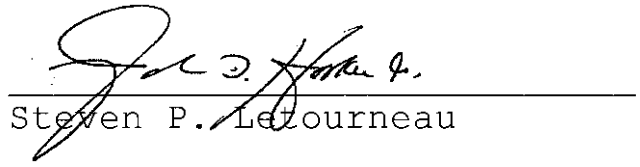
CERTIFICATE

I hereby certify that fifteen(15)copies of this brief were hand-delivered in the office of the Clerk of this Court, an electronic copy in PDF format by e-mail or CD, and three (3) copies have been mailed on this 21th day of October, 2009, to counsel for the Appellee, Virginia B. Theisen, Senior Assistant Attorney General, 900 East Main Street, Richmond, Virginia 23219, Telephone (804)786-2071, Robert W. Jones, Assistant Commonwealth's Attorney, 2425 Nimmo Parkway, Virginia Beach, Virginia 23456, Telephone (757) 385-8732, Mark D. Stiles, City Attorney, 2401 Courthouse Drive, Virginia Beach, Virginia 23456, Telephone (757) 385-8803.


Steven P. Letourneau

Virginia:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

Commonwealth of Virginia, **Plaintiff**	
v.	**Docket No.: CR07-004377**
Chad Crawford Roberson, **Defendant**	

Order For Discovery And Inspection

WHEREAS, the defendant in this case, by counsel, has moved this Court to order discovery pursuant to Rules 3A:11 and 7C:5 of the Supreme Court of Virginia,

It is ORDERED that the Attorney for the Commonwealth permit counsel for the defendant to inspect and copy or photograph any relevant written or recorded statements or confessions made by the accused, or copies thereof and the substance of any oral statements and confessions made by the accused, to any law enforcement officer, the existence of which is known or becomes known to the Attorney for the Commonwealth and such material or information is to be offered in evidence against the accused in an appeal from the General District Court to the Circuit Court.

It is further ORDERED that the Attorney for the Commonwealth permit counsel for the defendant to inspect any criminal record of the accused the existence of which is known to the Attorney for the Commonwealth and such criminal record is to be offered in evidence against the accused in an appeal from the General District Court to the Circuit Court; and

It is further ORDERED that the duties imposed by this Order are continuing in nature.

ENTER:

_____

Judge

OFFICE OF THE COMMONWEALTH'S ATTORNEY
2425 NIMMO PARKWAY
VIRGINIA BEACH, VIRGINIA
23456-9010
(757) 427-4401

I Ask for This:

HARVEY L. BRYANT
COMMONWEALTH'S ATTORNEY

_____
Jason Mayfares
Assistant Commonwealth's Attorney

Seen:

_____
John D. Hooker
Attorney for the Defendant

Virginia:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

Commonwealth of Virginia, **Plaintiff**	
v.	**Docket No.: CR07-004377**
Chad Crawford Roberson, **Defendant**	

Commonwealth's Response to Order for Discovery and Inspection

COMES NOW the Commonwealth and submits the following discovery information:

1. In response to paragraph 2 of the Order for Discovery and Inspection, the Commonwealth submits that they are unaware of any statements made by defendant to law enforcement officers.

2. In response to paragraph 3 of the Order for Discovery and Inspection, defense counsel may inspect any criminal record of the defendant, known by the Commonwealth, at a mutually convenient time.

HARVEY L. BRYANT
COMMONWEALTH'S ATTORNEY

By: _____
Jason Miyares
Assistant Commonwealth's Attorney

OFFICE OF THE COMMONWEALTH'S ATTORNEY
2425 NIMMO PARKWAY
VIRGINIA BEACH, VIRGINIA
23456-9002
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to John D. Hooker, Jr., Esquire, 1206 Laskin Road, Suite, 110 Virginia Beach, VA 23451, this 15 day of October, 2007.

_____
Jason Miyares
Assistant Commonwealth's Attorney