In The

Supreme Court of Virginia

RECORD NO. 110818

JEAN PAUL ENRIQUEZ,

***Appellant*,**

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Jean Paul Enriquez (hereinafter "Mr. Enriquez," "Appellant" or "Defendant") was indicted by the Grand Jury of the City of Alexandria for unlawfully driving or operating a motor vehicle on September 18, 2009, while under the influence of alcohol, and having been previously convicted twice in violation of Virginia Code § 18.2-266, or a substantially similar statute, law, or ordinance within five years prior to this offense.

Prior to trial on December 30, 2009, Mr. Enriquez filed a Motion to Suppress. Sup. Ct. Appendix at 1. The Honorable Judge Nolan B. Dawkins heard testimony and argument for the pretrial motion on January 28, 2010. Sup. Ct. Appendix at 7-88. At the hearing, Mr. Enriquez sought to suppress evidence obtained in violation of the 4th Amendment of the United States Constitution as well as in violation of Virginia Code § 19.2-81. The Defendant argued that the Motion to Suppress should be granted because the officer lacked probable cause to believe the Defendant was under the influence of drugs or alcohol and in the alternative, that the Commonwealth could not establish that the Defendant was

operating a motor vehicle in the officer's presence. Sup. Ct. Appendix at 59-88. Judge Dawkins denied Defendant's Motion to Suppress. Sup. Ct. Appendix at 140. The Defendant waived his right to a jury trial after the pretrial hearing.

On February 2, 2010, the Commonwealth amended the indictment to the misdemeanor offense of driving under the influence as a second offense within five years of the first. The Honorable Judge Lisa Kemler presided over the trial. Assistant Commonwealth's Attorneys, Bryan Porter and Jessica Smith, were present on behalf of the Commonwealth of Virginia. The Defendant, Mr. Enriquez, was present and represented by counsel, Alberto Salvado, to answer to the charge that he had violated Va. Code § 18.2-266 by operating a motor vehicle while under the influence of alcohol for a second time within five years. The Defendant entered a plea of not guilty.

At the conclusion of the evidence, the Defendant made a motion to strike the Commonwealth's evidence on the grounds that the evidence was insufficient as a matter of law that he was operating a motor vehicle. Sup. Ct. Appendix at 298-305. The

Defendant contended that "operation" of a motor vehicle required more than merely a key in the ignition in the off position with the radio on. The court denied that motion. Supreme Court Appendix at 313. Mr. Enriquez rested without introducing evidence and again argued for dismissal on the same grounds. Sup. Ct. Appendix at 316-319.

The Court found Mr. Enriquez guilty of the offense charged and sentenced him to confinement in the Alexandria City Jail for 12 months, with all but 60 days suspended conditioned upon the Defendant's uniform good behavior for a period of 2 years and a fine of $500.00. Mr. Enriquez was also ordered to participate in the Alcohol Safety Action Program and advised that his operator's license was revoked for 3 years.

The Court of Appeals affirmed the conviction in an unpublished opinion.

STATEMENT OF THE FACTS

On the 18th day of September, 2009, Thomas J. Feeney, a City of Alexandria parking enforcement officer arrived to the 6000 block of Lincolnia Road around 3:12 am. Sup. Ct. Appendix at

155. Upon arrival, Officer Feeney observed a silver Toyota illegally parked in an area designated as a bus stop. Sup. Ct. Appendix at 155. The vehicle was not obstructing traffic and was parallel to the curb. Sup. Ct. Appendix at 160. After writing a ticket from inside his vehicle, the officer walked up on the driver's side door of the Toyota to place the ticket under the windshield wiper. At this point Officer Feeney realized that the vehicle was occupied. Mr. Enriquez was in the driver's seat and appeared to be sleeping. After repeated attempts to awaken the defendant, Officer Feeney backed away and called the City of Alexandria Police Department. Sup. Ct. Appendix at 156-157.

Officer Asonglefac arrived on scene and Officer Feeney directed him to the silver Toyota. Sup. Ct. Appendix at 165. Mr. Enriquez appeared to be sleeping and after two to three minutes of banging and knocking on the car's windows, roof, and doors, he finally awoke. Sup. Ct. Appendix at 168. Officer Asonglefac took notice of the illuminated radio and music playing from inside the vehicle but the engine was not running. Sup. Ct. Appendix at 167.

As Mr. Enriquez rolled down the window, Officer Asonglefac smelled a strong odor of alcohol and an odor that appeared to be marijuana. Sup. Ct. Appendix at 170. Mr. Enriquez initially denied having any alcoholic beverages but eventually admitted to drinking one Long Island Iced Tea an hour before this encounter. He stated he believed he was in Arlington and that he was there to visit his girlfriend but couldn't give the officer her exact address. Sup. Ct. Appendix at 170-171. The officer did not inquire any further as to whether or not the girlfriend lived in that area and there was no evidence as to when the vehicle was last driven or when the defendant arrived at that location.

Officer Asonglefac could not recall the ignition switch's position. Sup. Ct. Appendix at 169 and 199. The officer did not check to see if the radio was original equipment, operating on an independent power source, or if the key was required for the radio's operation (Sup. Ct. Appendix at 213-214), nor did he remember if there were any buttons on the steering wheel which could have been used to control the radio. Sup. Ct. Appendix at 216-217 Although the officer remembered that the radio turned

off when the keys were removed from the ignition he did not recall who removed them from the vehicle and did not testify that the key needed to be rotated in order to remove it from the ignition. Sup. Ct. Appendix 215-216.

Mr. Enriquez was escorted by foot to a parking lot by Officer Asonglefac and asked to perform a series of field sobriety tests. After failing to perform the field sobriety tests to Officer Asonglefac's satisfaction, Mr. Enriquez was arrested for operating a motor vehicle while under the influence.

ASSIGNMENTS OF ERROR

I. The Court of Appeals Erred by Not Finding that the Trial Court Erred in Failing to Grant Defendant's Motion to Strike and by Convicting Him of the Charged Offense, as the Evidence at Trial was Insufficient to Convict Defendant as a Matter of Law of Operating a Motor Vehicle While Being Under the Influence, Inasmuch As Defendant's Conduct of Sleeping in a Non-Running Vehicle with only the Radio Activated but the Keys in an Unknown Position in the Ignition Did Not Meet the Legal Standard for "operating" a Motor Vehicle Under Va. Code § 18.2-266. (Assignment of Error 1)

The Defendant preserved this assignment of error on his motion to strike the evidence (Sup. Ct. Appendix at 298-305) obtained through the direct and cross examination of the

Commonwealth's witnesses (Sup. Ct. Appendix at 154-217), who observed Mr. Enriquez at the scene of the arrest, at the conclusion of the Commonwealth's case. The Defendant incorporated the argument made at his motion to strike in his closing argument without presenting any evidence. Sup. Ct. Appendix at 316-319.

ARGUMENT

I. The Evidence at Trial was Insufficient as a Matter of Law to Convict Defendant of Driving While Intoxicated, Because Defendant's Conduct of Sleeping in a Non-Running Vehicle With Only the Radio Activated with the Keys in an Unknown Position Did Not Meet the Legal Standard for "operating" a Motor Vehicle Under Va. Code § 18.2-266.

A. Standard of Review

Whether Enriquez operated his vehicle within the meaning of Code § 18.2-266 is a mixed question of law and fact which is reviewed de novo on appeal. The evidence and all reasonable inferences flowing there from must be viewed in the light most favorable to the prevailing party in the trial court. The Judgment of the trial court is presumed to be correct and will be reversed only upon a showing that it is plainly wrong or without evidence

to support it. Nelson v. Commonwealth, 281 Va. 212, 707 S.E.2d 815 (2011).

B. Defendant Did Not "Operate" a Motor Vehicle by Sleeping in a Vehicle with the Key in the Ignition in an Unknown Position and the Radio Activated. To Operate a Motor Vehicle, One Must Be "Engaging the Machinery of the Vehicle Which Alone, or In Sequence, Will Activate the Motive Power of the Vehicle.

Virginia case law clearly holds that a motor vehicle need not be running or moving for a person to be found guilty of violating Virginia's driving or operating while under the influence statute. Neither the Court of Appeals nor the Supreme Court of Virginia has established a bright line rule to determine whether a person is operating a motor vehicle as a matter of law.

The Supreme Court of Virginia has held that "Operating'…not only includes the process of moving the vehicle from one place to another, but also includes starting the engine, or manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion. It means engaging the machinery of the vehicle which alone, or in sequence, will activate

the motive power of the vehicle." Stevenson v. City of Falls Church, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992) (citing Williams v. City of Petersburg, 216 Va. 297, 301, 217 S.E.2d 893, 896 (1975); Nicolls v. Commonwealth, 212 Va. 257, 258, 184 S.E.2d 9, 10 (1971); Gallagher v. Commonwealth, 205 Va. 666, 670, 139 S.E.2d 37, 38 (1964)).

A reading of Williams, Nicolls, and Gallagher and all other reported Virginia cases on the topic of "operation" illustrates that the courts in Virginia have limited the definition of operation such that it applies when the individual engages "the necessary machinery" or electrical equipment to make the vehicle mobile. The individual must "perform certain acts" which go beyond simply having "the means of starting the engine, or of operating [the vehicle's] mechanical or electrical equipment." Stevenson, 243 Va. at 437, 416 S.E.2d at 437. There must be "some other contemporaneous circumstance." Leake v. Commonwealth, 27 Va. App. 101, 107, 497 S.E.2d 522, 525 (1998) (discussing the Stevenson definition of operation); See also Overbee v. Commonwealth, 227 Va. 238, 243, 315 S.E.2d 242, 244 (1984)

(stating it was not enough that "possession of the keys may have given [the individual] the means of effecting control over the truck[,] he cannot be said to have been in actual physical control of the vehicle.")

Operation has been affirmed in cases where the vehicle's engine is not running, but the mechanical equipment of the vehicle has clearly been engaged. For example, a vehicle in gear where the mere release of the brake could set the car rolling forward under the actual physical control of an intoxicated operator or the presence of a rotated key in the ignition. See Keesee v. Commonwealth, 32 Va. App. 263, 527 S.E.2d 473 (2000) (the vehicle was in gear and the taillights were illuminated); Propst v. Commonwealth, 24 Va. App. 791, 485 S.E.2d 657 (1997) (the vehicle's gear shift was in first or third gear, the dashboard lights were illuminated, and the head and taillights were on); Nelson v. Commonwealth, 281 Va. 212, 707 707 S.E.2d 815 (2011) (the defendant was sleeping in his car, the engine was not running, the key in the ignition was in the "on or accessory position," the radio inside the vehicle was on).

Prior to Nelson, the closest factual cases to Mr. Enriquez's were Propst and Stevenson. In Propst the defendant was found in a truck parked in the middle of an intersection with its headlights on. The truck's engine was off, but the defendant was sitting in the driver's seat. The officer could not recall the ignition position of the key. When the officer woke the defendant, the defendant admitted that he had been "driving around." Propst, 24 Va. App. at 792-93, 485 S.E.2d at 658. The court upheld Propst's conviction by relying on Lyons v. Petersburg, 221 Va. 10, 266 S.E.2d 880 (1980), noting that "it can be inferred that Mr. Lyons' car was where it was at the time because he drove it there…" Id. at 793, 485 S.E.2d at 658. The Propst court relied on a number of factors, including his admission that he had been driving, and the reasonable inference based on his location in the middle of an intersection to find that the defendant had operated his vehicle, and held that "[t]he trial court correctly concluded from this circumstantial evidence that the only plausible way for the truck to have arrived at the intersection was for the defendant to have driven it there while under the influence of alcohol. Id. Indeed,

"Lyons deals with the sufficiency of circumstantial evidence necessary to establish that an accused had driven his vehicle into a parked car." Stevenson, 243 Va. at 437, 416 S.E.2d at 437. Propst is nothing more than Lyons with an admission of driving added to the circumstantial evidence.

Mr. Enriquez stated that he "drank a long island iced tea an hour before" and that he was on his way to his girlfriend's house. Unlike Lyons and Propst, Mr. Enriquez was not found in the middle of an intersection or nearby to a recent accident. The Commonwealth failed to establish when the vehicle was parked at that location and that Mr. Enriquez was inside the vehicle the entire period of time after it was parked. Furthermore the issue is moot because the Commonwealth conceded that the circumstantial evidence in this case was not as strong as the evidence found in Propst. Sup. Ct. Appendix at 311. The record also proves that the trial court declined to make a Propst like inference when it stated in its ruling, "what is obvious is that the radio was playing and the lights on the radio were displayed. So

there was some—there was electrical operation, at the very least." Sup. Ct. Appendix at 320-321.

Since the trial court found that Mr. Enriquez was operating his vehicle when the Officer first came into contact with him, the analysis is narrowed to determining the legal definition of "operating."

In Stevenson, the defendant was found asleep behind the steering wheel of a car "the key was in the ignition but it was not recalled whether the key was in the 'on' or 'off' position. The engine of the motor vehicle, and all of its other mechanical and electrical parts were off." Stevenson v. Commonwealth, 243 Va. at 435, 416 S.E.2d at 436. The Supreme Court of Virginia held that because "[it] was 'not recalled whether the key was in the "on or "off" position[,]'" "on appeal, we must assume that the key was in the off position." Id. at 438, 416 S.E.2d at 438.

The most obvious distinguishable fact from Stevenson and the present case is that a radio located insi de the vehicle occupied by Mr. Enriquez was illuminated and playing music. No other electrical components of the vehicle were engaged, the

vehicle was not in gear and the actual position of the ignition was unknown. Though the trial court found that the radio turned off when the keys were removed, it made no finding that the activated radio engaged the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle or that the ignition switch had to be rotated in order for the radio to activate in the first place.

Despite having the opportunity to do so, Officer Asonglefac did not determine whether or not the radio could operate without the key in the ignition and if any other radio controls were found on or near the steering wheel which could have turned on the radio's power. Sup. Ct. Appendix at 213-214. The officer could not recall who or how the keys were removed from the steering column. Sup. Ct. Appendix at 216.There was absolutely no evidence that the ignition had been rotated in any direction or that the radio could 'only have been operated by rotating the ignition to a position other than in the off position.

Mr. Enriquez respectfully disagrees with the Court of Appeals reasoning that this case is controlled by Nelson. While Mr.

Enriquez concedes that Nelson has obvious similarities with the case at hand he also points out an important difference in a dispositive fact. Unlike the present case, the evidence in Nelson proved that "there was no doubt it was the key whether in an "ON" or "Accessory" position, that turned on the 'factory' mounted radio." 281 Va. at 217, 707 S.E.2d at 817. The officer testified that he rotated the key in order to remove it from the ignition and clearly established that the key was not in the "off" position.

> "Operating" means "engaging the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle." [Stevenson, 243 Va. at 438, 416 S.E.2d at 438] (Emphasis added.) Manipulating the electrical equipment was one step between the "off" position and the point at which the motive power would be activated. While Nelson's action in turning the key to the "on" or "accessory" position of the ignition did not alone activate the motive power, it was an action taken "in sequence" up to the point of activation, making him the operator of the vehicle within the meaning of Code 18.2-266.

If the Commonwealth had established the key in the Mr. Enriquez's vehicle's position, then this would be identical to Nelson. However, because the Commonwealth failed to establish that fact, the Court must assume that the key was in the "off"

position. Though the activated radio could be circumstantial evidence of the key's position, there is no doubt that Officer Asonglefac had not verified whether the radio was factory mounted, shared the same power source of the motive power of the vehicle or if the radio could activate without turning the ignition switch.

The Supreme Court's focal point in both Nelson and Stevenson falls on the key's position and not on the activated electrical equipment. Though there is still no bright line rule for determining operation on all cases, the Court was abundantly clear that evidence of a rotated ignition switch satisfies the definition of operation. If the analysis focused on the activated radio rather than the key's position, then rotating an ignition switch without activating a radio or other electrical component would not be operation. This cannot be what the Supreme Court envisioned.

There are many electrical components in a vehicle that are activated without turning the ignition switch. For example, the dome light inside the vehicle may turn on by simply opening a

door, the electric locks (if so equipped) may unlock with a press of a button, or various warning chimes or chirps could automatically activate with the keys being placed or left in the ignition. Though the Commonwealth proved that the radio was activated, it did not show that Mr. Enriquez was any closer to engaging the motive sequence of the vehicle than Mr. Stevenson.

CONCLUSION

WHEREFORE, Mr. Enriquez respectfully requests this Honorable Court to vacate the order of conviction in this case, to dismiss this case, and any other appropriate relief.

Respectfully Submitted,

Jean Paul Enriquez
By Counsel

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CERTIFICATE PURSUANT TO RULE 5:26

Pursuant to Rule 5:26(h), I hereby certify that on this 7th day of October, 2011, I caused 15 bound copies, and one electronic copy on CD, of the Brief of Appellant and Appendix to be hand-filed with the Clerk of the Supreme Court of Virginia, and on the same day, caused 3 bound copies of the Brief of Appellant, one bound copy of the Appendix, and one electronic copy of the same, to be served, via UPS Ground Transportation, to Gregory W. Franklin, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, (804) 786-2071 (Telephone), (804) 371-0151 (Facsimile), mail@oag.state.va.us.

Counsel does not waive oral argument.

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Alberto Salvado