IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 110818

JEAN PAUL ENRIQUEZ,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

Jean Paul Enriquez was convicted in a bench trial in the Circuit Court of the City of Alexandria of driving while intoxicated, second offense within five years, in violation of Virginia Code § 18.2-266. The trial court on February 4, 2010, sentenced Enriquez to 12 months in jail, with all but 60 days suspended, and fined him $500. The Court of Appeals granted the

defendant an appeal on July 29, 2010. A divided panel of the Court of Appeals affirmed the conviction in an unpublished opinion on April 5, 2011, *Enriquez v. Commonwealth*, 11 Vap UNP 0463104, Record No. 0463-10-4 (April 5, 2011). This Court granted the defendant an appeal on September 7, 2011, on the assignment of error below.

ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED BY NOT FINDING 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.

STATEMENT OF FACTS

Alexandria parking enforcement officer Thomas J. Feeney testified at trial that at 3:12 a.m. on September 18, 2009, he observed a silver colored Toyota parked in a designated bus stop in the 6000 block of Lincolnia Road. (A 154-155).[1] Feeney did a check on the Toyota's license plate to

[1]Page references to the Appendix are denoted "(A __)."

make sure the car was not stolen, and, while sitting in his own vehicle behind the Toyota, prepared a parking ticket to place on the Toyota's windshield. (A 156).

When Feeney walked up to the Toyota to place the ticket, he noticed that the vehicle's radio was playing and there was a man sitting in the driver's seat. (A 156-158). Feeney tapped on the car's window, door, and hood, for "[p]robably a minute," but got no response from the sleeping driver. (A 156-157). Feeney then "backed away from the car and called for a police officer to respond." (A 157).

Feeney testified that when a police officer and a police sergeant arrived, all three of them tried to arouse the man by knocking on the door, window, and hood of the car. (A 158). Feeney also directed his flashlight beam into the man's face, without effect. (A 158). "After a couple of minutes, he finally raised his head, opened his eyes, and the police officer asked him to roll down his window so they could talk to him." (A 158).

Officer Aloysius Asonglefac of the Alexandria Police Department testified he responded to the parking enforcement officer's call, and traveled to the scene in his marked police cruiser. (A 164-165). Asonglefac observed the defendant, Jean Paul Enriquez, sleeping behind the wheel of the silver Toyota. (A 166, 168). Asonglefac could hear the radio in the car

playing even though the windows were closed, and "could see the light from the radio area." (A 167-168). Officer Asonglefac then used his fist to hit the "driver's side window, the windshield, and the roof of the car" in an unsuccessful attempt to wake Enriquez. (A 168). He also directed his flashlight at Enriquez, but it took "two to three minutes for him to wake up." (A 169). Asonglefac observed that the car keys were in the ignition, but he did not remember whether the keys were aligned at the "on," "off," or "accessory" position on the switch. (A 169-170).

When Enriquez woke up, the officer asked him to roll down his window; when the defendant did so, Officer Asonglefac "smelled a strong odor of an alcoholic beverage" and also smelled marijuana. (A 170). The officer began to question Enriquez, and learned Enriquez believed he was in Arlington. (A 171). The defendant told Asonglefac he was there to visit his girlfriend, but he could not provide her address. (A 171). Enriquez first denied that he had been drinking. (A 171). However, after the officer asked him to perform some field sobriety tests, but before the defendant began those tests, Enriquez told Officer Asonglefac that he had had a Long Island iced tea about an hour earlier. (A 173).

Enriquez did not perform well on the tests, and Officer Asonglefac decided to arrest him for DUI. (A 171-182). A blood test performed

thereafter showed Enriquez's blood alcohol content was .10%. (A 241-242, 248). Enriquez's prior conviction for DUI was introduced at trial without objection. (A 264-265).

Officer Asonglefac noticed the keys in the ignition switch when he went to the passenger side of the vehicle. (A 199). He could not recall how many keys there were or what they looked like. (A 199). Asonglefac also testified that he did not know "if that radio requires the key to be in the ignition." (A 214). The officer testified, however, that although he did not recall who had removed the key from the ignition switch, when the key was removed, "the radio shut off." (A 215-216).

ARGUMENT

THE EVIDENCE AT TRIAL WAS SUFFICIENT TO CONVICT THE DEFENDANT OF OPERATING A MOTOR VEHICLE WHILE INTOXICATED.

Standard of Review

Whether a defendant operated his vehicle within the meaning of Code § 18.2-266 is a mixed question of law and fact that is reviewed *de novo* on appeal. *Nelson v. Commonwealth*, 281 Va. 212, 215, 707 S.E.2d 815, 816 (2011). "[U]pon appellate review, the evidence and all reasonable inferences flowing therefrom must be viewed in the light most favorable to

the prevailing party in the trial court," in this case, the Commonwealth. *See Maxwell v. Commonwealth*, 275 Va. 437, 442, 657 S.E.2d 499, 502 (2008).

Such deference applies not only to the historical facts, but to the inferences from those facts as well. The inferences to be drawn from proven facts, so long as they are reasonable, are within the province of the trier of fact. *Johnson v. Commonwealth,* 209 Va. 291, 295, 163 S.E.2d 570, 574 (1968). "Circumstantial evidence, if convincing, is entitled to the same weight as direct testimony." *Britt v. Commonwealth*, 276 Va. 569, 573, 667 S.E.2d 763, 765 (2008). "This Court 'must examine the evidence that supports the conviction and allow the conviction to stand unless it is plainly wrong or without evidence to support it.'" *Commonwealth v. McNeal*, 282 Va. 16, 20, 710 S.E.2d 733, 735 (2011) quoting *Vincent v. Commonwealth*, 276 Va. 648, 652, 668 S.E.2d 137, 139-40 (2008).

"Operating" a Vehicle Under the Influence of Alcohol

Under Virginia Code § 18.2-266 it is "unlawful for any person to drive or *operate* any motor vehicle . . . while such person is under the influence of alcohol." (emphasis added). This statute requires that the Commonwealth prove two things: "(1) that the defendant was operating or driving a motor vehicle, and (2) that he was under the influence of intoxicants at the time he was driving or operating it." *Nicolls v.*

Commonwealth, 212 Va. 257, 258, 184 S.E.2d 9, 10 (1971). Here, the question of Enriquez's intoxication is not before the Court. The only issue is whether the evidence proved that Enriquez "operated" his motor vehicle.

> "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.

Williams v. City of Petersburg, 216 Va. 297, 300, 217 S.E.2d 893, 896 (1975) (emphasis added); *Stevenson v. City of Falls Church*, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992). *See also* § 46.2-100 (defining an "operator" as a person who "drives or *is in actual physical control* of a motor vehicle on a highway") (emphasis added).

Analysis

Movement of the vehicle is not a necessary component of "operating." *See Gallagher v. Commonwealth*, 205 Va. 666, 139 S.E.2d 37 (1964). Rather, as stated above, this Court has more broadly defined "operating" to include "manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion." *Williams*, 216 Va. at 300, 217 S.E.2d at 896. Under this standard, criminal defendants have been convicted of "operating" vehicles in a variety of different circumstances. In each of these cases, there is at least one commonality:

the defendants did something to engage the car's mechanical or electrical equipment. The counterpoint is provided by this Court's ruling in *Stevenson*, which held that a defendant was *not* the "operator" of a vehicle when he was seated in the driver's seat with the ignition key in the "off" position, when all other mechanical and electrical parts of the vehicle were off. 243 Va. 434, 435, 416 S.E.2d 435, 436 (1992).

The facts of the case at bar are nearly identical to those in *Nelson*. In *Nelson,* the defendant was discovered passed out in the driver's seat of a parked vehicle. 281 Va. at 214, 707 S.E.2d 816. He had a cell phone to his ear, but was not speaking into it; the officer who arrived at the scene could see the lights of the car's radio were illuminated and could hear music coming from it. *Id.* When the officer attempted to arouse Nelson, the defendant responded slowly and exhibited signs of intoxication. *Nelson*, 281 Va. at 215, 707 S.E.2d 816.

> Officer Benedict also observed that there was a key in the ignition that appeared to be in the "on or accessory position." Officer Benedict testified that in this position "the car is not actually running" but it enables one to "run the radio and use things in the car" and in "[t]hat way you don't actually have to have the engine running but you can still use the battery." Officer Benedict said that to remove the key from the steering column he had to reach through the open window and pull the key backward "to the point where it would actually release." This movement, Officer Benedict said, turned off the radio.

Nelson, 281 Va. at 214, 707 S.E.2d 816.

Relying on *Stevenson*, Nelson argued in his appeal that the evidence was insufficient as a matter of law because "he did not operate his motor vehicle by placing a key in the ignition and activating the radio because neither action alone, or in sequence, will activate the motive power of the vehicle." 281 Va. at 215, 707 S.E.2d 816.

In *Stevenson*, the officer did not recall whether the key was in the "on" or "off" position, but the engine and all other mechanical and electrical parts were ***off***. 243 Va. 434, 435, 416 S.E.2d 435, 436 (1992). Despite the fact that Nelson's radio was *on*, he relied upon *Stevenson,* arguing "that he did not *operate* his motor vehicle by placing the key in the ignition and activating the radio because neither action alone, or in sequence, will activate the motive power of the vehicle." *Nelson*, 281 Va. 215, 707 S.E.2d 816 (emphasis added). This Court rejected Nelson's argument, finding that he "turned on the radio by placing the key in the latter position, and this action constituted "manipulating the . . . electrical equipment of the vehicle." *Id.* at 219, 707 S.E.2d at 818.

Pertinent to the instant case, in *Propst v. Commonwealth*, 24 Va. App. 791, 485 S.E.2d 657 (1997), the defendant was convicted of "operating" where the motor was not running, but the vehicle's headlights, taillights and interior lights were illuminated, the key was in the ignition, and

the car was in gear. *Id.* at 793, 485 S.E.2d at 658. The officer could not say what position the key was in. *Id.* The Court of Appeals in *Propst* relied upon circumstantial evidence that the defendant had been driving, but also noted that neither Virginia appellate court "has fashioned a bright line rule that a vehicle's motor *must* be running or its ignition switch *must* be in the 'on' position for a defendant to be convicted of driving or operating a motor vehicle while intoxicated in violation of Code § 18.2-266." *Propst*, 24 Va. App. at 794, 485 S.E.2d at 659 (emphasis added). *See also Keesee v. Commonwealth*, 32 Va. App. 263, 265, 527 S.E.2d 473, 474 (2000).

The facts of the case at bar demonstrate that Enriquez, like the defendant in *Nelson*, was "manipulating the . . . electrical equipment of the vehicle without actually putting the car in motion" by using the ignition key to activate the radio. The only difference is that here, the officer could not recall the position of the key when the radio was in operation. However, unlike the situation in *Stevenson*, in this case it was clear that, regardless of the position of the key, its insertion had activated the radio, and its withdrawal shut off the power to the radio. Thus, Enriquez's action, like that of Nelson, clearly constituted manipulating the electrical equipment of the vehicle through the use of the ignition switch.

The defendant argues however, that the officer "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." (Def. Br. 16).

These arguments fail due to the fact that the removal of the key shut off the electrical power to the radio. That occurrence makes it clear that the radio *was* a part of the electrical equipment *of the vehicle*, connected to the ignition system, and dependent upon the vehicle's battery. (A 215). If the radio had an independent power source, removing the key from the car's ignition switch could not deprive it of power. In *Nelson*, the officer similarly reported that that when he "reach[ed] through window and pull[ed] the key backward 'to the point where it would actually release'" "this movement" "turned off the radio." *Nelson*, 281 Va. at 214, 707 S.E.2d at 816.

On appeal, this Court reviews the evidence in the light most favorable to the prevailing party, here, the Commonwealth, and accords "the Commonwealth the benefit of all reasonable inferences deducible from the evidence." *Brown v. Commonwealth*, 278 Va. 523, 527, 685 S.E.2d 43, 45 (2009). The only reasonable inference from the fact that removal of the ignition key caused the radio to shut down is that the radio's power supply came from, or through, the car's ignition switch. Significantly, that switch

also permits the operator to activate the starter motor, thereby "engaging the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle." *Williams*, 216 Va. at 300, 217 S.E.2d at 896.

Notwithstanding the officer's failure to recall the *position* of the ignition switch, it is clear at a minimum that by *placing* the key in the ignition switch, Enriquez, like the defendant in *Nelson*, undertook the action necessary to provide the electrical power *of the vehicle* to be routed to the radio. Thus, the defendant's reliance upon *Stevenson* is misplaced, for that case stands for the proposition "that '*operating*' a vehicle within the proscription of the drunk driving statute" ***includes*** "manipulating the . . . electrical equipment of the vehicle without actually putting the car in motion." 243 Va. at 438, 416 S.E.2d at 438.

Stevenson's conviction was reversed because there was no showing of any action by the defendant that had activated *any* electrical or mechanical component of the vehicle; "the presence of the key in the ignition switch in the off position ***did not*** engage the mechanical or electrical equipment of Stevenson's car. . . ." *Stevenson*, 243 Va. at 438, 416 S.E.2d at 437 (emphasis added). This Court found it significant that not only the engine was turned off, but "*all* of its other mechanical and electrical parts were *off*." *Id.* (emphasis added).

The case at bar differs from *Stevenson*, but is like *Nelson*, in that the vehicle's radio and its illuminating lights were on *because* the placing of the key in the ignition switch had engaged the electrical equipment of the vehicle.[2] Contrary to the defendant's argument that the decision in *Nelson* turned on the *position* of the key, the controlling issue was whether the defendant's actions *engaged the electrical system* of the vehicle. This Court expressly disclaimed any support for the notion that "putting the key in the ignition is not an action which could alone or in sequence activate the motive power of the vehicle." *Nelson*, 281 Va. at 219, 707 S.E.2d 818.

By placing the key into the ignition switch in *whatever* position it was when observed by the officer, Enriquez "manipulat[ed] the . . . electrical equipment of the vehicle." *Williams*, 216 Va. at 300, 217 S.E.2d at 896. That same switch, by definition, was designed to activate the motive power of the vehicle. Consequently, Enriquez was guilty of "operating" his motor vehicle while intoxicated, and this Court should affirm his conviction.

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[2]By reference to *Stevenson and Nelson*, the fact that the switch was in a position that *activated* the radio supports the inference that it *could not* have been in the "off" position; it obviously <u>was</u> in the "on" position as far as operation of the radio was concerned. Accordingly, the trial court stated: "It's unclear whether they were [sic] in the *on* position or the *accessory* position" "but what is obvious is that the radio was playing and the lights on the radio were displayed" so "there was electrical operation, at the very least." (A 320-321, emphasis added). The trial court thus reasonably inferred from the fact of the radio's operation that the switch was <u>not</u> in the *off* position.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals affirming the judgment of the Circuit Court of the City of Alexandria.

Respectfully submitted,

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CERTIFICATE AND TRANSMISSION OF SERVICE

On November 1, 2011, the required number of copies of this brief was hand-delivered to the Clerk of this Court and three copies were mailed to: Alberto Salvado, Esquire, Salvado, Salvado & Salvado, PC, 5985 Columbia Pike, Suite 302, Falls Church, Virginia 22041. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 14 pages.

The Commonwealth requests oral argument.

_____

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