IN THE

Supreme Court of Virginia

RECORD No. 131747

JUSTIN SARAFIN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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REBUTTAL ARGUMENTS

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THIS COURT'S APPROVAL OF THE "COMPTON DISSENT" IN *STEVENSON V. CITY OF FALLS CHURCH*, 243 Va. 434, 439-40, 416 S.E.2d 435, 438 (1992) DID NOT MEAN THAT THIS EVIDENCE WAS SUFFICIENT TO CONVICT SARAFIN FOR INTOXICATED OPERATION OF A MOTOR VEHICLE AT HIS HOME BECAUSE, THERE AND FOR PARKED VEHICLES ON OTHER PRIVATE DRIVEWAYS, THE POLICE HAVE LESS INVASIVE ALTERNATIVES TO PROTECT THE PUBLIC

The actual holding in **Stevenson** was consistent with and supports Sarafin's first assignment of error. There, where how Stevenson arrived at a convenience store parking lot away from home and the position of the key were unknown, with no mechanical or electrical equipment running, the evidence was insufficient to convict for violation of Va. Code § 18.2-266. **Stevenson**, 243 Va. at 438, 416 S.E.2d at 438; **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) ("**any individual who is in physical control of a vehicle is an 'operator'**") (emphasis added).

The Compton dissent in **Stevenson**, 243 Va. at 439-40, 416 S.E.2d at 439, cited with approval in **Enriquez**, 283 Va. at 516, 722 S.E.2d at 255, is inarguably laudable for those arrested on public roadways away from

home but not applicable to Sarafin's situation.[1] The Commonwealth did not refute or attempt to rebut Sarafin's undisputed evidence that he had already arrived safely home before consuming a significant amount of additional alcohol there. Sarafin then retired to his parked vehicle and fell asleep while listening to the loud music on his car radio. These facts did not constitute "operation" because Sarafin's actions did not engage the machinery of the vehicle which will activate its motive power. Sarafin's "at home" location, which is an especially limited version of "private driveways" everywhere else, did not automatically transform listening to his radio there, powered by his draining car battery, into "operation" as it is defined.[2]

> In **Williams v. City of Petersburg**, 216 Va. 297, 301, 217 S.E.2d 893, 896 (1975) (ran engine and made "motion" to gearshift)] ... [citation omitted], we pointed out that "operating" a vehicle within the proscription of the drunk driving statute 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

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[1] This Court's approval of the Compton dissent in **Enriquez** suggested that the last sentence in refused Instruction 1A (J.A. 92) applied to Sarafin because state of mind is often an issue in cases involving parked cars.

[2] Putting the key in the auxiliary position on a public highway was an "action taken in sequence up to the point of activation" but this was not extended to at home locations by this Court, contrary to the broader suggestion at C. Br. 13, that such action always constitutes "operation" anywhere. **Nelson v. Comm.**, 281 Va. 212, 219, 707 S.E.2d 815, 818 (2011). Here, Sarafin did not then act in the sequence to operate his car parked on his home driveway.

> 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.

While the Compton dissent's approval of taking dangerous people off roads certainly expresses legislative intent, the police always have other safe alternatives to protect the public when they encounter those who are intoxicated and parked on private driveways. Whenever police find someone who is intoxicated, even if behind the wheel of a parked car that could potentially be moved, they can also arrest for "public intoxication" in violation of Va. Code § 18.2-388.[3] This is a far less invasive option in private driveway cases where a suspect is not clearly endangering others. Those so arrested are customarily detained in local jails until sober. 1983-1984 Op. Va. Att'y Gen. 228, referenced in f. n. 1 of Op. Va. Att'y Gen. No. 04-049 (copy attached) approved such routine jail detention until someone

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[3] If any person profanely curses or swears or is intoxicated in public, whether such intoxication results from alcohol, narcotic drug or other intoxicant or drug of whatever nature, he shall be deemed guilty of a Class 4 misdemeanor. In any area in which there is located a court-approved detoxification center a law-enforcement officer may authorize the transportation, by police or otherwise, of public inebriates to such detoxification center in lieu of arrest; however, no person shall be involuntarily detained in such center.

Va. Code § 18.2-388.

is safe and sober. Therefore, the assertion, at C. Br. 9, that Sarafin denies that his actions could be a crime in Virginia is incorrect.

Here, the police also could have placed polite and cooperative Sarafin into the custody of his roommate, Abigail Wiebe, and next door neighbor, Kristin Cornwell, to safely travel the 10 feet between his car and the front door of his residence to be allowed to resume sleeping inside. (J.A. 104) If satisfied that there would be no risk or liability to the public by choosing this option, Officer McBrearty needed only to wait outside for possibly 15 minutes until Sarafin's slumber and everyone's safety was assured. This would have involved little inconvenience and no paperwork for anyone while liberating Officer McBrearty to handle other actually serious or dangerous problems more efficiently and much sooner.

THIS COURT MUST CONSTRUE THE UNAMBIGUOUS WORD "OPERATION" AS IT IS SPECIFICALLY DEFINED IN THE VIRGINIA CODE STRICTLY AGAINST THE COMMONWEALTH AND IN FAVOR OF SARAFIN

The Commonwealth's suggestion to construe legislative intent only applies when language chosen by the General Assembly is ambiguous or uncertain. "Operation" has a legislatively defined meaning that should be consistently applied ***in pari materia*** for every regulation of "motor vehicles" found in the Virginia Code. This Court specifically held that this statutory

definition found in Va. Code § 46.2-100 applied to Va. Code § 18.2-266. **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012).

The argument that decisions in **Gray v. Comm.**, 23 Va. App. 351, 477 S.E.2d 301 (1996), **Mitchell v. Comm.**, 26 Va. App. 27, 492 S.E.2d 839 (1997) and **Reynolds v. City of Virginia Beach**, 31 Va. App. 629, 525 S.E.2d 65 (2000) were never legislatively overruled, C. Br. 23, is spurious because the General Assembly also never overturned this "rule" in **Enriquez** or modified the more recent Model Jury Instruction adopting it.[4]

Although Instructions I, J, K and L were taken verbatim from the General Assembly's precise statutory definitions enacted in Va. Code § 46.2-100, the Commonwealth absurdly suggests that this Court should speculate that they had a different legislative intent. Likewise, although this Court specified that "*we establish the rule*" quoted above in **Enriquez**, the Commonwealth argues this was only *obiter dictum*. **Sarafin v. Comm.**, 62 Va. App. 385, 400-401, 748 S.E.2d 641, 648 (2013).

Statutes should be construed strictly against the Commonwealth and in favor of the accused. **Stevenson v. City of Falls Church**, 243 Va. 434, 436, 416 S.E.2d 435, 437 (1992).

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[4] The 'operating' model jury instruction was modified to incorporate 'on a public roadway' after the conclusion of Sarafin's trial, see 1-21 Va. Model Jury Instructions: Criminal Instruction No. 21.250 (2012).

> [U]nder basic rules of statutory construction, we determine the General Assembly's intent from the words contained in the statute. **Alger v. Comm.**, 267 Va. 255, 259, 590 S.E.2d 563, 565 (2004). When the language of a statute is unambiguous, courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated. **Id.**

Elliott v. Comm., 277 Va. 457, 463, 675 S.E.2d 178,182 (2009).

Strict construction limits application of language only to cases falling clearly within each statute. **Stevenson v. City of Falls Church,** 243 Va. 434, 416 S.E.2d 435 (1992) (Defendant did not "drive" or "operate" within the meaning of Va. Code § 46.2-100 because these words are given their ordinary meaning, because the officer was unsure if the car key was in the "off" position and, because the mechanical or electrical equipment was not engaged, defendant was not in actual physical control of the vehicle.); **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) ("We take this opportunity to state that the statutory definition of 'operator' is controlling and that any individual who is in physical control of a vehicle is an 'operator'" ... ""[W]e establish the rule that when an intoxicated person is seated behind the steering wheel of a motor vehicle **on a public highway** and the key is in the ignition switch, he is in actual physical control of the vehicle and, therefore is guilty of operating...") (emphasis added); **Nicolls v. Comm.**, 212 Va. 257, 259, 184 S.E.2d 9, 11 (1971) ("the

word "operator" was defined in [the Virginia Code] ... as ... [e]very person who drives or is in actual physical control of a motor vehicle...).

Words of a penal law cannot extend by implication to the prejudice of the accused, and all reasonable doubt must be resolved in his favor. **Waller v. Comm.**, 192 Va. 83, 88, 63 S.E.2d 713, 716 (1951); **Bottoms v. Comm**., 20 Va. App. 466, 457 S.E.2d 796 (1995). Furthermore,

> [i]n accordance with the principles of statutory construction of penal statutes, a court must not add to the words of the statute nor ignore the words of the statute and must strictly construe the statute and limit its application to cases falling clearly within the statute. **Turner v. Comm.**, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

Farrakhan v. Comm., 273 Va. 177, 181-82, 639 S.E.2d 227, 230 (2007); **Baker v. Comm.**, 278 Va. 656, 685 S.E.2d 661 (2009).

To extend the application of Va. Code § 18.2-266 to the operation of all motor vehicles on private driveways, the General Assembly should have simply added "*For purposes of this article, the terms "drive" or "operate" include motor vehicles when located on private driveways*" or words of like effect. Without such express language, "operate" must be consistently defined *in pari materia* within the Virginia Code because the General Assembly ***"knows how to include such language"*** if it wishes to broaden the meaning of this unambiguous word. **Brown v. Comm.**, 284 Va. 538, 544-545, 733 S.E.2d 638, 641 (2012) (emphasis added).

Ignoring the *in pari materia* rule of statutory construction, the Court of Appeals rejected Sarafin's argument that "operation" in Va. Code § 18.2-266 had a plainly defined statutory meaning for every "motor vehicle", as defined in Va. Code § 46.2-100, plus mopeds operated on public highways.

The General Assembly, when enacting Va. Code § 18.2-266, did not modify the meaning of "drive" and "operate" as defined in Va. Code § 46.2-100. Thus, Va. Code § 18.2-266 did not include operating motor vehicles off public highways. It added a qualifier, "when operated on highways," to the inclusion of mopeds as motor vehicles for purposes of DUI enforcement because mopeds were otherwise excluded from the ordinary definition of "motor vehicles."[5]

The assertion at C. Br. 23 that **Reynolds v. City of Virginia Beach**, 31 Va. App. 629, 631, 525 S.E.2d 65, 66 (2000) conclusively decided that Va. Code § 46.2-100 definitions did not apply in Title 18.2 was wrong. First, nothing in the actual language of Va. Code § 46.2-100 restricted the

[5] "For the purposes of this title, any device herein defined as a bicycle, electric personal assistive mobility device, electric power-assisted bicycle, or **moped shall be deemed not to be a motor vehicle**." Va. Code § 46.2-100 (emphasis added).

in pari materia doctrine or in any way prevented those definitions from being applied anywhere else in the Virginia Code or Title 18.2 in particular.[6]

Second, **Reynolds** explicitly made no finding as to whether the ditch location there was a public roadway.[7]

Third, **Reynolds** involved prosecution of a separate local Ordinance, not Va. Code § 18.2-266, that expressly as written applied "***in the city***". **Id.** at 630, 525 S.E.2d at 66. (emphasis added) Therefore, this language was ***obiter dictum***. **Valentine v. County of Brunswick**, 202 Va. 696, 698, 119 S.E.2d 486, 487 (1961) was likewise limited to locality boundaries and did not extend to the broader statewide scope of Va. Code § 18.2-266. See also, **Williams v. City of Petersburg**, 216 Va. 297, 298, 217 S.E.2d 893, 894-895 (1975) ("The evidence does not establish whether the parking lot was publicly or privately owned, but because the city ordinance ....

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[6] The following words and phrases when used in this title shall, for the purpose of this title, have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning.

Va. Code § 46.2-100.

[7] "The fact that appellant operated the vehicle while trying to extricate it from a ditch, off the traveled portion of the public highway, is of no importance." **Id.** at 632, 525 S.E.2d at 66.

proscribes the prohibited conduct "in the city," ownership of the parking lot is not relevant in this case. See **Valentine** [internal citation omitted].").

Furthermore, the scope of where the implied consent law applies, in Va. Code § 18.2-268.2, confirms that this entire integrated statutory scheme regulates motor vehicles only on highways. The inclusive language in Va. Code § 18.2-268.2.A[8] does not signify a different legislative intent for what constitutes "operation". This language is just synonymous with "drive or operate" in Va. Code § 18.2-266 as defined in Va. Code § 46.2-100. If you operate a motor vehicle on highways, you must consent to BAC chemical testing as a condition of exercising this privilege. Therefore, the General Assembly did not change the "drive or operate" definitions in Va. Code § 18.2-266 and did not extend application of both the implied consent and DUI laws beyond public highways.

The General Assembly surely did not intend to give people driving motor vehicles on public highways more rights to avoid DUI charges, to defend with approved breath or blood tests and to so document their innocence than for people parking motor vehicles on private driveways. If

[8] Any person, whether licensed by Virginia or not, who operates a motor vehicle upon a highway, as defined in § 46.2-100, in the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood, breath, or both blood and breath taken....

the General Assembly intended to extend DUI prosecution to private driveways, it would have co-extended the implied consent law.

Officer McBrearty did not require a breath or blood test from Sarafin because he parked on a private driveway. Police officers will likewise have no problem, in the future, determining that, when intoxicated offenders are parked on private driveways, they should be arrested for public intoxication in violation of Va. Code § 18.2-388 rather than intoxicated motor vehicle operation in violation of Va. Code § 18.2-266.

The same reasoning applies to the Commonwealth's drinking "while driving" analysis of Va. Code § 18.2-323.1 at C. Br. 20 because, unlike the broader Va. Code § 18.2-266 prohibition for intoxicated operation, this language only proves a legislative intent to not criminalize drinking during parked operation for people who are not intoxicated.

The Commonwealth's suggestion, for purposes of engine or train operation (CB p. 18, fn. 10), that some tracks are privately owned is wrong and misleading. Private or public ownership is not determinative. The character and use of a road (whether highway or rail tracks) matters. The Commonwealth need only prove that pavement or rail tracks are open to the use of the public for purposes of motor vehicle, train or engine travel. This is already the law where publicly open private parking lots have been

found to be public highways. See, **Kay Management v. Creason**, 220 Va. 820 (1980) (an apartment complex parking lot), **Furman v. Call**, 234 Va. 437 (1987) (an office condominium parking lot), and **Mitchell v. Comm.**, 26 Va. App. 27 (1997) (a mobile home park). Any railway tracks, over which trains travel between two points, are public roadways by this standard.

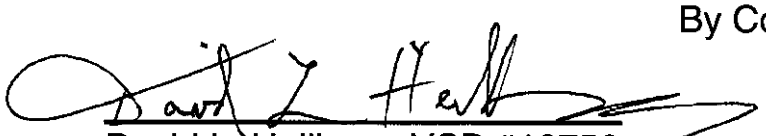
This Court should confirm that, if the laudable Compton dissent does not mean that state of mind is an element of proof in Va. Code § 18.2-266, as urged at C. Br. 29-30, then the majority opinion in **Stevenson v. City of Falls Church**, 243 Va. 434, 416 S.E.2d 435 (1992) is still good law. Consequently, the approval of the strictly construed Va. Code § 46.2-100 definition of the unambiguous word "operation" in **Nicolls v. Comm.**, 212 Va. 257, 259, 184 S.E.2d 9, 11 (1971) and **Enriquez v. Comm.**, 283 Va. 511, 516-517, 722 S.E.2d 252, 255 (2012) applies to all Va. Code § 18.2-266 cases. Local governing bodies are not bound by the General Assembly's statutory definition of operation. Therefore, the broader construction of the word operation in **Valentine v. County of Brunswick**, 202 Va. 696, 119 S.E.2d 486 (1961), **Williams v. City of Petersburg**, 216 Va. 297, 217 S.E.2d 893 (1975) and **Reynolds v. City of Virginia Beach**, 31 Va. App. 629, 525 S.E.2d 65 (2000) is limited to local ordinances that are not statewide regulations of motor vehicles like Va. Code § 18.2-266.

If this Court does not set such logical limits, similar facts will raise future disputes as to whether juries can be the equivalent of equitable chancellors with the constitutional right to nullify or override laws that defy common sense.

CONCLUSION

WHEREFORE, the Appellant, Justin Sarafin, respectfully requests this Honorable Court to reverse the judgment below on the errors assigned and remand this matter directing the Charlottesville Circuit Court to vacate his conviction and dismiss the warrant with prejudice.

Respectfully submitted,
JUSTIN SARAFIN
By Counsel



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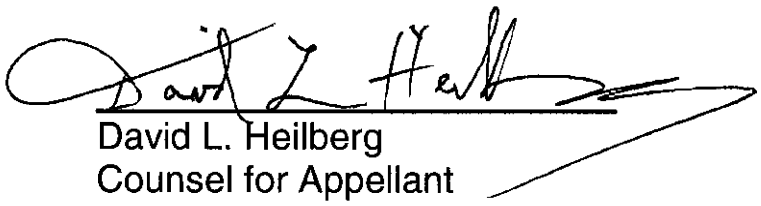

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CERTIFICATE OF COMPLIANCE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Opening Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies, and one electronic copy have been mailed postage prepaid and/or hand delivered to Virginia B. Theisen, VSB #23782, Office of Attorney General, 900 E. Main Street, Richmond, VA 23219 on this 5th day of May, 2014.

I also certify compliance with the word count in that this brief contains 2,560 words, exclusive of those parts that by rule do not count toward the word limit, as counted in the Microsoft Word version of word processing and is thirteen (13) pages long.

David L. Heilberg
Counsel for Appellant

Exhibit A

OP. NO. 04-049

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DRIVING MOTOR VEHICLE, ETC., WHILE INTOXICATED — CRIMES INVOLVING MORALS AND DECENCY – OBSCENITY AND RELATED OFFENSES.

No statutory time limit within which magistrate must grant bond for intoxicated individual charged with misdemeanor offense, such as driving under influence or public intoxication.

The Honorable Gary W. Waters
Sheriff for the City of Portsmouth
July 15, 2004

Issue Presented

You ask whether there is a specified time within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

Response

It is my opinion that there is no statutory time limit within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

Applicable Law and Discussion

A 1983 opinion of the Attorney General addresses your question.[1] The opinion notes that the justification for detaining a person accused of driving under the influence or public intoxication[2] is that the accused represents a threat to his own safety or the safety of others.[3] The determination as to when to release such a person must be based on a subjective evaluation of the person's condition at that time.[4]

This standard defies fixed time limits. Instead, the magistrate must hold the intoxicated person until he may be released without "unreasonable danger to himself or the public."[5] This release must occur in a manner that protects the accused from being unreasonably held long after his condition has changed.[6] The 1983 opinion concludes that, "[b]ecause of the limited justification for this detention, the confinement should last only until the accused can be released to the supervision of a *responsible* third person *or* the condition which presents a danger to the accused and others changes."[7]

Bail decisions generally are committed to the sound discretion of the appropriate judicial officer.[8] Of course, this discretion may not be exercised arbitrarily.[9] Even if the person is still intoxicated, the magistrate must release him to a third party only, if one is available and is deemed by the magistrate to be responsible.[10]

The determination as to whether a third party is "responsible" rests with the sound discretion of the magistrate.[11] Factors such as the age, physical characteristics, and demeanor of both the detainee and the other adult may enter into this decision. For example, a magistrate could determine, in his discretion, that release of a belligerent, intoxicated, 250-pound detainee to a meek 100-pound family member, who clearly cannot control him, is not appropriate.[12] Similarly, a magistrate might find that a sober passenger in the vehicle at the time the defendant was driving under the influence is not "responsible."[13]

I am unable to find any statute requiring a magistrate to release an individual charged with driving under the influence or public intoxication to a family member or other third party while the arrestee is still intoxicated. The magistrate must release such individual only if, in his sound discretion, he deems the third party to be responsible. Otherwise, the magistrate may order the individual held until his physical condition no longer constitutes a threat to himself or others.

Conclusion

Accordingly, it is my opinion that there is no statutory time limit within which a magistrate must grant bond for an intoxicated person charged with a misdemeanor offense, such as driving under the influence or public intoxication.

[1]*See* 1983-1984 Op. Va. Att'y Gen. 228.

[2]*See* Va. Code Ann. §§ 18.2-266, 18.2-388 (Michie Repl. Vol. 1996) (relating to driving while intoxicated and public intoxication, respectively).

[3]1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229; *see also* Va. Code Ann. § 19.2-120(A)(2) (LexisNexis Repl. Vol. 2004).

[4]*See* 1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229; *see also* § 19.2-120(A) (providing for pretrial detention of person held in custody when there is probable cause to believe accused will flee or will pose danger to safety of community).

[5]Section 19.2-120(A)(2); *see also* 1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229. Under some circumstances, the magistrate may delegate this decision to the custodian holding the prisoner. 1983-1984 Op. Va. Att'y Gen., *supra*, at 229-30.

[6]1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229.

[7]*Id.* (emphasis added); *see also* Pulliam v. Allen, 466 U.S. 522, 526 n.2 (1984) (noting lower court's directive that any pretrial detention of persons arrested for nonjailable offenses and deemed to be danger to themselves or others must cease when condition that created danger changes or abates, or arrestee is released into third-party custody under circumstances that abate danger).

[8]Judd, No. 2 v. Commonwealth, 146 Va. 276, 277-78, 135 S.E. 713, 713-14 (1926) (per curiam) (granting of bail after conviction of felony). This discretion may be curtailed by other provisions of law. For example, effective July 1, 2004, a presumption against bail exists for any individual charged with a fourth or subsequent offense of driving under the influence committed within five years. Section 19.2-120(B)(9).

[9]"There is a presumption that public officials will discharge their duties honestly and in accordance with law, and will not arbitrarily exercise the discretion placed in their hands." Nat'l Maritime Union v. City of Norfolk, 202 Va. 672, 680, 119 S.E.2d 307, 313 (1961).

[10]*See* 1983-1984 Op. Va. Att'y Gen., *supra* note 1, at 229.

[11]*See, e.g.*, State v. Haas, 505 S.E.2d 311, 314 (N.C. Ct. App. 1998) (noting that under North Carolina statute, impaired driver has right to pretrial release only when magistrate determines that sober, responsible adult will assume responsibility for impaired individual).

[12]As other states have recognized, the consequences of premature release of drunk drivers can be tragic. For example, in New Jersey, a drunk driver who was released while still intoxicated drove within an hour of his release, killing himself and a recent Naval Academy graduate with whom he collided. Joseph A. Gambardello, *DWI law lets towns keep hold of drivers*, Philadelphia Inquirer, Aug. 28, 2003, at B01, *available at* LEXIS, News Library, Major Newspapers File; *see also* N.J. Stat. § 40:48-1.3(a) (LEXIS through June 7, 2004) (permitting municipalities to adopt ordinances to hold DUI arrestees in protective custody until blood-alcohol concentration is less than 0.05% or up to eight hours without hearing).

[13]In the case of an arrestee charged with public intoxication, part of the magistrate's consideration must be whether the third party can arrange to transport the arrestee so that he does not subject himself to rearrest for again appearing in public while intoxicated.