IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 131747

JUSTIN SARAFIN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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JUSTIN SARAFIN,

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v.

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

The defendant, Justin Sarafin, was arrested by warrant dated January 20, 2011, for a violation of Virginia Code § 18.2-266, driving or operating under the influence of an intoxicant. The defendant was convicted of the charge in the General District Court of Charlottesville, and he appealed to the Charlottesville Circuit Court.

A March 8, 2012 jury trial ended in mistrial because the jury was unable to reach a verdict. On September 12, 2012, a jury convicted the

defendant as charged in the warrant and imposed a fine of $500. The trial court imposed the jury's sentence, but suspended $250 of the fine on the condition the defendant complete an alcohol safety program. (App. 78-81). By opinion letter dated September 17, 2012, the trial court "affirmed" the conviction and sentence. (App. 114-15).

The defendant appealed the circuit court's judgment to the Court of Appeals of Virginia. Following briefing and oral argument, the Court of Appeals, in a published opinion issued October 8, 2013, affirmed the trial court's judgment. See Sarafin v. Commonwealth, 62 Va. App. 385, 748 S.E.2d 641 (2013) (App. 121-38). This Court, by order entered February 19, 2014, granted Sarafin's appeal.

ASSIGNMENTS OF ERROR

1. The Virginia Court of Appeals erred by permitting the trial court to find that Justin Sarafin ("Sarafin") was in physical control of his vehicle and thereby that he was its "operator" while asleep with only his car radio playing while parked on his private property.

    a. The Virginia Court of Appeals erred by finding that these facts were sufficient to support the trial court's conviction.

2. The Virginia Court of Appeals erred in construing Va. Code § 18.2-266 to allow conviction for "operation" on private property.

3. The Virginia Court of Appeals erred by not requiring the trial court to give any or all of Instructions I, J, K and L offered by Sarafin that precisely and correctly defined what constituted "operation" to the jury.

STATEMENT OF FACTS[1]

On January 20, 2011, the Charlottesville Police Department received a complaint of loud noise around 3:30 a.m., to which Officer K. E. McBrearty responded. (App. 109). When Officer McBrearty arrived at 1001 Page Street, the defendant's home, she saw the defendant seated in the driver's seat of his Mercedes automobile, located in the home's private driveway, and determined the car radio was the source of the loud noise complaint. (App. 109).

McBrearty knocked on the window of the car with her flashlight in an effort to rouse Sarafin from sleep. When he awoke, he turned the key to cut off the car's auxiliary power. He opened the car door and got out of the car, at which time the officer detected a strong odor of alcohol. (App. 109). The defendant's eyes were bloodshot and glassy. (App. 109).

In response to McBrearty's questions, the defendant said he had drunk several beers at McGrady's Irish Pub and then drove to "The Corner"

[1] No transcript of the jury trial was filed in this case. Rather, a Statement of Facts, signed by the trial judge, was filed. (App. 109-13).

near the University of Virginia to purchase food. He said he then drove to his home. He told the officer he had been asleep in his car since about 2:30 a.m. (App. 109).

The officer administered several field sobriety tests. Sarafin did not follow the officer's instructions for the walk-and-turn test, the one-legged stand test, or the finger-to-nose test. (App. 110). He successfully completed the alphabet test. (App. 110). Following a preliminary breath test, the defendant was arrested for DUI. (App. 110).

Prior to trial, the defendant filed a motion on August 7, 2012, asking the court to "properly define the words 'operate' or 'operation.'" (App. 29-57). He argued he could not be convicted of DUI in the case because his car was located in his private driveway and not on a public highway. On September 4, 2012, Sarafin moved the court prior to trial to "strike the evidence." (App. 61-77). He again argued he could not be convicted of DUI because the incident occurred in his private driveway. He also argued there was no evidence he intended to activate the motive power of the vehicle. (App. 71-74).

At trial on September 12, 2012, the Commonwealth presented its case-in-chief. The defendant moved to strike the Commonwealth's evidence, based on the grounds raised in the pre-trial written memorandum

filed September 4, 2012. (App. 110). The trial court took the motion to strike under advisement. (App. 110).

The defense presented testimony from the defendant's housemate about events she witnessed the night of the incident and the repair of the stereo system located inside the house. (App. 110-11). The defendant introduced a receipt from Crutchfield's Electronics Store. (App. 197-98). The defendant's next-door neighbor testified regarding the events she witnessed that night. (App.111).

The defendant testified at the trial that he drank beer and vodka at McGrady's Pub and left at 1:30 a.m. (App.111). He testified he purchased a sandwich at The Corner and arrived home at 1:45 a.m. (App. 111). He said he consumed drinks containing vodka after arriving home and went to sit in his car at approximately 2:30 a.m. to listen to the radio. (App. 111).

Following the defense case, Sarafin's counsel renewed the motion to strike the evidence, and the court again took the motion under advisement. (App.112). The trial court refused Instructions I, J, K, and L, tendered by

the defense. (App. 112).[2] The court used the instruction defining operation which was tendered by the Commonwealth, over a defense objection. (App. 112).

The court overruled the motion to strike the evidence by opinion letter dated September 17, 2012. (App. 112, 114-15). In the letter, the trial court rejected the defendant's argument that this Court has interpreted Code § 18.2-266 to require that the operated vehicle be on a public highway. The court stated that this Court was "not addressing that question" in Enriquez v. Commonwealth, 283 Va. 511, 722 S.E.2d 252, cert. denied, ___ U.S. ___, 133 S. Ct. 428 (2012). (App. 114).

SUMMARY OF THE ARGUMENT

Although the defendant has assigned error to the rulings in the Court below regarding sufficiency of the evidence to sustain his DUI conviction and the refusal of his proposed jury instructions defining the term "operating" or "operator," the central issue in each assignment of error focuses on whether Virginia's DUI statute prohibits intoxicated operation of

[2] Although the statement of facts filed in the circuit court states each of the proffered instructions defined the term "operation," (App. 112), Instructions J and L do not define such term. Instead, they define "private road or driveway" and "highway," respectively. (App. 95, 97). Also, the lengthy instruction which appears on pages 93-94 of the Appendix does not bear a "refused" notation. Nor does it bear an identifying letter designation.

a car only on a public highway. Indeed, the Court of Appeals held in its opinion:

> Both of appellant's arguments are premised on his assertion that Virginia's driving under the influence statute, as interpreted in Nelson v. Commonwealth, 281 Va. 212, 707 S.E.2d 815 (2011), and Enriquez, 283 Va. at 511, 722 S.E.2d at 252, prohibits intoxicated operation of an automobile only on a public highway.

(App. 125-26).[3]

Virginia Code § 18.2-266 forbids any person "to drive or operate any motor vehicle" while under the influence of alcohol. In recent years, this Court has concluded that one who has inserted a key into the ignition switch of a vehicle and then sleeps or passes out in the driver's seat of that vehicle is operating it.

The DUI statute does not reference the "highway" in the portion of the statute which defines the offense. The legislature has in fact included the term "highway" in other sections in Title 18.2 that concern driving offenses, such as the implied consent statute. Where the legislature has used a particular term in one statute and has omitted it in another statute, it is presumed that such omission was intentional.

[3] Sarafin has not assigned error to this conclusion by the Court of Appeals.

This Court and the Court of Appeals of Virginia previously have explicitly held that unless a DUI statute or ordinance includes such a limitation, operating a vehicle under the influence of intoxicants is not limited to acts conducted on the public highway. Although the DUI statute has been amended since such opinions were published, the legislature has ***not*** revised the statute in the intervening years to add a requirement that the driving or operation must occur on the public highway. Such lack of action by the legislature evinces its acquiescence in, and approval of, the rulings by the appellate courts.

The issue before this Court in Enriquez was ***not*** whether the DUI statute applied only to incidents occurring on a public highway. Rather, the issue in Enriquez was whether a sleeping driver in a car in which the key was in the ignition, but not necessarily in the on or auxiliary position, was operating the vehicle. The defendant's car in that case unquestionably was located on a public highway. The Court in Enriquez noted it looked for assistance to Code § 46.2-100 in defining "operator," but, as the Court of Appeals concluded below, any reference to "highway" in Enriquez was

dictum; this Court did not add a "highway" requirement to the DUI statute.[4]

ARGUMENT

I. THE EVIDENCE PRESENTED AT TRIAL SATISFIED THE REQUIREMENTS OF CODE § 18.2-266 AND SARAFIN WAS PROPERLY CONVICTED OF OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL.

The defendant argues on brief in support of Assignments of Error 1 and 2 that based on this Court's ruling in Enriquez, his sleeping in his car parked in his own private driveway, with only the car radio playing, was insufficient to prove that he operated his car for purposes of Code § 18.2-266. He asserts that because he was asleep and the key was only in the auxiliary position in the ignition, he could not engage the electrical or mechanical machinery in sequence to activate the motive power of the car.

Sarafin further contends this Court held that in order to violate the DUI statute, one must operate the vehicle on a public roadway. He alleges his actions did not constitute a crime in Virginia. He argues the statutory

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[4] Code § 46.2-100 is entitled "Definitions," and defines "words and phrases" "when used in this title," "for purposes of this title." The statute defines "operator or driver" as follows:

> "Operator" or "driver" means every person who either (i) drives or is in actual physical control of a motor vehicle on a highway or (ii) is exercising control over or steering a vehicle being towed by a motor vehicle.

.

definition of "operator" found in Code § 46.2-100, with its "highway" requirement, applies to Code § 18.2-266.

His contentions, however, are incorrect. The trial court did not err in convicting Sarafin for violating Code § 18.2-266 and the Court of Appeals of Virginia did not err in affirming that conviction.

Standard of Review

On appeal, the evidence must be viewed in the light most favorable to the Commonwealth, the prevailing party in the trial court. See Perry v. Commonwealth, 280 Va. 572, 578, 701 S.E.2d 431, 435 (2010); Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). The issue of the meaning of the term "operate," as used in Code § 18.2-266, is one of statutory construction, which this Court reviews de novo. Baker v. Commonwealth, 284 Va. 572, 576, 733 S.E.2d 642, 644 (2012) (citing Kozmina v. Commonwealth, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)); see Jordan v. Commonwealth, 286 Va. 153, 156, 747 S.E.2d 799, 800 (2013). When considering the sufficiency of the evidence to sustain a conviction, this Court "will only reverse the judgment of the trial court if the judgment is plainly wrong or without evidence to support it." Id.

Virginia Code § 18.2-266

The DUI statute provides as follows:

It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (v) while such person has a blood concentration of any of the following substances at a level that is equal to or greater than: (a) 0.02 milligrams of cocaine per liter of blood, (b) 0.1 milligrams of methamphetamine per liter of blood, (c) 0.01 milligrams of phencyclidine per liter of blood, or (d) 0.1 milligrams of 3,4-methylenedioxymethamphetamine per liter of blood. A charge alleging a violation of this section shall support a conviction under clauses (i), (ii), (iii), (iv), or (v).

For the purposes of this article, the term “motor vehicle” includes mopeds, while operated on the public highways of this Commonwealth.

Analysis

1. Physical Control

Sarafin first contends he did not operate the vehicle because he was asleep, with only the radio playing, as the car was parked in his private driveway. (Def. Br. at 9-10). In recent years, the Court of Appeals and this Court have addressed the issue of what actions one must take to operate a motor vehicle for purposes of the DUI statute.

For example, in Ngomondjami v. Commonwealth, 54 Va. App. 310, 678 S.E.2d 281 (2009), the Court of Appeals affirmed the DUI conviction of a man who was unconscious in the driver's seat of his vehicle, with its engine running, which car was located on a school parking lot. The Court found that "the jury could reasonably conclude appellant was in actual physical control of the car and was operating it within the meaning of Code § 18.2-266." Id. at 317-18, 678 S.E.2d at 285. The Court of Appeals concluded "it was not necessary that the jury find [the defendant] acted 'with the purpose of putting [a car] in motion' to find he operated a car within the meaning of Code §18.2-266." Id. at 318, 678 S.E.2d at 285.[5] In

[5] This Court refused Ngomondjami's appeal from the Court of Appeals by order entered November 13, 2009. Record No. 091540.

other words, the Commonwealth was not required to prove the defendant intended to enter a public highway.

In Nelson v. Commonwealth, 281 Va. 212, 707 S.E.2d 815 (2011), this Court ruled that the evidence was sufficient to establish the defendant was operating an automobile for purposes of the DUI statute where he appeared to be sleeping or unconscious in the driver's seat of his parked car and the key in the ignition was turned to the on or accessory position, allowing the radio to play. The Court addressed the issue of the position of the key in the ignition. The Court held:

> Operating means "engaging the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle." [Stevenson, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992)]. 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*.

Nelson, 281 Va. at 219, 707 S.E.2d at 818. (emphasis added).[6]

This Court ruled in 2012 in Enriquez, that where a key is in the ignition, irrespective of the position of the key, the intoxicated person

[6] The Court did not discuss the location of the car, which was parked in a residential cul-de-sac. See Nelson, 281 Va. at 214, 707 S.E.2d at 816.

behind the wheel is "in actual physical control" of that car. Enriquez, 283 Va. at 516, 722 S.E.2d at 255.

In Enriquez, the defendant was asleep in his vehicle. The car was illegally parked at a bus stop on Lincolnia Road in Alexandria. See id. at 513, 722 S.E.2d at 253. A parking enforcement officer approached the car to place a ticket on it, heard the car's radio playing, and saw the defendant, apparently asleep. See id. Additional officers assisted the first one in attempting to rouse Enriquez. Although an officer testified the key was in the ignition, he could not identify in what position the key was turned. However, when the key was removed, the radio went off. See id. at 513-14, 722 S.E.2d at 253-54.

In Enriquez, this Court determined that the dissent in Stevenson v. Falls Church, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992), not the majority, was "correct" in addressing actual physical control of a vehicle. Enriquez, 283 Va. at 516, 722 S.E.2d at 255. In the Stevenson dissenting opinion, three Justices concluded that a "drunk" in the driver's seat who has "inserted the key in the ignition switch" is in "'actual physical control' of the vehicle." Stevenson, 243 Va. at 439, 416 S.E.2d at 438 (Compton, J., dissenting). The dissent explained:

> The reason for this liberal interpretation of the words "operate," "operator," and "operating" is obvious. A motor vehicle is recognized in the law as a dangerous instrumentality when in the control of a sober person; in the control of a drunk, the dangerous instrumentality becomes lethal. Therefore, until now, the Court has interpreted the drunk-driving statute in a way that kept drunks from behind the steering wheels of motor vehicles, even when the drunk needed to "sleep it off."
>
> Ordinary experience tells us that one in a drunken stupor in the driver's seat of a vehicle is likely to arouse abruptly, engage the motive power of the vehicle, and roar away imperiling the lives of innocent citizens. This sequence of events easily can occur where, as here, a drunk is sitting behind the steering wheel of a motor vehicle alone, with the key already in the ignition. From a mechanical standpoint, the vehicle is "capable of being immediately placed in motion to become a menace to the public, and to its drunken operator."

Id. at 439-40, 416 S.E.2d at 439 (citations omitted).[7]

The Enriquez Court stated:

> We take this opportunity to state that the statutory definition of "operator" is controlling and that any individual who is in actual physical control of a vehicle is an "operator." We hold, therefore, that the dissenting opinion in Stevenson was correct, and in discerning whether an intoxicated person seated behind the steering wheel of a motor vehicle on a public roadway with the key inserted into the ignition switch of the vehicle is in actual physical control of the vehicle, the position of the key in the ignition switch is not determinative.

Enriquez, 283 Va. at 516, 722 S.E.2d at 255.

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[7] The vehicle in Stevenson was parked in a 7-11 parking lot. See Stevenson, 243 Va. at 435, 416 S.E.2d at 436.

Likewise, Sarafin, who was sleeping in his car, with the key in the auxiliary position in the ignition to allow for the radio to play, was operating the vehicle.[8]

2. Private Driveway

Virginia Code § 18.2-266 makes it unlawful for any person to drive or operate a motor vehicle while intoxicated. The language of the statute does not limit its application to the driving or operation of a vehicle on a public highway; the words "public highway" or "roadway" are not included as elements of the offense.[9]

Well-established tenets of statutory construction require an appellate court to "look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the

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[8] Sarafin argues on brief that the Court of Appeals recently, in Case v. Commonwealth, 63 Va. App. 14, 753 S.E.2d 860 (2014), misinterpreted Enriquez in concluding this Court has treated a defendant's intent to operate a vehicle as unnecessary to a finding of guilt of DUI. (Def. Br. at 11). Case argued that the trial court had erred in rejecting his argument that in order to prove a DUI, the Commonwealth was required to prove that he possessed the requisite *mens rea*. However, the Court of Appeals correctly held in Case that, in light of the omission of a *mens rea* requirement in § 18.2-266 and the "public safety concern underlying the statute," both this Court and the Court of Appeals had found proof of intent to operate a vehicle was "unnecessary to a determination of guilt" under the statute. Case, 63 Va. App. at 26, 753 S.E.2d at 866.

[9] The statute does note that a moped is deemed a motor vehicle, when it is operated on a public highway.

relevant statute." Zinone v. Lee's Crossing Homeowners Ass'n, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011) (citation omitted). The goal of statutory interpretation "is to ascertain and give effect to legislative intent." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998).

Significantly, moreover, "when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, [the Court] must presume that the difference in the choice of language was intentional." Zinone, 282 Va. at 337, 714 S.E.2d at 925. Accord Rives v. Commonwealth, 284 Va. 1, 3, 726 S.E.2d 248, 250 (2012), cert denied, 133 S. Ct. 1294 (2013).

In Brown v. Commonwealth, 284 Va. 538, 733 S.E.2d 638 (2012), this Court addressed the meaning of terms in Virginia Code § 18.2-53.1. In Brown, the Court included the following quotation from Halifax Corp. v. Wachovia Bank, 268 Va. 641, 654, 604 S.E.2d 403, 408 (2004):

> "[W]hen the General Assembly includes specific language in one . . . statute, but omits that language from another . . . statute, [courts] must presume that the exclusion of the language was intentional" because under these circumstances, it is evident that ***the General Assembly "knows how" to include such language*** in a statute to achieve an intended objective; thus the "omission of [such] language [in another statute] represents an unambiguous manifestation of a contrary intention."

Brown, 284 Va. at 545, 733 S.E.2d at 641 (other citations omitted, emphasis added).

Furthermore, when one statute addresses a subject in a general way and another addresses the same subject in a more specific way, if the two statutes cannot be harmonized, the more specific statute "prevails." Daniels v. Warden of the Red Onion State Prison, 266 Va. 399, 402-03, 588 S.E.2d 382, 384 (2003) (quoting Thomas v. Commonwealth, 244 Va. 1, 22-23, 419 S.E.2d 606, 618 (1992)).

Applying these principles of statutory construction to the instant case, it is clear the General Assembly did not make public ownership of the property upon which the vehicle is driven or operated an element of DUI under § 18.2-266. The General Assembly intentionally chose not to limit prosecution for DUI to operation on public roadways. As the statute contains no language restricting the areas where the offense may be committed, this Court must not read such a requirement into § 18.2-266.[10]

[10] It should be noted that the statute prohibits operation of "an engine or train" while intoxicated. Clearly, a train is not operated on a public roadway. It runs on tracks, which may be privately owned. Thus, one could never be guilty of DUI of a train if the statute imposed an unwritten requirement that the operation must be on a public roadway.

Moreover, the provision in Code § 46.2-100, a general definitional statute, cannot "prevail" over the specific provisions of the DUI statute, § 18.2-266, particularly since § 46.2-100 itself notes that its definitions apply to Title 46.2.

Significantly, other Virginia statutes in Title 18.2 of the Code related to motor vehicles contain an explicit reference to a "highway." See, e.g., §18.2-268.2 (implied consent); § 18.2-323.1 (consumption of alcoholic beverage). Thus, the legislature "knows how" to reference the highway in statutes in Title 18.2. The inclusion of "highway" or "public highway" in other statutes in Title 18.2 pertaining to drinking and driving, demonstrates that exclusion of those terms from § 18.2-266 was intentional.[11]

Of particular significance is § 18.2-268.2, the implied consent statute. Located in the very same title, article, and chapter as § 18.2-266, § 18.2-268.2(A) provides as follows:

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[11] Contrary to Sarafin's argument on brief (Def. Br. at 18-19), the Court of Appeals of Virginia did not ignore the *in pari materia* rule of statutory construction. "[T]he mere fact that statutes relate to the same subject or are part of the same general plan does not mean that they cannot also be in conflict." Lucy v. County of Albemarle, 258 Va. 118, 129, 516 S.E.2d 480, 485 (1999). The Court recognized that *in pari material* "is only one rule of statutory construction among many" and the one goal of statutory construction "to which all rules of construction are subservient" is "to ascertain the will of the legislature." Id.

> 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 for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he is arrested for violation of § 18.2-266, 18.2-266.1, or subsection B of § 18.2-272 or of a similar ordinance within three hours of the alleged offense.

(Emphasis added). The legislature's explicit language evincing an intent to limit application of the implied consent law to those drivers who operate vehicles on the highway stands in stark contrast to the omission of such language in the DUI statute. See Mitchell v. Commonwealth, 26 Va. App. 27, 34, 492 S.E.2d 839, 842 (1996) ("Unlike Code §18.2-268.2, which applies only when a person operates a motor vehicle on a highway, Code § 18.2-266 is generally silent as to the place where the offense may be committed").

Likewise, Code § 18.2-323.1, which statute is contained in the same title and article as the DUI statute, prohibits any person from consuming alcoholic beverages while "driving a motor vehicle upon a public highway of this Commonwealth." The legislature again chose to include in that statute an express limitation to the public highway.

In Valentine v. County of Brunswick, 202 Va. 696, 119 S.E.2d 486 (1961), the defendant argued the trial court had erred in convicting him of

violating the county ordinance prohibiting operating a motor vehicle under the influence of intoxicants because he had operated the vehicle "upon a private lane or driveway on the premises of one George J. Pierce and not upon a public highway." Id. at 697, 119 S.E.2d at 486-87. The Court in Valentine thus identified the "sole question presented" as "whether or not the defendant violated the county ordinance in driving or operating his motor vehicle on a private lane or driveway." Id. at 697, 119 S.E.2d at 487.

In rejecting Valentine's argument, this Court held:

> It has been generally held that an ordinance or statute which provides that no person shall drive or operate a motor vehicle while under the influence of intoxicants, and is silent as to the place where the offense may be committed, does not require as an element of the offense that the driving or operating shall be on a public highway.

Id. at 698, 119 S.E.2d at 487.

In Gray v. Commonwealth, 23 Va. App. 351, 477 S.E.2d 301 (1996), the defendant argued her DUI conviction should be reversed because Code § 18.2-266 did not apply to driving on private property. See Gray, 23 Va. App. at 352, 477 S.E.2d at 302. It was uncontested that Gray operated her motor vehicle upon a privately owned parking lot. See id. The Court of Appeals concluded that "[e]xcept for operation of mopeds," the statute

"contains no language restricting its application to one who 'drives' or 'operates' his or her motor vehicle on a public highway." Id.

The Court in Gray relied on Valentine in determining that the DUI statute is "clear, unambiguous, and means what it says. Other than for the operation of a moped, the statute does not specify that the driving or operating that it criminalizes must occur on a public highway, and we decline the invitation to impose that requirement." Gray, 23 Va. App. at 353, 477 S.E.2d at 302. The Court affirmed Gray's DUI conviction.

The Court of Appeals expressly addressed the issue again in Mitchell. Mitchell challenged his conviction under Code § 18.2-266 on the ground he had operated his vehicle on privately owned property. Mitchell, 26 Va. App. at 28, 492 S.E.2d at 839. The Court of Appeals, relied on its prior decision in Gray, and held that "public ownership of the property upon which the vehicle is driven or operated is not an element the Commonwealth must prove in a prosecution for driving in violation of Code § 18.2-266." Id. at 35-36, 492 S.E.2d at 843.

Finally, in Reynolds v. City of Virginia Beach, 31 Va. App. 629, 525 S.E.2d 65 (2000), the Court of Appeals relied again on this Court's opinion in Valentine in determining that application of the local DUI ordinance was not limited to incidents on the public highway. See Reynolds, 31 Va. App.

at 630-31, 525 S.E.2d at 65-66. Significantly, in rejecting Reynolds' argument that a DUI can occur only on a highway, the Court of Appeals noted that the cases on which Reynolds relied were inapposite, and further held:

> These cases refer to Code § 46.2-100 which defines operator as one "who . . . (i) drives or is in actual physical control of a motor vehicle on a highway. . . ." However, ***the definitions in Code § 46.2-100 are expressly applicable only to Title 46.2 and do not control Title 18.2.*** See Code § 46.2-100. Valentine specifically states that an ordinance regulating driving while under the influence "is not a highway regulation and cannot be construed as part of the general codification of the State motor vehicle laws." Valentine, 202 Va. at 698, 119 S.E.2d at 487. Therefore, the definition of operator pursuant to Code § 46.2-100 is inapplicable to this case.

Reynolds at 631, 525 S.E.2d at 66 (emphasis added).[12]

In the years since the above-noted decisions, the legislature has not amended the DUI statute to add a requirement that the driving or operation of an automobile must be on a highway, although § 18.2-266 was in fact amended in other respects in 2005. The General Assembly is "presumed" to be aware of the usage of terms in appellate decisions. "Its acquiescence

[12] In an unpublished opinion, the Court of Appeals held that driving on a suspended operator's license after multiple convictions for DUI, pursuant to Code § 46.2-391 (D)(3), was limited to operation on a public highway, even though the statute did not explicitly so provide. See Villareal v. Commonwealth, No. 0764-12-2, 2013 Va. App. LEXIS 150 (May 14, 2013). The offense at issue in Villareal was a violation of an offense in Title 46.2.

is deemed to be approval." Barson v. Commonwealth, 284 Va. 67, 74, 726 S.E.2d 292, 296 (2012) (citing Tazewell County School Board v. Brown, 267 Va. 150, 163-64, 591 S.E.2d 671, 678 (2004)).

In Enriquez, which case is at the centerpiece of this appeal, this Court did ***not*** add a new requirement to § 18.2-266 that a DUI involving an automobile could occur only on a public highway. Nor did the Enriquez Court overrule the several cases cited above, limit them, or even *mention* them.

In its letter opinion of September 17, 2012, the trial court in the instant case correctly noted that this Court in Enriquez was not addressing the issue of whether a violation of Code § 18.2-266 can occur only on a highway. (App. 114). Indeed, in Enriquez, the issue concerned what an individual must do in his automobile in order to operate it. Specifically, the question was whether the evidence sufficiently proved operation of the vehicle when the officer was unsure whether the key in the ignition was in the "on" position, but was certain that when the key was removed from the ignition the radio "went off." Enriquez, 283 Va. at 514, 722 S.E.2d at 254.

There was no question that Enriquez's car was parked on a public highway and this Court was not asked to decide whether a car's location on a highway was an element of the offense in the DUI statute. In the instant

case, the Court of Appeals noted that this Court's "use of the terminology 'on a highway' in Enriquez was merely a recitation of the facts in that case as Enriquez was located on a highway when he was operating the vehicle. Thus, the additional language of 'on a public highway' is non-binding *dictum*." Sarafin, 62 Va. App. at 401, 748 S.E.2d at 648. (App. 134).[13]

The Court of Appeals in the instant case aptly concluded:

> Contrary to appellant's assertions, the Supreme Court did not add the requirement that a vehicle be on a public roadway to the elements of the offense in Code § 18.2-266 in Enriquez. Rather, the references to being "on a public roadway" and Code § 46.2-100 were merely dictum as the issue in Enriquez was "the proper considerations in determining whether a person is operating a motor vehicle."

Sarafin, 62 Va. App. at 400, 748 S.E.2d at 648 (App. 133-34) (citation omitted).

The Court in Enriquez, looked for "assistance" to Code § 46.2-100 to define "operate." Id. at 515, 722 S.E.2d at 255. The Enriquez Court also looked to the dissenting opinion in Stevenson and the opinion in Williams v. City of Petersburg, 216 Va. 297, 217 S.E.2d 893 (1975). See Enriquez, 283 Va. at 516, 722 S.E.2d at 255. Stevenson's car was parked in a 7-11

[13] Statements in an opinion constitute dictum when they are"not responsive to the question presented and . . . not necessary to a disposition of the case." Simon v. Commonwealth, 58 Va. App. 194, 201, 708 S.E.2d 245, 248 (2011) (citation omitted).

parking lot. See Stevenson, 243 Va. at 435, 416 S.E.2d at 436. The defendant's automobile in Williams, also was located in a parking lot. See Williams, 216 Va. at 298, 217 S.E.2d at 894.[14]

In ruling on Sarafin's challenge to the sufficiency of the evidence, the Court of Appeals held:

> The evidence at trial established beyond a reasonable doubt that appellant was seated behind the steering wheel of his motor vehicle, that he was intoxicated, and that the key was in the ignition switch of the vehicle in the auxiliary position. Accordingly, we hold that the trial court did not err in holding the evidence was sufficient to convict appellant of operating a motor vehicle while under the influence of alcohol.

Sarafin, 62 Va. App. at 404, 748 S.E.2d at 650. (App. 137). This conclusion by the Court below was not erroneous and its judgment should be affirmed.

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[14] Citing Valentine, 202 Va. at 698-99, 119 S.E.2d at 487-88, the Court in Williams noted:

> The evidence does not establish whether the parking lot was publicly or privately owned, but because the city ordinance . . . proscribes the prohibited conduct "in the city," the ownership of the parking lot is not relevant in this case.

Id. at 298 n.3, 217 S.E.2d at 894 n.3 (citations omitted).

II. THE DEFENDANT'S PROFFERED INSTRUCTIONS DID NOT ACCURATELY STATE THE LAW. THE TRIAL COURT PROPERLY REFUSED THE INSTRUCTIONS AND THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S JUDGMENT.

The defendant argues in support of his third Assignment of Error that the Court of Appeals erred in affirming the trial court's judgment rejecting his proffered jury instructions I, J, K, and L. He contends the Court of Appeals' interpretation of the legislative intent behind Code § 18.2-266 was "absurd" and the Court erred in concluding that the use of the term "public highway" in Enriquez was dictum. (Def. Br. at 29).

Standard of Review

This Court recently affirmed that "'whether a jury instruction accurately states the relevant law is a question of law that [the Court] review[s] de novo.'" Lawlor v. Commonwealth, 285 Va. 187, 228, 738 S.E.2d 847, 870 (citations omitted), cert. denied, 134 S. Ct. 427 (2013). "A trial court has a duty when instructing the jury to define each element of the relevant offense. However, . . . what the elements are is a question of law." Id. at 229, 738 S.E.2d at 871 (citations omitted). The appellate court reviews "whether a jury instruction accurately states the relevant law de novo." Id. at 256, 738 S.E.2d at 886. The meaning of the term "operate," as used in Code § 18.2-266, involves statutory construction.

Granted Instructions

Instruction 4, given at trial, stated as follows:

> The defendant is charged with the crime of operating a motor vehicle while under the influence of alcohol. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> > (1) That the defendant, Justin Sarafin, was operating a motor vehicle; and
> >
> > (2) That at the time he was under the influence of alcohol.
>
> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty but you shall not fix the punishment until your verdict has been returned and further evidence has been heard by you.
>
> If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty.

(App. 87).

Instruction 6, given at trial, provided as follows:

> Operating a motor vehicle means driving the vehicle from one place to another or starting the engine or manipulating the electrical or mechanical equipment of the vehicle without actually putting the vehicle in motion or engaging the machinery of the vehicle which alone or in sequence will activate the motive power of the vehicle.

(App. 89).

Analysis

The trial court correctly refused to give Sarafin's proffered instructions defining "operating" and "operator" because they were not correct statements of the law. The Court of Appeals correctly affirmed the trial court's decision.

Instruction IA (operating) included a requirement that one in physical control of the vehicle must be so in control "on a public roadway." (App. 91). The defendant's proffered Instruction I (operating) mirrored IA, but added the following phrase: "When the engine is not running in a private driveway, ***the Commonwealth must prove by direct or circumstantial evidence that the defendant specifically intended to activate the motive power of the vehicle to enter a public roadway*** while under the influence of alcohol." (Emphasis added.) (App. 92). Instruction K (operator) defined an operator as one in actual physical control of a motor vehicle on a "highway." (App. 96).[15]

Each of the defendant's proposed instructions included a requirement either that the vehicle was operated on a "highway" or "public roadway," or proof that the intoxicated defendant intended to enter a public

[15] As noted above, Sarafin's proffered Instructions J and L defined "private road or driveway" and "highway," respectively. (App. 95, 97).

highway. As discussed at length above in Argument I in this brief, such requirements do not constitute elements of an offense under the Virginia's DUI statute.

The Court of Appeals correctly ruled as follows:

> In the present case, the trial court properly refused appellant's proffered jury instructions as they were not an accurate statement of the law. Nothing in the plain language of the statute requires that a motor vehicle other than a moped be located on a public highway in order to constitute a violation of the statute proscribing operating a motor vehicle while intoxicated. Nor does the statute require that an individual intends to drive the vehicle. In addition, case law establishes that being on a public highway is not a required element of Code § 18.2-266.
>
> Appellant's proffered "operating" instruction improperly stated that "[a]ny individual who is in actual physical control of a vehicle on a public roadway is an operator." It went even further and incorrectly stated, in contravention to this Court's holding in Ngomondjami, 54 Va. App. at 317-18, 678 S.E.2d at 285, that "[w]hen the engine is not running in a private driveway, the Commonwealth must prove by direct or circumstantial evidence that the defendant specifically intended to activate the motive power of the vehicle to enter a public roadway while under the influence of alcohol." Appellant's "operator" instruction also improperly stated that "[o]perator means every person who drives or is in actual physical control of a motor vehicle on a highway." Accordingly, we hold that the trial court did not err in refusing to grant appellant's proffered jury instructions as they inaccurately stated the law.

Sarafin, 62 Va. App. at 402, 748 S.E.2d at 649 (footnote omitted) (App. 135-36).[16]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia and the Circuit Court of the City of Charlottesville should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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[16] The Court of Appeals also correctly rejected Sarafin's contention that the given operation instruction was vague and confusing. See id. at 403, 748 S.E.2d at 649. (App. 136).

CERTIFICATE OF TRANSMISSION AND SERVICE

On April 22, 2014, the required number of copies of this brief were hand-delivered to the Clerk of this Court and an electronic copy was sent to the Court at scvbriefs@courts.state.va.us. Three copies were sent by UPS Ground Delivery to David L. Heilberg, Esq., Dygert, Wright, Hobbs & Heilberg, PLC, 675 Peter Jefferson Parkway, Suite 190, Charlottesville, Virginia 22911, counsel for the appellant. An e-mail copy was sent to him at dheilberg@charlottesvillelegal.com. The brief complies with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

_____

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