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Record No. 5058

In the
Supreme Court of Appeals of Virginia
at Richmond

HUBERT EDWIN BOWMAN

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF WYTHE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5058

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 13th day of August, 1959.

HUBERT EDWIN BOWMAN, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Wythe County

Upon the petition of Hubert Edwin Bowman a writ of error and *supersedeas* was awarded him by one of the Justices of the Supreme Court of Appeals on the 11th day of August, 1959, to a judgment rendered by the Circuit Court of Wythe County on the 27th day of April, 1959, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

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page 4 }

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Circuit Court for the County of Wythe, on Monday, the 27th day of April, in the year of our Lord Nineteen Hundred and Fifty-nine.

* * * * *

MISDEMEANOR—DRIVING DRUNK.

This day came the Commonwealth by her attorney and the defendant in person and by counsel, and upon a plea of not guilty by the defendant, and by agreement all matters of law and fact being submitted to the Court without the intervention of a jury, it is the judgment of the Court that the defendant, Hubert Edwin Bowman, be convicted of operating a motor vehicle while under the influence of intoxicants, as charged in the warrant, and that his punishment be fixed at a fine of $100.00, and he shall pay the costs of this proceeding.

Thereupon counsel for the defendant moved the Court to set aside the Court's finding of guilty and judgment thereon on the ground of admission and consideration of improper evidence by the Court, which motion the Court overruled and counsel for defendant excepted to the ruling of the Court.

Whereupon counsel for the defendant moved the Court to grant a stay of execution for a period of ninety days in which to apply to the Court of Appeals for a writ of error, which motion the Court granted, it appearing that the defendant's appearance bond and security were adequate.

* * * * *

page 6 }

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Hubert Edwin Bowman here gives a notice of appeal from a final judgment of the Circuit Court of Wythe County

rendered on the 27th day of April, 1959, in which he was found *guilty* of driving a motor vehicle while under the influence of intoxicants and assigns the following errors:

(1) The Court erred in admitting and considering improper evidence offered by the Commonwealth.

(2) The Court erred in finding the defendant guilty of driving a motor vehicle while under the influence of intoxicants because of the insufficiency of the evidence.

Respectfully,

HUBERT EDWIN BOWMAN
By Counsel.

WOODS & GLEAVES
By JAMES L. GLEAVES, JR.
Counsel for Defendant.

Filed in the office of the Clerk of the Circuit Court of Wythe County, Virginia this 5th day of June 1959.

Teste:

J. E. CROCKETT, Clerk
By EMILY J. WILLIAMS, Dep. Clk.

* * * * *

page 8 }

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STIPULATION OF FACTS.

On Saturday, March 14, 1959, at approximately 6:30 P. M., Hubert Edwin Bowman, a truck driver by occupation, was operating his private automobile on U. S. Route 52 in Wythe County, Virginia, approximately four (4) miles south of the village of Max Meadows, Virginia. The vehicle driven by Hubert Edwin Bowman, who is hereinafter referred to as the defendant, left the traveled portion of the highway and overturned at the time and place aforesaid. There were no other motor vehicles involved in the accident. The defendant received serious injuries, including a head wound which rendered him unconscious.

State Trooper R. W. Litton patroling alone arrived at the

scene of the accident at approximately 6:45 P. M. At the time Trooper Litton arrived at the scene an ambulance had already been called for the benefit of the defendant, who was the only occupant of the wrecked vehicle. The defendant was unconscious at the time the Trooper arrived at the scene of the accident, but appeared to be recovering consciousness when he was placed in the ambulance. Trooper Litton observed the odor of alcohol was prevalent when the defendant was removed from the wrecked vehicle and placed in the ambulance. State Trooper G. A. Farthing, dressed

page 9 } in civilian clothes, driving a private motor vehicle, appeared by chance upon the scene of the accident and assisted Trooper Litton by summonsing a wrecker to remove the defendant's vehicle.

The defendant was taken by the ambulance to the Wytheville Sanatorium & Hospital, which is located on U. S. Route 52 between the scene of the accident and the Town of Wytheville, Virginia, approximately one and one-half miles from the corporate limits of the Town of Wytheville, Virginia. Trooper Litton remained at the scene of the accident to investigate the scene and to direct traffic. Trooper Litton's investigation revealed an empty vodka bottle in the wrecked vehicle. The cap was off of the vodka bottle and the Trooper was unable to determine if the contents had spilled out in the wreck or if there was any vodka in the bottle prior to the accident. The wreck truck summonsed by Trooper Farthing arrived at the scene from 15 to 20 minutes after the defendant was sent to the hospital and removed the wrecked vehicle.

Trooper Litton radioed the State Police dispatcher at 4th Division Headquarters which is also located on U. S. Route No. 52, between the scene of the accident and the Wytheville Sanatorium & Hospital, and had the dispatcher call Officer Frank Walker of the Police Department of the Town of Wytheville, and request Officer Walker to go to the hospital and advise the defendant that he was to be charged with driving an automobile under the influence of intoxicants in violation of Code 1950, §18-75 and to further inform the defendant of his right to submit to a determination of the amount of alcohol in his blood as shown by a chemical analysis of his blood. Officer Walker accompanied by another police officer of the Town of Wytheville, proceeded to the Wytheville Sanatorium & Hospital and informed the defendant of the charge to be placed against him and of his right to a chemical analysis of his blood.

page 10 } Dr. W. E. Malin was on duty at the hospital and observed the defendant. Dr. Malin asked the defendant to move to one side of the litter on which the de-

fendant was lying and directed several questions to the defendant and in each instance received a normal response. According to Dr. Malin the defendant understood what was told to him and was capable at the time of consenting to a chemical analysis of his blood. Due to the head injuries of the defendant it is Dr. Malin's opinion that the defendant may or may not have any recollection of having consented to such determination. The defendant denies any recollection of giving his consent. A laboratory technician at the Wytheville Sanatorium & Hospital withdrew the blood from the defendant for the purpose of determining the alcoholic content therein. The blood sample was placed in a sealed container provided by the Chief Medical Examiner. After completion of the taking of the sample the container was resealed in the presence of the accused, after calling the fact to his attention. The defendant lapsed into a coma shortly thereafter. The container was properly *equiped* with a sealing device, sealed, labeled and properly identified. The sample was delivered to Officer Walker for transporting and mailing to the Chief Medical Examiner. Officer Walker later in the evening, delivered the sample to Trooper Litton, who mailed it to the Chief Medical Examiner. The certificate executed by the office of the Chief Medical Examiner, which was proper in all respects, was returned to Trooper Litton, prior to the time of the defendant's arrest.

Trooper Litton, after the wrecked vehicle was removed from the scene of the accident, remained at the scene of the accident and measured the tire marks and observed the physical evidence and located the defendant's personal belongings. He then went to the Wytheville Sanatorium & Hospital, arriving there at approximately 8:00 P. M., at which time he saw the defendant. According to Trooper Litton, he as-
page 11 } sisted the nurse who was treating the defendant but did not talk to the defendant as he was going into a state of shock.

Trooper Litton conferred with the local Justice of the Peace on the night of the accident concerning a warrant and on Sunday, March 15, 1959, the same Justice of the Peace issued a warrant charging the defendant with operating a motor vehicle on the highways of Wythe County under the influence of intoxicants. According to Trooper Litton this warrant was not brought to the attention of the defendant until some time later because of the defendant's condition. Trooper Litton on a later date, requested the defendant to advise him when he was released from the hospital as there was a warrant outstanding for his arrest. On the 23rd day of March, 1959, the defendant called Trooper Litton, at which

time he was placed under arrest. Trooper Litton at the time of arresting the defendant did not say anything to the defendant concerning a determination of the amount of alcohol in his blood as shown by a chemical analysis.

The report of the chemical analysis of the defendant's blood showed it was at the time 0.26 per cent by weight of alcohol in the accused's blood. The defendant was tried on the warrant in the County Court of Wythe County on the 8th day of April, 1959, found guilty and fined $100.00 and cost. The defendant appealed the case to the Circuit Court of Wythe County on the 9th day of April, 1959, and the defendant having waived a jury, was tried by the Court and found guilty of driving an automobile while under the influence of intoxicants, Code 1950, §18-75, and fined $100.00 and cost.

The certificate of the Chief Medical Examiner introduced in evidence and considered by the Court reporting the results of the blood analysis of the defendant was over the objections of the defendant in both the County Court and the Circuit Court. The objections were over-ruled in both Courts and the defendant excepted to the introduction in evidence of the results of such analysis for the following

page 12 } reasons, which were also the reasons stated upon objection.

1. The defendant was not informed by the arresting authorities of his right to such determination.

2. The defendant was not informed by the arresting authorities of his right of such determination at the time of his arrest.

3. The sample for the chemical analysis of the defendant's blood was taken prior to the defendant's arrest.

4. The assistance rendered the defendant in obtaining such determination was not done by the arresting authorities.

5. The defendant made no request of the arresting authorities for such determination.

6. The Town Police Officer who advised the defendant of his right to a chemical analysis of his blood to determine the amount of alcohol in his blood, and assisted the defendant in obtaining such determination, was not the arresting authority and was outside of his official jurisdiction at the time he did so.

7. The requirements of Code 1950, §18-75.1, requiring that the defendant, at the time of his arrest, be informed by the arresting authorities of his right to such determination, and if he make such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness, were not complied with.

It is agreed that the foregoing pages, 1 to 5 inclusive, is a correct stipulation of facts and other proceedings had in the trial of this case.

WOODS & GLEAVES
By JAMES L. GLEAVES, JR.
Counsel for Defendant.

E. G. SHAFFER
Attorney for the Commonwealth.

page 13 } The foregoing stipulation of facts, pages 1 to 5 inclusive, is a correct statement of the entire proceedings had in the trial of this case.

JACK M. MATTHEWS, Judge.

Received on the 5th day of June, 1959, within 60 days of final judgment.

JACK M. MATTHEWS, Judge.

Signed on the 5th day of June, 1959, within 70 days of final judgment.

JACK M. MATTHEWS, Judge.

Received and filed on the 5th day of June, 1959.

J. E. CROCKETT, Clerk.

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Judgment—April 27, 1959	2
Notice of Appeal and Assignments of Error	2
Stipulation of Facts	3

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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