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Record No. 5240

In the
Supreme Court of Appeals of Virginia
at Richmond

OLYVE GRAEF MOORE

V.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF BATH 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. 5240

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 6th day of October, 1960.

OLYVE GRAEF MOORE, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Bath County

Upon the petition of Olyve Graef Moore a writ of error and *supersedeas* is awarded her to a judgment rendered by the Circuit Court of Bath County on the 5th day of May, 1960, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor; upon the petitioner, or some one for her, entering into bond with sufficient surety before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs; but said *supersedeas,* however, is not to operate to discharge the petitioner from custody, if in custody, or to release her bond if out on bail.

RECORD

* * * * *

page 2 } State of Virginia,
County of Bath, to-wit:

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, Special Police John G. McFarland has this day made complaint and information on oath before me, Elisabeth L. Thompson, Clerk Bath County Court of the said County, that Mrs. Olyve Graef Moore in the said County did on the 1st day of December, 1959: Unlawfully operate a motor vehicle in a reckless manner: namely pass a school bus while discharging passengers.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon:

as witnesses.

Given under my hand and seal, this 3rd day of December, 1959.

ELISABETH L. THOMPSON (Seal)
(Title of Issuing Officer)
Clerk Bath County Court.

* * * * *

page 4 } INSTRUCTION NO. 1.

The Court instructs the jury that every person convicted of reckless driving shall, for the first violation, be punished by a fine not exceeding five hundred dollars or confined in jail not exceeding twelve months, or both.

Given 5-5-60.

E. L. A.

INSTRUCTION NO. 2.

The Court instructs the jury that a person shall be guilty of reckless driving who shall, fail to stop at a school bus

stopped on the highway for the purpose of taking on or discharging school children, when approaching the same from any direction and to remain stopped until all school children are clear of the highway and the bus is put in motion, provided, however, that this shall apply only to school buses marked or identified as provided in the regulations of the State Board of Education.

Given 5-5-60.

E. L. A.

INSTRUCTION NO. A.

The Court instructs the jury that every fact necessary to constitute the offense charged must be proven beyond a reasonable doubt, and that if there is a reasonable doubt as to any such fact, they shall adquit; that the result of the evidence must be to exclude every reasonable hypothesis of innocence, and be consistent only with the guilt of the accused; that the jury is not at liberty to guess, and where a fact is susceptible of two reasonable interpretations, one of which is consistent with the innocence of the accused, they cannot arbitrarily adopt that interpretation which incriminates him.

Given 5-5-60.

E. L. A.

page 5 } INSTRUCTION NO. B.

The Court instructs the jury that in the eyes of the law every person is presumed to be innocent until he is proven guilty, and not only is the burden of proving the guilt of a person charged with crime, on the commonwealth, but to warrant a conviction the guilt of the accused must be proven to the exclusion of every reasonable doubt.

Given 5-5-60.

E. L. A.

page 6 } INSTRUCTION NO. D.

The Court instructs the jury that if they believe the defendant violated the rules of the road namely Sec. 46.1-207 of Code of Va., but did not drive in a reckless manner, the jury may find the defendant guilty of violating the rules

of the road and fix the punishment by a fine of not more than ..... dollars and not less than ..... dollars.

Refused 5-5-60.

E. L. A.

INSTRUCTION NO. C.

The Court instructs the Jury that where the defendant is charged with reckless driving, the jury may find the defendant guilty of reckless driving or the jury may find the defendant guilty of any lesser offense or the jury may find the defendant not guilty.

Refused 5-5-60.

E. L. A.

page 7 } We the jury find the defendant guilty as charged and fix a fine of $15.00.

Foreman—NELSON CARPENTER.

* * * * *

page 9 } Circuit Court of the County of Bath on Thursday, the fifth day of May, in the year of our Lord, One Thousand Nine Hundred and Sixty.

Present: The Honorable Earl L. Abbott, Judge.

* * * * *

This day came the Attorney prosecuting on behalf of the Commonwealth and the defendant appeared and for plea the defendant says he is not guilty as charged in the warrant of operating a motor vehicle in a reckless manner: namely pass a school bus while discharging passengers and for her trial putteth herself upon her country and thereupon came a panel of eleven persons drawn and summoned to serve as Jurors for the trial of the accused, to-wit: Joseph E. Ginger, Clyde C. Hively, Raymond W. Shanks, Nelson B. Carpenter, Elsie S. McCormick, Forrest G. Burns, William H. Fertig, Clara M. Wade, R. K. Alexander, Arthur L. Johnson and Howard S. Marshall from which panel each struck three names, leaving the following five persons as a Jury for the trial of this case, to-wit: Clyde C. Hively, Nelson B. Carpenter, Forrest G. Burns, William H. Fertig and R. K. Alexander, who were sworn the truth of and upon the prem-

ises to speak and a true verdict render according to the evidence and having heard the evidence and argument of counsel and receiving their instructions from the court, retired from the bar to consult of a verdict and after sometime returned into court the following verdict, to-wit: "We the Jury find the defendant guilty as charged and fix a fine of $15.00. *Forman* Nelson Carpenter." And the defendant, by counsel, moved the court to set aside the verdict of the jury as contrary to the law and the evidence, refusal of court to give certain instructions and refusal to sustain motion page 10 } of the defendant to strike the evidence of the Commonwealth and overruled, which motion, being argued is overruled by the court, to which ruling the defendant by counsel excepted. Wherefore, it is considered that the Commonwealth recover of the defendant the fine aforesaid of $15.00 and her costs. Whereupon, the defendant having indicated an intention to apply to the Supreme Court of Appeals for a writ of error, execution of this judgment is suspended for a period of Seventy (70) days in order that the defendant may apply for such writ of error upon the execution of a bond in the amount of $250.00.

EARL L. ABBOTT, Judge.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The defendant, Olyve Graef Moore, hereby gives notice pursuant to the provisions of Section 4, Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia, of her appeal from that certain final judgment entered in the above-styled cause on May 5, 1960, in which certain exceptions of the defendant were overruled and judgment entered against her by finding her for Twenty-five ($25.00) Dollars for reckless driving for passing a school bus.

The following are errors assigned:

(1) That the Court erred in refusing the defendant's Instruction C which instruction stated that the defendant could have been fined guilty of reckless driving or for a lesser offense or the Jury may have found the defendant not guilty.

(2) That the Court erred in refusing the Defendant's

Instruction D which stated that the Jury could find the defendant guilty of violating the rules of the road namely Section 46.1-207 of the Code of Virginia.

(3) The Court erred in refusing to allow the Commonwealth's witness to testify on cross examination how the school bus was marked and how it met the regulations of the State Board of Education.

(4) That the Court erred in refusing to allow the defendant to argue part of the Commonwealth's Instruction No. 1 which stated that the school bus must be marked according to the regulations of the State Board of Education.

page 13 } (5) The Court erred in failing to set aside the verdict of the Jury as contrary to the law and evidence, and without evidence to support it.

(6) That the evidence was insufficient to sustain the verdict finding the defendant guilty of reckless driving because of passing a school bus as there was no proof that the school bus was properly marked.

Respectfully submitted,

OLYVE GRAEF MOORE
By Counsel.

ERWIN S. SOLOMON, Counsel
Hot Springs, Virginia.

Filed in the Clerk's Office of Bath County Circuit Court June 7, 1960.

VIRGINIA D. CLEEK, Clerk.

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To: Duncan Byrd, Commonwealth Attorney for Bath County, Warm Springs, Virginia:

Pursuant to Rule 5:1, Para. 3 (f) of the Rules of the Supreme Court of Appeals of Virginia, you are hereby notified that the undersigned will tender a statement of the oral testimony and other incidents of the trial in the above reference case to the Honorable Earl L. Abbott, Judge of the Circuit Court of Bath County, Virginia at the Courthouse at Clifton

John McFarland.

Forge, Virginia on June 29, 1960 for certification thereof as a part of the record in said case.

Dated this 21st day of June, 1960.

ERWIN S. SOLOMON
Counsel for Defendant.

This is to certify that a copy of the within notice was mailed to Duncan Byrd, Commonwealth attorney for Bath County, Warm Springs, Virginia this 21st day of June, 1960.

ERWIN S. SOLOMON.

Filed in the Clerk's Office of Bath County Circuit Court June 22, 1960.

VIRGINIA D. CLEEK, Clerk.

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CERTIFICATE OF THE TRIAL JUDGE.

Be it remembered that, after the Jury was sworn to try the issue joined in this case, and before me the undersigned trial judge presiding at said trial on the 5th day of May, 1960, the Commonwealth to prove the charge of reckless driving against the defendant introduced the following evidence:

JOHN McFARLAND,

a county policeman, was called by the Commonwealth and after first being duly sworn testified that he was sitting in his police car in the parking space at the C and O Station in Hot Springs, Virginia at approximately 3:30 P. M. He stated he observed the school bus driven by Roscoe Williams stop to discharge school pupils. After the bus had come to a stop and the school pupils started to unload, McFarland further stated that he then observed Olyve Graef Moore, the defendant, come down U. S. Highway No. 220 and pass the school bus while the pupils were dismounting from the bus. He stated the bus had "Stop" written on it, and that the bus marking conformed with the regulations of the State Board of Education.

On cross examination, McFarland was asked how the bus was painted so as to conform with the regulations of the State Board of Education. The Court stated that the question was not proper and instructed the Officer not to answer the question as the question was not material, to which ruling the defendant excepted. The Court held the question and answer to be immaterial for the reason it is presumed the school bus was marked in accordance with the rules and regulations of the State Board of Education, and that the burden of going forward with the proof of showing the school bus was not so marked became the duty of the defendant.

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ROSCOE WILLIAMS,

a school bus driver, was then called by the Commonwealth and after first being duly sworn testified that he had stopped his bus on U. S. Highway No. 220 heading south in the Village of Hot Springs, Virginia. He stated the safety patrol boy on his bus did not get out to flag traffic because a police officer was on duty. He stated further that a car driven by Olyve Graef Moore headed North passed his bus while it was unloading pupils. He stated that the bus was marked in accordance with the regulations of the State Board of Education, and had the red blinker on and it was blinking.

On cross examination, Williams was asked to state how the bus markings conformed with the regulations of the State Board of Education. The Trial Court stated the question was immaterial and refused to allow the witness to answer the question to which ruling the defendant excepted. The Court held the question and answer to be immaterial for the reason it is presumed the school bus was marked in accordance with the rules and regulations of the State Board of Education, and that the burden of going forward with the proof of showing the school bus was not so marked became the duty of the defendant.

The defendant introduced the following evidence:

OLYVE GRAEF MOORE,

testified that she did not see the school bus and that she had followed another car through the Village of Hot Springs to the Post office.

Mrs. Stillwell testified substantially the same.

The witnesses for the Commonwealth denied there was a

car ahead of defendant, which she claimed she followed by the school bus.

When the defendant's counsel stated in his closing argument that the Jury to convict Olyve Graef Moore of reckless driving must find that the school bus was marked page 17 } in accordance with the regulations of the State Board of Education, the Trial Judge informed counsel this was not proper argument and the Jury should disregard the defendant's attorney's statement; to which ruling the defendant excepted.

COUNSELS' CERTIFICATE.

The undersigned counsel for Commonwealth and defendant respectively, in the action of Commonwealth *v.* Olyve Graef Moore, heard in the Circuit Court of Bath County at Warm Springs, Virginia, final judgment wherein was rendered on the 5th day of May, 1960, hereby affix our signatures to the foregoing statement of facts, testimony, and other incidents of the trial provided by Rule 5:1 Section 3 (e) of the Rules of the Supreme Court of Appeals of Virginia, to the end that the same may become part of the record on appeal.

Given under our hand this 30 day of June, 1960.

DUNCAN M. BYRD
Counsel for Plaintiff.

ERWIN S. SOLOMON
Counsel for Defendant.

CERTIFICATE OF TRIAL JUDGE.

The undersigned, Earl L. Abbott, Judge of the Circuit Court of Bath County, Virginia, who presided over the trial of Commonwealth of Virginia *v.* Olyve Graef Moore on the 5th day of May, 1960, pursuant to Rule 5:1, Section 3 (e) of the Rules of the Supreme Court of Appeals of Virginia, hereby affixes his signature to the foregoing statement of facts, testimony and other incidents of the trial which was tendered to him within sixty days after final judgment was rendered on the 5th day of May, 1960, and is signed within seventy days after date of said judgment, this 2nd day of July, 1960.

EARL L. ABBOTT
Judge of the Circuit Court of
Bath County, Virginia.

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NOTICE TO CLERK TO TRANSMIT RECORD
PURSUANT TO RULE 5:1, PARA. 7.

To: Mrs. Virginia D. Cleek, Clerk of the Circuit Court of Bath County, Warm Springs, Virginia:

Pursuant to Rule 5:1, Para. 7 of the Rules of the Supreme Court of Appeals of Virginia, you are hereby notified that the undersigned attorneys for both the *appelant* and appellee requests that the Clerk of the Circuit Court of Bath County, Virginia transmit the records of this said case.

Dated this 24th day of August, 1960.

ERWIN S. SOLOMON
DUNCAN M. BYRD

Filed in the Clerk's Office of Bath County Circuit Court August 25, 1960.

VIRGINIA D. CLEEK, Clerk.

A Copy—Teste:

H. G. TURNER, Clerk.

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