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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6871

In the Supreme Court of Appeals of Virginia at Richmond

BEN BERRY

v.

CITY OF CHESAPEAKE

FROM THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6871

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 12th day of January, 1968.

BEN BERRY, Plaintiff in error,

against

CITY OF CHESAPEAKE, Defendant in error.

From the Circuit Court of the City of Chesapeake
Major M. Hillard, Judge

Upon the petition of Ben Berry a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Chesapeake on the 21st day of July, 1967, in a prosecution by the City of Chesapeake against the said petitioner for a misdemeanor; upon the petitioner, or some one for him, entering into bond with sufficient surety before the clerk of the said circuit court in the penalty of $600, 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 his bond if out on bail.

RECORD

* * * * *

page 3 }

* * * * *

BILL OF PARTICULARS

The plaintiff City of Chesapeake states that the defendants in the above styled cases are being prosecuted on appeal for violation of Chapter 23 Section 23-51 of the City Code of the City of Chesapeake.

CITY OF CHESAPEAKE

by PETER M. AXSON, JR.
Commonwealth's Attorney

Filed 7/21/67. M. M. H.

page 3-A } I, Raymond L. Spence, Clerk of the Council of the City of Chesapeake, Virginia, do hereby certify that the following is a true copy of Section 23-51, Misc. Offenses Ordinance, of the City of Chesapeake, Virginia.

[SEAL]

RAYMOND L. SPENCE
Clerk of the Council

Section 23-51 Same—Carrying or Transporting.

It shall be unlawful for any person to carry any loaded firearms on any public lands except those legally opened for hunting, or on a properly established target shooting range, except persons authorized by law to carry loaded firearms.

Commonwealth's Exhibit #1

Date July 21, 1967

Judge M. M. H.

* * * * *

page 6 }

* * * * *

In the Circuit Court of the City of Chesapeake on the 21st day of July, 1967.

* * * * *

This day came the Attorney for the City, and Howard I. Legum, counsel for the defendant, as well as the above named defendant, in person, who plead not guilty to the above charge, and on motion of the defendant, in person, and with the consent and concurrence of the attorney for the City, the Court proceeded to hear and determine the whole matter of law and fact, and after having fully heard the evidence and argument of counsel; it is considered by the Court that the said Ben Berry is guilty of Transporting Loaded Firearms and fixes his punishment at a fine of Two-Hundred and Fifty ($250.00) Dollars.

Therefore it is considered by the Court that the City of Chesapeake recover of the said Ben Berry the said fine of Two-Hundred and Fifty ($250.00) Dollars, and the cost of Court in this case expended.

Thereupon the defendant, by counsel, signifying a desire to apply to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas* to the said Judgment; it is Ordered that execution of Judgment be suspended for a period of Sixty (60) days from this date, and this case is continued.

* * * * *

page 7 }

* * * * *

ASSIGNMENTS OF ERROR

1. The Court erred in entering the final judgment on July 21, 1967.
2. The Court erred in finding the defendant guilty of violating Section 23-51, Chesapeake City Code.
3. The Court erred in ruling that a public street was "public lands" within Section 23-51, Chesapeake City Code.
4. The Court erred in finding the defendant guilty of "transporting loaded firearms," as charged in the City warrant.

5. The Court erred in overruling the motion of the defendant to strike the City's evidence.

6. The Court erred in confiscating the firearms of the defendant.

BEN BERRY

By HOWARD I. LEGUM
Of Counsel

* * * * *

Filed in the clerk's office the 30th day of August, 1967.

TESTE:

CHARLES B. CROSS, JR., Clerk

By H. T. GILLETTE, D.C.

* * * * *

TRANSCRIPT

Following is stenographic transcript of proceedings had on above-entitled cause, on the 21st day of July, 1967, in the Circuit Court of the City of Chesapeake, before the Honorable Major M. Hillard.

PRESENT:

PETER M. AXSON, JR., ESQ., Commonwealth's Attorney

HOWARD I. LEGUM, ESQ., Fine, Fine, Legum, & Fine Counsel for Defendants

* * * * *

page 3 } (11:50 A.M.)

Mr. Axson: May it please the Court, this is a city charge against Mr. Ben Berry and Mr. Jack Herbert George who are charged with transporting of loaded firearms.

This falls within the ordinances of the City of Chesapeake entitled Miscellaneous Ordinances, chapter 23, subsection 23-51, which was adopted by the City Council, City of Chesa-

peake, on November 12, 1963, an attested copy of which I have in my hand and will offer.

It is section 23-51, Carrying or Transporting.

"It shall be unlawful for any person to carry any loaded firearms on any public lands except those legally open for hunting or in a properly established target shooting range except persons authorized by law to carry loaded firearms."

And I would like for this to be received and marked.

The Court: Section 51?

page 4 } Mr. Axson: Yes, sir. This was an amendment, and it may not be in your book.

Mr. Legum: Your Honor, I have an order which Mr. Axson has endorsed, requiring a bill of particulars as to the section of the city code under which the appeal is being prosecuted, which is 23-51, as Mr. Axson has said.

The Court: Mr. Axson, you haven't signed the bill of particulars.

Mr. Axson: I am sorry.

(Bill of particulars signed at this time.)

Mr. Legum: I would like to file with the Court a trial memorandum of law, sir, which I think would be helpful to the Court in construing this ordinance.

The Court: All right, sir.

This is the ordinance under which gun permits are issued, then, Mr. Axson?

Mr. Axson: Your Honor, there is a number of subsections.

The Court: Have to get an investigation by the

page 5 } police, and the Court then grants a permit to carry a gun on these lands which you are claiming are not public lands, meaning the streets of the city.

All right, sir. I have read your memorandum.

Do you have a motion?

Mr. Legum: No, sir.

The Court: To strengthen it?

Mr. Legum: I will make my motion after the Commonwealth rests. Your Honor.

The Court: All right.

You may proceed. Swear the witnesses.

(Witnesses sworn.)

J. A. McClenny

J. A. McCLENNY, witness first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

Examined By Mr. Axson:

Q. Would you state your name, please, and your occupation?

A. J. A. McClenny, police officer, Chesapeake Po-
page 6 } lice Department.

Q. Were you on duty on April 16, of 1967, in the City of Chesapeake?

A. Yes, sir.

Q. Were you operating a patrol car on that day?

A. Yes, sir.

Q. Were you alone or was there someone with you?

A. Officer Foster was with me.

Q. All right, sir. Now I believe that you got a message from the dispatcher to go to a certain location. Is that correct?

A. Yes, sir.

Q. What were you to look for when you arrived?

A. I received a call to go down to Allen Drive, that there was a man seen walking up and down the road with a rifle.

Officer Foster and myself proceeded to the road and went down Allen Drive and we didn't see anyone with a rifle except one gentleman putting a rifle inside of a truck.

We proceeded on down the road, Allen Drive, and turned around and came back and didn't see anyone else
page 7 } but the truck had already left, that we seen the rifle being placed in.

Q. Is the man in the courtroom today who was putting the rifle in the truck?

A. Yes, sir, he is.

Q. Would you point him out to us?

A. That gentleman with the glasses on?

Q. With the glasses on?

A. Yes, sir.

Q. And this is Mr.—?

Mr. Legum: Berry.

Mr. Axson: The record can show he identified Mr. Berry as putting a rifle in the truck.

J. A. McClenny

Mr. Axson:

Q. Where did he put the rifle in the truck?

A. Put it in a rack in the back window of the truck.

Q. All right, sir. Did you later see the truck?

A. Yes, sir. Officer Foster and myself went on out route #168 and saw the truck proceeding north on route #168. We fell in behind.

Q. Go ahead, sir.

page 8 } A. We followed the truck for approximately a half mile, and the truck went into an Amoco service station.

We pulled up right behind the truck. I got out of my patrol car and walked up beside the truck Mr. Berry was operating, and asked him if the rifle which he had in the back of his truck was loaded.

I could see the clip sticking out of the bottom of the rifle at the time.

He didn't say anything to me. I asked him the same question again, and he still didn't answer my question, so I told him to give me the rifle, which he did.

When I got the rifle in my hand, I pulled the bolt back and a .30 caliber shell came out of the chamber.

It had a clip in the rifle which was fully loaded with, I believe it holds 30 rounds of ammunition.

Q. When you operated the bolt, a shell was ejected, is that correct?

A. Yes, sir. That is correct.

Q. For it to eject a shell, a carbine—M-1 carbine—does it have to be in the chamber when you pull the bolt

page 9 } back?

A. As far as I remember from my military service. If there is—

Mr. Legum: Your Honor, I object unless he knows of his own knowledge.

The Court: He said he remembered from his military service.

Wait a minute.

Q. Have you ever had any experience with a carbine rifle?

A. Yes, sir. I carried one for 6 years in the army.

Mr. Axson: We could, of course, establish it here by using this carbine if there is any question about it.

The Court: He can testify. If he carried one for 6 years, I am sure he knows something about it.

J. A. McClenny

Mr. Axson:

Q. If there is a loaded clip in this carbine, but there is not one chambered, not a round chambered, and you pull the operating handle back, will it eject or will it just feed one into the chamber?

A. No, sir. It will not eject. It will feed one
page 10 } out of the magazine onto the bolt and push it into the chamber when you release the bolt.

Q. But if there is a round chambered and you pull the bolt handle back, will that eject?

A. Yes, sir.

Q. And automatically feed another?

A. Yes, sir.

Q. I ask you to examine the rifle and see if this is the rifle you have been referring to in your testimony?

A. Yes, sir, it is the same weapon.

Q. And is this clip here which is called a banana clip, is that the clip that you found?

A. Yes, sir. It is. It was in the rifle.

Q. Did it contain the shells in it that are now in it?

A. Yes, sir.

Mr. Axson: Your Honor, I am going to ask that this be marked as Commonwealth's Exhibit #2.

The Court: #2?

Mr. Axson: Yes, sir. The ordinance was #1.
page 11 } The Court: Oh, I see. Mark it, Mr. Gillette.

Mr. Axson:

Q. Officer McClenny, was there any more rifles in the car, other than the one that has been identified and marked "Commonwealth's Exhibit #2"?

A. I didn't see any more rifles.

Q. Was this rifle in the same place that you saw Mr. Berry putting a rifle into the truck?

A. Yes, sir, it was.

Q. Now here's a western frontier model Colt, I believe it is a Magnum.

A. 357 Magnum.

Q. Where did you get this weapon from?

A. This weapon was in the truck. Officer Foster, when I came around Officer Foster's side, he had this weapon in his hand.

I don't know where out of the truck he got it.

Q. Was it loaded?

A. Yes, sir, it was. It had a round in the cylinder.
Q. Here is a .38 caliber under-over, I think it is. I don't recognize it by brand name. Under-over.
page 12 } Where did this pistol come from?
A. That was on Mr. Jack George's person.
Q. Which is Mr. George?
A. The big gentleman sitting there.

The Court: One of the defendants?

A. Yes, sir.
Q. Was this gun loaded?
A. Yes, sir, there was a round in the cylinder.

Mr. Axson: Your Honor, I am going to ask that these be received and marked Commonwealth's Exhibits respectively #3 and #4.
The Court: It will be so marked.
The frontier model colt serial number is 3-4425 is the best I can make it out.
The serial number on the .38 caliber pistol is #59014.

Mr. Axson:
Q. Was the place that you stopped this car and the place that you saw the truck originally, was that a public street?
A. We were following the vehicle on a public
page 13 } street.
It was private property, gas station, when he pulled into the service station, that was private property.
Q. But you were behind the car when it pulled off the public street?
A. Yes, sir.

The Court: How long did you follow them, Officer?
A. There was some traffic between us. When we got directly behind him, I imagine 200 or 300 yards. We stopped behind him at a stop light before he pulled into a service station.
It took us, I imagine, we were on Allen Drive, took us a couple of minutes to get turned around.
By the time we got turned around, he was already on the road, on #168 proceeding north.

Mr. Axson:
Q. Was Officer Foster with you at the time?

A. Yes, sir.

Q. Did he have an equal opportunity to see what
page 14 } you saw and heard?

A. Yes, sir.

Q. Would his testimony be purely cumulative?

A. Yes, I believe it would.

Mr. Axson: He is here today, Officer Foster.

CROSS EXAMINATION

Examined By Mr. Legum:

Q. Officer McClenny, when you looked at the guns, the truck was, as you say, at a service station which was private property?

A. Yes, sir.

Q. And you had no search warrant, did you?

A. No, sir, I did not.

Q. Now none of these guns were fired in your presence, were they?

A. Not in my presence, no, sir.

Q. And you didn't see either of these two defendants load the guns?

A. No, sir.

Q. You cannot say of your own knowledge whose guns they are, can you?

A. No, sir.

page 15 } Q. Now, Mr. George—was one of his arms in a sling?

A. I believe it was one of his arms was bandaged.

Q. Was bandaged?

A. I don't know whether it was in a sling or not.

Q. He was riding as a passenger?

A. Yes, sir.

Q. And the rifle you mentioned was in a gun rack in the back of the truck?

A. Yes, sir, in the back window.

Q. Sir?

A. In the back window, in the gun rack.

Q. Which you could see readily?

A. Yes, sir.

Q. All right.

Mr. Legum: I believe that is all I wish to ask him, Your Honor.

Mr. Axson: We will rest.

Mr. Legum: Your Honor, I wish to move to strike the Commonwealth's evidence on the ground that the ordinance charges section 23-51 of the city code, and the

page 16 } statute, in order to make it an offense, you must carry loaded firearms on public lands.

The question is whether a public street is considered public lands.

If it is considered public lands, Your Honor, it seems to me that the exceptions would have no meaning whatsoever and it is difficult to believe that the City Council would put words which have no meaning, because the statute says, the ordinance says, "It shall be unlawful to carry any loaded firearms on any public lands except those legally open for hunting, or on a properly established target-shooting range."

Now clearly a public street could not be legally open for hunting, nor could it be a properly established target-shooting range, and public lands, Your Honor, has an established meaning as shown by the authorities set forth in my memorandum, and I ask you, sir, to strike the evidence for the reasons assigned in the trial memorandum which

page 17 } cited a Virginia case, which is *Xippas* v. *Commonwealth,* on the second page of the memorandum, that before an accused can be convicted of a violation of a statute, the crime charged must fall within the provisions thereof.

We have cited Michie's Jurisprudence, which is under Public Lands, which states, ". . . there is an office for the registration of land titles, and a procedure established for the acquisition of wastes in unappropriated lands. The field for acquiring a right to the waste land of the Commonwealth is open to all."

And we have cited section 41-84 through 89 of the state code which provides for the sale of public lands, and I take the position that the evidence established does not show any crime committed by these defendants under section 23-51 of the code, and I move you, sir.

My second ground, if Your Honor please, is that

page 18 } the officer had no search warrant.

He had no right, on private property, to go into the truck to take the guns. He had no knowledge whatsoever, personally, of any gun being loaded or unloaded, if Your Honor please, when he stopped. When they were apprehended, they were on private property.

They weren't on any public lands, and I ask you, sir, for

that reason to strike the Commonwealth's evidence and dismiss the warrant, if Your Honor please.

The Court: Well in the first place, the Court is of the opinion that exceptions here—frankly, in the statute, instead of nullifying it, it means, says that it exempts certain lands, and they are guilty for carrying loaded firearms on any other except those that are exempted.

And if the public street—now the public travels, and where it is mostly used by the public and owned by the
page 19 } public, which is the City, and if that isn't public lands, I don't know what public lands would be.

I am going to overrule your motion.

And as to searching and seizure, the statute controlling that, or law controlling it, in this case, they saw him put the gun in the car, which they knew was a violation.

They saw the gun in the car when it was not like it was hit or they had to search for it. It was in full view.

It has been held by the courts time and again where the car is stopped and contraband goods or stolen goods or a thing of that sort is in full view, where no search has to be made, and they can see them and know they are there, that is not a violation of the search and seizure law for them to take that and use it as evidence.

I overrule your motions, both of them.

Mr. Legum: I would like to note my exceptions for the record, please.

page 20 } JACK HERBERT GEORGE, Defendant, first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

Examined By Mr. Legum:

Q. You are Jack H. George?

A. Yes, sir.

Q. Where do you live?

A. 540 South Highway #168.

Q. And how far is your home from the service station where the officers got the guns from the truck, approximately?

A. Possibly a mile.

Q. Where are you employed, Mr. George?

A. I am in business with Mr. Berry.

Q. What kind of business is that?

Jack Herbert George

A. Berry Heating and Air Conditioning.
Q. What is your age?
A. 35 years old.
Q. Have you ever before been convicted of any crime?
A. No, sir.
Q. Now on this particular day, which was April 15, 1967, was this morning or afternoon or evening when
page 21 } the officers—
A. It was in the morning.
Q. About what time?
A. Midmorning, 10:30, somewhere's in there.
Q. What day of the week was it?
A. It was a Sunday, sir.
Q. Who was driving the truck?
A. Mr. Berry.
Q. Now Mr. George, where were you and Mr. Berry going?
A. Mr. Wilson's farm.
Q. Where is that located?
A. Down just beyond St. Brides.
Q. What were you all going to do there?
A. Going down there to vaccinate some hogs and do some target practice.
Q. And did he know you were coming?
A. He was aware of it, yes, sir. He was notified.
Q. Now on this particular day, were you wearing a bandage of any sort or a sling?
A. Yes, sir.
Q. What were you wearing?
A. On my left arm.
page 22 } Q. What was it?
A. I had my arm bandaged up and had it kind of held up in my shirt.
Q. All right, sir. Now these particular guns, tell His Honor whether they were or were not loaded?
A. Sir?
Q. Tell His Honor whether these guns were or were not loaded?
A. Well, I can state that they weren't loaded, from my previous military service, which was 5 years 19 days during the war, that the gun has to be loaded with a shell in the chamber.
Q. Were there any shells in the chamber of any of these guns?
A. There was not a shell under either one of the firing pins. Shells underneath the cylinders, but not underneath of the firing pins.

Jack Herbert George

Q. Then you say that for the gun to be loaded, the shell has to be under the firing pin?
A. (Nods.)
Q. Is that right?
A. That is from my military experience, yes, sir.
Q. All right.

page 23 } Mr. Legum: You may examine, Mr. Axson.

CROSS EXAMINATION

Examined By Mr. Axson:
Q. Do I understand you, sir, that if I take this clip, this banana clip, load it with 30 shells, and I let that bolt go home, and I take it and I put this in that gun, that gun is not loaded?
A. And you fired the gun, sure.
Q. Is that gun not loaded?
A. No, sir.
Q. It is not?
A. No, sir.
Q. What is it, semi, halfway, partially?
A. It is semi. Semi-loaded.
Q. Is that a military term?
A. Yes, sir.
Q. Where did you ever hear the military term, semi-loaded rifle?
A. Semiloading is used on the firing range of military service, sir.
Q. Are you really serious about that?
A. Yes, sir, I am.
Q. Well, I was in the infantry for 5 years. I never heard that.
page 24 } How about the pistol. You were carrying the pistol, weren't you?
A. Yes, sir.
Q. Was that semiloaded, too?
A. Yes, sir.
Q. If it is semiloaded, how would you fully load it?
A. Shells in all the cylinder holes.
Q. Well this is a 5-shell cyinder. Is that correct?
A. Yes, sir.
Q. So you only have 4 shells in there?
A. Yes, sir.
Q. You figure it not loaded because there isn't one under the firing pin?

A. It has to be pulled once, and pulled again.

Q. I see.

Then you distinguish between loading as the pulling of the trigger?

A. Yes, sir.

Q. Well if you pull the trigger, it will go off?

A. Unless the hammer is pulled back, yes, sir.

page 25 } That is a double-action gun. It has a single action there.

Q. You pull this trigger and it will go off?

A. If that chamber is open and you pull the trigger, and then you have to pull it again because that cylinder ahead of it is open.

Q. This cylinder under the pin is open. Right?

A. No, sir. The cylinder ahead of it is open.

Q. I am talking about there is no shell in that cylinder. See that right there?

A. Yes, sir.

Q. There is no shell there?

A. No, sir.

Q. I am putting that under the firing pin.

There is a shell in the vestibule?

A. No, sir.

Q. There isn't?

A. No, sir.

Q. Is that empty, too?

A. The one next to the *barrell* on a double action gun is open.

page 26 } Q. The one under the firing pin is open?

A. No, sir. That is a loaded gun.

Q. Oh.

A. In a double action gun, the one under the pin goes loaded.

Q. All right, sir. That is all.

Well you had that gun on you?

A. Yes, sir.

Q. And whose carbine was this?

This was Mr. Berry's carbine, wasn't it?

A. Yes, sir.

Q. What you were doing down on Allen Road, walking up and down with the carbine?

A. I wasn't walking up and down Allen Road.

Q. Who was? Mr. Berry?

A. No, sir.

Q. Neither one of you?

A. No, sir.
Q. What were you doing with the rifle on Allen Drive?
A. I live on the corner of Allen Drive and #168.
Q. Mr. Berry live there?
page 27 } A. No, sir.
Q. Did he get the rifle from your house?
A. No, sir.
Q. Why did you take it out?
A. We were going to the farm.
Q. On Allen Road?
A. No, sir. We weren't on Allen Road.
Q. Someone saw you on Allen Road and saw you putting the rifle in the truck.
A. Let's distinguish between Allen Road and #168.
We did not go down Allen Road. Went into my driveway, one of our witnesses brought the truck out of the back yard, and Mr. Berry—

Mr. Axson: That is all.
Mr. Legum: All right. Step down, Mr. George.

Mr. Axson:
Q. Who belongs to the Magnum?
A. It belongs to me.
Q. That is your gun?
A. Yes, sir.

page 28 } BEN BERRY, Defendant, first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

Examined By Mr. Legum:
Q. Will you state your name, sir?
A. Ben Berry.
Q. Where do you live?
A. 412 Oaklette Drive.
Q. Is that in the City of Chesapeake?
A. Yes, sir.
Q. How old are you?
A. 46.
Q. What is your occupation?
A. Refrigeration and air conditioning.
Q. You have your own business?

A. That is right.
Q. Have you, yourself, ever been convicted of any crime?
A. No, sir.
Q. Now on this particular morning, were you driving the truck that Mr. George was in?
A. Yes, sir.
Q. Now where were you all going?
page 29 } A. Going to Mr. Wilson's farm.
Q. Had you been there before?
A. Yes, sir.
Q. Did Mr. Wilson know you were coming there?
A. Yes, sir.
Q. Now the gun that you own, sir—which gun?
A. That is the carbine.
Q. The carbine? Now tell His Honor whether the gun was or was not loaded at the time the officers took the gun.
A. I had the clip out of the gun. I put the clip in the gun when I put it in the truck because if you step onto them or drop them, in other words, they are no good.
Q. Was the gun loaded?
A. No, sir. It was no bullet in the chamber.
Q. And you are telling His Honor that before that gun can be loaded it has to be a bullet in the chamber?
A. That is right. You have to pull it back.

Mr. Legum: You may examine, Mr. Axson.

page 30 } CROSS EXAMINATION

Examined By Mr. Axson:
Q. Mr. Berry, you and Mr. George were on the public highway, is that true?
A. We were on #168.
Q. That is a public highway, is it not?
A. Yes, sir; and the filling station property.
Q. Sir?
A. We pulled up in there to get some gas.
Q. I say, you were on #168?
A. That is right.
Q. And you did have these guns in the truck?
A. That is right.
Q. And there were shells in the cylinders of the pistols and there were shells in the clip of the carbine?
A. There were shells in the clip.

Mr. Axson: That is all.
Mr. Legum: All right. Step down.

page 31 } O. B. ("PETE") WILSON, witness first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

Examined By Mr. Legum:
Q. Mr. Wilson, will you state your name, sir?
A. O. B. Wilson.
Q. Where do you live?
A. St. Brides.
Q. What is your occupation?
A. Well, farming.
Q. Now on this particular Sunday morning, April 15, 1967, were you expecting Mr. George and Mr. Berry?
A. Yes, sir.
Q. What were they going to do at your farm?
A. They were going to help my brother vaccinate some hogs, and his wife had called and said they were going to be directly down there; and it was about 2 or 3 or 4 hours before they ever come.
Q. Were they going to do anything else besides vaccinate hogs?
page 32 } A. As a rule, they usually target practice a lot of times when they come out.
Q. How long have they been target-practicing at your particular farm before this particular incident?
A. I would say 6 to 8 months.
Q. How many acres do you have?
A. I don't have too much because I live with my mother. The land actually belongs to my mother.
I reckon it is about two or three hundred acres.
Q. Two or three hundred acres?
A. Yes.
Q. Do you know the reputation in this community of these two defendants for truth?
Just answer the question yes or no.
A. Yes, sir.
Q. What is it? Is it good or bad?
A. It is good.

Mr. Legum: All right. You may examine.

Mr. Axson: I have no questions.
The Court: You may step down.

page 33 } DEWEY WINSTON GREEN, witness first having been duly sworn, was called to the witness stand and upon being examined, testified as follows:

DIRECT EXAMINATION

Examined By Mr. Legum:
Q. State your name, please.
A. Dewey Winston Green.
Q. Where do you live?
A. 502 Bethel Road.
Q. Is that Chesapeake?
A. Yes, sir.
Q. How old are you?
A. I am 24.
Q. What relation are you to Defendant Ben Berry?
A. Son-in-law.
Q. Son-in-law?
A. That is right.
Q. Now on this particular morning, were you in the truck with the two defendants?
A. Yes, sir.
Q. Now where were you all going if you all had not been stopped?
A. Well, we went to Jack's place. You know, page 34 } we had to change license.
Q. By Jack, you mean Jack George?
A. Yes, sir.
Q. Put the license on his truck. He didn't have enough gas to get all the way to the farm, so we went down to the filling station to get some gas, and went on down—

Mr. Axson: Your Honor, I am perfectly willing to stipulate that they were going down there to shoot and hunt.
I don't know what relevancy it would have on this case. None, as a matter of fact, but I am perfectly willing to stipulate that if it will save some time for the relevancy.

Mr. Legum:
Q. Were you arrested for any charges since you were in the truck?
A. No, sir.

J. H. George

Q. All right.

Mr. Legum: That is all I wish to say.

CROSS EXAMINATION

Examined By Mr. Axson:

Q. You were not carrying any loaded weapon, either, were you, Mr. Green?

page 35 } A. Nobody was, actually. Just in the truck. One was laying on the dash. Jack had one. And the other was in the gun rack. And as far as the shell ejecting out, I didn't see it. As far as I know, there wasn't nothing in it.

Mr. Legum: We rest, Your Honor.

The Court: I want to ask Mr. George a question.

Stand right where you are, Mr. George.

J. H. GEORGE

Q. I understood on your direct examination you said your arm was in a sling.

What was the trouble?

A. I had been shot that night.

Q. That night?

A. The same night, yes, sir.

Q. The same night that you had these loaded guns in your truck, you had been shot? Is that right?

A. Well, I had been shot at 12:30 that night, and we had made arrangements the following Sunday, we always made arrangements with Mr. Wilson the following Sunday that we were going to the farm and what work he

page 36 } wanted done down there, and we always target-practiced down there.

When I left Mr. Berry's house and came to my house, the guns were still laying in the truck.

They had been laying in the truck all night, with the exception of Mr. Berry's rifle.

And like Mr. Dewey stated, he took the license plates out of the shed, which was locked up.

I had my german shepherd dog in there. We turned him out. And he put the plates on the truck, and Mr. Berry, when we pulled up to the corner.

Q. I understand that. You testified to that before.

A. Yes, sir. He took it out of his car. I told him, I said, "Don't leave the rifle here. We are going to do some target-practice and you wanted to use the gun."

Q. Let me ask one other question. At the time you were carrying these loaded guns in the car, had the man who had shot you been arrested?

A. Yes, sir, he had been arrested the night be-
page 37 } fore.

The Court: Very well.

Anything else, Mr. Axson?

Mr. Axson: That is all we have, Your Honor.

Mr. Legum: We have no further evidence, Your Honor.

The Court: Either one of you care to have anything to say?

Mr. Axson: No, sir. I think they, by their own admission, had loaded firearms, certainly on public lands.

Mr. Legum: Your Honor has already ruled on public lands, so I will not enlarge on that.

Your Honor, neither of these people have ever been convicted of any crime.

They reside in the City of Chesapeake. They are decent people. They have testified that the firearms, that these guns were not loaded, but that is a conflict that Your Honor will have to resolve.

The officer says it was loaded.

If it was not loaded, then, of course, there has been no violation of the statute.

page 38 } Mr. Wilson testified that he was expecting these men there that morning, he has a two or three hundred-acre farm and "we have for the past 6 to 8 months have been target-practicing" at his farm, if Your Honor please.

And I would ask you, Your Honor, under the circumstances to dismiss the warrants so that there won't be any blemish on these men's records, if Your Honor please.

The Court: Well, I don't think there is any question.

I don't know what the military consensus is, but I don't think there is any question but that under the purview of this statute that these guns were loaded.

You drive up and down the highway with a clip in a gun that all you have got to do is pull a trigegr and it will fire, it seems to me it is loaded and ready for action.

Now there is one empty cylinder in the gun, but
page 39 } that might be, but even if you had to pull it twice

to make it fire, it still is loaded for this section of the statute, the intent of the statute.

And to carry a carbine that all you have to do is pull that bolt one time and it will fire, in the opinion of this Court, for the purpose and meaning of this staute, the gun is loaded.

Now the purpose of this staute is to keep people from carrying loaded firearms on public lands and up and down the streets, and these men were carrying—why, I don't know, why they would have all these guns in this truck. They say for the purpose of target practice.

Well, that may well be. That doesn't make them any less guilty under the statute, and the purpose of this statute further is to prevent people from carrying these weapons in public places and up and down the streets as a menace to the public.

We have had numbers of cases of shooting, and one of the gentlemen right here is one of them, where loaded firearms were carried up and down the street with the re-
page 40 } sults of people being injured and shot.

One person was killed, shot through a window and killed, one young, innocent girl, because of people carrying loaded firearms up and down the streets.

And this Court intends to enforce this statute to the best of its ability because it is its public duty to do so.

I find you both guilty as charged under this statute, and—

What is the punishment, Mr. Axson?

Mr. Axson: $250.00 was the fine in lower court.

The Court: —fine each of them $250.00 and costs.

Mr. Legum: Your Honor, may be have a stay of execution for 60 days to let us appeal to the Supreme Court of Appeals of Virginia?

I think it involves a question of law, and I would like for Your Honor to set the bonds. They are prepared to give bonds.

The Court: Very well, sir. Are they under bonds now?

page 41 } Mr. Legum: Yes, sir. How much, I don't know.

Mr. George: $750.00.

The Court: You are under sufficient bond.

Is your bondsman here, willing to give you bond?

Mr. George: Mr. Meiggs.

Mr. Axson: Your Honor, I move to confiscate the guns under this statute.

The Court: Wait a minute. Let me finish with this.

The present bond can be renewed and carried.

Is it necessary in your opinion to renew the bond, or stay on the same bond?

Mr. Axson: Same bond, I think is sufficient.

The Court: And motion for stay of execution for 60 days is granted.

The guns will be forfeited.

Mr. Axson: Thanks.

(12:30 P. M.)

page 42 } JUDGE'S CERTIFICATE

I, Major M. Hillard, Judge of the Circuit Court of the City of Chesapeake, Virginia, who presided over the foregoing trial in the case of City of Chesapeake v. Ben Berry and Jack H. George, tried in said court in the City of Chesapeake, Virginia, on the 21st day of July, 1967, do certify that the foregoing is a true and correct report of all the evidence, together with all motions, objections, and exceptions on the part of the respective parties, the action of the Court, all exhibits, and all other proceedings of said trial.

I do further certify that the exhibits offered in evidence, as described by the foregoing record, and designated as Commonwealth's Exhibits Nos. 1 through 4 are all the exhibits offered upon said trial and the originals thereof have been initialed by me for the purpose of identification.

I further certify that said transcript was presented to me for certification.

Given under my hand this 14 day of Sept., 1967.

MAJOR M. HILLARD, Judge

page 43 } CLERK'S CERTIFICATE

I, Charles B. Cross, Jr., Clerk of Circuit Court of the City of Chesapeake, Virginia, do hereby certify that the foregoing transcript of the testimony and other proceedings of the trial of the case of City of Chesapeake v. Ben Berry and Jack H. George, together with original exhibits, certified by the Judge of the said court was filed in my office on the 14th day of Sept., 1967.

CHARLE B. CROSS, JR. Clerk

H. T. GILLETTE, D.C.

* * * * *

Howard G. Turner, Clerk.

A Copy—Teste:

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