215 Va. 130

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

730897

KENNETH F. BAILEY

V.

COMMONWEALTH OF VIRGINIA

APPENDIX

Francis E. Clark
~~RICHARD E. BAILEY~~, for plaintiff in error

A. R. WOODROOF, Assistant Attorney General
(Andrew P. Miller, Attorney General) for
defendant in error

APPENDIX

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WARRANT OF ARREST

DOCKET NO. A 25438

STATE OF VIRGINIA)
) to-wit:
City of Franklin)

To the Sergeant or any Police Officer of said city to execute:

Whereas, Marvin S. Daughtrey of the said City, has this day made complaint and information on oath before me, Marvin S. Daughtrey, Dep. Cl. of the Civil and Police Court of the said City, that Kenneth F. Bailey in the said City did on the 20 day of Dec, 1969, unlawfully ~~Refuse to take a blood test~~ violate Sec. 17-78.1 (j) of the City Code in that he did fail or refuse to take a test to determine the alcoholic content of his blood

(amended before trial 1-26-70 RBC)

in violation of City Ordinance and against the peace and dignity of the Commonwealth of Virginia.

These Are, Therefore, To commond you, in the name of the Commonwealth, to apprehend and bring before the Civil and police Court of the said City, the body of the said Kenneth F. Bailey to answer the said complaint and to be further dealt with according to law. And you are also

directed to summon ~~Wendell-Pixley-Magnolia-St.-Franklin Va.-Dr.-W.-O.-Ward-High-St.-Franklin-Va.-G.-Bellinger-Rt-4 Box-289B-Suffolk-Va~~ , as witnesses.

Given under my hand and seal this 20 day of Dec, 1969.

s/Marvin S. Daughtrey, Dep. Cl. of the Civil and Police Court (Seal)

Note: When the case came on for trial in the Civil and Police Court of the City of Franklin, Virginia on October 9, 1972, the Court, on motion of the Commonwealth's Attorney and over the objection of the defendant, amended the warrant to charge a violation of Section 18.1-55.1 of the Code of Virginia whereas the original warrant as amended on January 26, 1970 charged a violation of Sec. 17-78.1 (j) of the City Code.

REFUSING PERMIT TO TAKE BLOOD SAMPLE

DECLARATION OF REFUSAL TO PERMIT
TAKING OF BLOOD SAMPLE

Section 18.1-55.1 of the Virginia Code provides that any person, whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-four, shall be deemed thereby to have agreed as a condition of such operation to consent to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if he is arrested for operating a motor vehicle while under the influence of intoxicants within two hours of the alleged offense. If the person arrested refuses to permit the taking of blood for such test, the arresting officer must take the person arrested before a committing magistrate. If the person arrested, after having been advised by the arresting officer that the law of Virginia requires a person accused of operating a motor vehicle while under the influence of intoxicants to permit a sample of his blood to be taken so that a test may be made of his blood to determine the alcholic content thereof and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a

motor vehicle upon the highways of this State, then refuses to permit the taking of blood for such test and does again so refuse upon being taken before a committing magistrate, and being further advised by such magistaate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia, or refuses or fails to so declare in writing and such fact is certified by the committing magistrate, then no blood sample shall be taken even though the person arrested may thereafter request the same. Conviction of the offense of unreasonably refusing to permit the taking of a blood sample will result in the suspension of the arrested person's license for a period of ninety days for the first offense, and six months for a second or subsequent offense or refusal within one year of the first or other such refusals.

> "Having read the above statement, and having been advised by the arresting officer and by the committing magistrate of the law requiring the taking of a blood sample and the penalty for refusal, I refuse to permit the taking of a blood sample and herewith make this declaration of refusal as prescribed by law."

/s/ Kenneth F. Bailey
Person From Whom Blood Sample
Is Sought

/s/ Sgt. Dick C. Poole
Witness

12-20-69
Date

WITNESS SUBPOENA

No._____

STATE OF VIRGINIA,

CITY OF FRANKLIN, to-wit:

(Rule 3A:15)

To the Chief of Police of the City of Franklin or any other Authorized Officer:

You are commanded to summon

Sgt. D. C. Poole (Name)	Police Dept. Franklin, Va. (Residing at)
_____ (Name)	_____ (Residing at)
_____ (Name)	_____ (Residing at)
_____ (Name)	_____ (Residing at)
_____ (Name)	_____ (Residing at)

to appear in the Civil and Police Court of the City of Franklin at its Municipal Building located at 207 West Second Avenue on _____, 19__ at _____ O'clock _m., to testify in the case of Commonwealth (City of Franklin) v. _____.

This subpoena is issued on application of the Common-

wealth (City of Franklin) (Defendant) in the case of Commonwealth (City of Franklin) v. _____

/s/ Elizabeth R. Saunders, Clerk
Judge, Clerk

ORDER - TRIAL - SENTENCE

COMMONWEALTH

VS. #130-1972; June 21, 1973

KENNETH F. BAILEY

This day came the Attorney for the Commonwealth and the defendant, in person and by his attorney, Richard E. Railey.

Whereupon, the attorney for the defendant moved the Court to quash the warrant on grounds assigned which motion the Court overruled and to which ruling of the Court the defendant, by his attorney, excepted.

Whereupon, the accused was arraigned and pleaded NOT GUILTY to Violating Section 18.1-55.1 of the Code of Virginia in that he did fail or refuse to take a test to determine the alcoholic content of his blood as charged in the warrant.

And after being advised by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury, and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without a jury and having heard the evidence of the Common-

wealth, the attorney for the defendant moved the Court to strike the Commonwealth's evidence, which motion was overruled and exception was noted; at the conclusion of all the evidence, the attorney for the defendant renewed his motion to strike the Commonwealth's evidence, which motion was overruled and exception was noted. And having heard argument of counsel, the Court doth find the accused GUILTY of Refusing to take a blood test, as charged in the warrant.

The Court doth ADJUDGE and ORDER that the defendant's motor vehicle operator's permit is revoked for NINETY (90) DAYS, and that the Commonwealth recover its costs in the amount of $30.50.

On motion of the attorney for the defendant, execution of the sentence is suspended for 30 days to allow the defendant to perfect an appeal. If the defendant's operator's license is not surrendered or the appeal perfected within 30 days, the Clerk of this Court is ordered to issue a capias for the defendant.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO THE HONORABLE B. A. WILLIAMS, JR., CLERK OF THE CIRCUIT COURT OF SOUTHAMPTON COUNTY:

Counsel for Kenneth F. Bailey, the defendant in the above styled case in the Circuit Court of Southampton County, Virginia, hereby gives notice of appeal from the order entered in this case on June 21, 1973, and sets forth the following assignments of error:

1. The Court erred in overruling defendant's motion to quash the warrant in this case, it being defendant's contentions that the warrant should have been quashed on the following grounds: (a) The warrant was issued by Marvin S. Daughtrey, Deputy Clerk of the Civil and Police Court of the City of Franklin, Virgimia, on the complaint of Marvin S. Daughtrey, one and the same person; and (b) There is no authority for a deputy clerk to issue a warrant such as the one in question, the Code specifically providing that such warrant shall be issued by the committing or issuing justice, clerk or assistant clerk; and (c) Said warrant, which was issued on December 20, 1969 charging a violation of the Code of the City of Franklin, Virginia, was amended by the Judge of the Civil and Police Court of the City of Franklin, Virginia, on October 9, 1972 to

charge a violation of the Code of Virginia, such amendment being made more than one year after the warrant was issued.

2. The Court erred in overruling defendant's motion to strike the evidence at the conclusion of the Commonwealth's evidence which evidence established that on the advice of counsel the defendant refused to take the blood test.

3. The Court erred in overruling defendant's motion to strike the evidence at the conclusion of all the evidence.

4. The Court erred in entering judgment against the defendant.

In accordance with the provisions of Rule 5:6 of the Rules of Court, defendant states that he intends that a transcript or statement of facts, testimony or other incidents of the case, the latter to be prepared by him, be hereafter filed.

Given under my hand this 20th day of July, 1973:

/s/ Richard E. Railey
Counsel for Kenneth F. Bailey

Richard E. Railey
Attorney at Law
Courtland, Virginia 23837

CERTIFICATE

I hereby certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, Virginia, Boykins, Virginia 23827, this 20th day of July, 1973.

/s/ Richard E. Railey

WRITTEN STATEMENT OF FACTS, TESTIMONY OR OTHER INCIDENTS OF TRIAL, HEARD ON JUNE 21, 1973

STATEMENT OF FACTS, TESTIMONY
AND OTHER INCIDENTS OF THE CASE

Defendant submits the following as a narrative report of the testimony, together with the motions, objections and exceptions on the part of the respective parties, the action of the Court with respect thereto, and all other incidents of the trial of the case of the Commonwealth of Virginia vs. Kenneth F. Bailey, heard in the Circuit Court of Southampton County, Virginia, on the 21st day of June, 1973, before The Honorable George F. Whitley, Jr., Judge, without a jury, Mr. Richard C. Grizzard, Commonwealth's Attorney of Southampton County, for the Commonwealth; and Mr. Richard E. Railey for the defendant.

ARREST, CHARGE, BOND

Kenneth F. Bailey was arrested in the City of Franklin, Virginia, on December 20, 1969 by Sgt. Dick C. Poole of the Franklin Police Department, charged with driving under the influence and refusal to take a blood test, and bonded for his appearance in the Civil and Police Court of the City of Franklin, Virginia. This case involves only the charge of refusal to take a blood test, the charge of

driving under the influence having been disposed of in the Circuit Court of Southampton County, Virginia, on October 5, 1972.

TRIAL IN THE CIVIL AND POLICE COURT
IN THE CITY OF FRANKLIN, VIRGINIA,
APPEAL

The case came on for trial in the Civil and Police Court of the City of Franklin, Virginia on October 9, 1972, subsequent to the defendant's trial for driving under the influence. On motion of the Commonwealth's Attorney, and over the objection of the defendant, the Court amended the warrant to charge a violation of the Code of Virginia whereas the warrant as originally issued charged a violation of the Code of the City of Franklin, Virginia; earlier, on January 26, 1970, the Court had amended the warrant from its original charge of "refuse to take a blood test" to "violate Sec. 17-78.1 (j) of the City Code in that he did fail or refuse to take a test to determine the alcoholic content of his blood."

The defendant objected to the Commonwealth's motion to amend because such amendment came more than one year after the date of the alleged offense and the statute of limitations for misdemeanors is one year, it being the contention of the defendant that the Commonwealth was not

asking for the warrant to be amended but in effect was asking for a new warrant, the original warrant being fatally defective because the ordinance of the City of Franklin was invalid on December 20, 1969 in that it provided for a lesser punishment than that prescribed by general law for a similar offense, contrary to the expressed provisions of Section 15.1-132 of the Code of Virginia.

After the warrant was amended and the defendant excepted thereto, defendant pleaded not guilty and then moved to quash the warrant on the grounds that (1) it was issued by Marvin S. Daughtrey, Deputy Clerk of the Civil and Police Court of the City of Franklin, Virginia, on the complaint of Marvin S. Daughtrey, one and the same person; and (2) there is no authority for a deputy clerk to issue a warrant such as the one in question, Section 18.1-55.1 (j) of the Code of Virginia specifically providing that such warrant shall be issued by the committing or issuing justice, clerk or assistant clerk. The Court overruled defendant's motion to quash, and the defendant excepted.

At the conclusion of the Commonwealth's evidence, defendant moved to strike the evidence; after hearing argument on the motion, the Court overruled the motion, and the defendant excepted. The defendant offered no evidence

and renewed his motion to strike which motion the Court overruled and defendant excepted. The Court found defendant guilty as charged in the warrant as amended; he appealed the judgment of conviction and his bond was continued.

TRIAL IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

When the case came on for trial in the Circuit Court of Southampton County, Virginia, on June 21, 1973 on appeal from the Civil and Police Court of the City of Franklin, Virginia, defendant moved to quash the warrant on the following grounds: (a) The warrant was issued by Marvin S. Daughtrey, Deputy Clerk of the Civil and Police Court of the City of Franklin, Virginia, on the complaint of Marvin S. Daughtrey, one and the same person; (b) There is no authority for a deputy clerk to issue a warrant such as the one in question, the Code specifically providing that such warrant shall be issued by the committing or issuing justice, clerk or assistant clerk; and (c) Said warrant, which was issued on December 20, 1969 charging a violation of the Code of the City of Franklin, Virginia, was amended by the Judge of the Civil and Police Court of the City of Franklin, Virginia, on October 9, 1972 to charge a violation of the Code of Virginia, such amendment

being made more than one year after the warrant was issued.

The Court overruled the motion and the defendant excepted.

EVIDENCE FOR THE COMMONWEALTH

Sgt. Dick C. Poole of the Police Department of the City of Franklin, Virginia, testified that he first saw the defendant at 11:50 P.M. on December 19, 1969 at the scene of an accident at the railroad crossing on High Street in the City of Franklin, Virginia; that the defendant and a girl in his automobile were taken by an ambulance to the Emergency Room of the Southampton Memorial Hospital; that at the Emergency Room, he told defendant what he was charged with, and advised him of the law requiring the taking of a blood sample and the penalty for refusal; that after his release from treatment in the Emergency Room, defendant said he would submit to the taking of a sample of his blood, and the nurse prepared him for same; that before the sample was taken, defendant's brother came in and talked with defendant; defendant then told Sgt. Poole and the nurse to wait for his brother to get back, that he had gone to call his lawyer, this being some time after midnight on December 20, 1969; that defendant's brother came back in a matter of two or

three minutes and told defendant that his lawyer said for him not to take the test; that they then went back to the fire station where a warrant was issued for defendant's refusal to take a blood test after Marvin S. Daughtrey, Deputy Clerk of the Civil and Police Court of the City of Franklin, Virginia, further advised defendant of the law requiring a blood test to be taken and the penalty for refusal, and he was released on bond; that defendant seemed to understand the law requiring the taking of a blood sample and the penalty for unreasonable refusal; and that all this occurred within an hour to an hour and one-half from the time Sgt. Poole first saw defendant at the scene of the accident.

MOTION TO STRIKE

At the conclusion of Sgt. Poole's evidence, the Commonwealth rested and defendant moved to strike the evidence and dismiss the charge on the grounds of his earlier motion to quash and the further ground that the evidence established that on the advice of counsel the defendant refused to take the blood test. On this latter point, defendant cited the opinion of Attorney-General Button, and Deaner v. Commonwealth, 210 Va. 285.

The Court overruled defendant's motion to strike the evidence, and defendant excepted. Defendant rested and renewed his motion to strike which the Court overruled and defendant excepted.

VERDICT AND JUDGMENT

The Court found the defendant guilty of refusing to take the test to determine the alcoholic content of his blood, and suspended his operator's license for 90 days. On defendant's motion, the Court suspended execution of the sentence for thirty days to permit defendant to consider an appeal to the Supreme Court of Virginia.

CERTIFICATION

We, Richard C. Grizzard, Commonwealth's Attorney for Southampton County, and Richad E. Railey, Counsel for Kenneth F. Bailey, do certify that the foregoing is an accurate statement of the facts, testimony and other incidents of the trial of the case of the Commonwealth of Virginia v. Kenneth F. Bailey, and that the original thereof, duly authenticated by the Judge who presided over the trial of said case, was lodged and filed with the Clerk of the Circuit Court of Southampton County, Virginia, on the 7th day of September, 1973.

/s/ Richard C. Grizzard
Commonwealth's Attorney

/s/ Richard E. Railey
Counsel for Kenneth F. Bailey

I, B. A. Williams, Jr., Clerk of the Circuit Court of Southampton County, do certify that the foregoing is an accurate statement of the facts, testimony and other incidents of the trial of the case of the Commonwealth of Virginia v. Kenneth F. Bailey, and that the original thereof, duly authenticated by the Judge who presided over the trial of said case, was lodged and filed with the Clerk of the Circuit Court of Southampton County, Virginia, on the 7th day of September, 1973.

/s/ B. A. Williams, Jr.
Clerk of the Circuit Court of
Southampton County, Virginia

I, George F. Whitley, Jr., Judge of the Circuit Court of Southampton County, Virginia, who presided over the trial of the case of the Commonwealth of Virginia v. Kenneth F. Bailey, in said Court, do certify that the foregoing is an accurate statement of the facts, testimony and other incidents of the trial of said case.

I further certify that a copy of said written state-

ment was mailed by Richard E. Railey, Counsel for Kenneth F. Bailey, to the Honorable Richard C. Grizzard, Commonwealth's Attorney for Southampton County, within sixty days after entry of final judgment, together with notice that the statement would be presented to me no earlier than ten days nor later than twenty days after such notice.

Given under my hand this 7th day of September, 1973.

/s/ George F. Whitley, Jr.
Judge of the Circuit Court of
Southampton County, Virginia