215 Vo. 243
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SUPREME COURT OF VIRGIN
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 731080

WILLIAM LEWIS STROUPE,
Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA,
Defendant in Error.

APPENDIX

COMMONWEALTH'S EXHIBIT NO. 1

CERTIFICATE OF BREATH ALCOHOL ANALYSIS

April 22, 1973

Name of Accused: William Lewis Stroup

Address: Route 1 Meadowview, Va.

Name of Court: Smyth County Court

Address: Marion, Va. 24354

Analysis Conducted By: D. E. Garrett

Health Department License No.: 72120091

License Expires: April 30, 1974

Date Test Conducted: April 22, 1973

Time Sample Was Taken: 1:37 AM

Test Equipment Instrument No. 1120514 was tested for its accuracy by State Health Commissioner's Office on 12-13-72 and found to be accurate.

Results:
Blood Alcohol Content 0.11% by weight by volume.

Attest:

I certify that the above is an accurate record of the test conducted; that the test was conducted in accordance with the manufacturer's specifications, and that the equipment on which the breath test was conducted has been tested within the past six months and found to be accurate. Given under my hand this 23th. day of April, 1973.

/s/D. E. Garrett
Breath Test Operator
72120091
License Number

State Of Virginia, County or City of Smyth
Subscribed and sworn to before me this 23 day of April, 1973.

/s/ Roy N. Davis Notary Public
My Commission Expires May 15, 1976

The Court instructs the Jury that the law of this state provides that in a prosecution for a violation of the law prohibiting operating a motor vehicle while under the influence of alcohol or other self-administered drugs, the amount of alcohol in the blood of the accused at the time of the alleged offense as indicated by a chemical analysis of the accused's blood or breath shall give rise to the following presumptions:

(1) If there was at that time 0.05 percent or less by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was not under the influence of alcoholic intoxicants;

(2) If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight by volume of alcohol in the accused's blood, such facts shall not give rise to any presumption that the accused was or was not under the influence of alcoholic intoxicants, but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused;

(3) If there was at that time 0.10 percent or more by weight by volume of alcohol in the accused's blood, it shall be presumed that the accused was under the influence of alcoholic intoxicants.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS IN THE CIRCUIT COURT OF SMYTH COUNTY, VIRGINIA, OF SEPTEMBER 5, 1973

Testimony of Trooper J. L. Archer

[1] * * *

Direct Examination by Robert I. Asbury, Attorney for the Commonwealth:

Q. Please state your name, please sir. A. Trooper J. L. Archer.

Q. And were you the arresting officer in this case? A. Yes sir, I was.

Q. Just go ahead and testify, please. A. Your Honor, on the 21st day of April, at approximately 11:50 P.M., Saturday night, I noticed a '73 Oldsmobile going West on U.S. Route #11, leaving town, and at this time I was—

Q. —Which town? A. Town of Marion. At this time, I was situated at the parking lot of Jennings and Warren. The vehicle passed

a line of cars on the right hand side. I attempted to get out behind the vehicle, but before I could get out the vehicle had gained some distance on the—on me, and I observed the vehicle on #81. I got behind the vehicle on #81; I noticed the vehicle was travelling at a pretty high rate of speed.

J. Johnson: Your Honor, I object—

The Court: Well, if you can estimate the speed, Trooper, you may.

[2] A. I noticed the vehicle travelling West on #81; the vehicle came up on a car in the right hand lane—skidded the brakes before driving to the left hand lane to pass—it ran up behind a vehicle in the left hand lane, skidded—he again hit his brakes—pulled back into the right hand lane of traffic and passed on the right. He continued West and came up behind a tractor-trailer. At this time, he hit his brakes again and swerved back into the left lane; passed the tractor-trailer and trucks immediately in front of the tractor-trailer. At this time, I pulled the vehicle over and found it to be operated by William Lewis Stroupe. I noticed he had a heavy odor of alcohol about his person. His eyes were red and blood-shot; his walk was unsteady. I informed Mr. Stroupe that he would be arrested for driving under the influence. I then explained his rights as I brought him in.

Q. Is this in Smyth County, Virginia, where you observed this operation? A. Yes sir, it was.

Q. Was anyone else in the car with him? A. With me?

Q. With him? [3] A. No sir.

Q. Trooper Archer, what time did you arrest him? A. Approximately 11:55.

Q. After you placed him under arrest, where did you take him to? A. Smyth County Jail.

Q. And, what occurred at the Smyth County Jail? A. At this time, Mr. Stroupe was given a breath alcohol test.

Q. And, who administered this test? A. Trooper B. E. Garrett

Q. And, after he administered the test, did he thereafter execute a certificate which has been filed with the papers here? A. Yes, he did.

Q. And do you have this certificate in your hand? A. Yes.

Q. Show it to Mr. Johnson, Please. What were the test results, according to the certificate?

J. Johnson: Your Honor, if it please the Court, we object to the introduction of this test because there is no proof that the calibration of the breathalizer machine was accurate. There is no evidence to show that the breathalizer machine was properly operating [4] and that there is no evidence that the breath test was properly administered and that the results are accurate.

The Court: Overruled.

Trooper Archer: The results was 0.11.

Asbury: This certificate is offered as Commonwealth's Exhibit #1.

J. Johnson: We object to the introduction of this test because there is no proof that the calibration of the machine was accurate; there is no evidence to show that the machine was operating properly and there is no evidence that the breath test was properly administered and that the results are accurate, and there is nothing to indicate that the person who gave the breath test was an authorized individual to administer this test.

The Court: Alright, your exceptions will be noted. Mr. Asbury, the certificate will be so marked.

[5] * * *

Cross Examination by Joseph P. Johnson, Jr.:

[9] * * *

Q. Then, you placed him under arrest and brought him on—now, what happened between the time you brought him to jail and the breath test? A. A man was called out of bed—one of the Troopers was called out of bed. Trooper Garrett.

Q. Okay, now, when he arrived what did he do? A. He observed the subject for approximately 20 minutes. Then he came in and gave him the breath test.

Q. Trooper Garrett was not there when you arrived? A. No, he wasn't.

Q. I'll ask you whether or not he administered this breath test to another subject prior to the one who is on trial today? A. He could have.

Q. Could you answer "yes" or "no." A. Mr. Johnson, if I knew I'd—that's what I'd do.

Q. Well, you were there—can you tell the jury whether or not Mr. Garrett administered [10] this breathalizer test to another gentleman prior to administering it to this defendant? A. As I say—he could have.

Q. Well—sir—could you answer "yes" or "no?"

The Court: Well, if he doesn't know, Mr. Johnson, he can't answer "yes" or "no." Trooper, do you know?

A. No. sir.

J. Johnson: Well, sir, you don't know much about what Trooper Garrett did in preparation for this breathalizer test, do you? A. No, sir.

Q. You don't know whether or not the machine was properly set up or not. A. I know nothing about the machine.

Q. Well, did you observe what he did with the defendant—or what he required the defendant to do? A. I observed him, but I didn't understand what he was doing.

[11] * * *

J. Johnson: We move the Court to dismiss the charges against the defendant because the Commonwealth has not borne the burden of proving that the breathalizer test was properly administered as required by law.

The Court: Motion overruled.

The next witness, having first been duly sworn, testified as follows:

Testimony of William Lewis Stroupe

Direct Examination by Joseph P. Johnson, Jr.:

Q. State your name, please. A. William Lewis Stroupe.

[13] * * *

Q. And, when Mr. Archer arrived at your car, what occurred? A. He asked me, "May I see your license?" And, I showed him that. And he says, "Well, how much have you had to drink?" and I told him I had had five beers to drink. And he says: "Well, get out and walk the line for me, won't you, please," and I got out and walked, and then he called me back in and said: "Get in back here," and he said: "I'm going to place you under arrest for driving under the influence and reckless driving. And then they give me a breathalizer test, [14] or drunk test or whatever it is, and then we set there for seven or eight minutes and he said: "Well, how about getting out again," so I got out again and walked in front of his car this time—on down—I guess about 25 feet—and then I come back. When I got back in the car, I heard him talking to the other guy and I never did understand what he was a-saying—I didn't pay no attention to him too much—he said something about something and then he said he was a-going to place me under arrest for—and that he was going to take me in.

Q. When he placed you under arrest, was that after you had already walked the two times? A. Yes sir. I'd done walked the line two times.

Q. And then, he brought you on to jail? A. Yes sir.

Q. And, what happened when you got to jail? A. Well, they brought me into the jail house, and they filled out some papers and got my license out, and there was another guy in there—and they had him for driving under the influence—I believe—I understand he was from Tennessee—and it wasn't—I'd say—ten minutes until the guy come in and give the breathalizer test. And then, we set there for about—it seemed to me like [15] a hour before he ever give us a breath test.

Q. What do you mean "Gave us a breath test?" A. He gave another guy right in front of me—took us both back there and Mr. Archer was back there, and there was a Deputy Sheriff back there, and all three of them—Archer and the Deputy Sheriff was a-setting on a table and they took the other guy and give him the test and they give me one right behind him.

Q. And, how much time would you say there was between the test they gave the other gentleman and the one they gave to you? A. Well, everybody got up and he just walked out and he took me on in.

Q. Did he change any filters? A. No.

Q. Did he change the mouth-piece? A. Not while I was there, he didn't.

Q. Had you been smoking there—from the time you were arrested until the time you took the breathalizer test? A. Yes sir—approximately—

Q. Approximately how many cigarettes? A. Oh, I would say three-four.

Q. You may ask.

[18] * * *

The Court: On the record. Commonwealth tendered Instruction #1, #2, and #3.

J. Johnson: I have no objection—other than the general objection to strike the evidence of the Commonwealth, and we so move at this time, for the reasons heretofore stated.

The Court: They will be granted. The Defendant tendered Instructions #A and #B—any objections, Mr. Asbury?

R. Asbury: I haven't seen it, Judge, I'll—

The Court: #A and #B are granted—

J. Johnson: On the motion to strike—

The Court: I thought I ruled on that in the beginning.

[19] J. Johnson: Yes, sir, but I again make the motion.

The Court: The ruling will be the same.

* * *

(Thereupon the jury retired to their room to consider of their verdict and after some time returned into the open courtroom and presented their verdict in the following words, to-wit:) "We the Jury find

the Defendant guilty as charged and fix his punishment by a fine of $200.00 and confinement of 30 days in jail. Signed: Stuart Frye, Foreman."

The Court: That is your verdict, ladies and gentlemen?

[20] * * *

The Court: I hereby sentence you to forfeiture of fine of $200.00 and costs to the Commonwealth, and that you serve 30 days in jail.

* * *

(Thereupon, Counsel for the Defendant moved The Court to suspend execution of the aforesaid sentence; to allow the Defendant to apply to the Supreme Court for a Writ of Error. Such motion is granted on the condition the Defendant post additional $200.00 cash bond in addition to the $300.00 bond previously posted by Defendant; said bond having been executed, the Defendant is allowed to depart.

* * *