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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. ~~740940~~ 740490

CHARLES WILLIAM WHORLEY,
Plaintiff in error

v.

COMMONWEALTH OF VIRGINIA,
Defendant in error

APPENDIX

F. Guthrie Gordon, III
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Charlottesville, VA 22903

Paul Whitehead, Jr.
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VIRGINIA:

IN THE CIRCUIT COURT OF BEDFORD COUNTY

COMMONWEALTH OF VIRGINIA

vs. X ORDER

CHARLES WILLIAM WHORLEY
Route #1
Big Island, Virginia

This matter came on this day to be heard pursuant to information filed against Charles William Whorley pursuant to Section 46.1-387.4 of the Code of Virginia of 1950, as amended, and pursuant to show cause order issued by this Court requiring the appearance of the said Charles William Whorley before the Judge of the Circuit Court for Bedford County in the Circuit Court Courtroom at the Bedford County Courthouse, Bedford, Virginia, on 4 November 1970, at 9:30 a.m. and requiring that he show cause why he should not be found an "habitual offender" and barred from operating a motor vehicle on the highways of the Commonwealth of Virginia, after personal service of said order upon the said Charles William Whorley, along with a certified transcript or abstract of Charles William Whorley's driving record.

The said Charles William Whorley having personally appeared and having failed to show cause why he should not be deemed an "habitual offender" the Court, after reviewing the certified transcript or abstract of Charles William Whorley doth, therefore, ADJUDGE, ORDER and DECREE that the said Charles William Whorley comes within the definition of an "habitual offender" as defined in Section 46.1-387.2 of the

Code of Virginia, this Court finds that the said Charles William Whorley is an "habitual offender" and orders that he not operate a motor vehicle on the highways of the Commonwealth of Virginia for a period of ten (10) years from the date of this order, pursuant to Section 46.1-387.6 of the Code of Virginia. It is further ordered that the said Charles William Whorley surrender to the Court all licenses or permits to operate a motor vehicle on the highways of this State. The said Charles William Whorley is advised that the law requires that no license to operate motor vehicles in Virginia may be issued to a person declared to be an "habitual offender" for a period of ten years from the date of the order which declares him to be an "habitual offender" and until his privilege to operate a motor vehicle has been restored by order of a court of record. Any person who is convicted of operating a motor vehicle in this State while the court order prohibiting such operation remains in effect may be punished by confinement in the penitentiary not less than one, nor more than five years. At the expiration of a period of ten years from the date of this order, the said Charles William Whorley may petition this Court or any court of record in Virginia having criminal jurisdiction in the political subdivision in which he then resides, for restoration of his privilege to operate a motor vehicle in the State, which privilege may, in the discretion of the Court, and for good cause shown, be restored, subject to such terms and conditions as the court may prescribe, and subject to other provisions of law relating

to the issuance of operators' or chauffeurs' licenses.

I hereby certify that a copy of this decree was this day delivered to the defendant, Charles William Whorley.

Dated: 11/4/70

Entered: /s/ William W. Sweeney, Judge

I request the entry of this Order:

/s/
Harry W. Garrett, Jr.
Harry W. Garrett, Jr., Commonwealth's Attorney for Bedford County

VIRGINIA: IN THE OFFICE OF THE DIVISION OF MOTOR VEHICLES AT RICHMOND

I, W. H. BRILLHEART, Director of the Bureau of Safety Responsibility, of the Division of Motor Vehicles, Commonwealth of Virginia, being duly designated by the Commissioner for the purpose of attesting and certifying pursuant to the provisions of Section 46.1-34.1 of the Code of Virginia (1950), as amended, (Chapter 368, Acts of Assembly, 1962), do hereby certify as required by Section 46.1-387.3 of the Code of Virginia (1950), as amended, Chapter 476, Acts of Assembly, 1968), that the attached are true copies of:

> Abstract of Conviction received from the Bedford Co. Court of the Town of Bedford, certifying that Charles William Whorley, Big Island, Va., was convicted in that court on June 12, 1964, of "reckless driving," and that his operating privilege was suspended by that court for a period of six months.
>
> Uniform Traffic Ticket received from the State of North Carolina, certifying that Charles William Whorley, Big Island, Va., was convicted in that State on December 29, 1965, of "By speeding 85 MPH in a 65 MPH zone.
>
> Abstract of Conviction received from the Bedford Co. Court of Bedford Co., certifying that Charles William Whorley, Rt. 1, Big Island, Va., was convicted in that court on January 16, 1968, of "drunk driving."
>
> Order of Revocation and Suspension dated March 5, 1968, issued against Charles William Whorley, Rt. 1, Big Island, Va., as result of his conviction of DRIVING WHILE INTOXICATED on January 16, 1968.

Abstract of Conviction received from the Municipal Court of Lynchburg, certifying that Charles William Whorley, Rt. 1, Box 48, Spring Lake, N.C., was convicted in that court on April 3, 1968, of "Reckless driving."

Abstract of Conviction received from the Municipal Court of Lynchburg, certifying that Charles William Whorley, Rt. 1, Box 48, Spring Lake, North Carolina, was convicted in that court on April 3, 1968, of "Drive during revocation."

Order of Revocation and Suspension dated May 10, 1968, issued against Charles William Whorley, Route 1, Box 48, Spring Lake, North Carolina, as result of his conviction of operating after license revoked on April 3, 1968.

Abstract of Conviction received from the Bedford Co. Court of Bedford County, certifying that Charles William Whorley, Rt. 1, Wigginton Rd., Lynchburg, Va., was convicted in that court on June 10, 1969, of "reckless driving."

Abstract of Conviction received from the Co. Court of Bedford County, certifying that Charles William Whorley, Rt. 1, Big Island, Va., was convicted in that court on July 22, 1969, of "illegal equipment (only)."

Abstract of Conviction received from the Bedford Co. Court of Bedford County, certifying that Charles William Whorley, Rt. 1, Big Island, Va., was convicted in that court on September 26, 1969, of "Drive while under influence of intoxicants 2nd Off."

Order of Revocation and Suspension dated December 23, 1969, issued against Charles William Whorley, Rt. 1, Big Island, Va., as result of his convictions of DRIVING WHILE INTOXICATED on January 16, 1968, and Setpember 26, 1969.

the originals of which are on file and of record in this office.

GIVEN UNDER MY HAND and under the Seal of the Division of Motor Vehicles this 13th day of February, 1970.

/s/ W. H. Brillheart
Director of the Bureau of Safety Responsibility of the Division of Motor Vehicles of the Commonwealth of Virginia

COMMONWEALTH OF VIRGINIA

COUNTY OF CAMPBELL, to-wit:

IN THE CIRCUIT COURT OF CAMPBELL COUNTY, VIRGINIA

MARCH TERM, 1973

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Campbell, and now attending the said Court, upon their oaths present that on or about the 6th day of January, 1973, CHARLES WILLIAM WHORLEY while an "habitual offender", did unlawfully operate an automobile in Campbell County while the Order of the Circuit Court of Bedford County prohibiting such operation was in effect. Virginia Code Section 46.1-387.8.

THIS INDICTMENT found at the March Term, 1973 of the Circuit Court of Campbell County on the evidence of Trooper T. L. Powell, witness sworn and sent to the Jury by the Court.

misdemeanors?

COURT Well, let's go ahead and dispose of them the way they are here now.

HARVEY All right.

COURT Do you mean at the same time or do you mean do that first? Which do you mean?

HARVEY I thought we would go ahead and get rid of them first, but it really doesn't make any difference.

WHITEHEAD It doesn't make any difference, Your Honor.

COURT You can try them all together if you have the same officer. We can just take all the evidence together but I don't know how your evidence will run.

HARVEY Well, I think it all was the result of one accident--vehicle operation. All the evidence--

COURT So far as possible, let's put on the evidence in all of it at one time. If you think you need any evidence on the misdemeanor cases.

HARVEY All right.

HARVEY

Q All right, Officer Powell, you investigated this case against Mr. Whorley, did you not?

A Yes, sir.

Q All right. Just give us the results of your investigation.

POWELL This occurred on January 6, 1973. It was a Saturday at approximately 7:25 p.m. I was notified of a hit and run accident on the Old Forest Road in front of the Old Forest Road Baptist Church.

I arrived at the scene at approximately 7:35, eight tenths of a mile west of Lynchburg on Route 291 in Campbell County.

When I got to the scene, there was two vehicles, a '64 Cadillac, 4-door which had been operated by Nat Mason Brooks, a '64 Pontiac, 2-door belonging to Mary Wingfield Moore.

When I arrived at the scene, I took pictures of the two vehicles involved--

HARVEY You have seen these, haven't you?

WHITEHEAD Yes, I have seen them.

HARVEY I'll show the judge the pictures.

POWELL Here is the pictures of the Cadillac owned and operated by Nat Mason Brooks. This is looking west on Route 291 toward Bedford County. This is marks proceeding from the left side of the Brooks

vehicle up to the right front tire of the Moore vehicle. This is a picture of the Moore vehicle.

COURT All right.

POWELL Skid marks total 795' from the point of impact to where the Moore vehicle is resting in front of the Old Forest Road Baptist Church.

At this time when I arrived at the scene, I was met by a Mr. Fred Klages who was working at the time of the accident in the Old Forest Road Baptist Church and whose home is located directly across the street from the Old Forest Road Baptist Church.

He gave me a description of the man operating the Pontiac. I gave out a broadcast of a white male, short blond hair, weighing approximately 160 pounds, 5'8" or 9" with a yellow short-sleeved shirt.

At this time, Mr. Brooks made a statement. He stated that he was--he stated that "after leaving Fass Brothers Fish House on Old Forest Road, we were struck in the left rear by another car. I applied brakes and pulled to the right curb and stopped."

It was approximately $900 damage to the left rear fender bumper, trunk and frame of the Cadillac,

and approximately $700 damage done to the Moore vehicle. There was also another witness at the scene, a Vernon Martin who lives on Primrose Lane just a short distance away who was working on the churbh with Mr. Klages.

At approximately an hour after I arrived at the scene, I received word from Appomattox to go to Cindy's Truck Stop located on Route 29 south that Trooper Chumley had a subject there, Miss Mary Wingfield Moore, who stated she knew where the operator's vehicle was.

At this time, I met Miss Moore at Cindy's Truck Stop and proceeded over to Tanglewood Trailer Park, Lot 40 where I observed the Charles William Whorley who was asleep on a couch in the trailer.

I got him to the door and asked him if he had been involved in an accident. He was unsteady on his feet, and he had a strong odor of alcohol about him and his eyes were bloodshot.

At this time I asked him for his operator's license, and he stated that he did not have one that he was an habitual offender from Bedford County.

At this time, I advised him of his rights and placed him under arrest for driving--hit and run and reckless driving.

HARVEY What color was his shirt?

A When I got Mr. Whorley out of the trailer, he had been laying on the couch and he had no shirt on, but there was a short sleeved yellow shirt located on a chair next to the couch.

Q Did Fred Klages, is that what his name is, Fred Klages?

A Klages, K L A G E S.

Q Klages? Did he ever identify the defendant?

A Yes, sir, he did.

Q --as the driver?

A On January 16, 1973 after receiving certified copy from the Division of Motor Vehicles stating the subject was an habitual offender, I arrested Mr. Whorley and advised him again of his rights and carried him to Campbell County Jail in Rustburg.

Q This is a certified copy of the--

COURT Yes, sir.

WHITEHEAD Your Honor, there is no question about the fact that the Order has been entered declaring him an habitual offender--

HARVEY I would like to introduce--

WHITEHEAD --entered by you in Bedford County Circuit Court. For purposes of the record, I think I should

put on the defendant just to testify briefly.

COURT All right, but do you have any questions of this officer?

WHITEHEAD No, sir, but he is introducing that. I am not--I can't exactly agree to its admissability of it, although there is no question of the authenticity of it. I just have a question as to its underlying conviction of it without putting on evidence--

COURT All right, for the purposes of this trial, I am going to admit this to Commonwealth Exhibit #1.

All right, sir.

HARVEY That's all.

COURT Are there no further questions of the officer?

Step down, please, sir, Mr. Powell.

HARVEY Your Honor, we have a lot of other witnesses, but I think this establishes the case--

COURT You say there was an eye witness identification of this defendant?

A Yes, sir.

COURT All right.

A We have that witness here and--

WHITEHEAD Yes, sir, I don't think it is necessary to put on any more evidence. We--the only reason the

defendant is pleading "not guilty", is purely so the question will not be raised later on to cut off any rights he might have had by having plead guilty here.

COURT All right.

WHITEHEAD There is abundant evidence.

COURT All right, thank you, Mr. Powell. Any further evidence for the Commonwealth?

A No, sir.

COURT Do you have any evidence that you want to put on, Mr. Whitehead?

A I think I had better put on very briefly about this underlying conviction.

COURT All right.

WHITEHEAD Just take the stand, Mr. Whorley.

COURT All right.

CLERK Do you solemnly swear that the evidence you give the Court in the case now before the Court to be the truth, the whole truth and nothing but the truth, so help you God?

A I do.

CLERK Have a seat please.

WHITEHEAD

Q What is your full name, sir?

A Charles William Whorley.

Q Now I understand you are declared an habitual offender by the Circuit Court of Bedford County in 1969 or 1970?

A I am not sure, I think it was 1970.

Q O. K. Now--

COURT It was November 4, 1970.

Q Now was the--I will show to you an abstract of your convictions. I will ask you if that is the abstract of your convictions upon which the Order was entered declaring you an habitual offender?

A Yes, sir.

Q I would like to introduce this as defendant's exhibit #1. Do you have any objections, Mr. Harvey?

A No.

COURT All right, defendant's exhibit #1.

Q Now the last conviction listed is for driving under the influence of intoxicants, second offense where you were conticted in the Municipal Court of the City of Lynchburg, Virginia on September 26, 1969.

A Yes, sir.

Q Were you convicted that day?

A Yes, sir.

Q And what punishment, if any, did you receive?

A It was $200 fine. I am not sure about the cost, but a $200 fine and give me 30 days in jail, suspended my driving license for three years.

Q All right. Did you actually serve a jail sentence?

A Yes, sir.

Q Did you have an attorney?

A No, sir.

Q Did you have any funds to employ an attorney?

A No, sir.

Q That is the only questions I have.

COURT Any questions of the Commonwealth?

HARVEY No.

COURT All right, you may step down.

HARVEY Your Honor, there are several witnesses who have been summonsed to this trial. At this time, Your Honor, they can be dismissed if you do not want them.

COURT Let me finish this case.

HARVEY All right.

TWENTY-FOURTH JUDICIAL CIRCUIT

OF VIRGINIA

COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND WAYNESBORO
AND COUNTIES OF AMHERST, BEDFORD, CAMPBELL AND NELSON

December 13, 1973

RETROACTIVITY OF ARGERSINGER v. HAMLIN

Several cases are before me in the Circuit Courts of Campbell and Bedford Counties concerning the retroactive application of Argersinger v. Hamlin, 407 U.S.25 (1972). In most cases, the question was raised where one or more convictions in the lower court which made the Habitual Offender Statute operative were uncounseled trials. I have delayed entering final judgments in such cases in order that I might study the applicable state and federal decisions. I have now studied such decisions and I believe that Argersinger should not be applied retroactively in the cases before me. Therefore, final judgments will be entered as of the opening day of the January, 1974, term in each case.

My authorities for so ruling are as follows:

1. Potts v. Superintendent, 213 Va. 432 (1972)
2. Marston v. Oliver, ___F. 2d ___
   Fourth Circuit, October 9, 1973.
3. Ferguson v. Gathright, ___F. 2d___
   Fourth Circuit, October 8, 1973.

The recently decided United States Supreme Court per curiam case of Berry v. City of Cincinnati, (__U.S.___ Docket Number 73-5245) is not in point. That case involved a defendant who was actually serving time as the result of an uncounseled misdemeanor conviction when Argersinger was decided. A defendant may not collaterally attack the validity of misdemeanor convictions for lack of counsel where such convictions are final and where there have been intervening proceedings such as an Habitual Offender Determination.

/s/ William W. Sweeney
William W. Sweeney, Judge
Twenty-Fourth Judicial Circuit

VIRGINIA: In the Circuit Court for the County of Campbell on Friday the 25th day of January, 1974.

COMMONWEALTH OF VIRGINIA

Vs. # 2123-B

UPON AN INDICTMENT FOR HABITUAL OFFENDER VIOLATOR

CHARLES WILLIAM WHORLEY (age 24 Yrs.)

This day came again the Attorney for the Commonwealth and Charles William Whorley who stands convicted of a felony, to-wit: Habitual offender violator, appeared in Court according to the condition of his recognizance, accompanied by his counsel, Paul Whitehead, Jr.

On April 16, 1973, upon the defendant's plea of not guilty to the indictment and waiving of a jury trial, the Court proceeded to hear the evidence and determine the case as provided by law. And after hearing said evidence the Court found the accused guilty of being an habitual offender violator as charged in the indictment, took the matter under advisement and withheld sentencing at that time. Now the Court, after considering the evidence and all matters concerning this case, doth this day proceed to enter final judgment and doth ascertain the punishment of the accused to be one (1) year in the penitentiary.

And it being inquired of the accused, Charles William Whorley, if he desired to make a statement and if he desired to advance any reason why judgment should not now be pronounced against him, and nothing being offered or alleged in delay of judgment, it is ordered by the Court that the

said Charles William Whorley be confined in the penitentiary of this Commonwealth for a period of one (1) year, the period by the Court ascertained as aforesaid.

The Court certifies that the said Charles William Whorley was committed to the jail of this Court on January 16, 1973 and was bonded on January 16, 1973. The Court further certifies that the said Charles William Whorley had the advice of and was represented by able counsel of his own choosing, and that at all times during the trial of this case the accused was present.

The defendant, by counsel, having indicated his intentions to apply to the Supreme Court for a writ of error and supersedeas stay of execution is granted for a period of ninety (90) days,

And the Commonwealth is to recover of the defendant its costs by it in this behalf expended in the amount of $62.50.

Recorded In Common Law Book
No. 16, Page 475.

VIRGINIA:

IN THE CIRCUIT COURT OF CAMPBELL COUNTY

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

CHARLES WILLIAM WHORLEY,
Defendant

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Notice is hereby given, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, that Charles William Whorley, the defendant above mentioned, hereby appeals to the Supreme Court of Virginia from the final judgment entered in this action on January 25, 1974.

The Transcript or statement of facts, testimony or other incidents of the case, will be filed in the office of the Clerk within the time prescribed by Rule 5:9 of the Rules of the Supreme Court of Virginia.

Pursuant to the aforesaid Rules, the aforesaid defendant makes this his assignments of error and alleges that the Court erred:

(1) In refusing to set the judgment aside as contrary to the law and the evidence;

(2) In refusing to set the judgment aside as there was not sufficient evidence so as to sustain a judgment;

(3) In entering up judgment against the defendant finding him guilty of being a habitual offender violator and fixing his punishment at one year in the penitentiary, as evidence was presented at this trial to show that the Order entered in the Circuit Court of Bedford County, Virginia on

November 4, 1970, declaring the defendant a habitual offender and ordering him not to operate a motor vehicle on the highways of the Commonwealth of Virginia for a period of ten years from the date of said Order was based in part upon a conviction of the defendant for driving under the influence of intoxicants, second offense, in the Municipal Court of the City of Lynchburg, Virginia, on September 26, 1969, wherein said defendant was not represented by counsel, was not advised of any right to counsel and did not waive his right to counsel, and was therein convicted and given a jail sentence of thirty days and fined $200.00 and therefore the defendant was denied counsel and therefore this conviction should be void under the decision handed down in the case of Argersinger v. Hamlin, 407 U.S. 25 (1972); said rule having been declared retroactive under the decision handed down by the United States Supreme Court on November 6, 1973, Berry v. City of Cincinnati, (____U.S.____Docket Number 73-5245), 42 L.W. 3268; therefore, the Order of the Circuit Court of Bedford County, Virginia declaring the defendant a habitual offender should be set aside since it was based upon an invalid conviction and the judgment of the Circuit Court of Campbell County, Virginia, entered on January 25, 1974, should be set aside.

Paul Whitehead Jr.

Paul Whitehead, Jr., Attorney at Law
Whitehead Building, 721 Court Street
Lynchburg, Virginia, Attorney for the
defendant, Charles William Whorley

PAUL WHITEHEAD, JR., p.d.
Whitehead Building
721 Court Street
Lynchburg, Virginia

I, Paul Whitehead, Jr., attorney of record for the defendant, hereby certify, pursuant to Rule 5:1, that a copy of the above Notice of Appeal and Assignment of Error has this 20th day of February, 1974, been mailed to E. Bruce Harvey, Esquire, Commonwealth Attorney for the County of Campbell, Rustburg, Virginia, opposing counsel of record.

/s/ Paul Whitehead Jr.
Paul Whitehead, Jr., Attorney
for the defendant