Refusing breath test

216 Va. 297

CLERK
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 741144

FRANKLIN R. WILLIAMS,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPENDIX TO BRIEF

Lawrence E. Blake
Counsel for Appellant
Route 106
Prince George, Virginia
23875

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COMMONWEALTH OF VIRGINIA
CITY OF PETERSBURG

V. MISDEMEANOR WARRANT

FRANKLIN R. WILLIAMS No. 15600

WHEREAS, Officer Flanagan has this day made complaint and information on oath, before me, the undersigned Clerk, Deputy Clerk or Magistrate of the Petersburg General District Court of said City, that Franklin R. Williams did on or about May 3, 1974 unlawfully in the City of Petersburg violate section 18.1-54.1 of the Code of the State of Virginia, to-wit: Refuse breath test to determine probable alcoholic contents of his blood after having been arrested for driving under the influence of alcoholic beverage or other self-administered drugs.

CLERK
5/3/74

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PETERSBURG,

JULY 30, 1974.

Commonwealth

v. Misdemeanor - Appeal from General District Court - Refusing Take Breath Test

Franklin R. Williams, Defendant

This day came the Attorney for the Commonwealth and the defendant, in person and by his attorney, William F. Binford, Jr.

Whereupon, the accused was arraigned and after consultation with his said attorney pleaded NOT GUILTY to refusing to take breath test, 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 and argument of counsel, doth find the accused GUILTY of refusing to take breath test, as charged in the warrant.

The Court doth ADJUDGE and ORDER that the defendant pay and the Commonwealth recover $28.00 costs. It is the further judgment of the Court that the defendant's motor vehicle operator's permit is revoked for ninety (90) days.

Whereupon attorney for the defendant moved the Court to set aside its judgment aforesaid, which motion was overruled.

The defendant is continued on bond until the further order of this court.

A Copy, Teste:

Ruth M. Bailey, Clerk

NOTICE OF APPEAL AND ASSIGNMENT
OF ERROR PURSUANT TO RULE OF COURT 5:6

TO: Ruth M. Bailey, Clerk
Petersburg Circuit Court

And

J. Thompson Wyatt, Commonwealth Attorney
Petersburg, Virginia

PLEASE TAKE NOTICE that the defendant, Franklin R. Williams, by counsel, hereby gives notice of appeal from the Order entered herein on July 30, 1974 and sets forth the following assignment of error:

The Court erred in overruling defendant's Motion to set aside the verdict of the Court as contrary to the law and the evidence.

Lawrence E. Blake
Franklin R. Williams, by counsel

Lawrence E. Blake
Route 106
Prince George, Virginia 23875

(53) THE CLERK: This warrant charges that Franklin R. Williams did on or about May the 3rd, 1974, unlawfully in the City of Petersburg violate Section 18.1-54.1 of the Code of the State of Virginia, to-wit, refuse breath test to determine probable alcoholic content of his blood after having been arrested for driving under the influence of alcoholic beverage or other self-administered drug, what saith you, guilty or not guilty?

THE DEFENDANT: Not guilty.

(54) JOHN E. FLANAGAN, introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. WYATT:

Q. Officer Flanagan, this warrant before the Court, sworn out by you, Officer Flanagan, against the defendant, Franklin R. Williams, alleges that on May the 3rd, '74, after being arrested on a charge of alcoholic beverages, refused to take a breath test or a blood test, did you make the arrest of this party?

A. Yes sir.

(55) Q. Did you take him to Headquarters, the magistrates?

A. Yes, sir.

* * * * *

Q. All right, did you warn him of his -- did you tell him of his rights to take a test of alcoholic content in his blood?

A. Yes, sir.

Q. Did he agree to take any test either of his breath or blood?

A. No sir.

Q. Did you -- did the magistrate inform him on the same rights?

A. Yes, sir.

Q. And did . . . . . record his refusal of -- the defendant's refusal to take the test.

(56) MR. WYATT: I'd like to file the certificate in evidence, Your Honor.

THE COURT: Well, let Mr. Binford see it.

Q. Well, all right, but -- yea, what was the reason that he gave for not taking the test?

A. No reason.

Q. No reason at all, no physical handicap or no allergy?

A. No sir.

Q. Did he ever take a test at any time before, even within a couple of hours after the arrest?

A. No, sir, he never took a test.

CROSS EXAMINATION

BY MR. BINFORD:

(57) Q. Officer, did you -- you did explain his rights to the blood test, is that correct?

A. Yes, sir.

Q. Did you ever request that he sign any certificate refusing to take the test?

A. No, sir.

Q. Officer, did you ever have occasion to offer this man a preliminary breath test as provided in 18.1-54.1 of the Code?

A. To -- blowing up a balloon.

Q. Alkalizer test?

A. No, sir.

Q. Were the alkalizer units available?

A. I was on a foot detail, another unit did respond, they probably had one but Mr. Williams had a cut on his hand so he was taken to the hospital.

Q. But none was ever offered him prior to the time that he was requested to take the standard blood or breath alcohol test to determine the content, is that correct?

A. Yes, sir.

Q. The preliminary test was (58) never offered?

A. No, sir, it wasn't.

* * * * *

REDIRECT EXAMINATION

BY MR. WYATT:

Q. You say you were a pedestrian patrolman and did not have the field test equipment with you?

A. Yes, sir, that's true.

Q. You did have it or didn't have it?

A. I did not.

Q. Could you carry that as a pedestrian, is it operatable in the hands of a pedestrian trooper?

A. Yes, sir, I imagine you could carry it with you.

* * * * *

RECROSS EXAMINATION

BY MR. BINFORD:

Q. One other question, Officer, how many other units responded to the scene?

A. Two.

(59) Q. Did anyone at any time offer him this preliminary as provided for by the statute?

A. No, sir.

(60) Q. And in so doing his hand was cut on the glass or something and he had to be rushed to the hospital to have his wounds taken care of,

A. Yes, sir.

Q. is that correct?

A. Yes, sir.

* * * * *

ARGUMENT

MR. BINFORD: May I see the warrant, Your Honor please. (pause) We would rest, Your Honor please.

THE COURT: All right, comments Mr. (61) Wyatt?

* * * * *

MR. BINFORD: Yes, sir, if Your Honor please, there is no punishment prescribed under the section which Mr. Williams is charged he's charged with failing to take the preliminary test under 18.1-54.1. The regular test is prescribed under 18.1-55.1, consequently no punishment is prescribed for violation of this.

THE COURT: What -- what does the warrant read, Mr. Binford?

MR. WYATT: Well, I'll amend it to read the proper number for the Court.

THE COURT: What does the warrant (62) read, what's the charge in the warrant? Are you saying just the wrong section number is referred to?

MR. BINFORD: If Your Honor please, both sections refer to the taking of blood or breath test, but 18.1-54.1, which is the section under which he is charged deals with the preliminary test.

THE COURT: Let me see the warrant just a minute.

MR. WYATT: The certificate of the magistrate

THE COURT: Mr. Hicks --

MR. WYATT: 18.1-55.1, I'll just amend the warrant, sir . . . exactly what the language of the warrant covers, and I think the rules says the language covers the crime.

THE COURT: I want to see the warrant.

MR. WYATT: I say, the rules -- the language covers the crime, (counsel quite distant from microphone)..... (unintelligible) the head of that certificate, the top line.

(63) THE COURT: The offense charged is refused to submit to breath test.

MR. WYATT: The field test is not there, sir.

MR. BINFORD: If Your Honor please, 18.1-54.1 does refer to a breath test, which is a preliminary test.

THE COURT: Well, I'll overrule your motion.

MR. WYATT: I'd like to amend the warrant . . . . . .

THE COURT: I think the warrant sufficiently charges the crime.

MR. BINFORD: Well, if Your Honor pleases, may I be heard?

THE COURT: Certainly.

MR. BINFORD: Well, if Your Honor please, the language of 18.1-54.1 is mandatory, if equipment is available; the officer testified that two units who were not on foot came to the scene, that he imagined they were available, yet the test was never offered, therefore, if he had, in fact, taken the blood test --

THE COURT: Mr. Binford, I don't (64) think it's incumbent on police officers, when a man has refused to open the door to his car, has jumped in the back seat to avoid being apprehended, has resisted the arrest, and is cut on the arm, I don't believe they've got to stand there to make a formal offer of the preliminary blood test. Now, I may be wrong, but I overrule your motion, I disagree with you, I think they did all they had to do under the circumstances, and any of Mr. Williams' problems

he brought on by himself by the facts of this case, and I think they have to offer the thing under normal circumstances, but if a man has acted like he had under the facts of this case, and I very well remember them, I think the officers did all they could possibly be asked to do, and any of Mr. Williams' problems he brought on himself, and I think they did the wise thing in taking him to the hospital to get his cut taken care of instead of trying to give him a preliminary breath test to see whether he was drinking when he was passed out over the wheel of the car to begin with. I just disagree with you, and I'll find him guilty for refusing to take the test and his operator's license revoked for ninety days.

MR. BINFORD: If Your Honor please, we move to set aside the verdict as contrary to the law and the evidence.

CERTIFICATE

In accordance with Rule 5:49 of the Rules of the Supreme Court of Virginia, I hereby certify that I have this 1st day of April, 1975 filed 25 copies of the Appendix to Brief in the Office of the Supreme Court of Virginia, and have mailed three (3) copies of the Appendix to Brief to Mr. James F. D'Alton, Jr., Assistant Commonwealth Attorney City of Petersburg, State Planters Bank Building, Petersburg, Virginia 23803.

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