Driving under influence

216 Va. 297

CLERK'S OFFICE
SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 741145

FRANKLIN R. WILLIAMS,

Appellant,

V.

CITY OF PETERSBURG
COMMONWEALTH OF VIRGINIA

Appellee.

APPENDIX TO BRIEF

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

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CITY OF PETERSBURG
COMMONWEALTH OF VIRGINIA

V. MISDEMEANOR WARRANT

FRANKLIN R. WILLIAMS No. 27534

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 22-142 of the Code of the City of Petersburg, Virginia, to wit: Operate a motor vehicle upon the streets while 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 5, 1974.

City of Petersburg

v. V. C. O. - Appeal from General District Court - Operating a Motor Vehicle While Under the Influence of Intoxicants

Franklin R. Williams, Defendant

This day came the Attorney for the City of Petersburg (D'Alton acting), 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 operating a motor vehicle while under the influence of intoxicants, 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 City of Petersburg 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 take same under advisement.

And the defendant is continued on bond.

A Copy, Teste:

Ruth M. Bailey, Clerk

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

JULY 30, 1974.

City of Petersburg

v. V. C. O. - Appeal from General District Court - Operating a Motor Vehicle While Under the Influence of Intoxicants

Franklin R. Williams, Defendant

This day came the Attorney for the City of Petersburg (Wyatt acting) and the defendant, in person and by his attorney, William F. Binford, Jr.

And the Court having heard the evidence and arguments of counsel in this case on July 5, 1974, and having taken same under advisement, doth find the accused GUILTY of operating a motor vehicle while under the influence of intoxicants, as charged in the warrant.

The Court doth ADJUDGE and ORDER that the defendant pay and the City of Petersburg recover a fine of $200.00 and $31.00 costs.

It is further judgment of the Court that the defendant's motor vehicle operator's permit is revoked for six (6) months.

Whereupon the 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

(3) MR. D'ALTON: This is -- there are two distinct offenses, and perhaps he shouldn't be arraigned on but one at a time. I think we'll proceed with the driving under the influence, Your Honor, first, which is written on the city warrant.

THE COURT: All right.

THE CLERK: This warrant charges (4) that Franklin R. Williams did on or about May 3rd, 1974, unlawfully in the City of Petersburg violate section 22-142 of the Code of the City of Petersburg, Virginia, to-wit, operate a motor vehicle upon the streets while under the influence of alcoholic beverage or other self administered drugs, what saith you, guilty or not guilty?

THE DEFENDANT: Not guilty.

MR. D'ALTON: I'll introduce the appropriate city ordinances, 22-142 and 22-145, 22-143.1, 22-99, 22-100, and 22-101 and 102.

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

DIRECT EXAMINATION

BY MR. D'ALTON:

Q. State your name and occupation?

A. John E. Flanagan, Petersburg Bureau of Police.

Q. Speak up just a little bit. It's alleged that this defendant, Franklin Williams, was driving under the influence on the streets of Petersburg, what date did this occur, Mr. Flanagan?

A. May 3rd, 1974.

Q. Where did you see the defendant?

(6) A. I saw him at the corner of Sycamore and Bollingbrook Street in the block right next to the Sanitary Restaurant.

Q. What time was it?

A. Approximately four o'clock.

Q. A.M. or P.M.?

* * * * *

Q. All right, in the afternoon or in the morning?

A. Morning.

Q. It would be a.m. then?

A. Yes.

Q. What attracted your attention to the car?

A. I heard the sound coming from the exhaust.

Q. Was it -- it was being -- it was running, the motor was running?

A. Yes, sir, it was.

Q. Did you go over to the car?

A. Yes, sir, I did.

Q. What did you observe at that time?

A. I observed Mr. Williams slumped over the sterring wheel.

(7) Q. What was the car -- what was the position of the car, what was it doing?

A. It -- at the present time it was -- at that time it was standing still, the motor was running.

Q. Lights on?

A. No, sir, I don't believe the lights were on.

Q. How about the gears, what was the status of the gears?

A. I don't remember if the car was in gear, the car was not moving, but after Mr. Williams was awakened he did make a motion to the gear shift, I -- it was dark and I couldn't see if it actually was in gear and he took it out or if was already --

* * * * *

Q. Was he awake when you came up to the car?

A. No, sir, he was not.

Q. How did you attract his attention?

A. By tapping on the window and yelling (8) to him, I said, "I'm a police officer."

Q. Were you in uniform?

A. Yes, sir, I was.

Q. Were you by yourself at that time?

A. At that time I was, but not when he was awakened.

Q. Could you get him out of the car initially?

A. No sir, I could not.

Q. What was the problem?

A. He just -- after he was awakened, he just refused to open the door or roll down the window, and at that time Officer Carmichael had responded to the scene to assist me and together we woke him up, and then after we aroused him he would not roll down the window or open the door, or even talk to us, he just remained in the car.

Q. Did you see any alcoholic beverages in the car?

A. No, sir.

* * * * *

A. After several minutes of trying to get him out with negative results, Lieutenant J.R. Cornwell was called to the scene and he advised Mr. Williams if he did (9) not comply with our request to come out that he would have to use force.

* * * * *

A. The only thing he said was that -- when we asked him to roll down the window, unlock the door, was that he was going to jail if he did and he was going to jail if he didn't, and other than that I don't remember him stating anything else.

Q. And you got him -- had to break a window to get him?

A. Yes, sir.

Q. Did he come out then, or did you have to drag him out?

A. No sir, he still would not come out, he had to be drug.

* * * * *

Q. When you got him out of the car, did he cut his hand?

A. Yes, sir, he did.

Q. Did you have to bodily take him to (10) Headquarters?

A. He was taken to the Emergency Room at that time, then later on he --

Q. What did you notice about his condition when he was taken out of the car?

A. He was unstable on his feet, I could -- some smell of alcohol on his breath.

Q. How about his speech?

A. He didn't say too much at all, he never said hardly anything to us.

* * * * *

Q. You say he was unsteady on his feet?

A. Yes sir.

(11) Q. Did he perform any dexterity test for you, pick up a nickel, touch his nose, or anything like that?

A. No, sir, he was taken directly to the hospital.

Q. And you did smell alcohol on him?

A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. BINFORD:

Q. Officer Flanagan, would you describe this lot to the Court that the vehicle was located in?

(12) A. It was a cement paved lot, there are several large holes in it, it's on the corner of Bollingbrook Street and Sycamore.

* * * * *

Q. Are there marked parking lanes in this lot?

A. No, sir, there are not.

Q. The vehicle was properly parked or stopped?

A. It was off the roadway, yes, sir.

Q. It was on the lot, stopped on this lot, is that correct?

A. Yes, sir.

* * * * *

Q. Officer Flanagan, do you know whether or not the vehicle was in gear?

A. No, sir, I could not state.

Q. I believe you indicated that he made some motion towards the shift as he was awakened, is that (13) correct?

A. Yes, sir.

Q. And did he then cut the automobile off?

A. Yes, sir.

Q. Do you recall whether the heater was on or not?

A. No, sir, I do not, I was not inside the car.

* * * * *

Q. The vehicle was then still with the motor running, is that correct?

* * * * *

Q. He was asleep when you arrived at the car?

A. Yes, sir.

Q. Officer, did he make any statement (14) to you after you had arrested him as to where he had been earlier in the evening?

A. No, sir, he did not.

Q. What conversation at all did you carry on with the defendant after you stopped him, or what conversation was carried on with him in your presence?

A. His name and -- up at the hospital they asked for his name and address and information like that for their reports, and --

Q. Was he able to give them this information?

A. Yes, sir.

Q. He understood the questions that were asked him then and was able to respond to them, is that correct.

(15) Q. You did not ask if he had anything to drink, but you noted an odor of some alcohol, is that correct?

A. Yes, sir.

* * * * *

Q. Officer, any business places open that sell any alcoholic beverages in close proximity to this location?

A. Yes, sir, I don't believe they were open at that hour.

Q. They were not open at that hour?

A. I don't believe so.

Q. What places would they be, sir?

A. The Sanitary Restaurant, Adler's, the Petersburg Restaurant.

Q. Do you know what time these establishments close, Officer?

A. No, sir.

(16) Q. Had you been on patrol in that area earlier that evening?

A. No sir.

Q. This was the first time you had observed this vehicle, is that correct?

A. Yes, sir.

* * * * *

REDIRECT EXAMINATION

BY MR. D'ALTON:

Q. This restaurant is open to the public, is it not, the Sanitary Restaurant?

A. Yes, sir, it is.

Q. Was it open for business at that hour?

A. No, sir.

(17) MR. D'ALTON: That's our case.

MR. BINFORD: Call Mary Johnson, if Your Honor please.

(18) MARY JO JOHNSON, introduced on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BINFORD:

Q. Mrs. Johnson, did you have occasion to be in the presence of Franklin R. Williams on the evening of May the 2nd, or early morning of May the 3rd, 1974?

A. Yes, I did.

Q. Please tell us under what circumstances you were in his presence, and what time you got into his presence?

A. Well, it was about -- about seven o'clock, I think, that evening, we were going to band practice.

Q. Where was the band practice held, m'am?

(19) A. At his brother's, in Dinwiddie County.

* * * * *

Q. Please tell us what you know about from seven o'clock until the time you left his presence that evening?

A. Oh, all right. We went out to his brother's to band practice, which lasted until about nine-thirty, I believe, quarter after nine.

Q. Did you have anything to drink at band practice?

A. Two beers.

Q. From there where did you go?

A. We went back to Petersburg.

(20) Q. Where was this car stopped in Petersburg?

A. In the Master Chevrolet parking lot, beside the Sanitary.

Q. Did you park the vehicle there?

A. Yes sir.

Q. Where did you go from there, Mrs. Johnson?

A. To the Sanitary.

Q. Did the defendant go with you?

A. Yes, sir.

Q. How long were you at the Sanitary?

A. Well, from about a quarter to ten until closing time.

Q. What time is closing time?

A. One o'clock.

Q. Did he leave you at that time?

A. Well, he was up and down and all over the place, I think he went over to Adler's for a little while and down to Petersburg and then came back to the Sanitary.

(21) Q. Now, when was the last time you saw him at a restaurant on the date?

A. At one o'clock.

Q. Did he have his keys to his automobile or did you have them?

A. He had them.

Q. Did you have occasion to see him sometime after he left your presence the first time?

A. Yes, sir.

Q. Under what circumstances did you see him then?

* * * * *

Q. Let me ask you this, did he make any representation to you about where he was going when he left your presence?

A. Yes, he said he was going to go to sleep in the car.

* * * * *

Q. All right, did you have occasion to go by this car?

A. Yes, sir.

Q. What time did you go by the car?

A. Between a quarter 'til three and (22) a quarter after three.

* * * * *

Q. Was he in the car at that time?

A. Yes, sir.

Q. Was he asleep in the car?

A. Yes, he was.

Q. Was he lying on the seat or behind the wheel?

A. He was lying on the seat.

Q. Had the car moved at all

A. No, sir --

Q. from where you parked it?

A. No.

* * * * *

A. He said he didn't feel like he should be driving.

CROSS EXAMINATION

BY MR. D'ALTON:

(23) Q. Would you assume that meant he'd been drinking too much?

A. Well, I assume it meant that he felt like he had been drinking too much.

* * * * *

Q. He drank several beers in those three restaurants, wouldn't you say?

A. Well, yes, I imagine he had, more than what he felt --

* * * * *

BY THE COURT:

(25) Q. Why did you drive him into Petersburg?

A. Well, every once in a while he lets me drive the car because I like to drive.

Q. Not because he wasn't able to drive at that point?

A. No.

(26) FRANKLIN R. WILLIAMS, the defendant, on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BINFORD:

Q. Mr. Williams, please tell the Court who you were with, where you were, and what you did from rougly seven o'clock on May the 2nd until the time the officer arrived at your car?

A. Well, I left work about a little after six and I went downtown to meet Mary because she was going to babysit for my brother while we had band practice. We went out there and we practiced a while and then we come back to town, and I asked her did she wanted to drive and she said yea, and so she drove back to town and we come downtown and had a few beers, and I went to the car and went to sleep.

(27) Q. How few beers did you have?

A. Four or five.

Q. Now, Mr. Williams, why did you go to the car and go to sleep?

A. Well, for one thing, I was as tired as the devil, and I had a few drinks, so I figured I ought not to drive, I thought I'd sleep for a while.

Q. All right, sir, what time did you get in the car and go to sleep?

A. Around one.

* * * * *

Q. Did you have occasion to wake up?

A. Well, I did wake up cold and started the engine and turned the heater on.

Q. Did you move that car at all?

A. No, sir.

Q. Did you have any intention of moving that car, Mr. Williams?

A. No.

(28) Q. One more time, why did you get in that car?

(29) A. Why did I get in it?

Q. Yes, sir?

A. To go to sleep.

Q. You felt you had a few drinks, were tired and didn't think you should be operating, is that correct?

A. I was tired, yes.

* * * * *

Q. Why didn't you take a taxi home?

A. Well, that I wouldn't be able to get back to work the next day.

Q. Where do you live in Dinwiddie County?

A. Back out by the airport.

CROSS EXAMINATION

BY MR. D'ALTON:

(30) Q. How did the car get started?

A. I started it.

Q. At what time?

A. I don't know.

(31) Q. Left the keys in the ignition, the motor running?

A. Right, and when they woke me up I was sweating, it was warm -- warm.

Q. How long were you going to sleep, were you going to stay there all night?

A. I intended to, I'd done it before.

Q. Why did you think you were going to jail whether you did or did not come out of the car?

A. Because I'd been snatched from a car before.

(32) Q. And yet you wouldn't cooperate with them and come out of the car so they could talk to you?

A. Well, they -- I told them they could -- we could talk through the window, I don't know why they wanted to get in the car.

* * * * *

Q. Well, you left the restaurant about one o'clock after you had been drinking, did you drink in (33) Adler's and the Petersburg Restaurant too?

A. Well, no, I wouldn't -- I went into Adler's and I drank a beer there and I went up to Petersburg and come back down to the Sanitary.

* * * * *

Q. Did you drink a couple of beers at band practice?

A. Right.

Q. And continued on until you went to sleep?

A. Well, off and on.

(35) BY THE COURT

(36) Q. After you had your nap and woke up and you were cold, why didn't you drive home then?

A. Well, I just wanted to get warm at that time.

Q. Why didn't you cut your heater on while you were driving home, get warm on the way home?

A. Well, I was real sleepy when I woke up, cold, I just started to get warm, then I went on back to sleep.

REDIRECT EXAMINATION

BY MR. BINFORD:

(38) Q. Mr. Williams, did you ever put the car in gear?

A. No, sir.

Q. Did you operate any of the other mechanisms other than turning on the motor and turning on the heater?

A. No, sir.

* * * * *

THE COURT: Anything further?

MR. BINFORD: We have no further evidence, if Your Honor please.

(39) THE COURT: Mr. D'Alton?

MR. D'ALTON: That's our case, Judge.

(50) THE COURT: Now, this case I reserved judgment in, this was the man that was in the parking lot down on Master Chevrolet lot, he had been obviously drinking and the police tapped on his window, he wouldn't open the door, they finally had to break the window and get in to see what was the problem, and he was charged with operating a motor vehicle while under the (51) influence of alcohol. The question arose as to whether this man claimed he had his heat -- motor running so he could run his heater to get warm and wasn't driving the car, and the question was whether he could be convicted of operating a motor vehicle under those circumstances.

Now, I have reviewed the cases, cited by Mr. Binford, representing the defendant, and Mr. D'Alton, representing the Commonwealth's Attorney's office, and I'm of the opinion after reading these cases that he's clearly guilty as charged.

Now, the motor was running in the car and he had set in motion the machinery of the vehicle, which could, in the final analysis set that vehicle in operation. I fine him two hundred dollars and costs of Court and operator's license revoked for six months. Next case.

MR. BINFORD: Your Honor, we move to set the verdict aside as being contrary to 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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