SUPREME COURT OF VIRGINIA
RECEIVED
MAR 20 1978
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 770987

JOHNNY CARL SIMMONS

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Apellee.

JOINT APPENDIX

William F. Burnside
958 Laskin Road
Virginia Beach, Virginia 23451
Counsel for Appellant

Andrew P. Miller
Attorney General
Todd E. LePage
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Supreme Court Building
Richmond, Virginia
Counsel for Appellee

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COMMONWEALTH OF VIRGINIA,
CITY OF VIRGINIA BEACH } TO-WIT:

In the Circuit Court of the City of Virginia Beach:

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the City of Virginia Beach and now attending the said Court, upon their oaths, present that

JOHNNY CARL SIMMONS

on or about the 24th day of October in the year 19 75 in the said City of Virginia Beach, Virginia, did unlawfully, wilfully and feloniously, wrongfully and fraudulently, use, dispose of, conceal, embezzle, or convert to his own use, assorted personal property belonging to Robbie's Sunoco, valued in excess of $100.00.

Va. Code §18.2-111

THIS.....DAY OF_____19

Sept. 14, 1976 - Judge Lam BOOK 23 PAGE 236

A Copy Teste: John V. [illegible], Clerk
By_____, D.C.

COMMONWEALTH OF VIRGINIA)
D# 3694
vs.) Upon an indictment for Embezzlement
JOHNNY CARL SIMMONS)

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by the electronic device this day approved by the court.

And thereupon came Edward Hanson, Assistant Attorney for the Commonwealth, and the accused, Johnny Carl Simmons, who stands indicted for embezzlement, was led to the bar in the custody of the Sheriff of this court, and also came, William Burnside, attorney for the accused, said attorney being of the accused own choosing, and upon being arraigned, the accused pleaded not guilty to said indictment, tendered in person by the accused, and with the consent of the accused, his counsel, and the concurrence of the Attorney for the Commonwealth, and the court here entered of record, the court heard and determined the case without the intervention of a jury, and after hearing the evidence, the court doth find the accused guilty of embezzlement, as charged.

Whereupon, on motion of the accused, by counsel, the court doth refer this case to the Probation Officer for a pre-sentence report.

And the accused is remanded to the Sheriff of this City.

Mar. 17, 1977 - Judge Lam

THIS ___ DAY OF _____ 19

COMMONWEALTH OF VIRGINIA	)	
		D# 3694
vs.	)	Upon an indictment for Embezzlement
JOHNNY CARL SIMMONS,	)	

The court doth order for the recording verbatim of the evidence and incidents of the trial of this case by Linda Bryant, a court reporter.

Whereupon, came Edward Hanson, Assistant Attorney for the Commonwealth, and the accused, Johnny Carl Simmons, who pleaded not guilty to said indictment, tendered in person by the accused, and was on the 14th day of Sept, 1976, found guilty of embezzlement, and his case referred to the Probation Officer of this court for a report, was again led to the bar in the custody of the Sheriff of this court, and also came William Burnside, attorney for the accused, said attorney being of the accused own choosing, and also came the Probation Officer and rendered his report in open court, which report was ordered filed as part of the record in this case, and after considering said report, and it being demanded of the accused if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay thereof, it is adjudged, ordered, and decreed by this court that the said Johnny Carl Simmons, age 29 years (8-4-47) be and hereby is sentenced to confinement in the penitentiary of this Commonwealth for the term of 5 years.

And the court deeming it compatible with the public interests, pursuant to the statutes in such cases made and provided, and with the concurrence of the Assistant Attorney for the Commonwealth, doth suspend execution of said sentence, and doth place the said Johnny Carl Simmons on probation during his good behavior for a period of five years, and upon the further conditions that he comply with all the rules and regulations of the State Parole Board, and that he pay the costs incident to his prosecution and conviction. Said arrangement of payment to be made through the Parole Board. And the defendant is turned over to the custody of his father who will take him to his home in North Carolina.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA, :

v. :

JOHNNIE SIMMONS, :

Defendant. :

NOTICE OF APPEAL

Now comes Johnnie Simmons, by counsel and does hereby give notice of appeal from a final Order of the Circuit Court of the City of Virginia Beach, Virginia, entered on June 22, 1977, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

1. Did the trial Judge err in not sustaining the defendant's Motion to Strike the Commonwealth's evidence on the grounds that the Commonwealth had not established a prima facie case, and entering a verdict of acquittal in this matter;

2. Did the trial Court err in not sustaining the defendant's Motion to Strike, after all evidence was presented in this matter, and returning a verdict of acquittal, on the grounds that the Commonwealth had not established it's case beyond reasonable doubt.

NOTICE

The defendant shall file a transcript of the testimony and other incidents of the trial at a later

date, but within the time prescribed by the Rules of the Supreme Court.

JOHNNIE C. SIMMONS

By William F. Burnside
of Counsel

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA, :

v. :

JOHNNIE SIMMONS, :

Defendant. :

PARTIES AGREED STATEMENT OF FACTS

Now comes the Commonwealth, by the Assistant Commonwealth Attorney, and the defendant, by counsel, and present the following agreed statement of facts pursuant to the applicable Rules of the Supreme Court of Virginia:

This alleged offense occurred between the hours of 5:30 p.m. on October 23, 1975 and 7:30 a.m. on October 24, 1975.

Carl E. Robeson, the victim and witness for the Commonwealth, testified that he was the owner and operator of Robbie's Sunoco, a gas station, which is located on Virginia Beach Blvd., Virginia Beach, Virginia. Prior to the crime involved in this proceeding, Mr. Robeson had not conducted any inventory on that day.

Mr. Robeson stated that he had employed defendant, as a night man, who solely operated the station between the hours of 6:00 p.m. to 9:00 p.m. Prior to the offense date, defendant had worked six prior days. Defendant had previously told Mr. Robeson that his wife was pregnant, close to delivery, and that he, the defendant, might have to leave unexpectedly

to transport her to the hospital. Prior to this occasion, he had employed 10 to 12 night men, each of whom had a key to the premises. However, each time a new night man was employed, Mr. Robeson would change the lock which necessitated a new different key to the premises. He described defendant as a "polite, nice man", and that several customers had made favorable remarkes to him about the defendant.

Mr. Robeson testified that the station was normally open from 7:00 a.m. until 9:00 p.m., and that he employed 2 other individuals to perate the station between the hours of 7:00 a.m. until 6:00 p.m., at which time they were relieved by defendant. Both of these other individuals had keys to the station.

It was Mr. Robeson's practice to appear at the station at closing time, which was 9:00 p.m., for the purpose of picking up money, and otherwise checking on the security of the station. In this regard, defendant was responsible for the handling and securing of all cash and credit card invoices during his hours of employment.

On the day in question, Mr. Robeson stated that he departed the station at 5:30 p.m., and rather than following his normal procedure, he did not return to the station at closing time, which was 9:00 p.m., but rather, telephoned the station at 9:05 p.m. He received no answer to the call, and assumed defendant might have left early, and that he would

see defendant the next day. As a consequence, Mr. Robeson did not return to the station until 7:30 a.m. the next morning, and found all doors to the station unlocked.

Although Mr. Robeson had not conducted a physical inventory for several days prior to the day in question, upon walking through the station that morning, he notice various items were missing, which were the following: a money bag containing approximately $100.00 in cash, El Dorado tire and wheel worth $50.00, two 8.78 X 15 white wall tires worth $34.00 each; and miscellaneous hand tools worth $200.00. Mr. Robeson noted that defendant owned a 1965 Ford station wagon, and that none of the foregoing parts would fit defendant's car.

None of the foregoing items were recovered, nor were any of them found in the possession of the defendant.

Mr. Robeson stated that all his current employees had keys to the station. Further, he stated that he had suffered at least 2 dozen or more break-ins to the day in question. Also at the time of this alleged offense, Mr. Robeson owed defendant $70.00 in wages.

Officer Guertin, a police officer for the City of Virginia Beach, stated that he was contacted for the purpose of receiving a crime complaint, and otherwise investigating this matter. He testified that he was not able to locate

the defendant, and that the defendant was arrested with regard to the offense on May, 1976. The defendant made no statement to Officer Guertin.

Filed: June 22, 1977

/s/ Henry L. Lam
Judge

I ask for this:

/s/ William F. Burnside p.d.

Seen and agreed to:

/s/ Edward W. Hanson, Jr.
Assistant Commonwealth Attorney