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CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

4

801695

MIKE ODELL MIDKIFF,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

JOINT APPENDIX

A. L. Philpott
Philpott & McGhee
Philpott Building
Bassett, VA 24055

James W. Haskins
Young, Kiser, Haskins, Mann,
Gregory & Young
60 West Church Street
Martinsville, VA 24114

Counsel for Appellant

Jeffrey A. Spencer
Assistant Attorney General
Commonwealth of Virginia
P. O. Box 27412
Richmond, VA 23269

Counsel for Appellee

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WARRANT

Dated February 1, 1980

COMMONWEALTH OF VIRGINIA

To Wit:

No.

COUNTY [CITY] OF HENRY

ARREST WARRANT
(Rule 3A:4)

TO ANY SHERIFF, POLICE OFFICER, OR OTHER AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth forthwith to arrest

MIKE ODELL MIDKIFF

(Name of accused, or a description by which the accused can be identified)

and to bring him (her) before the GEN. DIST. COURT

(Designation of Court)

to answer a charge that he (she) committed an offense in the County (~~City~~) of HENRY

on or about FEB. 1, 19 80,

namely (give a brief description of the offense) UNLAWFULLY OPERATE A MOTOR VEHICLE ON PUBLIC HIGHWAY WHILE UNDER THE INFLUENCE OF ALCOHOL OR OTHER SELF ADMINISTERED INTOXICANT DRUG.

SEC. 18-2-266

On the basis of the sworn statement(s) of H.C. GUILLIAMS, the undersigned has found probable cause to believe the accused has committed the offense.

If a written complaint has been made, it is attached to the original of this warrant.

You are also commanded, in the name of the Commonwealth, to summon the following as witnesses:

Name _____ Address _____ ☐

Name _____ Address _____ ☐

Name _____ Address _____ ☐

Name _____ Address _____ ☐

Given under my hand and seal, this 1 day of FEB., 19 80.

Paul D. Nichols (SEAL)

(Signature of Issuing Officer)

MAGISTRATE

(Title of Issuing Officer)

COMMONWEALTH OF VIRGINIA,
COUNTY [CITY] OF _____

_____ and _____
(Name of accused) (surety)

each (if more than one) acknowledges himself indebted to the Commonwealth of Virginia in the sum of _____ ($_____) and waives all benefit under the homestead exemption laws of the State of Virginia as to this obligation.

The condition of this obligation is that if _____ shall appear personally before the
(Accused)

_____ on the _____ day of _____, 19_____, at __m.,
(Designation of court)

and at any time or times to which the proceedings may be continued in that court or heard on appeal, to answer for the offense with which he is charged, and shall not depart without leave of the court and shall keep the peace and be of good behavior, then this obligation shall be void when final disposition of the charge is made; otherwise, this obligation shall remain in full force and effect until declared void and released by order of a competent court. Non-appearance before any court referred to herein shall be deemed to constitute a waiver of trial by jury.

Whenever the context so requires, the masculine shall be deemed to refer to the feminine or neuter and the singular to the plural.

Given under out hands and seals this _____ day of _____, 19_____

_____ (SEAL)
(Name of corporate surety) (Accused)

by _____ _____ (SEAL)
Attorney-in-fact (or title of signing officer) (Individual Surety)

Acknowledged before me in my County (City) on the date last above written.

_____
(Signature of acknowledging official)

_____ _____
(Address of surety) (Title of acknowledging official)

APRIL 2 1980

DOCKET NO. 7-80-362

WARRANT OF ARREST

COMMONWEALTH vs. MIKE ODELL MIDKIFF

RT 2 FARRUM VA.

Executed this the 1 day of February 19 80.

Serving Officer

DISPOSITION OF CHARGE: W W CA

Plea: Not Guilty

Defendant found guilty

O. L. [illegible]

and

Date: 4-2-80

Appeal Withdrawn:

Date:

Defendant's Signature

Court of [illegible]

Fine $

Costs

Total $

JUDGE

The following witnesses were recognized to appear before the _____ Court of _____ County (City), Virginia, at _____, Virginia, at _____ M., on the _____ day of _____, 19____, under penalty of $_____

Fine	$
Liquidated Damages	$
COSTS	
Warrant	$
Trial	10.00
Bail	5.00
Arrest	
Clerk of Court	5.00
Commital (Date)	
Witnesses	
Sheriff/Sergeant:	
Fees	
Mileage	
Commonwealth Attorney	
Weighing Fee	
Reportable Violation D.M.V. ($5.00)	
D.M.V. Abstract Fee (50¢)	
Blood (Sample $ Analysis $)	
Court Appointed Attorney	
Total Costs	$ 20.00

BREATH ALCOHOL ANALYSIS

Dated February 1, 1980

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF GENERAL SERVICES
DIVISION OF CONSOLIDATED LABORATORY SERVICES
BUREAU OF FORENSIC SCIENCE

CERTIFICATE OF BREATH ALCOHOL ANALYSIS

2-1-80
Date of Report

NAME OF ACCUSED: MIKE ODELL MIDKIFF

ADDRESS: RT 2 FERRUM VA 24088

NAME OF COURT: HENRY Co. GEN. DIST.

ADDRESS: MARTINSVILLE VA.

BREATH ANALYSIS:

Analysis Conducted By: TPR. J.R. SCARCE

Division of Consolidated Laboratory Services License No.: 80011616 License Expires: 1-15-82

Date Test Conducted: 2-1-80 Time Sample Was Taken: 11:32 P.M.

Test Equipment Instrument No.: SMITH + WESSON BREATHLYZER MOD 900A 0920322 was tested for accuracy by Division of Consolidated Laboratory Services on 8-14-79 and found accurate.

RESULTS:

Blood Alcohol Content .16 % by weight by volume.

ATTEST:

I certify that the above is an accurate record of the test conducted; that the test was conducted with the type of equipment and in accordance with the methods approved by the Division of Consolidated Laboratory Services; that the test was conducted in accordance with the manufacturer's specifications, that the equipment on which the breath test was conducted has been tested within the past six months and found to be accurate, and that I possess a valid license to conduct such test. Given under my hand this 1 day of FEB, 19 80.

J.R. Scarce
Breath Test Operator

80011616
License Number

State of Virginia, County or City of Henry

Subscribed and sworn to before me this 1 day of Feb, 19 80.

Paul D. Nichols Notary Public

My Commission Expires Magistrate

ORDER

Filed July 22, 1980

VIRGINIA:

In the Circuit Court for the County of Henry this the 22nd. day of July, 1980.

COMMONWEALTH OF VIRGINIA

VS: #CR-80-0446 WARRANT APPEAL: DRIVE UNDER THE INFLUENCE

MIKE ODELL MIDKIFF

This day came the Attorney for the Commonwealth, and the defendant in person and by his attorney James W. Haskins.

Whereupon, the accused was arraigned and pleaded guilty to Drive Under the Influence, as charged in the warrant. And the Court, having made inquiry and being of the opinion that the accused fully understood the nature and effect of said plea, the penalties that may be imposed upon conviction and waiver of trial by jury, 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 Drive Under the Influence, as charged in the warrant.

Counsel for the accused made motion to place the defendant in the VASAP Program, which motion was denied.

Counsel for the defendant advised the Court the defendant desires to appeal the judgment rendered, and accordingly the imposition of sentence is deferred until the said appeal is acted upon.

Thereupon the defendant was allowed to depart.

File as part of the Record.

80-0446

LEGISLATIVE INTENT

TO: HENRY COUNTY CIRCUIT COURT

FROM: A. L. PHILPOTT, Member of the House of Delegates of Virginia

RE: LEGISLATIVE INTENT

In the 1980 session of the General Assemby, House Bill 834 was introduced which contained an amendment to Title 18.2 § 27.1-1 of the 1950 Code of Virginia.

This bill was subsequently considerably amended and passed by the House as Chapter 589 of the 1980 Acts of the Assemby.

The bill was proposed at the request of the Richmond Bar Association and the purpose of the bill was to urge those few jurisdictions in the Commonwealth of Virginia who had not participated in the Drivers Alcoholic Rehabilitation Program or in a program of similar nature, to give mature consideration to the creation of such a program and use of a program in those jurisdictions that had not heretofore provided one.

One of the jurisdictions in the immediate vicinity of Richmond had failed to adopt such a program and it was the desire of the Richmond Bar Association that they do so, and, to that end, the General Assemby was solicited to pass the proposed legislation which ultimately became Chapter 589 of the 1980 Acts of the Assembly

The debates and discussions were primarily made to the House Courts of Justice and Senate Courts of Justice Committees with very little debate or discussion on the floor of either the House or Senate of Virginia, and the bill was overwhelmingly adopted.

As evidenced by the discussions in committee, the feeling of the legislature was that each jurisdiction should give mature consideration to establishing such a program and the assignment of proper individuals to such programs for counseling and treatment.

The Courts of Justice of the House of Delegates was particularly concerned with the fact that all but two judicial districts in the state were using the Virginia Alcoholic Safety Action Program and that those programs were not implemented in the two remaining jurisdictions, and, while the legislature was unwilling to establish guidelines which would have made the mandatory feature of this program applicable to all jurisdictions, it did feel that all courts should give mature consideration to the assignment of individual defendants to such programs under such terms and conditions as the Court desired to impose.

The legislature was well aware that some Courts have used the VASAP program for repeat offenders; however, it was the feeling of the committee that only one opportunity should be given an individual to obtain the treatment under this program.

Respectfully submitted,

A. L. Philpott
Member, Virginia House of Delegates

STIPULATION
FILED AUGUST 8, 1980

It is hereby AGREED and STIPULATED between counsel for the Defendant and the Commonwealth's Attorney for Henry County that the following five (5) criminal cases, involving the charge of driving under the influence of alcoholic beverages, are now pending on the docket for the July 1980 term of Court. A plea of guilty to the charge of driving under the influence of alcohol has been entered in all of these cases. The disposition of these cases has been stayed by the Circuit Court of Henry County until the Supreme Court of Virginia renders a decision in the above-styled case, which is now in the process of being appealed.

1. Bobby Ray Beasley
   CR-80-0183
2. Earnest Garland Gilley
   CR-80-0419
3. Joneth T. Hairston
   CR-80-0434
4. Valerie Kimbro Lazarus
   CR-80-0486
5. Jack Bennett Downs
   CR-80-0416

This 8 day of August, 1980.

James W. Haskins

James W. Haskins
Of Counsel for Defendant

Wm. Roscoe Reynolds

Wm. Roscoe Reynolds
Commonwealth's Attorney for
Henry County

NOTICE OF APPEAL
FILED AUGUST 8, 1980

Pursuant to Rule 5:6 of the Rules of Court of the Supreme Court of Virginia, the Defendant hereby files a Notice of Appeal from the final judgment Order of the Circuit Court of Henry County entered in the above-styled case on July 22, 1980. A transcript of evidence and other incidents of the trial will be hereafter filed in the Clerk's Office of this Court.

This 8th day of August, 1980.

MIKE ODELL MIDKIFF

BY James W. Haskins
Of Counsel

James W. Haskins
Young, Kiser, Haskins, Mann,
Gregory & Young, Ltd.
60 West Church Street
Martinsville, VA 24112

CERTIFICATE

This is to certify that I have this 8 day of August, 1980, mailed a true copy of the foregoing Notice of Appeal to Wm. Roscoe Reynolds, Commonwealth's Attorney for Henry County, P. O. Drawer 112, Martinsville, Virginia 24112.

VIRGINIA
CIRCUIT COURT HENRY COUNTY
REC'D & FILED THIS THE
8th day of August 19 80
Teste R. P. Crook Clerk

James W. Haskins
James W. Haskins

ORDER
ENTERED SEPTEMBER 3, 1980

VIRGINIA: IN THE CIRCUIT COURT OF HENRY COUNTY

COMMONWEALTH OF VIRGINIA

VS: #CR-80-0446 ORDER

MIKE ODELL MIDKIFF

This day came Mike Odell Midkiff, who noted an appeal to the Supreme Court and stated to the Court that he is without funds to employ counsel of his own choosing to represent him in the matter whereof he stands charged.

Therefore as provided by Section 19.1-241.1 as amended of the Code of Virginia, the Court doth appoint James W. Haskins, a competent and discreet attorney practicing before the bar of this Court said attorney being approved and accepted by the accused to represent him on said appeal.

Enter this the 3 day of September, 1980

J. D. Hooker
JUDGE

CORRECTED ORDER

Entered July 31, 1981

This day came the Attorney for the Commonwealth, and the defendant in person and by his attorney, James W. Haskins.

Whereupon, the accused was arraigned and pleaded guilty to Drive Under the Influence, as charged in the warrant. And the Court, having made inquiry and being of the opinion that the accused fully understood the nature and effect of said plea, the penalties that may be imposed upon conviction and waiver of trial by jury, 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 Drive Under the Influence, as charged in the warrant.

The Court doth adjudge and order that the defendant pay, and the Commonwealth recover a fine of Two Hundred ($200.00) Dollars and Eighty-Five ($85.00) costs.

It is further ordered that the defendant's motor vehicle operator's license be suspended for six (6) months.

Counsel for the accused made a motion to place the defendant in the VASAP program, which motion was denied.

Counsel for the defendant advised the Court the defendant desired to appeal the judgment rendered, and accordingly the execution of sentence is deferred until the said appeal is acted upon.

Thereupon the defendant was allowed to depart.

John D. Hooker JUDGE

CORRECTED ORDER 7-31-81

TRANSCRIPT OF EVIDENCE

Heard on July 22, 1980

Court reporter sworn. Witnesses sworn.

THE COURT: Now, Mr. Haskins, the defendant's plea is what in this case?

MR. HASKINS: If Your Honor please, the defendant's plea is guilty on a charge of driving under the influence.

THE COURT: All right. Mr. Clerk, let the record show that the defendant Mike Odell Midkiff was arraigned and on his arraignment he entered a plea of guilty to the charge of driving under the influence. Now, Mr. Reynolds, will you, with Mr. Haskins' approval...

MR. REYNOLDS: Yes, sir. If the Court please, I can summarize the evidence.

THE COURT: ...summarize the evidence.

MR. HASKINS: Yes, sir, that will be fine.

MR. REYNOLDS: If the Court please, the evidence for the Commonwealth would indicate that on the date in question at about 10:35 p.m. Trooper Guilliams was on patrol on Route 57 west of Bassett in Henry County when he met a vehicle traveling at what he felt to be a high rate of speed. He clocked this vehicle for a distance in excess of ninety miles an hour. He stopped the vehicle after turning on the red lights and siren the vehicle stopped and found the defendant to be operating the vehicle. The Trooper noticed right away the indicia of intoxication and strong odor of alcohol coming from the defendant. The defendant had bloodshot eyes. He staggered heavily when he walked and had a strong odor of alcohol about him. In talking with the defendant about what he had had to drink he told the Trooper that he'd had about a half a fifth of bourbon to drink on this occasion. He

was arrested for driving under the influence. He was advised of the implied consent law. He requested the breath test. The breath test was administered and the results of that test were .16 percent. I believe this would be the evidence of the Commonwealth.

THE COURT: Point what, Mr. Reynolds?

MR. REYNOLDS: .16 percent.

THE COURT: Mr. Haskins, you've heard the summary by the Commonwealth's Attorney, Mr. Reynolds. Do you find that to be basically correct, sir?

MR. HASKINS: Yes, sir.

THE COURT: All right.

MR. HASKINS: If Your Honor please, of course the defendant has entered a plea of guilty. At this time I would like to move the Court that the defendant be placed in an alcohol rehabilitation program or alcohol safety action program pursuant to Virginia Code 18.2-271.1. In support of that, sir, I'd like the record to show that we've had some pre-trial discussions with the Court and with Mr. Reynolds. I would request the Court that there be admitted, or rather, admit into evidence this letter which the Court has previously seen from the Director of the Virginia Safety Action Program in Richmond which was written to the Court on prior occasion concerning the various statistics and merits of this program.

THE COURT: All right, sir. I'll receive this exhibit and mark it Midkiff Exhibit A.

MR. HASKINS: If Your Honor please, for the purpose of the record to be considered by the Supreme Court, I talked to Mr. Reynolds, the Commonwealth's Attorney, and we've agreed to stipulate that currently there is in force as of July 1, 1980, an active alcohol safety action program or an alcohol rehabilitative program

pursuant to 18.2-271.1 that's in use in the General District Court of Henry County as administered by Judge Covington. It is the purpose of that program that if a person is placed in the program and so far it's Judge Covington's position that every first offender who has not previously been through an alcohol rehabilitative program set forth in the statute is being maturely considered for assignment to the program. The needs of each person are being considered on a case-by-case basis. If the person goes to the seventeen week school that's been set up and is currently in use in the District Court of Henry County and completes the program, then the driving under the influence charge that was placed against him is dismissed. There's no record of the charge whatsoever. Mr. Reynolds and I have further agreed to stipulate, if the Court please, that the records of this Court, the Circuit Court of Henry County, would show that no person that's been charged with driving under the influence has ever been placed or admitted into one of these programs that I've cited that is prescribed and set forth by the General Assembly and the statute that I've already cited to the Court. If Your Honor please, I might say and the Court can, and, I'm sure, certainly will, correct me if I'm wrong in this statement to the Court, but if I understood what this Court stated in open Court on July 7th, 1980, at pre-trial docket call for this Term of Court, it is my understanding that the Court stated that there was no available program to be used in the Circuit Court of Henry County and for this Term of Court there would be no program for any person currently on the Court's docket to be admitted into. That would be just in the way of pre-trial stipulations for the record.

THE COURT: Any comment by you, Mr. Reynolds?

MR. REYNOLDS: Judge, the only comment I would make would be

that Mr. Haskins and I have talked extensively about this case before the trial of the case began. And he indicated to me that some of the matters that he mentioned would then be mentioned by him.

MR. HASKINS: In addition, if Your Honor please, one thing I did overlook, and I discussed this with Mr. Reynolds also and it's been discussed with the Court before trial, Mr. Reynolds has no objection and it's my understanding the Court has no objection if Mr. A. L. Philpott, the Speak of the House of Delegates, files a memorandum with the Court in this case involving Mr. Midkiff setting forth the legislative and statutory purposes that the General Assembly envisioned and had in mind when the new amendment was passed to this statute and became effective on July 1st, 1980.

THE COURT: I have no objection to that. Whatever the legislative intent might be, if Mr. Philpott feels that he can speak with some degree of certainty I certainly have no objection to it.

MR. HASKINS: Judge, I don't want to belabor this point but I'm sure this Court knows that I'm trying to protect the record on behalf of my client for an appeal to the Supreme Court. In regard to the memorandum that Mr. Philpott is going to file with the Court in the record of this case I would like the record to show that the Court is aware right now of what Mr. Philpott basically is going to say that the legislative purpose and the intent of the General Assembly was.

THE COURT: Now are you talking about the 1980 amendment?

MR. HASKINS: Yes, sir.

THE COURT: Well, I'm aware that Mr. Philpott will

in his own way state what he considers the legislative intent to have been when it used the language "and mature consideration should be given, etc., etc.". I certainly have no objection to that.

MR. HASKINS: My only point was, sir, while the Court is hearing this case that the Court is aware of what Mr. Philpott is going to subsequently file, based on pre-trial discussion.

THE COURT: I'm not aware exactly what Mr. Philpott is going to say but I'm aware of what he plans on doing and that is to state for the record in some type of memorandum his idea of the legislative intent when they passed the 1980 amendment to Section 18.2-271.1. I think that's what Mr. Philpott is going to do.

MR. HASKINS: Yes, sir. And that the Court is basically aware of the substance of what he's going to say.

THE COURT: Basically, yes.

The first witness, MIKE ODELL MIDKIFF, having been duly sworn, testified as follows:

DIRECT EXAMINATION - QUESTIONS BY MR. HASKINS

Q. Would you state your name to the Court, please?

A. Mike Odell Midkiff.

Q. Mr. Midkiff, how old are you?

A. Thirty.

Q. And where do you live?

A. Live at Ferrum, Virginia.

Q. Mr. Midkiff, are you employed?

A. Yes, I am.

Q. Would you tell the Court where you work?

O. I work at Blue Ridge Talc in Henry, Virginia.

Q. Mr. Midkiff, you are aware that you've been charged with driving under the influence in Henry County, Virginia, and of course today you've entered a plea of guilty to that charge before the Court. Is that correct?

A. Yes, it is.

Q. Mr. Midkiff, have you ever been convicted of driving under the influence before?

A. No, I haven't.

Q. Mr. Midkiff, have you ever been admitted into any type of alcohol rehabilitation program or alcohol safety action program that has been provided by the General Assembly of this state?

A. No, I haven't.

Q. If you were to lose your driver's license as a result of this conviction, Mr. Midkiff, would you state to the Court how that would affect your employment?

A. Well, I live by myself and I don't have any other way to work except by driving. I know I'd lose my job and I'm paying for my home.

Q. You'd lose your job.

A. And I'm still paying for my home.

Q. You're still paying for your home?

A. Yes.

Q. And you'd lose your home too?

A. It's possible, yes, sir.

Q. Well, if you didn't have your job would you have any other way to make house payments on your home?

A. No, I wouldn't.

Q. Would you indicate to Judge Hooker, Mr. Midkiff, whether or not you have and had at the time you were stopped by the State

Trooper in this case and given the ticket for driving under the influence, did you have any type of drinking problem at that time?

A. Well, I drink too much and too often. I know that. Yes, I would say I drink much too often.

Q. Have you ever been treated for this problem before?

A. No, I haven't. I know I've just got bad nerves and I just, I get nervous that's just what I want to do I guess.

Q. If the Court would see fit to do so, would you be willing to enter into an alcoholic rehabilitation program and submit yourself to counselling by properly trained people?

A. Yes, I would.

CROSS EXAMINATION - QUESTIONS BY MR. REYNOLDS

Q. Mr. Midkiff, what kind of work do you do?

A. Ah, I make caulking at the Blue Ridge Paint Company.

Q. What kind of education do you have?

A. Tenth grade.

Q. Tenth grade?

A. Yes.

Q. How long have you worked there for Blue Ridge?

A. It will be eight years the end of this month.

Q. Where did you work before then?

A. Continental Homes.

Q. And where did you work before Continental Homes?

A. I worked in Roanoke in a construction job, Lewis-Gale Hospital.

Q. Have you ever been in service or...

A. I got a medical discharge from service, yes, sir.

Q. How long were you in service?

A. Well, I was in the army reserves. I was going to

Collinsville to the meetings I think about three months and I went into basic training and that's where I got my discharge. I'd say I was there approximately a month and a half.

Q. When did you realize you had a drinking problem?

A. Well, I've been divorced now for about two years and I think that's one thing that got me...

Q. When did you realize you had a drinking problem?

A. Well, I've never wanted to admit it.

Q. Before today you never admitted you had a drinking problem?

A. I never wanted to but I felt like that I did need...

Q. And today is the first time you've ever admitted that you had a drinking problem?

A. Well, to myself I guess it is.

Q. Have you ever sought any help with the drinking problem?

A. No, I haven't.

Q. Were you living by yourself when this offense took place?

A. Yes.

Q. The Trooper's testified that on the occasion that this happened that you were traveling at a speed of about ninety miles an hour. Does that sound about right?

A. Yes, sir, it does.

Q. Were you by yourself on this occasion?

A. No, I wasn't.

Q. Where were you coming from and headed to?

A. Well, I was going back home. I was coming from, I had been out to eat.

Q. And where had you drunk a half a fifth of liquor?

A. I started at home that afternoon.

Q. Prior to this offense taking place you had to know, didn't you, that it was against the law to drive while you were intoxicated?

A. Yes, I did.

Q. And didn't you know that it was against the law to drive more than fifty-five miles an hour in a car?

A. Yes, I did.

Q. If you have this problem of drinking too much too often why haven't you tried to do something about it before now?

A. I have no answer. I really don't know.

Q. Do you have any plans to get involved in any kind of program to help you with your drinking?

A. Well, I'm going to have to do something, I know that.

Q. When, when were you charged with driving under the influence? Wasn't it February the 1st?

A. I'm not positive about the date.

Q. It's been about five months ago?

A. Yes, sir.

Q. Have you continued to drive since then?

A. I've continued driving, yes, sir.

THE COURT: All right, Mr. Haskins or Mr. Reynolds, any further evidence that you want to offer in this case?

MR. HASKINS: No, sir, we have no further evidence.

MR. REYNOLDS: Judge, I would just like to get in the record and I think this is true, if it's not please correct me, Mr. Haskins. That the defendant was charged with drunk driving and reckless driving at the time this offense took place. And after the conviction in the lower court for drunk driving the reckless driving charge was dismissed in accordance with the Virginia statute.

MR. HASKINS: I feel sure it was since Judge Covington convicted him of driving under the influence.

THE COURT: Well, I would assume so, that after the conviction of driving under the influence, the reckless driving charge went by the board. Now looking at the warrant in this case, and I think the record should show this, that this offense of driving under the influence was committed on the 1st day of February, 1980, he was tried in the District Court of Henry County on April 2nd, 1980, on a plea of not guilty. He was found guilty by the Judge of the General District Court of Henry County on April 2nd, 1980, required to pay a fine of $200.00 and the costs of the case and his operator's permit was suspended for six months. Since the offense was committed in February, 1980, and the conviction in the General District Court of Henry County was in April of 1980, the amendment to the statute effective as of July 1, 1980, would not, in my judgment, apply. There is nothing in the statute whatsoever to indicate that it should be applied retroactively. This being true, we are not concerned with the language in the amendment. Under Section 18.2-271.1 it is a matter of judgment or a matter of discretion with any Court in the Commonwealth of Virginia as to whether or not it participates in an ASAP program. In exercising that judgment and in exercising that discretion this Court has not become involved or has not participated in an ASAP program. Assuming, but certainly not conceding, that the amendment does apply, it is obvious that the legislature is simply saying to the Courts of the Commonwealth of Virginia that first

offenders who have not previously been through an alcohol rehabilitative program shall be "maturely considered for assignment to the program, etc." I listened to the evidence in this case very carefully and it strikes me as a very severe case of driving under the influence. The defendant was very much under the influence of intoxicants (0.16) and was operating his motore vehicle at 10:30 at night at a speed in excess of ninety miles an hour. To me this was an exceedingly dangerous situation. If I understand Section 18.2-271.1 of the Code of Virginia, it is a matter of judgment and a matter of discretion with any Court in the Commonwealth of Virginia as to whether or not it participates in an ASAP program. Let me say for the record that I have maturely and seriously considered the needs of the defendant and Mr. Haskins' request that the defendant be placed in an ASAP program, and the same will be denied for reasons set out above. To this action the defendant by counsel objects and excepts. Now, on the defendant's plea of guilty to the charge of driving under the influence it is my judgment that he shall be required to pay a fine of $200.00 and the costs of this case and that his operator's permit be suspended or revoked for a period of six months. This is the same penalty that he received in the District Court and from which he appealed. The defendant having indicated his intention to apply to the Supreme Court of Virginia for a writ of error to the judgment

of this Court, it is ordered that execution of this sentence be suspended until such time as the Supreme Court of Virginia has acted on his petition.

MR. HASKINS: If Your Honor please, in light of the Court's ruling I think it would have been premature for me to say what I'm going to say now before the Court did actually formally deny my motion. The Court has abused its discretion in failing to assign the defendant to a program authorized by Virginia Code Section 18.2-271.1. The Court has violated the mandate of the statute in that mature consideration was not given to the needs of the defendant in determining whether he should be allowed to enter the program authorized by this statute. I would respectfully submit to the Court that the action of the Court in denying my motion to place Mr. Midkiff in an appropriate program as set forth in the Virginia statute we've been talking about denies Mr. Midkiff as a citizen of the Commonwealth of Virginia equal protection of the laws as guaranteed to him by the 14th Amendment to the United States Constitution and the appropriate amendments to the Constitution of Virginia. It denies him due process of law in regard to how this program is operated throughout the state with other classes of citizens in Virginia as set forth in the 14th Amendment and the appropriate section of the Virginia Constitution. Mr. Midkiff is, it is our position, sir, obviously being exposed to additional perils really. That his driver's license is essential to him. The Supreme Court of the United States in Bell Vs: Burson, which was decided in May, 1971, reported in 91 Supreme Court Reporter, page 1586, has clearly said that the right to drive in our society today where a man's livelihood depends on it is really a matter of a right. It's an entitlement that so far as the right of state, and of course this

Court is acting as an appropriate organ of the State of Virginia, to suspend this license that it's got to be done in accordance with the Federal Constitution and in specific the 14th Amendment. That the Court's action in not allowing him to be admitted to one of these programs is clearly discrimination against him, he's clearly being denied the right that practically, as we discussed before trial with Mr. Philpott, every citizen in the State of Virginia has the benefit of a program of this type that the General Assembly has authorized except this jurisdiction, and I respectfully except to the ruling of the Court for those reasons.

THE COURT: Any further comment, Mr. Reynolds?

MR. REYNOLDS: If the Court please, the only comment I'd have is that has to be the end result of this section. There's no way that this statute that Mr. Haskins has moved for this appointment under could stand the test of constitutionality. It has to have the uneven application that Mr. Haskins complains of and the Commonwealth would be willing to confess that 271.1 is clearly unconstitutional and should be declared unconstitutional.

MR. HASKINS: You mean 18.2-271.1.

MR. REYNOLDS: Yes, sir.

THE COURT: You mean 18--you mean the ASAP statute, 18.2-271.1.

MR. REYNLDS: Yes, sir. It clearly itself has to be unconstitutional because it does force that result of which Mr. Haskins complains.

THE COURT: I think it's pretty obvious that Mr. Haskins--I really don't know how many jurisdictions--probably this is one of the very few jurisdictions in the state that has not become involved in the

ASAP program, but I am sure that at one time that there were quite a few, quite a few were not involved in it, so if what you're saying is true then at one time there were lots of Courts in Virginia who were discriminating against the operators of automobiles who were charged with and convicted of driving under the influence. Well, certainly the record will show your position and the position of the Court is quite clear and I hope clear on the record. So be it. Anything else that either one of you gentlemen would like to say that would add to the record?

MR. HASKINS: No, sir, we have no further comments or evidence for the defendant.

THE COURT: All right.

The foregoing evidence and incidents of trial were recorded by electronic recording device in the Circuit Court of the County of Henry and transcribed by the undersigned, to the best of her ability.

VIRGINIA
CIRCUIT COURT HENRY COUNTY
REC'D. & FILED THIS THE 3rd day of Sept. 80
Teste: R. D. Crouch Jr. Clerk

Phyllis E. Wales

ASSIGNMENTS OF ERROR

I. The Trial Court erred in that he failed to follow the mandatory language of Virginia Code §18.2-271.1 by refusing to give good faith mature consideration to the Defendant's request that he be assigned to a program authorized by the statute.

II. If the Trial Court has the absolute discretion to reject all requests from citizens for assignment to a statutory program authorized by Virginia Code §18.2-271.1, then the statute is unconstitutional and in violation of the due process clause and equal protection clause of the Fourteenth Amendment to the United States Constitution.