160-909 982

Record No. 1287

W. L. MOORE.

VS.

COMMONWEALTH

FROM THE CIRCUIT COURT OF MATHEWS COUNTY VIRGINIA.

"The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements."

The foregoing in printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

160 Va 709

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

W. L. MOORE

versus

THE COMMONWEALTH.

PETITION.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your Petitioner, W. L. Moore, respectfully shows unto the Court that he is aggrieved by a judgment of the Circuit Court of Mathews County, entered on the 9th day of June, 1932, in a criminal prosecution for operating an automobile while under the influence of intoxicants, wherein he was the defendant and in which he was assessed with a fine of One Hundred Dollars ($100.00) and the costs of the said prosecution, and sentenced to confinement in the County jail for a period of thirty days.

A transcript of the record in this case is herewith filed as a part of this petition.

STATEMENT OF FACTS.

From the oral testimony introduced at the trial of the case, the following facts appear:

That on the 27th day of March, 1932, the defendant, W. L. Moore, drove his automobile from his home to Mathews Court House, and while in Mathews, he met with Sheddie Armistead and Melvin Armistead who invited him to go with them to get a bottle of "home brew". He got into a car which belonged to one of the two Armistead boys and went with them

to the Cobbs Creek section of Mathews County, and down a lane to a place that he had never been before and while there he drank three bottles of "home brew". Just before leaving this place he became unconscious of everything that was going on around him and did not regain consciousness until about seven o'clock that night in his bed at his home.

Some time after leaving Cobbs Creek he was seen in his car alone near "Spring Hill", about two miles below Mathews Court House. His car was seen to go ahead a few feet and then roll into the ditch. He was driving the car at that time. According to the evidence of Sheriff G. T. Hudgins and H. K. Taylor, he was under the influence of some kind of an intoxicant (Record, pages 5-6). Sheriff G. T. Hudgins took the defendant to his home after first going to the home of Justice of the Peace Thomas F. Walden, and having him recognized to appear at a preliminary hearing which was to be held some time during the following week.

The defendant, Moore, testified (Record, pages 6-7) that he had no intention of violating any of the provisions of the prohibition law, that he did not know it was unlawful to drink "home brew" and that he certainly would not have driven his car from Mathews Court House upon his return from Cobbs Creek had he been conscious and aware of what he was doing. Both Sheriff Hudgins and H. K. Taylor testified (Record, pages 5-6) that the defendant did not know what he was doing during the time they were with him.

LAW OF THE CASE.

The only assignment of error in this case is to the refusal of the Trial Court to give the instruction set out in Certificate of Exception No. 1 (Record, page 4), which reads as follows:

"The Court instructs the Jury that although they may believe from the evidence beyond a reasonable doubt that the defendant, Moore, is guilty of driving a car on the public highways of Mathews County while under the influence of intoxicants, yet if they further believe that such violation of law was an unintention and inadvertent violation of law, then the jury may, in their discretion, omit the jail sentence in this case."

Section 4675, Subsection 6, of the Code of Virginia, provides in part as follows:

"But where, upon the trial of any charge of violation of this Act other than the charge of manufacture of or sale of ardent spirits, or the transportation thereof in excess of one quart, or for a felony, it shall appear to *the Jury trying the case* (italics supplied) that there has been no intentional violation of any provisions thereof but an unintentional or inadvertent violation thereof, the jury may in their discretion omit the jail sentence."

The evidence in this case shows most conclusively that the defendant had no intention of violating any provision of the State Prohibition Law. He testified (Record, pages 6-7) that he did not know that it was against the law to drink "home brew", and he further testified that he would not have driven his car home from Mathews Court House had he been conscious and known what he was doing. Both Sheriff Hudgins and H. K. Taylor testified (Record, pages 5-6) that the defendant was unconscious and did not know what he was doing during the whole of the time they were with him.

It will be seen from a careful reading of sub-section 6 of Section 4675 of the Code of Virginia that the question of intentional or unintentional violation of the law is left to the discretion of the jury trying the case, and they can, in their discretion, omit the jail sentence; and it is the duty of the Trial Court to so instruct the jury when requested so to do by the defendant, and certainly this instruction should have been given in the instant case when there was so much uncontradicted evidence upon which to base it.

In the case of *Hawkins* vs. *Commonwealth*, 120 S. E., page 854, Va., page , which was decided before sub-section 6 of Section 4675 of the Code of Virginia was amended, leaving the question of unintentional violation to the discretion of the jury instead of the Court, Judge Simms, in construing this Section (which at that time was sub-section 5) on the question of the admission of evidence of unintentional violation, said:

"This language applies to the whole act and hence necessarily applies to the aforesaid offense created by Section 21½ of the Act (which section deals with possession of stills and appliances, etc.). We are of the opinion, therefore, that the learned Trial Court was in error in excluding the testimony of witnesses offered by the accused, which, as appeared from the record before us, tended to corroborate the testimony of the accused on the subject of whether his conduct constituted

an unintentional violation of the provisions of the Act in question. On this subject the accused testified he had never seen such devices before and was totally ignorant as to what the apparatus was. Now, of course, the credibility of this testimony of the accused, and of the corroborating testimony also was for the Court under Section 5 aforesaid, and if the Court was not satisfied after hearing such testimony that it appeared therefrom that the violation of the Act in question was unintentional, the Court properly would and should have refused Instruction No. 3. But before the Court decided that question it should have considered the corroborating testimony mentioned, and we think it was reversible error for the Court not to have done so, and to have excluded it as inadmissible as a matter of law as it did."

Now, if it was reversible error for the Trial Court to exclude evidence of unintentional violation of the law and not to consider the same under Section 5 of the old law which left the question of unintentional violation entirely to the Court, would it not be reversible error in the instant case for the Trial Court to admit for the consideration of the jury evidence of unintentional violation and then refuse to instruct the jury that they could, in their discretion, omit the jail sentence if they believed from the evidence in the case that the violation was an unintentional and inadvertent violation, when sub-section 6 expressly leaves the matter to the discretion of the jury trying the case?

The position was taken by the learned Trial Judge in refusing the instruction in the instant case that this prosecution arose under sub-section 25 of Section 4675 of the Code of Virginia, which after defining the penalty for the violation of this Section provides that the Court in a proper case may suspend the jail sentence, and that the unintentional provision in sub-section 6 does not apply. This position is not sound for the reason that Judge Simms has said in the Hawkins case, cited above, that the language of Sub-section 5 (now sub-section 6) applies to the whole act, and hence necessarily afplies to the offense created by sub-section 25 of the Act. There are certain exceptions, however, stated in subsection 6 which do not apply to the instant case.

There is no evidence in the Record in this case that the accused is an habitual violator of the prohibition law, or that his reputation for violation thereof is bad. There is evidence that he did not know that it was against the law to drink "home brew" and that he had no intention of violating the

law and that when he was found in his car near "Spring Hill" by the Sheriff he was then in an unconscious condition and did not know what he was doing. The defendant himself testified as already stated that he certainly would not have attempted to drive his car after returning to Mathews Court House had he known what he was doing.

Therefore, Counsel submits that if there ever was a case in Virginia in which this instruction should have been given it should have been given in the instant case where there is so much evidence to support it; that the jury should have been told after this evidence was admitted by the Trial Court that if they believed that it was an unintentional or inadvertent violation of law they could, in their discretion, omit the jail sentence.

Counsel respectfully submits for the above reasons set forth in this petition which is adopted as the brief of the appellant that the said order of June 9, 1932, should be reversed and set aside and this case remanded to the Circuit Court of Mathews County for another trial.

Counsel for appellant hereby requests that he be permitted to argue orally the matters contained in this petition for a writ of error; and does certify that a copy hereof has been delivered to W. M. Minter, Esq., Commonwealth's Attorney of Mathews County, as provided by Rule 2, Section (a) of this Court.

Respectfully submitted,

W. L. MOORE,
By Counsel.

GILBERT L. DIGGS,
Counsel.

I, Gilbert L. Diggs, an Attorney, practicing in the Court of Appeals of Virginia, do certify that in my opinion it is proper that the decision of the Circuit Court of Mathews County in the case of W. L. Moore vs. The Commonwealth of Virginia, record of which is annexed, should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

Given under my hand this 27th day of July, 1932.

GILBERT L. DIGGS.

I hereby acknowledge receipt of a copy of the petition in the above case in conformance with Rule II (Section A) of the Supreme Court of Appeals of Virginia.

Given under my hand this 27th day of July, 1932.

W. M. MINTER,
Commonwealth's Attorney of Mathews Co.

Received July 30, 1932.

H. S. J.

Aug. 11, 1932.

Writ of error granted and *supersedeas* awarded, which is not, however, to discharge the accused if in custody, or to release his bail if out on bail.

LOUIS S. EPES.

Received Aug. 11, 1932.

H. S. J.

VIRGINIA:

County of Mathews, to-wit:

Pleas before the Circuit Court of the County of Mathews, at the Courthouse of the said county, on the 6th day of July, 1932.

Be it remembered, That heretofore, to-wit:

At a Circuit Court held for the said county at the courthouse, on Monday, the 16th day of May, 1932, W. B. Diggs, foreman, Claud Diggs, James C. Curfman, F. G. Boyd, S. P. James and George C. Diggs were sworn a special grand jury of inquest for the body of this county, and having received their charge withdrew, and after some time returned into court with an indictment against W. L. Moore for a misdemeanor, which, with the indorsement thereon by the foreman, is as follows:

Commonwealth of Virginia,
County of Mathews, to-wit:

In the Circuit Court of Mathews County.

The grand jurors in and for the body of the said County of Mathews, and now attending the said Court at its May, 1932, Term, upon their oaths, do present that W. L. Moore, on the day of March, 1932, and within one year next prior to the finding of this indictment, in the said County, and upon

the public highways of the said County, did unlawfully operate and drive an automobile while he, the said W. L. Moore, was under the influence of intoxicants, in violation of the Prohibition statutes made and provided for the State of Virginia, against the peace and dignity of the Commonwealth of Virginia.

Upon the evidence of Lawrence Richardson, Charles Richardson and G. T. Hudgins, witnesses sworn in open Court and sent on to the Grand Jury to give evidence.

Endorsed: A True Bill. W. B. Diggs, Foreman.

And on the same day, to-wit: At a Circuit Court held for the County of Mathews, at the courthouse thereof, on the 16th day of May, 1932, the following proceedings were had:

page 2 } The Commonwealth of Virginia
vs.
W. L. Moore.

ON INDICTMENT FOR A MISDEMEANOR.

This day came the Commonwealth by W. M. Minter, Esq., her attorney and the accused appeared in obedience to his recognizance entered into at the preliminary hearing of this case, and by Gilbert L. Diggs, Esq., his attorney, and upon his arraignment pleaded not guilty to the indictment against him, thereupon came a jury, viz.: Bernard Hunley, R. W. White, N. A. Lewis, Chas. N. Hill and Luther B. Clark, who were sworn to well and truly try and true deliverance make between the Commonwealth and the accused and a true verdict render according to the evidence, and having fully heard the evidence and argument of counsel were sent out of Court to consider of their verdict, and after some time returned into Court with a verdict in the following words:

We the jury find the accused guilty as charged in the within indictment and fix his punishment at a fine of $100.00 and confinement in the County jail for thirty days.

C. N. HILL, Foreman.

The accused, by his attorney, moved the Court to set aside the verdict of the jury as contrary to the law and the evidence and for refusal of the Court to give an instruction asked for by the accused, which motion the Court takes time to consider.

And at another day, to-wit: At a Circuit Court continued and held for the County of Mathews at the courthouse thereof, on Thursday the 9th day of June, 1932, the following order was entered:

The Commonwealth of Virginia
vs.
W. L. Moore.

ON INDICTMENT FOR A MISDEMEANOR.

page 3 } The Court having maturely considered the motion made by Gilbert L. Diggs, Esq., attorney for the accused, on the 16th day of May, 1932, to set aside the verdict of the jury as contrary to the law and the evidence and for the refusal of the Court to give an instruction asked for by the accused, doth decline to set aside the verdict.

It is therefore, considered by the Court that the Commonwealth recover of the accused W. L. Moore the fine of One Hundred Dollars, by the jury assessed and her costs in this prosecution expended, and that the accused be confined in the county jail of Mathews County for a term of thirty days, and it is forther ordered by the Court, that if the fine and costs be not paid at the expiration of the jail term, that the accused shall be delivered to the State Convict Road Force to be held until the fine and costs be fully worked out as provided by statute, unless same be sooner paid by the accused.

The accused, by his attorney, having signified his intention to apply to the Court of Appeals of Virginia for a writ of error, the execution of this judgment is suspended for a period of sixty days in order that he may perfect his appeal.

And now at this day, to-wit: In the Circuit Court of Mathews County, in vacation, on the 6th day of July, 1932, that being the same day and year as that first herein mentioned, the following proceedings were had.

VACATION ORDER.

The Commonwealth of Virginia
vs.
W. L. Moore.

ON INDICTMENT FOR A MISDEMEANOR.

This day came the defendant, W. L. Moore, by Gilbert L. Diggs, his attorney, before me, J. Boyd Sears, Judge of the Circuit Court of Mathews County, in vacation, and tendered his three certificates of exceptions numbered 1-2 and 3 and prayed that the same be taken, signed, sealed and
page 4 } enrolled and made a part of the record in this case.

And it appearing to the Court that the certificates of exceptions are tendered within sixty days of the date of the final judgment entered in this case, and that W. M. Minter, Esq., Commonwealth's Attorney of Mathews County, has had notice as required by law of the time and place of tendering the said certificates of exceptions, the same are accordingly signed, sealed, enrolled and made a part of the record in this case on this 6th day of July, 1932, and within sixty days of the time at which final judgment was entered therein.

The Clerk of the Circuit Court of Mathews County will enter the above vacation order in the current Common Law Order Book of his Court.

J. BOYD SEARS, Judge.

7-6-32.

The above order was received and entered July 6th, 1932.

W. B. SMITH, Clerk.

CERTIFICATE OF EXCEPTION NO. 1.

The following instruction was offered by the defendant at the trial of this case:

"The Court instructs the jury that although they may believe from the evidence beyond a reasonable doubt that the defendant, Moore, is guilty of driving a car on the public highways of Mathews County while under the influence of intoxicants, yet if they further believe that such violation of law was an unintentional and inadvertent violation of law, then the jury may, in their discretion, omit the jail sentence in this case."

The Court refused to give the above instruction and the defendant, by Counsel. excepted to the action of the Court in refusing to give the said instruction and gave as his reasons that the evidence amply disclosed the fact that the defendant, Moore, had no intention of violating the
page 5 } prohibition law and that Section 6 provided that where upon the trial of any charge of violation of this act other than the charge of manufacture or sale of ardent spirits or the transportation thereof in excess of one quart or for a felony it shall appear to the jury trying the case that there has been no intentional violation of any provision thereof but an unintentional or inadvertent violation thereof, then the jury may, in their discretion, omit the jail sentence. And further, that where there is any evidence of an unintentional or inadvertent violation, it is mandatory upon the Court to give to the jury the said instruction.

Teste; This 6th day of July, 1932.

J. BOYD SEARS, Judge, (Seal)

CERTIFICATE OF EXCEPTION NO. 2.

The following testimony on behalf of the Commonwealth and the defendant, respectively as hereinafter noted, is all the evidence introduced at the trial of this case.

G. T. HUDGINS,

A witness for the Commonwealth, testified as follows:

My name is G. T. Hudgins. I hold the position of Sheriff of Mathews County. On Sunday, March 27th, 1932, I received information that W. L. Moore had driven his car in the ditch near Spring Hill, about two miles below Mathews Court House. I went to this place and found Mr. Moore's car in the ditch. Mr. Moore was sitting in the car and was so much under the influence of something that he did not know me, nor did he know what was going on around him. I took him in my car to the home of T. F. Walden, Justice of the Peace, and had him recognized to appear at Mathews Court House one day the following week to answer a charge of operating an automobile under the influence of intoxicants. I do not think he knew what he was doing at the home of Mr. Walden.
page 6 } I then took him to his home, where I left him. The next morning Mr. Moore came to my home and asked me what he did the day before. He said his con-

dition was such that he did not know what he was doing. I did not find any liquor nor any intoxicants in Mr. Moore's car or on his person. He was so much under the influence of some kind of an intoxicant I do not think he knew what he was doing during the time he was with me on this Sunday.

HERBERT K. TAYLOR,
A witness for the Commonwealth, testified as follows:

My name is Herbert K. Taylor and I live near Mathews Court House.

On Sunday, March 27th, 1932, I was driving toward Mathews Court House from New Point, and near Spring Hill, I saw a car standing in the road. Just before I got to it, it went ahead a few feet and went in the ditch. I stopped my car and got out and went to this car and found Mr. W. L. Moore at the wheel, seemingly under the influence of an intoxicant. He did not seem to know what he was doing and I am not sure that he recognized me, although he knows me very well. I asked him what the trouble was and told him to get a rope and I would try to pull his car out of the ditch. He did not seem to know what I mean and finally with my assistance, he got out of the car and made a few steps, holding on to the side of the car. Mr. Moore was driving the car when I saw him.

After a little while the Sheriff came and took him in his car and drove off.

W. L. MOORE,
The defendant, testified as follows:

My name is W. L. Moore and I am engaged in the automobile repair and general garage business at Susan, Virginia.

page 7 } On Sunday, March 27th, 1932, I drove to Mathews Court House, and while there I met Sheddie Armistead and Melvin Armistead, and they invited me to go with them to get a bottle of home brew. I got in the car with them and drove up in the neighborhood of Cobbs Creek, and went down a lane to the home of a colored man, a place I had never been before, and while there I drank three bottles of home brew, in a wood shed on the place. Just before leaving this place, everything seemed to turn black before me and I became unconscious of everything that was going on around me. The first I knew after this was about seven o'clock that night when I came to myself in my bed at home. I was not the one who paid for the home brew.

I had no intention of violating the prohibition laws and I did not know it was against the law to drink home brew. I had drunk many times before as many as three or four bottles of home brew and it did not intoxicate me the least bit. I do not remember anything about getting in my car at Mathews Court House, as I certainly would not have attempted to drive it in the condition I was in, had I been conscious of what I was doing. I do not remember when the Sheriff took me to Mr. Walden's home and I went to the Sheriff's the next morning to ascertain from him what had happened the day before.

Teste: This 6th day of July, 1932.

J. BOYD SEARS, Judge, (Seal)

CERTIFICATE OF EXCEPTION NO. 3.

On the trial of this case and after the jury had brought in its verdict, the defendant, by Counsel, moved the Court to set aside the said verdict as contrary to the law and the evidence and without evidence to support the verdict, and for error committed by the Court in refusing to give the instruction asked for by the defendant, which motion the Court overruled and to which ruling of the Court the de-
page 8 } fendant by counsel excepted.

Teste: This 6th day of July, 1932.

J. BOYD SEARS, Judge, (Seal)

Virginia:

In the Circuit Court of Mathews County.

I, W. B. Smith, Clerk of the Circuit Court of the County of Mathews, do certify that the foregoing is a true transcript from the records of the said Court, and I further certify that W. M. Minter, Commonwealth's Attorney, has received notice as required by law.

Given under my hand this 25th day of July, 1932.

W. B. SMITH, Clerk.

Clerk's Fee, $4.50.

A Copy—Teste:

H. STEWART JONES, C. C.

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