

205Va 93

Record No. 5688

In the
Supreme Court of Appeals of Virginia
at Richmond

ROGER ALBERTUS LUTZ, JR.

v.

CITY OF RICHMOND

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

Th:
to be
Yo:
P:

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5688

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 5th day of June, 1963.

ROGER ALBERTUS LUTZ, JR., Plaintiff in error,
against

CITY OF RICHMOND Defendant in error.

From the Hustings Court of the City of Richmond
W. Moscoe Huntley, Judge

Upon the petition of Roger Albertus Lutz, Jr., a writ of error and *supersedeas* is awarded him to a judgment rendered by the Hustings Court of the City of Richmond on the 14th day of February, 1963, in a prosecution by the City of Richmond against the said petitioner for a misdemeanor; but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

Filed March 14, 1963.

page 1 }

* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

The Defendant, Roger Albertus Lutz, Jr., gives notice of appeal from the judgment of the Court rendered herein on February 14, 1963, and assigns the following errors as required by Rules of Court 5:1, Sec. 4:

1. The Court erred in overruling the Defendant's motion to dismiss on the basis of discrepancies in the dates on the Commonwealth's report as to when the blood was taken for testing as required by Virginia Code Vol. 4, 1960 Replacement Vol., Sec. 18.1-55.

2. The Court erred in refusing to grant the Defendant's motion for a dismissal on the grounds that the Defendant was not able to offer evidence in his behalf through no fault of his own, said evidence being authorized by Virginia Code Vol. 4, Sec. 18.1-55.

3. The Court erred in overruling the Defendant's motion to dismiss the charge at the completion of all the evidence on the basis that Virginia Code Vol. 4, 1960 Replacement Vol., Sec. 18.1-55 had not been complied with.

4. The Court erred in rendering a verdict and judgment against the Defendant, which was contrary to the law and the evidence.

I certify that a copy of the foregoing Notice of Appeal and Assignments of Error has been delivered to T. Gray Haddon, Esquire, Commonwealth's Attorney, Counsel of Record for the Commonwealth of Virginia this 14th day of March, 1963.

ROBERT H. MERHIGE, JR.

* * * * *

page 2 } City of Richmond,
Commonwealth of Virginia, to-wit:

No. 6806

TO ANY POLICE OFFICER:

WHEREAS, B. W. Hughes has this day made complaint and information on oath, before me, the undersigned, a Justice of the Peace of said city, that Roger Albertus Lutz Jr. did on the 9th day of Dec. 1962, Unlawfully operate a certain motor vehicle while under the influence of intoxicants or drugs.

These are, therefore, to command you, in the name of the City of Richmond, to apprehend and bring before the Traffic Court of the City of Richmond, the body of the above accused, to answer the said complaint and to be further dealt with according to law. And you are also directed to summon B. W. Hughes, Pc., V. C. Iacopinelli as witnesses.

Given under my hand and seal, this 9th day of Dec. 1962.

C. O. WILLIAMS (Seal)
Justice of the Peace.

* * * * *

page 3 }

* * * * *

Pleas at the Courthouse of the City of Richmond, before the Hustings Court of the said City, on the 19th day of March, 1963.

Be it remembered that heretofore, to-wit; on the 14th day of February, 1963, the following order was entered:

City of Richmond,

Judge Huntley

v. Appeal

Roger Albertus Lutz, Jr.,

Dft.

The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City. And being arraigned, he pleaded not guilty to operating a certain motor

vehicle while under the influence of intoxicants or drugs, as charged. And with the consent of the accused, given in person, and the concurrence of the Court and the Attorney for the City of Richmond, the Court proceeded to hear and determine this case without a jury, and having heard the evidence, doth find the said defendant guilty as charged and doth assess his fine at two hundred dollars and ascertains his terms of confinement in the City Jail at ninety days.

And thereupon the said defendant moved the Court to set aside its judgment as being contrary to the law and to the evidence and grant him a new trial, which motion the Court doth overrule and to which action of the Court in overruling his said motion the said defendant notes an exception and time is allowed him not to exceed sixty days in which to file his bills of exceptions.

Whereupon it is considered by the Court that the said Roger Albertus Lutz, Jr., pay and satisfy a fine of two hundred dollars and costs and be confined in the City Jail for a term of ninety days, and on his motion the execution of the said jail sentence is suspended during his good behavior for the next twelve months, and it is further ordered that he not operate a motor vehicle for a period of one year.

The said defendant then moved the Court to suspend the execution of the said sentence to allow him to appeal to the Supreme Court of Appeals, which motion the Court doth grant and the execution of the sentence is suspended to April 15, 1963.

And thereupon, with leave of the Court, the said defendant entered into a recognizance in the sum of three hundred dollars, with United Bonding Insurance Company, as surety, conditioned that he appear before this Court on April 15, 1963, to abide by the judgment of this Court in the event the Supreme Court of Appeals of Virginia refuses to grant a writ of error and supersedeas or if granted it be later dismissed, and in the meantime keep the peace and be of good behavior and violate none of the laws of this Commonwealth. And thereupon the said defendant is released.

* * * * *

page 4 }

* * * * *

B. W. Hughes.

Be it remembered that at another Hustings Court held for the City of Richmond, to-wit; on the 19th day of March, 1963, the following order was entered:

City of Richmond,

v. Appeal

Roger Albertus Lutz, Jr.,

Dft.

The transcript of the evidence adduced, the objections to evidence and other incidents in the trial was this day signed and sealed by the Court and delivered to the Clerk of this Court and hereby made a part of the record in this case.

* * * * *

page 1 }

* * * * *

Transcript of the evidence and other incidents of the above when heard on February 14, 1963 before Honorable W. Moscoe Huntley, Judge.

Appearances: Mr. T. Gray Haddon, Commonwealth's Attorney; Mr. Robert R. Merhige, Jr., 10 South 10th Street, Richmond, Virginia, and Mr. Charles W. Sydnor, 1 Jackson Avenue, Richmond, Virginia, counsel for the defendant.

* * * * *

page 4 }

B. W. HUGHES,
introduced in behalf of the City of Richmond, first
being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Haddon:

Q. Mr. Hughes, you are a police officer for the City of Richmond, are you not?

A. Yes, sir.

B. W. Hughes.

Q. How long have you been on the police force?

A. Eight and a half years.

Q. I believe you arrested the defendant here on what date?

A. On December 9, 1962.

Q. December 9, 1962, and you charged him with driving under the influence?

A. Yes, sir.

Q. Did you advise him of his rights to have his blood test taken?

A. Yes, sir.

Q. Did he consent to it?

A. Yes, sir.

Q. Where did you take him?

A. He was taken to the Medical College of Virginia. 20 cc's of blood was drawn.

Q. Then one vial was left with the Medical College—

A. I took my vial and dropped it in the slot at page 5 } the Medical Examiner's Office, and one vial was sent to the lockup with the prisoner.

Q. The result of the examination by the Medical College, will you—

Mr. Haddon: You have seen this, have you not, Mr. Merhige?

Mr. Merhige: I haven't seen that original, Judge Haddon. I have seen a copy.

A. .24

Q. The result is .24?

A. Yes, sir.

Q. That was in the City of Richmond?

A. Yes, sir.

Q. Was he under the influence?

A. Yes, sir. You want me to give the details?

Mr. Merhige: We object to the officer giving his conclusion as to whether the man was under the influence, Your Honor.

The Court: Objection sustained.

Q. What was his condition?

A. Mr. Lutz was operating a vehicle west on Grace Street, driving with his lights out. There were two police cars with red lights and sirens on when I got behind the car, and we

B. W. Hughes.

were unable to get him stopped. We had to block
page 6 } him in. One car in front of him, one behind him,
and one beside him.

When we got him stopped, he got out of the station wagon he was operating and fell up against it, after getting out of it. He had a very strong odor of alcohol; his eyes were blood-shot; and his speech was slurred to such an extent it was difficult to understand him. He said he was not injured. His finger to nose test, he hit the side of his nose. He stated he had been drinking bourbon at a party, and he was not taking medicine. He staggered on walking, and had difficulty in picking up a coin.

Q. That was in the City of Richmond, I believe?

A. Yes, sir. In the twenty-two hundred block West Grace.

Mr. Haddon: That is all.

CROSS EXAMINATION.

By Mr. Merhige:

Q. Mr. Hughes, what time was this man arrested, sir? The date.

A. On December 9, 1962 at 2:15 A.M.

Q. December the 9th?

A. That is correct.

Q. Is this the report that you received back from the office of the Chief Medical Examiner, and, if so, what
page 7 } was the alcoholic content, the reading?

A. .24. Yes, sir. This is the report.

Q. Now, sir, would you look at that and tell His Honor what date, according to that report, this blood was taken for testing purposes?

A. On December the 8th.

Q. That was prior to the time the man was even charged with an offense—

A. That is correct.

Q. —is that correct?

A. Yes, sir.

Q. Does that show how many cc's of blood was taken? Up on the top on the right, Mr. Hughes. Received—

A. 10 cc's of blood.

Q. 10 cc's?

A. Yes, sir.

Q. He voluntarily took the test?

B. W. Hughes.

A. Yes, sir.

Q. He was given a test tube sealed in accordance with the Statute?

A. It wasn't given to him at the hospital.

Q. But it was sealed.

A. Yes, sir. Sealed in his presence.

Q. Then you gave it to him.

A. To the operator of the wagon.

page 8 } Mr. Merhige: All right, sir. I have no further questions.

* * * * *

Mr. Merhige: If Your Honor please, in reference to this report, the Commonwealth's report shows the blood was taken on the 8th. The man wasn't even arrested until the 9th. Your Honor has already heard evidence as to the results of a report that couldn't possibly be, assuming the report is correct.

I move that the charge be dismissed at this stage.

Mr. Haddon: If Your Honor please, as far as the dates are concerned, the Officer said he was arrested on the 9th. He went with him to the hospital; the blood was taken, and the blood was turned over to the Medical College and the blood was turned over to him. The Officer said it was on the 9th. I am satisfied we can show from the records it was on the 9th. I think we can. Sgt. Iacopinelli told me the girl over there said they date everything over the week end for the 8th.

page 9 } I do not think the date is the true date when we show by the Officer that it was on the 9th. He stated he was arrested at 2:15 A.M., I believe. It is on the vial 12/9/62, and the Officer says it was on the 9th. The Officer says what time he was arrested. It couldn't have been taken before he was arrested. Just because the date on there is the 8th, that would not be conclusive. The Officer said it was on the 9th. The vial here that had blood in it says it was on the 9th. The Officer testified that he went there with him and the blood was taken on the 9th after he was arrested at 2:15 A.M. on the morning of the 9th. I do not think we are bound by that just because that certificate says it was on the 8th.

Mr. Merhige: Our position, sir, is that the Statute must be strictly complied with.

The only thing Your Honor has—the tube means nothing to

V. C. Iacopinelli.

the Court—all you have is a report from the Medical Examiner that certain blood taken on December the 8th showed an alcoholic content of .24. If the man wasn't arrested until the 9th, it is not his fault if there was an error by the Medical Examiner.

While there may be little doubt in Your Honor's mind, or even my mind, but that that report more than likely referred to the blood that was taken on the 9th, there page 10 } is no way to tell beyond all reasonable doubt that it was.

When a man voluntarily submits to the test, the test that he doesn't have to, the Court has held that the Statute must be strictly complied with, even to the method of sealing the tube.

I know Your Honor has heard evidence as to how it is sealed, so forth and so on. We make no issue of that at this point. We are satisfied that it was sealed properly.

But that report says it is blood that was taken on the 8th. I submit that we are entitled to all of the benefits, if it please the Court.

The Court: The Court overrules your motion.

Mr. Merhige: Exception, sir, for the reasons stated. The motion was, in effect, sir, to exclude all of that evidence and to dismiss.

The Court: Yes, sir.

* * * * *

page 11 }

V. C. IACOPINELLI,

introduced in behalf of the City of Richmond, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Haddon:

Q. Sergeant, were you called by Officer Hughes when the defendant was arrested of drunk driving?

A. Yes, sir.

Q. Did you observe the defendant?

A. Yes, sir.

Q. You have heard Officer Hughes here testify, have you not?

A. Yes, sir.

Q. Would your evidence be about the same as to the condition of the defendant?

V. C. Iacopinelli.

A. Yes, sir.

Mr. Haddon: All right, sir.

CROSS EXAMINATION.

By Mr. Merhige:

Q. Sergeant, I hand you herewith what purports to be a blood alcohol report delivered—so that we may let the record show—by St. Elizabeth's Hospital directly to the Clerk of the Traffic Court of the City of Richmond, and can you tell

His Honor, sir, the date of that report?
page 12 } A. 12/9/62 is the date—The date of the report is 12/17/62.

Q. Can you tell the date that was on the tube of the blood?

A. The container seal when received had not been broken or otherwise tampered with. 12/9/62.

Q. Does it show how many cc's of blood were delivered to St. Elizabeth's?

A. 8 cc's of blood for alcohol content, on this.

Q. Will you tell His Honor what the results was?

A. Blood clotted so was not satisfactory for blood alcohol test.

Mr. Merhige: All right, sir. We offer this, if it please the Court, as Defendant's Exhibit No. 1.

Note: The above identified report is now marked and filed as Defendant's Exhibit No. 1.

Mr. Merhige: If Your Honor please, we would like to introduce the tube by stipulation. This is the tube and container that was delivered to St. Elizabeth's Hospital. We offer that as Defendant's Exhibit No. 2.

Note: The above vial and mailing box is marked and filed as Defendant's Exhibit No. 2.

Mr. Merhige: I have finished with this witness,
page 13 } sir.

Mr. Haddon: That is all.

Witness stood aside.

Mr. Haddon: That is the Commonwealth's case.

Roger Albertus Lutz, Jr.

* * * * *

page 14 } ROGER ALBERTUS LUTZ, JR.,
the defendant, first being duly sworn, testified in
his own behalf as follows:

DIRECT EXAMINATION.

By Mr. Merhige:

Q. Mr. Lutz, please state your name and residence.

A. Roger A. Lutz, Jr., 9406 Greenford Drive, Richmond.

Q. You are the accused in this case, are you, sir?

A. Yes, sir.

Q. Mr. Lutz, I hand you a box containing, I believe, Defendant's Exhibit No. 2, and ask you, sir, if this is the box that was received by you purportedly containing the blood taken from you at MCV on December 9, 1962?

A. Yes, sir.

Q. Would you tell his Honor what day of the week, if you recall, was this blood taken from your arm?

A. It was taken early Sunday morning.

Q. Would that be December 9, 1962?

A. Yes, sir.

Q. When did you deliver this blood, if you did deliver it, to St. Elizabeth's Hospital?

A. On the morning of December 11th.

Q. December 11th?

A. (Nodding head in assent).

page 15 } Q. What day of the week was that?

A. Tuesday morning.

Q. Did you pay for the test at that point, sir?

A. Yes, sir.

Q. Did you ever see this box again until it was exhibited in Traffic Court?

A. No, sir.

Q. Did you make that writing on there that says Paid 12/11/62. Blood clotted. Unsatisfactory for testing?

A. No, sir.

Q. Was it on there before you delivered it to the hospital?

A. No, sir.

Q. Between the time you received the blood and the time you delivered it to the hospital, sir, under what condition was the blood kept?

A. It was kept in the refrigerator, sir.

Q. Were you instructed to do that by the police officer—

Roger Albertus Lutz, Jr.

A. Yes, sir.

Q. —or somebody over at MCV?

A. Yes, sir.

Q. And it was kept in the refrigerator?

A. Yes, sir.

Mr. Merhige: All right, sir. That is all,
page 16 } sir.

* * * * *

Mr. Haddon: I think probably, if Your Honor please, the reason I said it was three days, the receipt from the hospital was dated the 12th.

Mr. Merhige: That is correct.

Mr. Haddon: This was on the 9th. But I am satisfied if they summonsed the hospital people down here they would say that this was their writing of the hospital. The defendant said it was on a Tuesday; the arrest was on early Sunday morning.

I am satisfied the evidence would show probably that the receipt they have there was dated the 12th, when this box with the blood in it was delivered on the 11th.

Mr. Merhige: Yes, sir. If Your Honor please, I haven't even discussed this with Judge Haddon, I wonder if we could stipulate that that box was delivered from the Clerk of the Traffic Court to Mr. Sydnor, who is counsel, and it has been in either his possession, my possession or the Commonwealth's Attorney's possession since that time, and never

page 17 } in the possession of the defendant.

Mr. Haddon: Yes, sir.

Mr. Merhige: That is what Mr. Sydnor would testify to, and I state, too, that the defendant has never had it in his possession.

Mr. Haddon: I will stipulate that Mr. Sydnor, I am confident, would not have changed it at all.

Mr. Merhige: That is the defendant's case, if it please the Court.

I renew my motion to dismiss this charge on the grounds that Section 18.1-55 (f) of the Code states that in the event—in effect—there is any failure to comply with any requirements of the section, then that failure shall be deemed a reasonable doubt of the defendant's guilt.

This is a case where there are some confusing elements to it. One, there is, apparently, a typographical error, what

appears to be a typographical error on the Medical Examiner's Report saying the blood was taken on the 8th.

The evidence before Your Honor, the uncontradicted evidence before Your Honor is that only 8 cc's were
page 18 } put in this tube that was delivered to the accused.

While the Statute does not require a specific amount of blood, the instructions to the Medical Examiner—and this form is made up by the State, sir, which is kept in each tube—I don't know whether the officers carry the tubes with them or what—states "shall withdraw 20 cc's from the accused and place 10 cc's in each test tube." In this particular instance only 8 cc's were placed in the tube which was given to Mr. Lutz, the accused.

The evidence here, which is uncontradicted, is that it was kept under refrigeration in accordance with the instructions of the Commonwealth. The evidence here is that the blood was clotted and was unsatisfactory for testing. The results of the test show that the seal was not tampered with; that nothing was tampered with.

Under this section I submit, sir, this man is entitled to an acquittal.

On the question of whether or not an unreasonable length of time elapsed, as a matter of fact, I believe that blood can be kept at room temperature for as much as seventy-five days and it would not affect it. We did not anticipate this and I—

Well, I guess I cannot argue about anything but
page 19 } the evidence. But I feel confident that any testimony by the Medical Examiner would say that coagulation occurs by the failure to either put in enough sodium fluoride, which is mixed with the blood, or the failure to properly shake it at the time the blood is taken. That is not the accused's responsibility, if it please the Court.

I respectfully move for a dismissal of this charge, sir.

Mr. Haddon: I might say, if Your Honor please, as to the 8 cc's, if they reported back that there was not enough taken to make the examination, I think that would probably enter into it; but in view of the fact they reported back that what was in there had clotted, or had become coagulated, I do not think whether it was eight, ten or whatever it was would enter into it.

On the other question for Your Honor to determine as to whether or not within a reasonable length of time the accused delivered this to the hospital, if he did, then frankly I think we are out of court; if Your Honor comes to the conclusion that it wasn't within a reasonable time, then, of course, that is for Your Honor to determine.

The Court: The Court will overrule your motion. page 20 }

Mr. Merhige: We respectfully except, if Your Honor please.

The Court: All right, sir. Is that the case?

Mr. Haddon: Yes, sir. That is the case.

The Court: All right, sir. Stand up, please.

Note: At this point the defendant stands.

The Court: The Court finds you guilty as charged and fixes your penalty at \$200.00 and costs, and sentences you to jail for a term of ninety days. The Court will suspend the execution of the jail sentence for a period of twelve months on condition that you keep the peace and be of good behavior and not violate any laws of the Commonwealth.

I would like to point out to you, sir, that you will lose your operator's permit for a period of one year. Should you inadvertently operate a motor vehicle during that period of time and you are convicted, there is a mandatory jail sentence and, of course, this Court could revoke the suspended sentence given you this morning. I merely point this out to you so you will not get into any further difficulties.

Mr. Merhige: If Your Honor please, we would move the Court to set aside the verdict and judgment of the Court and, presupposing that Your Honor is going to overrule that—I have no other reasons than the reasons previously stated—we respectfully move the Court to suspend execution of the judgment of the Court until we have had an opportunity to prepare the record, sir, and apply for a writ.

The Court: The Court will overrule your motion.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Writ of Error and <i>Supersedeas</i> Awarded	1
Record	2
Notice of Appeal and Assignments of Error	2
Warrant	3
Judgment—February 14, 1963	3
Order—March 19, 1963	5
Proceedings	5, 8, 12
Witnesses:	
B. W. Hughes	5
V. C. Iacopinelli	9
Roger Albertus Lutz, Jr.	11