

205VA312

Record No. 5750

In the
Supreme Court of Appeals of Virginia
at Richmond

ROY AUGUSTUS BRUSH

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF NELSON COUNTY

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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5750

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 14th day of October, 1963.

ROY AUGUSTUS BRUSH, Plaintiff in error.

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

From the Circuit Court of Nelson County
C. G. Quesenbery, Judge

Upon the petition of Roy Augustus Brush a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Nelson County on the 22nd day of April, 1963, in a prosecution by the Commonwealth 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

.

page 1]

STATE OF VIRGINIA	}	No. _____
COUNTY OF NELSON	{	To-Wit:

TO ANY SHERIFF OR POLICE OFFICER:

Whereas, Tpr. C. W. Deyerle V.S.P. has this day made complaint and information on oath before me, R. M. Johns J. P. of the said County, that Roy A. Brush in the said County did on the 2nd day of Feb., 1963: Unlawfully (1) operate or drive a motor vehicle upon a public highway while under the influence of alcoholic beverage or other self administered intoxicant or drugs. (2) Refusing to take a blood test.

These are, therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the County Court of the said County, the body (bodies) 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: C. L. Nelson, D. Sheriff, color M C, Address Afton, Va., as witnesses.

Given under my hand and seal, this 2nd day of Feb., 1963.

R. M. JOHNS, J.P. (Seal)
(Title of Issuing Officer)

(Reverse side)

STATE OF VIRGINIA—COUNTY OF NELSON to-wit:

I, R. M. Johns a Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Roy A. Brush and Sherman & Helen League, as his surety, have this day each acknowledged themselves indebted to the Commonwealth of Virginia in the sum of Three Hundred & fifty Dollars (\$350.00), to be made and levied of their respective goods and chattels, lands, and tenements to the use of the Commonwealth to be rendered, yet upon this condition: That the said Roy A. Brush, shall appear before the County Court Nelson County, on the 7th day of March, 1963, at 10 A.M., at Lovingsston, Virginia, and at any time or times to which the proceedings may be continued or further heard, and before any court

thereafter having or holding any proceedings in connection with the charge in this warrant, to answer for the offense with which he is charged and shall not depart thence without the leave of said court, the said obligation to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent court; and upon the further condition that the said _____ shall keep the peace and be of good behavior for a period of _____ days from the date hereof. Nonappearance shall be deemed to constitute a waiver of trial by jury.

Given under my hand, this 2nd day of Feb., 1963.

R. A. BRUSH
I. S. LEAGUE
HELEN R. LEAGUE
R. M. JOHNS, J. P.

DOCKET NO. 7321

COMMONWEALTH

vs. } WARRANT OF ARREST
 } ROY A. BRUSH

COVESVILLE, VA.

Executed this, the 2 day of February, 1963

C. W. DEYERLE, S. P.

Upon the examination of the within charge, I find the accused plea not guilty. Found guilty driving under influence of alcohol, and imposed a fine \$200.00 and cost and 30 days in jail. Jail sentence suspended for one year during good behavior. Driving permit revoked for one year.

Charge refusing to take blood test dismissed.

JOHN W. WHEELER, JR., J.P.
3/21/63

Appeal Refused 3/21/63

Fine \$200.00
Cost 10.75
Total \$210.75
3/21/63

Warrant R. M. J. \$200
Blood Test Dr. Raynor 5.00
Trial 2.00
Bail
Clerk 5.75
Committal
Witnesses
Sheriff/Sergeant:
Fees
Mileage
Commonwealth Attorney
Weighing Fee
Total Costs 10.75
Fine 200.00
Total 210.75

Filed in the Clerk's Office the 22 day of March, 1963.

AUSTIN EMBREY, Clerk

page 2] LYNCHBURG GENERAL HOSPITAL
LABORATORIES

Attention:
Clerk of the County Court
Court of Lovingsston, Va.

Date: February 5, 1963

Reference: Blood Alcohol Specimen collected from: Roy
Augustus Brush
Address: Covessville, Va.
Date of collection: February 2, 1963
Date received: February 5, 1963

In view of the nature of these cases, it is necessary that the defendant pay for the test and its reporting in advance. The charge for this procedure is \$20.00. All individuals whose cases have not yet come to trial are therefore being sent a letter informing them that the privately requested test is voluntary on their part, and that we shall proceed immediately upon receiving check or money order, if they still desire to have us do so.

Our test results will be reported on the proper forms to you and to the defendant or his counsel.

Respectfully,

S. MILES BOUTEN, JR., M.D.

Pathologist

This was *attach* to the warrant when filed in the Clerk's Office the 22 day of March, 1963

AUSTIN EMBREY, Clerk

page 3] Name Roy Augustus Brush
Address Coveseville, Va.
Description Race W, Sex M, Month of Birth February, Year of Birth 1915
License No. 3B 544280 x Operator's 2-28-63 ☐ Chauffeur's none

Date of Trial March 7, 1963
Operator's or Chauffeur's License No:

Convictions:
6-4-58 Speeding, Co. Ct., Albemarle Co., Va.
12-16-60 Speeding, 70/55, Co. Ct., Albemarle Co., Va.

Accidents:
3-18-61 Acc.
2-16-62 Acc.

Revocation or Suspension: No.

This was attached to warrant when filed in the Clerk's Office the 22 day of March, 1963.

AUSTIN EMBREY, Clerk

Date 2-13-63, 10:45 A.M. Meade
2-13-63 J. M. 8:36

page 4] DECLARATION OF REFUSAL TO PERMIT
TAKING OF BLOOD SAMPLE

Section 18.1-55 of the Virginia Code provides that any person, whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-two, shall be deemed thereby to have agreed as a condition of such operation to consent to, and shall be entitled to, have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if he is arrested for operating a motor vehicle while under the influence of intoxicants within two hours of the alleged offense. If the person arrested refuses to permit the taking of blood for such test, the arresting officer must

forthwith take the person arrested before a committing justice. If the person arrested, after having been advised by the arresting officer that the law of Virginia requires a person accused of operating a motor vehicle while under the influence of intoxicants to permit a sample of his blood to be taken so that a test may be made of his blood to determine the alcoholic content thereof and that refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of blood for such test and does further so refuse upon being taken before a committing justice, and being there again by the committing justice advised of the law requiring a blood test to be taken and the penalty for refusal, all within two hours of the alleged offense, and so declares his refusal in writing upon a form provided by the committing justice, then no blood sample shall be taken. Conviction of the offense of failing to permit the taking of a blood sample will result in the suspension of the arrested person's license for a period of ninety days for the first offense, and six months for a second or subsequent offense or refusal within one year of the first or other such refusals and the effective dates thereof.

"Having read the above statement, and having been advised by the arresting officer and by the committing justice of the law requiring the taking of a blood sample and the penalty for refusal, I refuse to permit the taking of a blood sample and herewith make this declaration of refusal as prescribed by law."

R. A. BRUSH
Person From Whom Blood
Sample Is Sought

F. I. Saunders
Witness

Feb. 2, 1963
Date

CERTIFICATE OF COMMITTING JUSTICE

(To be executed by the committing justice only if the person arrested for driving while under the influence of intoxicants refuses to permit the taking of a blood sample and

further refuses to execute the declaration of refusal inscribed above.)

I, R. M. Johns, a committing justice of the County of Nelson, Virginia, do hereby certify that I advised Roy A. Brush, (Person Arrested), who has been arrested for operating a motor vehicle while under the influence of intoxicants and has refused to permit the taking of a blood sample, that his refusal to permit a blood sample to be taken — if found to be unreasonable — constitutes grounds for the revocation of his license to operate a motor vehicle upon the highways of Virginia, and I do further certify that Roy A. Brush (Person Arrested) refused or failed to execute declaration of refusal inscribed above.

R. M. JOHNS, J. P.
Committing Justice

Feb. 2, 1963
(Date)

This was attached to warrant when filed in the Clerk's Office the 22 day of March, 1963.

AUSTIN EMBREY, Clerk

page 5]

Circuit Court for the County of Nelson, begun and held on Monday, the twenty-fifth day of March, in the year of our Lord one thousand nine hundred and sixty-three and in the 187th year of our Commonwealth.

* * * * *

This day came the Commonwealth by her attorney, as well as the said Roy Augustus Brush, pursuant to his recognizance and was set to the bar. -

Whereupon, the said Roy Augustus Brush pleaded not guilty to the offense charged in the warrant, and not desiring trial by a jury, the Court proceeded to hear and determine this case and having heard all of the evidence doth take this case under advisement.

And the said Roy Augustus Brush is discharged on his recognizance aforesaid until the further order of this Court.

The foregoing consisting of one page(s) is a true copy

of Order recorded in my office in Common Law Order Book
"R" page 82. Teste:

AUSTIN EMBREY, Clerk
Circuit Court of Nelson County, Va.

page 6]

Circuit Court of the County of Nelson, on Monday, the
twenty-second day of April, nineteen hundred and sixty-three.

• • • • •

The Court having taken this case under advisement doth
determine and find the said Roy Augustus Brush guilty of
operating a motor vehicle upon the highway while under the
influence of alcoholic beverages and doth fix his punishment
at a fine of \$200.00, thirty days in jail and his driving permit
revoked for one year.

It is therefore adjudged and ordered that the said Roy
Augustus Brush is sentenced to serve 30 days in jail and
shall pay the Commonwealth a fine of \$200.00 together with
the cost of this prosecution. It is also ordered that his
driving permit be revoked for one year.

It appearing compatible with the public interest, the said
30 day jail sentence is suspended for one year during his
good behavior.

The Said Roy Augustus Brush shall pay the aforesaid fine
and cost within a reasonable time.

The foregoing consisting of one page(s) is a true copy
of Order recorded in my office in Common Law Order Book
"R" page 88. Teste:

AUSTIN EMBREY, Clerk
Circuit Court of Nelson County, Va.

page 7]

Circuit Court of the County of Nelson, on Tuesday, the
eleventh day of June, nineteen hundred and sixty-three.

• • • • •

This matter came on this day to be again heard and it
appearing that the order entered in this case on April 22,

1963 inadvertently omitted the suspension of judgment to permit the Defendant to apply for a writ of error, accordingly the judgment is suspended for a period of ninety days from April 22, 1963, to enable the defendant, Roy Augustus Brush, to apply for a writ of error to the judgment of this Court.

And this case is continued.

The foregoing consisting of one page(s) is a true copy of Order recorded in my office in Common Law Order Book "R" page 103. Teste:

AUSTIN EMBREY, Clerk
Circuit Court of Nelson County, Va.

page 8]

* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To The Clerk of The Circuit Court for the County of Nelson:

Notice is hereby given that the defendant, Roy Augustus Brush, will ask for appeal from the judgment of the Circuit Court for the County of Nelson, rendered in the above cause and states the following as the assignments of error:

I

The Court erred in permitting the blood test results to be admitted into evidence.

II

The Court erred in failing to strike the blood test from the evidence.

III

The Court erred in failing to strike the evidence of the Commonwealth at the close of the Commonwealth's evidence.

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IV

The Court erred in failing to strike the Commonwealth's evidence at the close of all the evidence.

Trooper C. W. Deyerle

V

The Court erred in finding the defendant guilty upon all the evidence when there was no evidence or not sufficient evidence to support the verdict of guilty and in the alternative, the defendant could not be found guilty under the terms of the statute in question because the blood tests should have been excluded from the evidence.

VI

The Court erred in failing to grant the motion of the defendant to set aside the verdict as contrary to the law and evidence.

ROY AUGUSTUS BRUSH

By: H. H. TIFFANY

* * * * *

Filed in the Clerk's Office the 11th day of June, 1963.

AUSTIN EMBREY, Clerk

page 1] Reporters note:

The witness,

TROOPER C. W. DEYERLE,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Goad:

Q. Please state your full name.

A. C. W. Deyerle.

Q. Tell us about your investigation of this case on February 2, 1963.

A. Well, Saturday night, about 10:30 myself and Deputy Sheriff Nelson were driving South on Route 29 and as we approached Lovingsston we met a vehicle traveling North on Route 29 on the limits of Lovingsston where the roads narrows. He had his bright lights on, all four headlights were lit. As I

Trooper C. W. Deyerle

met this vehicle I flashed my headlights to him to indicate that he should lower his lights.

Q. You were coming South down from the Gap?

A. Yes.

Q. Had you gotten to where the road widens?

A. Not quite.

Q. Alright, go on.

A. As we came on closer and as I observed this vehicle he passed the truck I had in front of me going South on Route 29. As he passed the truck he came two feet over the line on my side of the road and I had to drive my car onto the shoulder of the road.

Q. Was this where the road narrows?

A. It was right before we got to Broad Street in Lovings-ton, still on the narrow part. I turned around and pursued this vehicle to catch up with him as fast as I
page 2] could. He was weaving in his lane as we followed him.

Q. What type of car was it?

A. It was a 1959 Mercury. He went over the line again and the vehicle he was passing going in the *opposite* direction, had to pull to the right to avoid him. At that point, as quickly as traffic permitted, we pulled him off the road.

Q. Where was that?

A. At Ham Thompson's Service station. At Andy Johnson's Truck Stop there.

Q. You turned in Lovings-ton and started following him?

A. Yes.

Q. How far did you follow him would you say?

A. About one and a half miles.

Q. Where did you turn around to get behind him?

A. At the antique shop at the dip.

Q. You followed him from there?

A. Yes.

Q. How many times did he weave while you were following him?

A. Several times.

Q. How fast was he going?

A. Thirty-five or forty miles per hour.

Q. Did he weave over the white center line?

A. Once, about two feet over.

Q. *That's* a two lane road at that point. About how wide would you say it was?

Trooper C. W. Deyerle

A. About twenty-four and a half feet wide, I don't know exactly.

Q. Did you measure it?

A. No, we never measured it at that point.

page 3] Q. And what happened after you stopped him?

A. Well, I stopped the vehicle and the driver turned out to be Roy Brush. I asked him for his drivers license and registration. He seemed to be having some trouble finding his license. At that time I smelled the strong odor of alcohol. I asked him to get out of the car as he was having a hard time finding his license. I noticed that his speech was impaired and he was unsteady on his feet. He got out of the car and was leaning up against it. He finally found his license and I looked at it and the registration and then I asked him to walk to the end of the car. He walked unsteadily and staggered coming back. At that time I arrested him for drunken driving.

Q. Can you describe his speech impairment?

A. It was somewhat slurred and blurred. When Deputy Sheriff Nelson got out of the car Mr. Brush said he thought that he knew Mr. Nelson. Mr. Nelson said that they had met he believed twice. After that Mr. Brush did not talk much.

Q. Could he walk straight?

A. No Sir.

Q. To what *extend* could he not walk straight?

A. From one end of the car to the other. When I asked him to turn around and walk back he staggered and came back and leaned against the automobile.

Q. What did he do when you first asked him to take a blood test?

A. He refused, then he changed his mind.

Q. Why did he change his mind?

A. He refused because he wanted to talk to Mr. Goad to see if he should go ahead and take it.

page 4] Q. And he was advised to do so?

A. Yes.

Q. Did you take him to Doctor Rayner for the Blood test?

A. Yes.

Q. How much time was there between the time of Mr. Brush's arrest and the taking of the blood test?

A. About two hours. It took us some time to get there.

Trooper C. W. Deyerle

Q. What time was the arrest made?

A. At 10:30 and at 12:15 the blood test was taken.

By The Court:

Did you say it was done within two hours?

By Trooper Deyerle:

Yes, Sir, it might have been five or ten minutes, give or take a little.

By The Court:

But, it was approximately two hours after the arrest?

By Trooper Deyerle:

Yes, Sir.

By Mr. Goad:

Q. When you took him to Doctor Rayner for the blood test did the taking of the test comply with all things the statute calls for?

By Mr. Tiffany:

Your Honor, I think that calls for a conclusion of law and I object.

By The Court:

Overruled. Bring it up on cross-examination if you wish.

By Mr. Goad:

Q. Who took the blood from Mr. Brush's arm?

A. Dr. Rayner.

Q. Two samples?

A. Yes Sir.

page 5] Q. Are these the results that came back from Richmond?

A. Yes, Sir.

Q. You are sure?

A. Yes, Sir.

By Mr. Goad:

We would like to introduce this blood test in evidence —

By Mr. Tiffany:

I object, your Honor, Mr. Brush is entitled to have both samples introduced into evidence.

Trooper C. W. Deyerle

By Mr. Goad:

I am going to, but I only can do one at a time.

By Mr. Tiffany:

This part of my objection will not apply if he puts in both.

By Mr. Goad:

This blood test came back to the Court for Lynchburg Community Hospital. I enter this one at this time.

By Mr. Tiffany:

Your Honor, I would like to save any objections until after the introduction of any evidence which the Commonwealth may introduce to attempt to qualify the blood test for admission into evidence.

By The Court:

Alright.

By Mr. Goad:

Are you objecting to that now?

By Mr. Tiffany:

The results are not properly qualified and naturally entered as such. I am saving that objection and any other connected with the introduction of these blood tests.

By The Court:

What does this mean, 14 miligram percent?

By Mr. Tiffany:

That stands for percentage by weight.

page 6] By The Court:

I know, but I do not know what miligram percentage means.

By Mr. Goad:

Q. Mr. Deyerle, did Doctor Rayner take the blood test?

A. Yes.

Q. Is he qualified to do so?

A. Yes.

Q. Did he use the same type of equipment for both tests?

A. Yes.

Trooper C. W. Deyerle

By Mr. Tiffany:

I object to Mr. Goad leading the witness.

By The Court:

Just tell us what he did.

A. After he took the blood test he took the blood and put it in two tubes and sealed them in our presence. While he was taking the blood he explained to Mr. Brush what he was doing. After he sealed the tubes he handed me my sample and I kept it in my possession until it was sent to the Office of the Chief Medical Examiner in Richmond.

Q. What did Doctor Rayner use to sterilize his equipment?

A. While he was cleaning Mr. Brush's arm he told him that we was not using alcohol and then explained what he was doing. The blood test that was sent to Richmond was sent back to me.

Q. From where was it mailed?

A. It came from the Chief Medical Examiner's Office in Richmond.

Q. Did you keep it refrigerated?

A. No, it was kept locked in a filing cabinet and no one else had it in their possession.

Q. What was the next thing you did?

A. I sent it back to Richmond a second time on your recommendation.

page 7] Q. To where?

A. To the Chief Medical Examiner.

Q. Was it in your possession all the time, except when it was sent to the Chief Medical Examiner?

A. Yes.

Q. Was it the same, as far as you know, as when it was when it was first taken?

A. Yes, Sir.

Q. Was it marked with the name of Mr. Brush and the date that it was taken?

A. Yes, Sir.

Q. What was the result of having the blood test sent back a second time?

By Mr. Tiffany:

I object, your Honor, the accused is allowed to have the blood sent to —

Trooper C. W. Deyerle

By The Court:

I don't know what it is he is talking about, but I am sure that it is not admissable.

By Mr. Goad:

There was a discrepency in the blood tests and Doctor Mann suggested that it be sent back for a second test.

By The Court:

I will rule it out at this time.

By Mr. Goad:

Q. Let's get back to Mr. Brush. What did he tell you when you arrested him?

A. He said he had been to the horse races in West Virginia, and that they had just gotten back and that he had stopped at the home of Sherman League after driving him home from Crozet, and that was where he had taken his last
page 8] drink.

Q. Did he say how much he had had to drink?

A. He stated that five of them had been drinking out of one fifth that day.

Q. What did he say about his arrest?

A. He said "You have your job and I have mine."

Q. Did he ever deny that he had been drinking?

A. No, he never did.

Q. At the time when you first met his car was it raining?

A. Yes.

Q. Do you know whether the windshield wipers were working on Mr. Brush's Car?

A. They were when we stopped him.

Q. Did Mr. Brush make any complaint about anything being wrong with his body?

A. No, Sir.

By Mr. Goad:

I have nothing further.

CROSS EXAMINATION

By Mr. Tiffany:

Q. You stated that you first saw Mr. Brush at 10:30?

A. Ten thirty was the time I wrote the summons.

Deputy Sheriff Tim Nelson

Q. You did state that it was 12:15 when Mr. Brush took the blood test?

A. Yes.

Q. Do you remember telling the defendant that he took the blood test about one half hour after you arrested him that night?

A. No, Sir.

Q. You stopped him at Johnson's?

A. Yes, Sir.

page 9] Q. Now I ask you two specific questions, the first is: When the Doctor took the needle out of the Alcohol did he wipe it off?

A. I couldn't swear what he took it out of, but the Doctor told Mr. Brush as he was cleaning his arm that he was using no alcohol.

Q. What led you to believe that the needle was in anything other than alcohol?

By The Court:

That's not what he said.

By Mr. Tiffany:

I have no further questions.

Reporters note:

The witness,

DEPUTY SHERIFF TIM NELSON,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Goad:

Q. Please state your name.

A. Tim Nelson.

Q. You were riding with Trooper Deyerle on the night of February 2, 1963, at about 10:00 o'clock?

A. Yes, Sir.

Q. I believe that you were coming into Lovingsston, going South on Route 29 when you met Mr. Brush going North?

A. Yes, Sir.

Q. Where did you first see Mr. Brush?

A. Just South of the fruit stand. We first observed him

Deputy Sheriff Tim Nelson

there. We met him at the narrow and wide part of the road. We first noticed the high beams on his car. Trooper Deyerle flicked his lights up and down and Mr. Brush's lights were not lowered. He gradually kept coming over to the center line about two feet. He straddled the solid white line.

Q. He came over the line gradually?

page 10] A. Yes, he came over the line at the entrance of Mr. Turpen's orchard.

Q. What did Trooper Deyerle do when this car came over the center line?

A. He swerved to the right.

Q. Did the car leave the hard surface?

A. Yes.

Q. How many wheels left the paved surface?

A. I think both of the wheels did. I really couldn't tell.

Q. Right after that what happened?

A. We followed him to the bottom of the dip and he was gradually in and out on the highway. The traffic was heavy at that point, and at the bottom of the dip Mr. Brush again weaved over the center line and another vehicle almost hit him, but they got by. He went over the hill then.

Q. That's where Thompson's store is?

A. Yes.

Q. Did the other car have to change course?

A. Yes, Sir, it looked like they were going to hit head on.

Q. Did the other car go onto the shoulder of the road?

A. Yes, Sir.

Q. How many times did you see him weave like that?

A. I do not know how many times.

Q. So then did you stop this car at Andy's Truck stop?

A. Yes, Sir. We pulled in right there.

Q. Please tell us what you observed right there?

A. The Trooper got out and walked back and asked for Mr. Brush's license and registration. He asked Mr. Brush to get out of the car and when he got out he stood near the car door. At that time he asked me if we knew
page 11] each other and I told him "Yes, I knew him."

Then the Trooper asked him to walk out a distance which he did. He was a little unsteady. When the Trooper asked him to turn around and come back he was more unsteady. He came back and leaned against the rear fender of the car.

Q. Did you smell any alcohol?

Deputy Sheriff Tim Nelson

A. Yes, alcohol or liquor. It did not have the odor of beer or wine, but I do not know what it was positively.

Q. When did you smell it?

A. At the time he got out of the car and when I drove his car back to the office.

Q. Did you get close enough to him to smell his breath?

A. Here in our office I smelled the most of it.

Q. Who drove his car back here?

A. I did.

Q. Could you smell any alcohol in his car?

A. Not a strong odor.

Q. But there was some odor?

A. Yes, but it was not like a cigarette smoke odor.

Q. When you talked to Mr. Brush at the scene and back at the office how did he talk?

A. His speech was very impaired, blurred, at the scene and also down here at the office.

Q. Did you see whether his windshield wipers were working?

A. Yes.

Q. Was it raining?

A. Yes.

Q. When you first met Mr. Brush's car was it raining?

A. Yes, lightly.

Q. Were his wipers working when you first met his car?

A. I couldn't say.

page 12] Q. Were they working when you stopped him?

A. Yes, and they worked when I drove his car back here.

Q. Did you notice anything about his headlights?

A. Yes, I did, the other cars that met him would keep flashing their lights up and down.

Q. Did you ever see him dim his lights?

A. No.

By The Court:

Is there anything wrong with the car?

By Deputy Sheriff Nelson:

No.

By Mr. Goad:

Q. Was the car a 1959 Mercury?

A. I believe so.

Deputy Sheriff Tim Nelson

By Mr. Goad:

That's all.

CROSS EXAMINATION

By Mr. Tiffany:

Q. Mr. Nelson, you say that you do know Mr. Brush?

A. Yes, we've met twice.

Q. Would you say that you can tell how this man talks when he is sober?

A. I think I could tell the difference.

Q. That night were you aware that he had a sprained ankle?

A. No, Sir.

Q. You did state that he staggered when he made the turn?

A. At the time of turning he was very unsteady.

Q. Which foot was it that gave away?

A. I don't know.

page 13] By Mr. Tiffany:

Your Honor, I would like to renew my objection to the admission of the blood test on the grounds that the proper ground work has not been proven for their admission and on the grounds that the results were too far apart to be admitted as a matter of law. It follows that since they should not be admitted in evidence that the defendant could not be found guilty if the blood tests shall fail to be admitted in evidence, and therefore, I make a motion to strike the blood tests from the evidence and, in addition, a Motion to strike the Commonwealth's evidence.

By The Court:

I overrule both motions.

By Mr. Tiffany:

May I except, your Honor, to both rulings and I request the leave of the Court to put on evidence for the defendant without waiving my objections or exception to the admission of the blood tests, the failure of the Court to strike the blood tests and the failure of the Court to strike the entire evidence of the Commonwealth.

By The Court:

Alright.

Mr. Roy A. Brush

Reporter's note:

The defendant,

MR. ROY A. BRUSH,
after being duly sworn, testified as follows:

By Mr. Tiffany:

Q. Please state your full name?

A. Roy Augustus Brush.

Q. Where do you live?

A. Covesville, Virginia.

Q. What is the date of the incident in question?

page 14] A. February 2, 1963. Saturday night.

Q. Where had you been on that day and what did you do?

A. Five of us had been to the horse races at Charlestown, West Virginia.

Q. How much did you have to drink?

A. We had about a fifth between us and I had about four drinks.

Q. How many people were there?

A. Five of us including myself.

Q. What was the method of consumption as far as the five people, tell me about the respective shares?

A. We had about four drinks apiece for five people, we had the drinks before *diner* about two or two thirty.

Q. What did you have to drink after *diner*?

A. Nothing.

Q. What time did you leave the races?

A. About four or four thirty, maybe five.

Q. Tell the Court what you did after you left the races.

A. Well, we drove —

Q. Did you drive home?

A. No, I was riding with the others.

Q. Who was driving?

A. Mr. Barnes. (the witness nodded toward Mr. Bruce Barnes)

Q. What did you do on the way back?

A. I slept on the way back.

Q. How long were you asleep?

A. About one and a half hours.

Q. What time did you get back?

A. About seven forty-five.

Mr. Roy A. Brush

Q. And then what did you do?

A. I brought Mr League back to Lovingsston and I had a drink at his house and we ate some sandwiches. I left there about ten and proceeded on home. I was going
page 15] through Lovingsston when I met a truck on the wide part of Route 29. I couldn't get my wipers on and my windshield was fogged up. It was raining pretty heavy. I swerved while I was driving and trying to get the wipers working. I got them on around Thompson's, so it made it hard to drive.

Q. Do you remember if you had your headlights on bright or dim?

A. I don't remember. I thought I had them on dim, but going over the hill the water coming off the truck blinded me and I thought I turned them on high so I could see.

Q. Was it raining when you passed these cars?

A. Yes, Sir.

Q. Were your wipers on then?

A. No, I had them on before, but it had stopped raining so I turned them off and then I couldn't get them back on.

Q. Had you tried to get these wipers fixed the day before?

A. Yes, Sir.

Q. Who by?

A. Mr. Mauley in Charlottesville.

Q. Mr. Nelson said the wipers were working when you were stopped, is that correct?

A. Yes, Sir, I finally did get them on.

Q. On what day did you try to get Mr. Mauley to fix the wipers?

A. On February 1, and he couldn't do it that day.

Q. Where does Mr. Mauley work?

A. McGregor Motors in Charlottesville.

Q. Why was it not done on February first?

page 16] A. The trouble was a broken spring and he didn't have the time then to fix it, so I asked him to fix it temporarily until he had time to do the job right.

Q. I hand you a bill marked February 15, 1963, will you describe what that service order is for?

By The Court:

It speaks for itself.

Q. Why is there no charge for February 1st?

A. Mr. Mauley did the work on February first and said

Mr. Roy A. Brush

there would be no charge until he could get the cable. On February 9th, the following Saturday, he installed a new cable.

Q. Is this the service order for the new cable?

A. Yes, Sir.

By Mr. Tiffany:

I would like to enter these two service orders, the one for February 1, as Exhibit A, and the one for February 9, as Exhibit B.

Q. Did you tell me that you had sprained your ankle on the night of February second?

A. Yes, I sprained my ankle on Thursday. I stepped off the truck onto some ice and *Had* to go home and soak it that day for four hours. I started not to go to the races at all because of the darned thing.

Q. Did it cause you to stagger?

A. I limped around on it with all my weight on one foot. It made walking bad.

Q. When you were arrested did you tell the Trooper anything about your ankle at the time?

A. No. He asked me if I had had anything to drink and I told him I had. He said he had to charge me and I told him that was his job. The Deputy Sheriff wanted to drive my car back and I told him alright. I didn't
page 17] make any complaint about my ankle.

Q. Did you state that you had one drink at the home of Mr. League?

A. Yes.

Q. How much of a drink was it?

A. Just a regular drink.

Q. Were you drunk?

A. No.

Q. Do you remember the Trooper asking you to walk away from the car?

A. Yes.

Q. Did you stagger?

A. No, I wasn't staggering, I was limping.

Q. Were you unsteady on your feet from drinking?

A. No.

Q. Did you have any trouble controlling your car?

A. No.

Mr. Roy A. Brush

Q. Were you still feeling the effects of the drinks you had at the races when you were at Mr. *League* house?

A. No.

Q. When you were at the Sheriff's Office did you make any mention of having a sprained ankle?

A. I don't think so, but I may have to Mr. Saunders.

Q. What type of recollection do you have of that night?

A. I remember what happened.

Q. Why did you first refuse to take the blood test?

A. The Trooper asked me to take the blood test and I refused until I found out something. I called Mr. Goad and he advised me to take it so I did.

Q. Did you stop at Thompson's?

A. Actually I stopped at Johnson's.

page 18] Q. Do you remember that clearly?

A. Yes, Sir.

By Mr. Tiffany:

I have no further questions.

CROSS EXAMINATION

By Mr. Goad:

Q. Mr. Brush, who went with you to the races that day?

A. Mr. *League*, Bruce Barnes, myself, Pat Haden and Mr. Tiffany.

Q. What time did you get there?

A. About 1 or 1:30.

Q. What time did you leave Waynesboro or Crozet?

A. About 9:30 or 10.

Q. When did the races start?

A. I believe at one.

Q. How many races were there?

A. Ten.

Q. When were the races over?

A. About 4:30.

Q. You didn't eat while the races were going on did you?

A. Yes, about 2 or 2:30.

Q. Did you then go back to the races?

A. We could see the races as we ate.

Q. Who bought the whiskey?

A. Mr. *League* Father-in-law gave us a fifth of whiskey.

Q. Where did he give it to you?

A. In West Virginia.

Mr. Roy A. Brush

Q. Does he live there?

A. Yes, a few miles out of town, but he gave
page 19] us the whiskey at his office near the race track.

We hadn't bought any whiskey so that fifth was the only whiskey we had.

Q. What time was it when he gave you the whiskey?

A. About 12:45, I imagine. We stopped at his home and then went to his office to say hello.

Q. How far was his office from where the races were held?

A. About $\frac{3}{4}$ of a mile.

Q. What else did you have to drink?

A. Nothing. We drank the fifth before and during dinner and we had nothing else until I got back to Mr. *League*.

Q. You had no more to drink from the time you finished dinner until you reached Mr. *League* house?

A. Right.

Q. You did say that Mr. Barnes drove back?

A. Yes, that's right, he did.

Q. Did you drive to the races?

A. No, Mr. *League* did. Mr. Barnes drove back.

By The Court:

Was your car used?

A. No, Mr. Barnes's car.

By Mr. Goad:

Q. How come you drove Mr. Barnes's car to Lovington?

A. I didn't, I had left my car in Crozet.

Q. How long were you at Mr. *League*?

A. About two hours. We ate some sandwiches and talked over the races before I went home.

Q. You have testified that when you met these cars it was raining?

A. Yes.

Q. Were your windshield wipers on when you left Mr. *League*'s?

A. Yes, but I turned them off because it stopped rain-

page 20] Q. Why didn't you pull off the road and fix them?

A. I figured they'd go on any second. The button is hard to turn and I couldn't get it on. *It's* an electrical system and you just switch the button and they're supposed to go on.

Mr. Roy A. Brush

Q. Do you recall going over the white line?

A. Yes, Sir.

Q. Why didn't you pull off the road?

A. I thought they'd go on.

Q. Did you lower your lights to oncoming cars?

A. I remember lowering them a few times.

Q. Was there anything wrong with the steering?

A. No.

Q. Why were you weaving?

A. I was trying to turn on the wiper switch.

Q. Do remember almost hitting a car near Thompson's?

A. Yes, and right after that I got the wipers on.

Q. Do you remember when the Trooper asked you to walk?

A. Yes.

Q. Why didn't you tell him then about your ankle?

A. I just didn't.

Q. Did you know you were taking a test?

A. Yes.

Q. Then why didn't you tell him about your ankle?

A. I didn't think that had anything to do with it.

By Mr. Goad:

That's all.

RE-DIRECT EXAMINATION

By Mr. Tiffany:

Q. Did you think that the explanation would show for itself?

page 21] A. Yes.

Q. Why?

A. Because I was *visibaly* limping.

Q. You were walking with a limp?

A. Yes.

Q. After *we* reached Crozet where did you go?

A. After I picked up my car I came up Route 250 to the Veneer Plant and came up 151 and then on Route 6 on into Lovingson.

Q. Do you remember this?

A. I do.

Q. Did you have trouble driving at that time?

A. No.

Q. How far after you met the truck did you meet the Trooper?

Walker Joseph Mauley

A. About from here to the drug store. I am just guessing.

By Mr. Tiffany:

I have nothing further.

Reporter's note:

The Witness,

WALKER JOSEPH MAULEY,

being first duly sworn testifies as follows:

By Mr. Tiffany:

Q. Where do you live?

A. Scottsville Road, Charlottesville, Virginia.

Q. What is your occupation?

A. I'M a mechanic for McGregor Motors.

Q. How long have you been employed there?

A. Eighteen years.

Q. What is your full name?

A. Walker Joseph Mauley.

Q. Do you know Mr. Brush?

A. Yes.

page 22] Q. Did you see Mr. Brush on February 1, 1963?

A. Yes, I repaired a rear spring and did temporary repairs to the windshield wipers. The connecting cable was frozen up and it needed a new one. I oiled it so that he could use it until I could get the cable to fix it. When he left the shop he could turn the wipers on.

Q. You did a temporary repair job then on February 1?

A. Yes, but they worked awful hard.

Q. I show you Defendant's Exhibit A, is this the work which you did on February 1?

A. Yes.

Q. Why is there no charge?

A. I didn't charge him because it was a temporary repair.

Q. What type of wipers are they?

A. Electric.

By Mr. Tiffany:

I have no further questions.

John Bruce Barnes

Reporter's note:

The witness,

JOHN BRUCE BARNES,
being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Tiffany:

Q. Please state your full name.

A. John Bruce Barnes.

Q. Where do you live?

A. Ivy, Virginia.

Q. Where do you work?

A. In Crozet, at S. W. Barnes, Inc.

page 23] Q. Do you know Mr. Brush?

A. Yes, he's employed by S. W. Barnes, Inc.,
too.

Q. Were you with Mr. Barnes on February 2nd?

A. Yes.

Q. What did you do on February 2nd?

A. I met Mr. Brush at my office and we then met the others
and went on to Charlestown, West Virginia, to the Horse
Races and we got there right at race time. The weather was
bad that day.

Q. Did you take a bottle with you?

A. No.

Q. Did Mr. Brush?

A. No.

Q. Where did you get the whiskey you had at the track?

A. First we went to Mr. League's father-in-law's to pick
up passes to the Club House, he wasn't there so we had to go
to his office.

Q. Had Mr. Brush had anything to drink at that time?

A. No.

Q. Go on with what happened.

A. Well, Mr. League's father-in-law gave us a fifth of
whiskey, and the passes. After we got squared away we
proceeded to the race track. We did a little betting on the
daily double. After that we ordered set ups.

Q. How much did you have to drink?

A. We had one fifth.

Q. How much did Mr. Brush have to drink?

John Bruce Barnes

A. I'm not sure, but we all had about the same amount to drink.

Q. About how much would that be?

A. Three or four drinks apiece.

Q. How much whiskey would you estimate to be in one drink?

page 24] A. One ounce to a drink.

Q. How many drinks did you have?

A. I think I had two drinks, but I don't remember exactly.

Q. Were they strong drinks?

A. No.

Q. Did you have anything else to drink?

A. No, we had dinner and around three o'clock when we got through eating we drank some coffee until the races were over.

Q. What was the proof of the whiskey?

A. I don't know. It was Canadian Club.

Q. What did you do then?

A. We came back to Crozet.

Q. Do you remember what Mr. Brush did?

A. He slept until we got outside of Charlottesville.

Q. Did you see Mr. Brush as he left your car?

A. Yes.

Q. Could you describe his state of sobriety?

A. I think he was just as sober as anyone else in the crowd.

Q. How did he walk?

A. He had a bad ankle and had to go home from work the Thursday before because of it.

Q. Other than limping did he stagger?

A. No.

By Mr. Tiffany:

I have nothing further.

CROSS EXAMINATION

By Mr. Goad:

Q. What time did you get back to Crozet?

A. About 7:30 or 7:45.

page 25] Q. Did Mr. Brush leave Crozet right away in his car?

A. Yes.

Q. And you did not see him again that night?

A. No.

Deputy Sheriff George H. Saunders

By Mr. Goad:

That's all.

Reporter's note:

The witness,

DEPUTY SHERIFF GEORGE H. SAUNDERS,
after being duly sworn testified as follows:

DIRECT EXAMINATION

By Mr. Tiffany:

Q. Mr. Saunders, you are the Deputy Sheriff in the County of Nelson, are you not?

A. Yes, I am.

Q. Please state your full name.

A. G. H. Saunders.

Q. On February 2, 1963, were you present when Mr. Brush was brought back here after being arrested for drunk driving?

A. Yes.

Q. Did you observe Mr. Brush at that time?

A. No, Sir. I knew that they had brought him in. I was busy and I had to run back and forth too much to pay much attention to it.

Q. Did you hear anything from Mr. Brush about his ankle?

A. I heard him talking to Mr. Lee and I heard him say something about his ankle.

Q. You said something to him about white sox?

A. I don't remember.

page 26] By Mr. Tiffany:

I have no further questions. The defense rests as is. Your Honor, I renew my motions to strike the evidence and to strike the blood test on the same grounds as stated at the conclusion of the prosecution's evidence.

By Mr. Goad:

No questions.

By The Court:

I will take the case under advisement.

STATE OF VIRGINIA

COUNTY OF NELSON; To-wit:

I, Dorel O. Compton, a notary public in and for the County and State aforesaid, to the best of my knowledge and belief, do hereby certify that the foregoing 25 pages are a true and accurate transcript of the proceedings of the Court on the 25th day of March, 1963.

Given under my hand this 4th day of June, 1963.

My Commission expires April 7, 1965.

DOREL O. COMPTON
Notary Public

Tendered June 11th 1963.

C. G. QUESENBERRY

Signed June 11th 1963

C. G. QUESENBERRY

Filed in the Clerk's Office the 11th day of June, 1963.

AUSTIN EMBREY

A Copy—Teste:

H. G. TURNER, Clerk.

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