Record No. 1508

In the
Supreme Court of Appeals of Virginia
at Richmond

WALTER C. COWARD

v.

COMMONWEALTH OF VIRGINIA

FROM THE CORPORATION COURT, PART TWO, OF CITY OF NORFOLK

"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 is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 1508

WALTER C. COWARD

vs.

COMMONWEALTH OF VIRGINIA.

PETITION FOR WRIT OF ERROR.

To the Honorable Judges of the Supreme Court of Appeals:

Your petitioner, Walter C. Coward, respectfully represents that he is aggrieved by a judgment of the Corporation Court of the City of Norfolk, Number Two, entered on the 17th day of July, 1933, whereby he was sentenced to serve three (3) months in jail and to pay a fine of One Hundred ($100.00) Dollars and costs, on a charge of driving an automobile while under the influence of intoxicating liquor.

Briefly stated the facts are as follows:

The accused was indicted alleging that he was driving an automobile on the 11th day of June, 1933, while under the influence of ardent spirits. Police Officer Rhodes testified that his attention was attracted to the car driven by your petitioner by reason of having no automobile license plates on the front or rear of the automobile. That he ordered your petitioner to pull over to the curb; that defendant was driving the automobile with his head bent over on his shoulder

and appeared to be under the influence of ardent spirits. This testimony was corroborated by the other Police Officers. The defendant denied he was under the influence of ardent spirits but had drunk several bottles of three point two beer.

Joe Fuller, another witness for the Commonwealth, testified: That the defendant was "twix and tween", neither drunk nor sober.

The Commonwealth was allowed to ask the defendant whether he was a man of means and able to buy an automobile and the Court also instructed the Jury that if they found the defendant guilty, on good behavior and with consent of the Court he would be allowed days off.

ASSIGNMENT OF ERRORS.

First: In permitting the Commonwealth's Attorney to ask of the defendant whether he was not a man of means and able to buy an automobile.

Second: Instructing the Jury, at its request as follows: "The law is that the jailor should keep a record of each convict, and for every month that any convict appears by such record to have faithfully observed the rules and requirements of the jail while confined therein, and not to have been subjected to discipline for violation of same, there shall, with the consent of the Judge, be deducted from the term of confinement of such convict ten days."

Discussing the first assignment of error, it is necessary to show that the defendant was prejudiced by the question, to-wit: whether he was a man of means and able to purchase an automobile.

Virginia Prohibition Law 1932, fixes the punishment for driving under the influence of ardent spirits at not less than one (1) month and more than six (6) months and a fine of not less than One Hundred ($100.00) Dollars and no more than Five Hundred ($500.00) Dollars, but the Jury might in its discretion omit the jail sentence. The evidence in this case disclosed that it was not aggrieved case, if we accept the testimony of the Commonwealth as being true. One of the Police Officers testified, he *appeared* to be under the influence of whiskey and another witness testified he was neither "drunk nor sober". So we may say that this was one of the cases that the Legislature had in mind when it permitted the Jury to say that they might eliminate the jail sentence.

It is true from the verdict, that the Jury wanted to punish the defendant. If he were a man of means and disclosed he was interested in the wholesale tobacco business, a fine would

not be sufficient punishment, as it probably would to a man of no means. They might consider that a fine meant nothing to him. If he had been a poor man he would have difficulty in raising the fine and costs or had he been unable to pay his fine, he would have to serve the time prescribed by law and consequently it would have worked a greater hardship upon him than a man who was amply able to pay his fine.

Of course, this is a speculative conclusion, but we submit it is a fair one when we take into consideration the evidence in the case.

SECOND ASSIGNMENT OF ERROR.

The remarks of the Court telling the jury that the defendant would be allowed ten (10) days credit provided he carried out the rules and regulations of the prison authorities. We submit that was highly improper.

We have been unable to find any authority on this point. It is true that the Virginia cases hold that a correct statement of the law in the abstract, is not a reversible error, but we submit that this case is different from those class of cases. In those cases the abstract proposition of law could and did not produce any result upon deliberation of the juries trying such cases, and it was not susceptible of producing such influence, where the case at bar permitted the jury to take into consideration extrinsic evidence which would or could influence their deliberations and which could and apparently did, cause the jury to reach a verdict other than what the evidence justified. The mere fact that the jury asked the Court the question, "what time would be allowed off the accused's sentence while serving his term in jail", shows conclusively that they were going to take that into consideration and see that he received a definite punishment, to-wit: sixty (60) days.

It is fundamental that the juries hear the evidence and fix the punishment according to such evidence, unbiased by extrinsic matters which have no place in the trial of the case.

The Legislature recognized this fundamental principle and determined after that sentence was fixed, they would show a consideration to the prisoner for good behavior, by allowing them certain "off time". It was not intended that the Judge or the jury should take this into consideration in fixing the punishment. It is clear that the jury wanted to give the defendant sixty (60) days in jail. If this had been done from the evidence and the proper instruction alone, the accused would serve only forty (40) days, but when they took in consideration the "off time" it increased his punishment by twenty (20) days.

They were not concerned in the "off time" because that is determined first, by the good behavior of the person while in jail, and second, the consent of the Trial Judge to such credits must be obtained. Because there might be no "off time" because of the failure of obtaining the consent of the Trial Judge or the failure of the prisoner to obey the prison rules.

For the above reasons we respectfully submit that a writ of error and *supersedeas* be granted and a new trial awarded your petitioner.

We request that this petition be used in lieu of brief on part of petitioner.

Respectfully submitted,

WALTER C. COWARD.
By: W. L. DEVANY, JR., Counsel.

I, W. L. Devany, Jr., attorney practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the judgment complained of in the foregoing petition is erroneous and should be reviewed and reversed by the said Court.

Given under my hand this 25th day of October, 1933.

W. L. DEVANY, JR.

Received Oct. 26, 1933.

M. B. WATTS, Clerk.

January 23, 1934. Writ of error and *supersedeas* awarded by the Court. No bond.

M. B. WATTS, Clerk.

RECORD

VIRGINIA:

Pleas before the Corporation Court of the City of Norfolk, Number Two, on the 8th day of September, 1933.

Be it remembered, that heretofore, to-wit: In the Corporation Court of the City of Norfolk, Number Two, on the 3rd

day of July, 1933, came John M. Arnold, Attorney for the Commonwealth for the City of Norfolk, Virginia, and filed an Information for Violation of the Prohibition Law against Walter M. Coward, in the following words and figures:

COMMONWEALTH OF VIRGINIA:
City of Norfolk, to-wit:

In the Corporation Court of the City of Norfolk, Number Two.

Be It Remembered that John M. Arnold, Attorney for the Commonwealth for the said City of Norfolk, and who for the said Commonwealth prosecutes in this behalf, in his proper person comes into the said Court on this the 3rd day of July, in the year 1933, and upon the complaint in writing verified by the oath of Officer C. A. Rhoades, a competent witness, gives the said Court here to understand and be informed that Walter M. Coward, to-wit: on the 11th day of June, in the year 1933, in the said City of Norfolk, did unlawfully drive an automobile while under the influence of intoxicants, or narcotic drugs, or any other self-administered intoxicants of whatsoever nature, against the peace and dignity of the Commonwealth of Virginia.

JNO. M. ARNOLD,
Attorney for the Commonwealth.

page 2 } And afterwards: In said Court, on the 14th day of July, 1933.

This day came the defendant, and also came the Attorney for the Commonwealth, and thereupon came seven lawful men, from which panel the Commonwealth and the defendant each struck one, leaving the following jury, to-wit: I. Evans, T. G. Broughton, J. W. Wright, C. D. Toombs and V. M. Chapman, who were sworn to well and truly try the issue joined, and having heard the evidence and argument of counsel, returned a verdict in the following words: "We, the jury, find the accused guilty as charged in the information and fix his punishment at three (3) months in jail and a fine of $100.00." Thereupon, the said defendant, by counsel, moved the Court to set aside the verdict * * * and grant him a new trial, on the grounds that the said verdict is contrary to the law and the evidence, the further hearing of which motion is continued until the 15th day of July, 1933.

And later: In said Court, on the 17th day of July, 1933.

This day again came the defendant, and also came the Attorney for the Commonwealth, and the motion for a new trial, heretofore made on the 14th day of July, 1933, having been fully heard by the Court, is overruled, to which action of the Court in overruling said motion, the defendant, by counsel, duly excepted. Whereupon, it is considered by the Court that the said defendant be sentenced on the State Convict Road Force for the period of three months, and fined the

page 3 ⟩ sum of One Hundred Dollars, and be required to pay the costs of his prosecution. It is further considered by the Court that in the default of the payment of the fine and costs aforesaid, that the said defendant be kept so confined on the State Convict Road Force, after he shall have served the said term of three months, as provided by Sections 2094 and 2095 of the Code of Virginia of 1919, as amended by Acts of the General Assembly of Virginia, approved March 26th, 1928, or is otherwise released by due process of law. Thereupon, the said defendant, by counsel, moved the Court for time in which to apply for a writ of error to the foregoing judgment, which motion, having been fully heard by the Court, is sustained, and the execution of the aforesaid sentence is hereby ordered postponed until the 17th day of August, 1933. (Bailed.)

And afterwards: In the said Court, on the 16th day of August, 1933.

This day again came the defendant, and also came the Attorney for the Commonwealth, and thereupon, the said defendant moved the Court for further time in which to apply for a writ of error to the judgment heretofore entered in this case on the 17th day of July, 1933, and it is ordered that the said stay of execution be extended to the first Tuesday in September, 1933.

page 4 ⟩ And now: In the said Court, on the 8th day of September, 1933.

This day said defendant by his attorney presented his several bills of exceptions numbers one to three, inclusive, after due notice to the attorney for the Commonwealth and within 60 days from final judgment and prays that the same be made a part of the record and it is hereby ordered that the same be, and is, hereby made a part of the record in this cause.

The following are the bills of exceptions referred to in the foregoing order:

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W. C. Coward.

BE IT REMEMBERED, after the jury was sworn to try the issue in this cause on the 14th day of July, 1933, the Commonwealth to prove and maintain the issue, on its part introduced the following evidence, to-wit:

Police Sergeant Rhodes testified that his attention was directed to an automobile driven by the defendant on the 11th day of June, 1933, by reason of the fact that there were no license tags either on front or rear of the automobile. That he told Coward, who was alone in the car and driving the same, to pull his automobile over to the curb and Coward's head was bent over on his shoulder; that he appeared to be under the influence of ardent spirits. That he
page 5 } was driving the said automobile in the City of Norfolk on Brambleton Avenue, going west and about a block from Wright's Automobile Lot. Police Officers H. A. Frank and G. A. Anderson corroborated Officer Rhodes.
Police Officer Bailey testified that Coward was under the influence of ardent spirits and corroborated Sergeant Rhodes in other respects. This was all the evidence for the Commonwealth.

The defendant to maintain the issue on his part, introduced the following evidence:

C. Roberts testified that he was with Coward at a restaurant near Wright's Automobile Lot and he and Coward had drank three bottles of three point two beer. That Coward was not under the influence of ardent spirits when he left him. That Coward always drove with his head over on his shoulder and would walk like a crab with one shoulder cocked up; that it was Coward's natural way of carrying himself.
The defendant, Coward, testified that he and Roberts had had three bottles of three point two beer and when Roberts left him at the restaurant he took one more bottle of beer and went directly to Wright's Parking Station to try out an automobile. He was going to buy a second-hand car; that he had on several occasions tried out automobiles that he was going to buy. He was merely driving around the block to test the car but had no permission to use the car. That he was not under the influence of ardent spirits. Under cross
page 6 } examination he testified that he was not a man of

means and was prepared financially to buy an automobile, but had an interest in a wholesale tobacco supply store.

Joe Fuller, testifying for the Commonwealth, testified that he worked at Wright's Automobile Lot and when he saw Coward that Coward was not drunk nor sober, but was "twix and tween". He further stated that Coward took the automobile from Wright's lot without his consent. That was all the evidence both for the Commonwealth and the defendant.

Whereupon the Court instructed the jury as to the law and they retired to their room to consider the verdict. Sometime thereafter they returned into Court and inquired of the Court what time the defendant would get off while he was confined in jail, to which the Court replied: "The law is that the jailor shall also keep a record of each convict, and for every month that any convict appears by such record to have faithfully observed the rules and requirements of the jail while confined therein, and not to have been subjected to discipline for violation of same, there shall, with the consent of the judge, be deducted from the term of confinement of such convict ten days."

Whereupon the defendant by counsel, moved the Court to declare a mistrial by so instructing the jury, but the Court overruled the said motion, to which ruling by the Court the defendant excepted and tenders this his Bill of Exceptions number one, which he prays to be signed and sealed and made a part of the record in this cause, which is accordingly done within 60 days from judgment.

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JAMES U. GOODE, Judge.

BILL OF EXCEPTIONS NUMBER TWO.

Commonwealth of Virginia,
vs.
W. C. Coward.

BE IT REMEMBERED, at the trial of the above-styled cause, during cross examination of the defendant, attorney for the Commonwealth asked the defendant was he a man of means and prepared financially to purchase an automo-

bile, to which question the defendant by counsel objected but the Court overruled the said objection and which the said defendant answered, he was not a man of means but had an interest in a wholesale tobacco supply store, which ruling by Court the defendant by counsel duly excepted and tenders this his Bill of Exceptions number two, which he prays to be signed and sealed and made a part of the record in this cause, which is accordingly done within 60 days from Judgment.

JAMES U. GOODE, Judge.

page 8 } BILL OF EXCEPTIONS NUMBER THREE.

Commonwealth of Virginia
vs.
W. C. Coward.

BE IT REMEMBERED, at the trial of the above styled cause, after the evidence had been heard both for the Commonwealth and the defendant and the jury had retired to consider their verdict, again returned to the courtroom and rendered the following verdict:

"We, the jury, find the accused guilty as charged in the information and fix his punishment at three months in jail and a fine of $100.00."

Whereupon the defendant by counsel moved the Court to set aside the verdict and grant the defendant a new trial on the grounds that same was contrary to the law and the evidence for the wrongful admission of evidence and the wrongful instruction of the jury, but the Court overruled the said motion and on the 17th day of July, 1933, entered judgment on the said verdict, to which ruling of the Court, the defendant by counsel duly excepted and tenders this his Bill of Exceptions number three, which he prays to be signed and sealed and made a part of the record in this cause, which is accordingly done within 60 days from judgment.

JAMES U. GOODE, Judge.

page 9 } Virginia:

In the Clerk's Office of the Corporation Court of the City of Norfolk, Number Two.

I, W. L. Prieur, Jr., Clerk of the said Corporation Court of the City of Norfolk, Number Two, do hereby certify that

the foregoing and annexed is a true transcript of the record in the suit of Commonwealth of Virginia, plaintiff, *vs.* Walter *M.* Coward, defendant, lately pending in said Court.

I further certify that said copy was not made up and completed until the Commonwealth had had due notice of the making of the same and the intention of the defendant to take an appeal therein.

Given under my hand this 27th day of September, 1933.

W. L. PRIEUR, JR., Clerk.

Fee for this record: $10.00.

A Copy—Teste:

M. B. WATTS, Clerk.

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