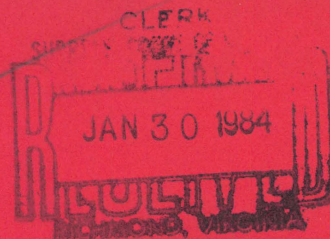


227Va 413



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 831312

WASHINGTON & LEE
LAW LIBRARY

JAMES RICHARD EDENTON,

Appellant,

SEP 18 1984

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

APPENDIX

R. Wayne Dawson
116 West Grace Street
Richmond, Virginia 23220

Gerald Baliles
Attorney General
101 North Eighth Street
Richmond, Virginia 23219

Counsel for Appellant

Counsel for Appellee

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a) Proceedings	20
b) Testimony of Robert C. East.	27
c) Testimony of Judy Sites.	32
d) Colloquy	34

VIRGINIA
COUNTY OF HENRICO, To-WIT:

} IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
APRIL 4, 1983

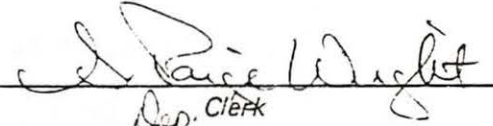
The grand jury charges that:

On or about January 28, 1983, in the County of Henrico, James Richard Edenton did operate a motor vehicle on the highways in the State of Virginia after having been found to be an habitual offender under the laws of this Commonwealth and while the order of the court prohibiting such operation was still in effect,

against the peace and dignity of the Commonwealth of Virginia.
Virginia Code Section 46.1-387.8

R. C. East

{ Witnesses sworn and sent
by the Court to the Grand
Jury to give evidence.


Dep. Clerk

A TRUE BILL


Foreman

MOTION TO QUASH INDICTMENT

Comes now the defendant, James Richard Edenton, by counsel, and moves the Court to quash the indictment and dismiss the charge against him, by reason of the following:

1. On March 17, 1981, an order was entered in the Circuit Court of Hanover County, an attested copy of which is attached hereto as Exhibit A requiring the defendant to appear on April 6, 1981 and show cause why he should not be declared an habitual offender.

2. On March 24, 1981, Deputy Sheriff D. L. Wright of Hanover County filed his return service, an attested copy of which is attached hereto as Exhibit B, stating that after diligent search the within named party, James Richard Edenton, could not be found within his baliwick.

3. At the hearing on April 6, 1981, the defendant did not appear, and on April 14, 1981, an order was entered in the said Circuit Court of Hanover County, an attested copy of which is attached hereto as Exhibit C, which delcared the defendant an habitual offender, although the same order recites that the Sheriff was unable to obtain service on the said defendant and that the said defendant failed to appear.

4. On August 19, 1981, an order was entered in the Circuit Court of Franklin County, an attested copy of which is attached hereto as Exhibit D, dismissing an indictment charging the

defendant with unlawfully and feloniously operating a motor vehicle on May 10, 1981 on the public highway after having been declared an habitual offender on the grounds that the proceeding in Hanover County Circuit Court was invalid in that the defendant was not served with process as required by law.

5. Since the entry of the said order in Franklin County Circuit Court, no steps have been taken to bring a new proceeding to have the defendant declared an habitual offender after proper service as prescribed in Virginia Code Section 46.1-387.5 and 8.01-296(1).

6. The said proceedings in Hanover County Circuit Court are null and void in that the defendant was denied notice of the proceedings and an opportunity to be heard prior to being declared an habitual offender in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and of Article I, Section 11 of the Virginia Constitution. See Ferguson v. Gathright, 485 F. 2d 504 (4th Cir. 1973).

WHEREFORE, your defendant asks that the indictment be quashed and the charges dismissed.

JAMES RICHARD EDENTON

By:

R. Wayne Dawson
Of Counsel

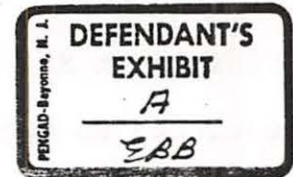
R. Wayne Dawson, p.d.
R. WAYNE DAWSON
Attorney At Law
16 South Second Street
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that I have mailed a true copy of the above Motion to Bert Nance, Commonwealth Attorney, Henrico Circuit Court, P. O. Box 27032, Richmond, Virginia 23273, this 22nd day of April, 1983.

R. Wayne Dawson
R. WAYNE DAWSON

ORDER



This day came Ramon E. Chalkley, III, Assistant Attorney for the Commonwealth for Hanover County, Virginia, and filed an Information alleging that on the 10th day of March, 1981, A. H. Nichols, Evaluator of the Driver Licensing and Information Department, Division of Motor Vehicles, Commonwealth of Virginia, filed a certificate alleging that James Richard Edenton is an "habitual offender" pursuant to Section 46.1-387.2 of the Code of Virginia, as amended.

WHEREFORE, it is ORDERED that James Richard Edenton, Route 2, Box 212-A, Montpelier, Virginia 23192, appear before this Court on the 6 day of April, 1981, at 10:00 A.M., at the Courthouse thereof, and show cause, if any he can, why he should not be prosecuted as an "habitual offender" as defined by Section 46.1-387.2 of the Code of Virginia, as amended, in view of the record shown by transcript and abstract attached to the petition herein and incorporated in and to be served with this Order.

ENTER: 3/17/81

JUDGE

I ask for this:

Ramon E. Chalkley III
Ramon E. Chalkley, III
Assistant Commonwealth's Attorney
Hanover County

A COPY TESTE

Richard L. Shelton, Clerk

By E. D. Shelton
DEPUTY CLERK



Exhibit B

A COPY TESTE

James L. Shelton, Clerk

by E. D. Taylor
DEPUTY SHERIFF

Date MAR 24 1981

After diligent search the within named Party

JAMES RICHARD FEDENTON

Could not be found within my bailwick

SHERIFF HAROLD E. BRADLEY

By E. D. Taylor

DEPUTY SHERIFF

ROUTED PER: MRS STANLEY
(MOTHER)

Exhibit C

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HANOVER
COMMONWEALTH OF VIRGINIA

vs.

L-51-A-81

JAMES RICHARD EDENTON

ORDER

On April 6, 1981, came the Attorney for the Commonwealth and an affidavit of compliance with Subsection 46.1-34.1 of the Code of Virginia, as amended, having been filed by the Commissioner of Motor Vehicles, and the Sheriff having been unable to obtain service on said defendant and the defendant thereupon having failed to appear on this day, and the Court having heard the evidence, doth find that the defendant is a resident of this Commonwealth, that he is the same person named in the abstracts of conviction filed herein, and that he is an habitual offender of the motor laws of this State, as defined in Subsection 46.1-387.2 of the Code of Virginia, as amended.

WHEREUPON, it is ORDERED and DECREED that James Richard Edenton is directed not to drive or operate a motor vehicle on the highways of the Commonwealth of Virginia for a period of ten (10) years from this date, and thereafter until his privilege to operate a motor vehicle in this Commonwealth has been restored as provided by law; and that James Richard Edenton do surrender forthwith to the Court all licenses and permits to drive or

operate a motor vehicle on the highways of this Commonwealth previously granted to him by the Division of Motor Vehicles of this Commonwealth to be disposed of in the manner provided.

It is further ORDERED that the Clerk of this Court mail an attested copy of this Order to the Division of Motor Vehicles, 2300 West Broad Street, Richmond, Virginia, and James Richard Edenton, Route 2, Box 212-A, Montpelier, Virginia 23192.

ENTER: 4/14/81

JUDGE

I ask for this:

Eddie R. Vaughn, Jr.
Eddie R. Vaughn, Jr.
Commonwealth's Attorney
Hanover County

A COPY TESTE
Richard L. Shelton, Clerk

By

DEPUTY CLERK

PRINTERS NOTE:

This page intentionally left blank.

VIRGINIA:

IN THE CIRCUIT COURT OF FRANKLIN COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

JAMES RICHARD EDENTON)

FINAL
ORDER

THIS DAY came the Commonwealth, by counsel, and James Richard Edenton, by counsel, who stands charged of a felony, to-wit: unlawfully and feloniously did operate a motor vehicle on the public highway after having been adjudicated an habitual offender in violation of §46.1-387.8 of the 1950 Code of Virginia, as amended, and upon an Information filed by the Commonwealth dated July 30, 1981, and a plea of not guilty by the defendant, and was argued by counsel.

UPON CONSIDERATION WHEREOF, the Court being of the opinion that a show cause order was entered on March 17, 1981, by the Circuit Court of Hanover County and in accordance with §46.1-387.5 of the 1950 Code of Virginia, as amended, and that the Sheriff's return of service dated March 24, 1981, a part of the Court records, stated that after diligent search the within named party, James Richard Edenton, could not be found within his bailiwick, Sheriff Harold E. Bradley by D. L. Wright, Deputy Sheriff, and that §46.1-387.5 of the 1950 Code of Virginia, as amended, states specifically that a copy of show cause order and such transcript or abstract shall be served on the person named therein in the manner prescribed by §8.01-296(1) of the 1950 Code of Virginia, as amended, and that §8.01-296 entitled Manner of Serving Process upon Natural Persons.-More Specifically Process, for which no

LAW OFFICES
DAVIS DAVIS
DAVIS & WELCH
ROCKY MOUNT, VA.

Particular Mode of Service is Prescribed may be Served upon Natural Persons as Follows:

1. By delivering a copy thereof in writing to the party in person;

and the Court being further of the opinion that an order was entered by the Circuit Court of Hanover County on April 6, 1981, adjudicating the defendant, James Richard Edenton, an habitual offender of the mode of laws of the State of Virginia, as defined in subsection 46.1-387.2 of the 1950 Code of Virginia, as amended, and the defendant, James Richard Edenton, was subsequently arrested in the County of Franklin on May 10, 1981, and charged with the operation of a motor vehicle after having been adjudicated an habitual offender in accordance with §46.1-387.8 of the 1950 Code of Virginia, as amended.

WHEREUPON, it is ADJUDGED, ORDERED and DECREED that the charge against James Richard Edenton of operating a motor vehicle after being adjudicated an habitual offender in violation of §46.1-387.8 of the 1950 Code of Virginia, as amended, be and is hereby dismissed in that the defendant was not served with process as provided by §8.01-296 of the 1950 Code of Virginia, as amended, which prescribes the method and mode of service in these matters and that service being by delivery of a copy thereof in writing to the party in person and the return service on the heretofore mentioned show cause order dated March 24, 1981, states that after diligent search the within named party, James Richard Edenton, could not be found within the serving officer's bailiwick.

It is further ORDERED that the Clerk of this Court mail a certified copy of this Order to the Division of Motor Vehicles, 2300 West Broad Street, Richmond, Virginia, and the Clerk of the Circuit Court of Hanover County, Hanover

LAW OFFICES
DAVIS, DAVIS, RAINE,
DAVIS & WELCH
ROCKY MOUNT, VA.

Courthouse, Virginia, and the attorney for James Richard Edenton.

ENTER: This the 19th day of August, 1981.

13A/2405
Judge

I ask for this:

A Copy, To wit:
Wm. J. W. [unclear], Jr., Clerk

Hubert A. Ruff, Jr.
Hubert A. Ruff, Jr.

Attorney for James Richard Edenton.

Lynn M. K. [unclear]
Deputy Clerk

Seen:

Clifford F. Hapgood
Clifford F. Hapgood
Assistant Commonwealth's Attorney

TRANSCRIPT OF RECORD

DIVISION OF MOTOR VEHICLES, VIRGINIA

1027

CONTL NO	ACCOUNT NO	REQUESTED BY	DATE FOR	PAGE
TR310688	SUBPOENA	POLICE CHECKS	05/09/83	1

RC NO. E04174-62153-235428
OL NO. 228-76-6896
CL NO. 228-76-6896

DEMERITS 12
SAFE DRIVING PTS 0
BALANCE MINUS 12

EDENTON, JAMES, RICHARD
RT 2 BOX 212-A
MONTPELIER, VA 23192

BIRTH DATE 08/19/52 SEX M
WGT 150 HGT 6-01 EYES BR HAIR BR
HANOVER

OPERATORS LIC STATUS - SUSPENDED HABITUAL OFFENDER -FR REQUIRED
CHAUFFEURS LIC STATUS - SUSPENDED HABITUAL OFFENDER -FR REQUIRED

CONVICTION	04/15/71 OFF	03/28/71	CO CT LOUISA OPERATE OR PERMIT OPERATION UNINS.MOT.VEH.
CONVICTION	06/15/73 OFF	05/26/73	CO CT HANOVER RECKLESS DRIVING
LIC ISSUE	08/20/75 EXP	08/31/79	OL CLASS NONE REST 0
LIC ISSUE	08/20/75 EXP REISSUE	08/31/79 04/18/78	OL CLASS NONE REST 0
CONVICTION	02/20/79 OFF	01/04/79	DIS CT RICHMONDCI SPEEDING 10-19MPH ABOVE SPEED LIMIT
LIC ISSUE	08/08/79 EXP	08/31/83	OL CLASS NONE REST 0
LIC ISSUE	08/08/79 EXP REISSUE	08/31/83 08/22/80	OL CLASS NONE REST 0 NO. 228-76-6896
CONVICTION	03/21/80 OFF	02/25/80	DIS CT HANOVER DRIV. IN VIOL. 46.1-250
SUSPENSION	04/16/80 TERM	08/12/80	CT ORDER FAIL TO PAY FINE
CONVICTION	04/16/80 DIS	CT HENRICO CU	CONTL ENDS 08/22/80
ORDER MAILED			
			COMPLIED WITH THIS ORDER 08/22/80
CONVICTION	04/16/80 OFF	03/09/80	DIS CT HENRICO DR,SUSP EFOR PROOF OF FINANCIAL RESPONSIBL

CONTINUED

Filed
5-10-83
8 E 238

CONTL NO	ACCOUNT NO	REQUESTED BY	DATE FOR	PAGE
TR310898	SUEPCENA	POLICE CHECKS	05/09/83	2

EDENTON, JAMES, RICHARD
RT 2 BOX 212-A
MONTPELIER, VA 23192

LIC ISSUE	11/25/80 EXP	08/31/82	CL CLASS A NO. 228-76-6896	REST 0
SUSPENSION	01/28/81 TERM	03/13/81	CT ORDER FAIL TO PAY FINE	
CONVICTION	01/28/81 DIS	CT RICHMOND CI	CONTL ENDS 03/13/81	
	ORDER MAILED			
	COMPLIED WITH THIS ORDER 03/13/81			
CONVICTION	01/28/81 OFF	07/28/80	DIS CT RICHMONDCI DRIV. IN VIOL. 46.1-350	
CONVICTION	04/01/81 OFF	01/21/81	TRA CT RICHMONDCI OPERATE UNINSPECTED VEHICLE	
SUSPENSION	04/14/81 REST	INDEF.	ADJUDGED HABITUAL OFFEND.	
CONVICTION	04/14/81 CIR	CT HANOVER CO		
	ORDER MAILED			
CONVICTION	04/14/81 OFF		CIR CT HANOVER HABITUAL OFFENDER CT. ORDER	SUSP INDEFINITE
LIC ISSUE	08/10/81 EXP	08/31/85	OL CLASS NONE NO. 226-19-6896	REST 0
LIC ISSUE	08/10/81 EXP	08/31/85	OL CLASS NONE	REST 0
	DUPLICATE	10/30/81	NO. 226-19-6896	
ACCIDENT	09/26/81 CASE	7777776	P1 DR-OWN	PRINCE WIL
SUSPENSION	12/04/81 TERM	INDEF.	CT ORDER FAIL TO PAY FINE	
CONVICTION	12/04/81 DIS	CT PR WILL CO		
	ORDER MAILED - RETURNED UNCLAIMED			
	ORDER SERVED TO HOUSEHOLD MEMBER	BY SHERIFF DEPT HANOVER CO	06/30/82	

CONTINUED

CONTL NO	ACCOUNT NO	REQUESTED BY	DATE FOR	PAGE
TR310888	SUBPOENA	POLICE CHECKS	05/09/83	3

EDENTON, JAMES, RICHARD
RT 2 BOX 212-A
MONTPELIER, VA 23192

CONVICTION	12/04/81 OFF	09/27/81	DIS CT PRINCE WIL INSUFFICIENT TREAD ON TIRES	
SUSPENSION	12/04/81 TERM	INDEF.	CT ORDER FAIL TO PAY FINE CONVICTION 12/04/81 DIS CT PR WILL CO ORDER MAILED - RETURNED UNCLAIMED ORDER POSTED TO DOOR	BY SHERIFF DEPT HANOVER CO 03/31/82
CONVICTION	12/04/81 OFF	09/27/81	DIS CT PRINCE WIL SUSP DRIVING WHILE INTOXICATED	1 YEARS
SUSPENSION	12/04/81 TERM	INDEF.	CT ORDER FAIL TO PAY FINE CONVICTION 12/04/81 DIS CT PR WILL CO ORDER MAILED - RETURNED UNCLAIMED ORDER POSTED TO DOOR	BY SHERIFF DEPT HANOVER CO 03/31/82
CONVICTION	12/04/81 OFF	09/27/81	DIS CT PRINCE WIL DEMERITS 6 RECKLESS DRIVING	
SUSPENSION	12/15/81 EFF	12/30/81	NO SR 21 RECD 46.1-167.4 ACC DATE 09/26/81 ACC JURISD PRINCE WIL ORDER MAILED - RETURNED UNDELIVERED ORDER POSTED TO DOOR	BY SHERIFF DEPT HANOVER CO 02/18/82
REVOCATION	01/07/82 TERM	12/04/82	DRIVING WHILE INTOXICATED ORDER MAILED - RETURNED UNCLAIMED	CONTL ENDS 12/04/85

CONTINUED

CONTL NO	ACCOUNT NO	REQUESTED BY	DATE FOR	PAGE
TR310988	SUBPOENA	POLICE CHECKS	05/09/83	4

EDENTON, JAMES, RICHARD
RT 2 BOX 212-A
MONTPELIER, VA 23192

SUSPENSION 06/01/82 TERM INDEF. CT ORDER FAIL TO PAY FINE
CONVICTION 06/01/82 DIS CT FREDRCKSBG
ORDER MAILED - RETURNED UNDELIVERED

CONVICTION 06/01/82 OFF 05/16/82 DIS CT FREDERICKS
DEMERTS 6 SPEEDING 20MPH/MORE ABOVE SPEED LIMIT

CONVICTION 06/01/82 OFF 05/16/82 DIS CT FREDERICKS
IMPROPER REGISTRATION OR LICENSE PLATES

SUSPENSION 06/23/82 TERM INDEF. CT ORDER FAIL TO PAY FINE
CONVICTION 06/23/82 DIS CT HENRICO CO
ORDER MAILED - RETURNED UNDELIVERED
ORDER NOT SERVED UNABLE TO LOCATE BY SHERIFF DEPT ARLNGTN CO 09/01/82


CONVICTION 06/23/82 OFF 05/16/82 DIS CT HENRICO
OPERATE OR PERMIT OPERATION OF UNLIC.MOT.VE

CROSS-REF 02/24/83 BEVINS, JAMES, L E05800-81670-825064

IN THE OFFICE OF THE DIVISION OF MOTOR VEHICLES AT RICHMOND, VIRGINIA.

I, THE UNDERSIGNED, PURSUANT TO THE PROVISIONS OF SECTION 46.1-34.1 OF THE CODE OF VIRGINIA, AS AMENDED, AND BEING DULY DESIGNATED BY THE COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES, COMMONWEALTH OF VIRGINIA, FOR THE PURPOSE OF ATTESTING AND CERTIFYING AS PROVIDED IN SAID SECTION, DO HEREBY CERTIFY THAT THE FOREGOING WRITING CONSISTING OF FOUR (04) PAGE(S) IS A TRUE AND EXACT TRANSCRIPT OF THE RECORD OF JAMES RICHARD EDENTON IDENTIFIED THEREIN BY NAME AND NUMBER. I FURTHER CERTIFY THAT THE LICENSE AND/OR PRIVILEGE OF THE HEREIN NAMED PERSON TO OPERATE MOTOR VEHICLES STANDS SUSPENDED AS SHOWN ON THE FOREGOING TRANSCRIPT OF RECORD AND REMAINS SUSPENDED ON THE DATE HEREOF, THAT NOTICE OF ALL SUSPENSIONS AND REVOCATIONS IMPOSED BY THE COMMISSIONER OF THE DIVISION OF MOTOR VEHICLES WAS SENT AS PRESCRIBED IN SECTION 46.1-441.2 OF THE CODE TO THE HEREIN NAMED PERSON ON THE DATE STATED ON THE TRANSCRIPT OF RECORD, AND THAT NOTICE OF ALL COURT SUSPENSIONS AND REVOCATIONS IMPOSED ON OR AFTER JULY 1, 1981, WAS SENT AS PRESCRIBED IN SECTION 46.1-441.2 TO THE HEREIN NAMED PERSON ON THE DATE STATED IN THE TRANSCRIPT OF RECORD, SUCH RECORD AND RECORD OF ANY STATUTORY ADMINISTRATIVE ACTION BEING ON FILE AND OF RECORD IN THIS OFFICE.

GIVEN UNDER MY HAND AND UNDER THE SEAL OF THE DIVISION OF MOTOR VEHICLES MAY 9, 1983.


DIVISION OF MOTOR VEHICLES OF
THE COMMONWEALTH OF VIRGINIA

This day came the attorney for the Commonwealth and James Richard Edenton, age 30, born August 19, 1952, who stands indicted for a felony, to-wit: operating a motor vehicle after having been declared an habitual offender (Virginia Code Section 46.1-387.8) appeared according to the condition of his recognizance and came also R. Wayne Dawson, his attorney heretofore appointed.

Whereupon the accused was arraigned and after private consultation with and being advised by his counsel, pleaded not guilty to the indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by jury and with the concurrence of the attorney for the Commonwealth and of the court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence and argument of counsel, the Court finds the accused guilty of operating a motor vehicle without a valid operator's license (Virginia Code Section 46.1-349), a misdemeanor and lesser included offense under the indictment.

The attorney for the accused then moved the Court to set aside the judgment, for the reasons stated to the record, which motion was overruled and exception was noted.

The Court adjudges and orders that the defendant is sentenced to confinement in the jail of this County for the term of six (6) months. The Court further orders that the defendant pay and the Commonwealth recover costs in the amount of \$ 303.⁰⁰. The defendant is not to obtain an operator's permit from the Division of Motor Vehicles until said costs are paid in full.

After pronouncing sentence, the Court advised the defendant of his right to petition for an appeal to the Supreme Court of Virginia and his right to proceed in forma pauperis and to have the assistance of court-appointed counsel.

Entered: May 10, 1983

Counsel for the defendant advised the Court the defendant desires to appeal the judgment rendered, and accordingly the Court suspended execution of the sentence for a period of thirty days and such additional time, as may be necessary, until the said appeal is acted upon.

And it appearing that the defendant is still indigent, the Clerk is ordered to have the record transcribed free of charge and such transcript is hereby made a part of the record.

And the Court appoints R. Wayne Dawson, an able and competent attorney at law to represent the defendant in said appeal.

On motion of the attorney for the defendant, the Court will allow the defendant to remain free on his present bond pending this appeal.

The Court certifies that at all time during the trial of this case the defendant was present in person and his attorney was likewise present in person and capably represented the defendant, for which services he is allowed an attorney's fee of \$ 150.-.

And the defendant is allowed to depart.

ENB

pjc

A Copy Teste:
MARGARET B. BAKER, Clerk

S. Patterson
Deputy Clerk

NOTICE OF APPEAL

Comes now the defendant, James Richard Edenton, by counsel, and hereby gives notice of his intention to appeal the judgment of conviction of this Court rendered on May 10, 1983 to the Supreme Court of Virginia.

A transcript of the testimony and other incidents of this case will be filed in the office of the Clerk of this Court.

JAMES RICHARD EDENTON

By: R. Wayne Dawson
Of Counsel

R. WAYNE DAWSON
Attorney At Law
16 South Second Street
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that I have on this 3rd day of June, 1983, mailed a true copy of the foregoing Notice of Appeal to Commonwealth's Attorney for the County of Henrico, P. O. Box 27032, Richmond, Virginia 23273.

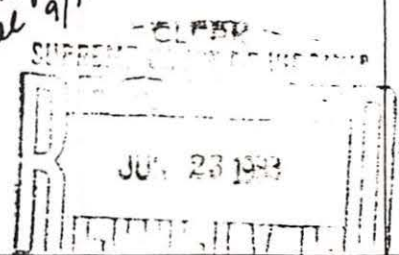
R. Wayne Dawson
R. WAYNE DAWSON

ERRORS ASSIGNED

1. The Court erred in denying the Appellant's motion to set aside the conviction of operating a motor vehicle without a valid Virginia operators license.

2. The Court erred in reducing the charge of operating a motor vehicle after having been declared an habitual offender to operating a motor vehicle without a valid Virginia operators license over the objection of the Appellant.

5/10
et. appt
pull 9/15



~~83/2/3~~ 83/3/2

RICHMOND, VIRGINIA

1 VIRGINIA:
2
3 IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO
4 COMMONWEALTH OF VIRGINIA
5 V
6 JAMES RICHARD EDENTON CASE NO. 83F113
7
8
9
10 Transcript of trial as heard on
11 May 10, 1983, before the Hon. E.
12 Ballard Baker.
13
14
15

16 APPEARANCES
17 Mr. B. Craig Dunkum
18 Attorney for the Commonwealth
19
20 Mr. R. Wayne Dawson
21 Attorney for the Defendant
22
23 Mr. James Richard Edenton
24 Defendant in Person
25

I N D E X

	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>
1			
2			
3	* Robert East	8	12
4	* Judy Sites	13	14
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16			
17	* Commonwealth's Witnesses		
18	** Defense's Witnesses		
19			
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24			
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E X H I B I T S

	<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
1			
2	Comm. Exh.		
3	1	Certificate	12
4	Def. Exh.		
5	A	Show Cause Order, notations on	16
6		the back of Show Cause Order,	
7		Order in Hanover County, Order in	
8		Franklin County.	
9			
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Transcript of trial as heard on
May 10, 1983, before the Hon. E.
Ballard Baker.

THE CLERK: Commonwealth v. James Richard Edenton. Case
No. 83F113. Is the Commonwealth ready to
proceed?

MR. DUNKUM: Yes, M'am.

THE CLERK: Is the defense ready?

MR. DAWSON: Yeah.

THE CLERK: Please stand, Mr. Edenton. James Richard
Edenton, the grand jury which met April 4, 1983,
charges that on or about January 28, 1983, in
the County of Henrico, you did operate a motor
vehicle on the highways in the State of Virginia
after having been found to be an habitual
offender under the laws of this Commonwealth
and while the order of the court prohibiting
such operation was still in effect, against
the peace and dignity of the Commonwealth.
Do you plead guilty or not guilty?

A Not guilty.

THE CLERK: On your plea of not guilty, do you wish to be
tried by the Court or by a jury?

A Court.

THE CLERK: With the consent of the Commonwealth?

1 MR. DUNKUM: Yes, M'am.

2 THE CLERK: Court concur?

3 THE COURT: Court concurs. There was a motion in the case,
4 is that --

5 MR. DAWSON: Yes, sir, Judge, we have a motion. I didn't
6 know whether the Court wanted to take that up
7 with the -- in advance. I think that is going
8 to be the crucial issue in the whole case.
9 There is not going to be any issue as to whether
10 the defendant was in fact operating on this
11 particular occasion.

12 THE COURT: What you want to say about your motion?

13 MR. DAWSON: If Your Honor please, the, there were a number
14 of exhibits attached to the motion.

15 THE COURT: Yes, I remember them.

16 MR. DAWSON: And I think the exhibits pretty much speak for
17 themselves. We have a situation where Hanover
18 County brought the proceedings to have the
19 defendant declared an habitual offender. The
20 order declaring ^{him} /an habitual offender itself
21 recites that no service was obtained upon the
22 defendant, and that he did not appear. Under
23 Virginia Code Section 46.1-387.5 [and I'm taking
24 one sentence out of that order, out of that
25 long statute] a copy of the Show Cause Order

1 and such transcript or abstract shall be served
2 on the person named therein in the matter
3 prescribed by 8.01-296.1. Needless to say, the
4 order reciting that he was an habitual offender
5 states that he was not served in that fashion.
6 The Franklin County Circuit Court has previously
7 had the same issue before it, dealing with the
8 same order. And the Circuit Court of Franklin
9 County found that the Hanover proceeding were
10 invalid, because he had never been properly
11 served, he was never given the notice and
12 opportunity to be heard as contemplated by that
13 statute. The case of Ferguson v Gathright,
14 decided in the 4th Cir. while finding that
15 that statute complied with due process re-
16 quirements did make the point that due pro-
17 cess required that notice and opportunity to
18 be heard be given before the driver license
19 revocation take place. That is statute 46.11-
20 87.5 provides for the due process requirements
21 of giving notice and an opportunity to be heard
22 before something is done like declaring him
23 an habitual offender and had his license revoked
24 for 10 years. That was not done in this case.
25 Franklin County Circuit Court found it to be

1 sufficient to dismiss a charge that they had
2 before it on that very same basis. I think
3 the issue then is pretty much already been
4 decided by one Circuit Court. And we're asking
5 this Circuit Court to make the same kind of
6 ruling, that Hanover County did not take the
7 proper steps to have him declared an habitual
8 offender. That he is not in fact validly
9 an habitual offender by any proper proceedings
10 and therefore he cannot be prosecuted for
11 driving after having been declared an habitual
12 offender.

13 THE COURT: Well let's see what Mr. Dunkum has to say about
14 that.

15 MR. DUNKUM: Well, Judge, I've given this case a lot of
16 thought and I, unfortunately, was not the one
17 who certified it from the General District/^{Court}to
18 the Circuit Court. Mr. Nance was the one who
19 did that and I've discussed it with him as well
20 as some other folks in the office. And what
21 I basically have come up with, Judge, is a
22 couple of things, one I don't think what
23 Franklin County did has any bearing on what
24 this Court should or should not do one way or
25 the other. I would say to the Court, I don't

1 think the Hanover order can be collaterally
2 attacked in this proceeding. And I would
3 rely on Worley v Commonwealth in 215 Virginia.
4 Which doesn't deal with the same point, but
5 deals with the collateral attack on the order
6 in another Circuit Court. I realize, however,
7 that obviously the Court is going to have to
8 look at what happened in Hanover. And I will
9 admit to the Court I was somewhat surprised to
10 read the order of the Circuit Court of Hanover
11 County which does in fact state that the
12 defendant was not present and he was unable to
13 be served with the Show Cause and notice of
14 the hearing. I would say to the Court there
15 will be additional evidence in this case along
16 the lines of notice and whether or not this
17 Court can decide the issue of whether of not
18 he is an habitual offender or not I think is
19 really the question. As far as Hanover/^{Circuit}Court
20 is concerned this man has been^{ad-}judged an habitual
21 offender. And there is an order to that effect
22 which despite what Franklin County has said
23 is still in existent at this time. I realize
24 that that --

25 THE COURT:

Is it void on its face?

1 MR. DUNKUM: I'd love to say no I don't think it is void
2 on its face. But I certainly think there
3 are some things there that would cause anybody
4 a lot of trouble when they look at it.

5 THE COURT: It sure would.

6 MR. DAWSON: The difficult thing is, Judge, is it's my under-
7 standing that the Commonwealth Attorney in
8 Hanover County has been approached several
9 times about taking the proper steps to clear
10 this matter up and he refuses to do so. He
11 says the order is valid, that's it. Won't
12 have any more to do about it. My client intends
13 to. I'm, of course, appointed on this case.
14 I have advised him that I think it is on his
15 best interest to bring a civil proceeding.
16 I'm not sure whether it's going to be by writ
17 of prohibition, mandamus, or what, but some
18 kind of proceeding in Hanover County Circuit
19 Court. Regardless of what this Court does
20 today, to clear that matter up. And at that
21 time, of course, anticipating in how the County
22 will have to decide that its own order is
23 invalid unless they want to just ignore the
24 statute. At that point they can reserve him
25 with a Show Cause Order and proceed to have it

1 done correctly. But I think here we've got a
2 situation where you do have an order void on
3 its face. Now I will concede that when you
4 get in questions of whether the underline
5 convictions that make up the habitual offenders
6 status are something that you have to bring
7 in the proceeding itself to declare the person
8 an habitual offender. It can't be collaterally
9 stopped once the person has been given the
10 opportunity to appear and to be heard on that
11 and if at some other point he wants to attack
12 that and say that's wrong he has to go back
13 there to that Court to do it. But we are
14 dealing with a different situation here. We
15 are dealing with things that get into constitu-
16 tional ramifications. The very crux of the
17 due process clause of the U.S. and the Virginia
18 constitution is to give the person notice of
19 what's being done when his liberty is being
20 deprived of. And give him the opportunity to
21 be heard. The order in Hanover Circuit Court
22 recites on its face that he was not given that.
23 So I think when you get into the constitutional
24 ramifications you can collaterally attack it
25 in these proceedings. Because it is quite a

THE COURT: Well my present thinking is that the Commonwealth has got a hard row to hoe on this one just hearing evidence. If you want to submit to something I'll be glad to hear it. Those who will testify please be sworn then.

(All witnesses who were going to testify in this case were duly sworn on the issue.)

THE COURT: All right. Who is your first witness?

MR. DUNKUM: Officer East.

THE COURT: East.

DIRECT EXAMINATION: Mr. East by Mr. Dunkum

Q State your name and occupation for the Court, please.

A Robert C. East, Police Officer in Henrico County.

Q How long have you been so employed?

A Five and a half years.

Q Did you have occasion to be working on January 28, 1983?

A Yes, sir, I did.

Q On that date did you also have occasion to observe the defendant, Mr. Edenton, operate a motor vehicle in Henrico County?

1 A Yes, yes sir, that's correct.

2 Q Did you have occasion to stop the vehicle and have a
3 conversation with Mr. Edenton?

4 A Yes, sir.

5 Q Tell Judge Baker when and where you approached the vehicle
6 and what took place.

7 A It was approximately 1:10 a.m. I had followed the vehicle
8 for a distance observing it. There was some question
9 about ^{the} driving. I stopped the vehicle on Austin Avenue.

10 MR. DAWSON: Judge, I'll stipulate ^{that} / the defendant was
11 operating a motor vehicle.

12 THE COURT: Okay.

13 MR. DUNKUM: Thank you, Judge, but I'd rather just go
14 through the briefer. It's not going to take
15 long.

16 THE COURT: All right. Go ahead.

17 A I'd observed a switch of the drivers on the vehicle on
18 Austin Avenue. I was one street over watching the vehicle.
19 After the switch of the drivers it pulled off again. I
20 stopped the vehicle at the intersection of Dill and
21 Austin Avenue, in Henrico County. After speaking with
22 the driver about the switch I went to the passenger who
23 was identified later as Mr. Edenton. He had an odor
24 alcohol about his person. He was later charged with
25 operating under the influence. He had --

1 MR. DAWSON: Judge, I object. I don't think that has any
2 relevance in this proceeding.

3 MR. DUNKUM: Just tell us what happened after that.

4 THE COURT: It doesn't make any -- go ahead.

5 A When speaking to him about his operators license, he
6 did not have one on him and he identified himself as
7 James Richard Bevins. That's the only information he
8 would give me. He said he did not know his date of birth.
9 So I was unable to obtain the other information under
10 that name. When I went back to the vehicle, that he had
11 been operating, on the passengers side I found a wallet
12 in the floor board of the vehicle on the passengers side.
13 Inside that wallet was a birth certificate card, one of
14 the plastic cards, with the name of James Richard Bevins.
15 James Richard Edenton on it. With that information and
16 the date of birth on the card I ran the check through
17 DMV. And by the dispatching came back, uh, further
18 information needed from DMV. It did not have a status on it.
19 I charged him with another charge and he was placed,
20 incarcerated in jail. The next morning, approximately
21 9:00 a.m., I responded to DMV and spoke with them about
22 the information. They checked through their computer
23 and was doing so under the name of James Richard Edenton
24 whose status was habitual offender. I also had them re-
25 search their files through the name of James Richard Bevins.

1 James Leroy Bevins, the name he had given me earlier.
2 And that status was suspended. It was an Arlington,
3 Virginia address. I then obtained a warrant for him and
4 responded back to the jail, also with a search warrant
5 for the wallet which I had returned to his property.
6 After reading him his rights he gave me information that
7 yes he did know he was an habitual offender. That he had
8 been declared so in Hanover County. He had had an attorney
9 or someone research information and there was a problem
10 with the order. That's what he told me the next morning
11 and that he just had not had the money to contest it.
12 He also admitted to me that he had in fact changed social
13 security numbers, changed two digets of his social security
14 number and had obtained a license under the name of James
15 Leroy Bevins. He said that he was trying to get his life
16 straighten out and that after he was declared an habitual
17 offender he had gone to several clinics. And then he was
18 trying to get things straight, but he had to have a
19 drivers license so that was the reason for changing it.
20 He told me that he was unaware that it was suspended under
21 the name of Bevin.

22 Q All of this took place in Henrico, didn't it?

23 A Yes, sir. That is correct.

24 Q Is this the gentlemen here who you talked to in reference
25 to it?

1 A Yes, sir.

2 MR. DUNKUM: Judge, I would offer the certificate, for what
3 as exhibit 1
it is worth, /for the Commonwealth.

4 THE COURT: All right, number 1.

5 MR. DUNKUM: I believe that's all the questions I have for
6 Officer East.

7 THE COURT: Any questions, Mr. Dawson?

8 CROSS EXAMINATION: Officer East by Mr. Dawson

9 Q Officer East, when you talked to him down at the jail
10 did he tell you that Franklin County Circuit Court had
11 indicated to him that these Hanover proceedings were
12 invalid?

13 A No, sir, I found out about that through DMV.

14 Q Didn't he show you a copy of an order that he had in his
15 possession?

16 A No, sir.

17 Q I ask you to take a look at this and tell me if you've
18 ever seen this before. You never saw that order?

19 A No, sir, I did not.

20 MR. DAWSON: Judge, if he hadn't seen it I'll withdraw it
21 from the exhibit.

22 THE COURT: All right.

23 Q Did he ever tell you he had an order from the Franklin
County Circuit Court?

24 A No, sir, I don't recall him saying that, just the information
25 regarding the research in Hanover.

1 Q He said that there was a problem with the Hanover Order
2 and he didn't have the money to go back there and fight
3 it, is that what he said?

4 A That is correct, yes, sir.

5 MR. DAWSON: That's all the questions I have.

6 THE COURT: Anything else?

7 MR. DUNKUM: No, sir.

8 THE COURT: All right, thank you Mr. Fast. You may step
9 down.

10 MR. DUNKUM: Ms. Sites.

11 DIRECT EXAMINATION: Ms. Sites by Mr. Dunkum

12 Q M'am, if you would state your name and occupation for
13 the Court.

14 A Judy Sites, Division of Motor Vehicles.

15 Q And do you have with you your records in regard to Mr.
16 James Richard Edenton today?

17 A Yes, I do.

18 Q And what do they reflect as to his status to operate a
19 motor vehicle on January 28, 1983.

20 A Suspended habitual offender.

21 Q Do your records reflect when and where he was declared
22 an habitual offender and how he was notified, if he was,
23 of that fact?

24 A He was/judged an habitual offender April 14, 1981, Hanover
25 Circuit Court.

1 Q And do your records reflect whether or not he was aware
2 of that proceeding or had been notified of it by the
3 Division of Motor Vehicles or anything?

4 A Division of Motor Vehicles served him a copy of this
5 order on May 18, 1981.

6 Q And what did they do when they served him a copy of the
7 order?

8 A They picked up his license, his chauffeur's license, and
9 he reported his operators license lost. And Mr. Harlow
10 served him a copy of the order and his signature is
11 attached and chauffeurs license is attached.

12 Q Okay.

13 MR. DUNKUM: Judge, I believe that is all the questions that
14 I would have.

15 THE COURT: Anything you want to say about that?

16 MR. DAWSON: No, sir, not at this time.

17 THE COURT: Any cross, Mr. Dawson?

18 CROSS EXAMINATION: Ms. Sites by Mr. Dawson

19 Q DMV has receive a copy of the Franklin County Circuit
20 Court order, has it not?

21 A Yes, it has.

22 MR. DAWSON: That's all the questions I have.

23 THE COURT: What is the date it was served on him, May 18
24 did you say?

25 A May 18, 1981.

1 THE COURT: '81. All right, thank you very much Ms. Sites.
2 All right, thank you very much / ^{Ms. Sites.} Is that the
3 Commonwealth's case?
4 MR. DUNKUM: That's all that I would have, Judge, yes, sir.
5 THE COURT: Do you want to put any evidence on for the
6 record, Mr. Dawson?
7 MR. DAWSON: Judge, I'd move to strike.
8 THE COURT: I will think about your motion. I may not
9 decide it this afternoon, but I find right much
10 merit in your position.
11 MR. DAWSON: May I confer with my client?
12 THE COURT: I find right much merit in your position.
13 Though we don't have ^{any} order actually in the
14 records yet.
15 MR. DAWSON: Judge, that's why I offered attested copies
16 with the motion as exhibits. I would offer
17 those if there is any question about whether
18 they should be made exhibits.
19 THE COURT: Well let's do that.
20 MR. DAWSON: They are attested and certified copies of each
21 of those documents.
22 THE COURT: They will be marked Exhibit 1 & 2 for A & B
23 for the defendant. That's the Hanover Order
24 and the Franklin County Order.
25 MR. DAWSON: Judge, the exhibits I'd offered was, I think,

1 Exhibit A was a copy of the Show Cause Order,
2 an attested copy of that. Exhibit B was the
3 notations on the back of that order that showed
4 the actual stamp of the service showing that
5 after diligent search the within named party,
6 James Richard Edenton, could not be found within
7 my bailiwick, Sheriff Harold E. Bradley by D.
8 L. Wright, Deputy Sheriff. Exhibit C was the
9 order in Hanover County declaring him an
10 habitual offender which recites on its face
11 the lack of service and the lack of appearance.
12 And Exhibit D was the order from Franklin County
13 Circuit Court.

14 THE COURT: I'll have them all committed as Exhibit A here.
15 All four (4) of them.

16 MR. DAWSON: That will be fine.

17 THE COURT: Well Mr. Dunkum.

18 MR. DUNKUM: Yes, sir.

19 THE COURT: Let's take one thing first. Are you representing
20 the Commonwealth of Virginia? In this case?

21 MR. DUNKUM: As far as I know I am.

22 THE COURT: Haven't you already lost this case one time?

23 MR. DUNKUM: Judge, I don't believe I have.

24 THE COURT: The Commonwealth has, hasn't it?

25 MR. DUNKUM: I believe the Commonwealth has lost a case in

1 Franklin County where he was charged with
2 driving after being declared an habitual
3 offender.

4 THE COURT: The order in which makes specific records to
5 the same order you're relying on here?

6 MR. DUNKUM: Yes, sir.

7 THE COURT: And you didn't appeal that?

8 MR. DUNKUM: No, I didn't, no, sir.

9 THE COURT: Was that an oversight?

10 MR. DUNKUM: Well, Judge, had I been there I might have
11 had something to do with it, but I don't know.
12 What I would say as far as that's concerned,
13 Judge, he could be tried in any jurisdiction
14 in the Commonwealth of Virginia in the case of
15 driving after being declared an habitual
16 offender ^{it} /could be dismissed against him. I
17 realize that in this particular case there is
18 a reason for the dismissal. And the reason
19 the Franklin Court cites is the Hanover order
20 being invalid. I don't know that the Franklin
21 County Court can rule that the order is invalid.
22 They can say we are dismissing the case, because
23 we feel that the order is invalid. I don't
24 know if that ties your hands at all as to what
25 you can decide about the Hanover order, if in

1 fact, you would decide anything different
2 which I have some question about. I don't
3 think that is binding upon this Court as I
4 said originally when we started --

5 THE COURT: Do you have some doubt whether the Commonwealth
6 can really be subject to an estoppel or any-
7 thing of that sort. Estoppel by judgment, I
8 doubt that.

9 MR. DUNKUM: I don't think we can be estopped from prosecut-
10 ing it under those circumstances.

11 THE COURT: Let's get to the heart of the case though.
12 What is good about the Hanover order?

13 MR. DUNKUM: It's signed by everybody it was suppose to be.
14 It is dated, it's got the right names in it.
15 And he was served with notice that it was in
16 effect. That's basically about all.

17 THE COURT: All you have that Franklin County doesn't have
18 is that we do have evidence to it that he was
19 served with notice of the order afterwards.

20 MR. DUNKUM: I think, Judge, just to put all of this aside
21 and to be real honest and to get right down
22 to it. I think the argument and the approach
23 that was taken in the General District Court
24 was that the Hanover order is valid on its
25 face. Franklin County can decide what they

1 will, but it was valid. And for their purposes
2 he had no notice at the time, but at the time
3 he became aware of the Franklin County order
4 he became aware that he was and had been^{ad-}judged
5 an habitual offender by Hanover. And, therefore,
6 at that time he had notice of it. Whether it
7 was valid or not was for Hanover to determine
8 and they are the ones that had to determine
9 that. And once he is put on notice that in fact
10 he is an habitual offender he is not suppose to
11 be operating a motor vechile in the Commonwealth.
12 I think that is the approach that was taken.
13 Whether it is proper or not obviously is what
14 we have got to decide. And I have some problems
15 with it myself looking at the order on its face.
16 But I think certainly he became aware of the
17 fact that the Hanover County Order was on its
18 face valid. And he was an habitual offender.
19 And I think the evidence you've heard today
20 shows that he was certainly aware of all of
21 that and in fact acknowledged to DMV and to
22 Officer East that he had been declared an
23 habitual offender in Hanover and knew it.
24 Although he did say there were some problems
25 with the order they had never been straighten

1 out and for that matter the order was still
2 valid in Hanover as being entered by the
3 Circuit Court. I would, well I won't point
4 that out yet. But after we finish the case
5 I'll point something else out to the Court
6 that I think will be interesting for the Court
7 to note in regard to Hanover County.

8 THE COURT: What, they do it all the time?

9 MR. DUNKUM: No, nothing like that.

10 THE COURT: Okay.

11 MR. DUNKUM: They are going to have to decide a single issue
12 on their own order, I think.

13 THE COURT: Go ahead, Mr. Dawson, what you want to say
14 about it?

15 MR. DAWSON: Judge, I think that as far, the Franklin County
16 Circuit Court did not say that they were dis-
17 missing their case because he did not have
18 notice that he had been declared an habitual
19 offender. They said he did not have service
20 of the pleadings of the papers of the Show Cause
21 Order when it was brought up there.

22 THE COURT: Let me ask you this though, do you think that
23 binds this Court?

24 MR. DAWSON: Judge, I think that there, I don't know that it
25 binds it, but I think it binds it as far as the

1 issue. I think there is an estoppel working
2 here.

3 THE COURT: Suppose they decide the other way. Suppose
4 they decided that he was an habitual offender
5 up there and/he ^{then} got some good legal advice
6 says no the Hanover Order is no good.

7 MR. DAWSON: I don't, well I have to retract--

8 THE COURT: Does he drive on a (unintel.) County order?

9 MR. DAWSON: that, Judge, I'm not real sure it is binding
10 that is why I did not, I don't think I said
11 in my motion that it was an estoppel ---

12 THE COURT: No, you didn't, you didn't, you didn't.

13 MR. DAWSON: Because I didn't want to assert that there was.
14 I think it certainly should have some influence
15 or it certainly should be weighed carefully.
16 That one Court had decided that way. Particularly
17 --

18 THE COURT: I agree (unintel.) --

19 MR. DAWSON: (unintel.) dealing with our own order, certainly
20 it would be binding I think. ---

21 THE COURT: (Unintel.) ---

22 MR. DAWSON: If Hanover had made that decision and in a case
23 up there, of course, that would be binding I
24 think, but since it's dealing with another issue.
25 The problem we get into though is I think the

1 logic, the reasoning that they used is sound
2 in Franklin County. They decided that the
3 service had not been compliced. He had not
4 been given the notice and opportunity to be
5 heard that is required under the constitution
6 for due process. And therefore those proceeding
7 are invalid, they are void. And I just, well
8 we made a mistake about one of the underlying
9 convictions. It really wasn't him that was
10 involved. He wasn't even given the opportunity
11 to appear, to challenge any of the underlying
12 convictions if there was some reason to challenge
13 it. Or to state whether or not he was the
14 person named in the, you know, in the records
15 and in the Show Cause Order. There are probably
16 very few defenses to be declared an habitual
17 offender once those proceedings are brought.
18 But, and about the only thing the Court has
19 stuck by in saying that has to be done is, one;
20 you have got to have the underlying convictions
21 there and two; the person has to be served with
22 notice of the proceeding.

23 THE COURT: Well is it void or is it voidable?

24 MR. DAWSON: I think it is void, Judge. I think it runs
25 afoul of the constitution of the United States.

1 And afoul of the Virginia constitution. And
2 I think that because it is void it certainly
3 should not form the basis for a conviction.
4 in this court. Besides the commonwealth made
5 the point that in the General District Court
6 it was certified on the basis that well now
7 he had notice that he was an habitual offender.
8 What he had notice of, because he wasn't served
9 until after he was stopped in Franklin County.
10 The offense date on that offense was May 10.
11 He was served on May 18 with the order declaring
12 him an habitual offender. He goes to court in
13 August, he gets told by the Judge we're dis-
14 missing this, because the Hanover proceedings
15 are invalid. By the notice he had was that
16 Hanover declared him an habitual offender, but
17 a Circuit Court of equal jurisdiction had said
18 that proceeding is invalid. We can't convict
19 you for driving as an habitual offender. So
20 I have a considerable difficulty understanding
21 how he was on notice that he should not be
22 driving when Franklin County all but told him
23 that proceeding is invalid. He, he even request
24 and got a copy of the order. And one of the
25 last paragraphs in the order says that a

1 certified copy of the Hanover County Circuit
2 Court order, the Franklin County Circuit Court
3 order be mailed to the Division of Motor Vehicle
4 and to Hanover County. Now I think for most
5 laymen, I doubt there's any laymen that wouldn't
6 think then that when Franklin County amender
7 the order and when they had sent a copy to
8 DMV and to Hanover County that that cleared
9 up matters or at least should start the process
10 of clearing up matters.

11 THE COURT: Well, Mr. Dunkum, do you want to have a chance
12 to tell me this thing is voidable?

13 MR. DUNKUM: Judge, certainly it's voidable. I don't think
14 it is void. I don't think this Court can
15 declare the order of the Hanover Circuit Court
16 void. I think it is voidable. That's the
17 position I have taken all along. And I would
18 take issue of what Mr. Dawson just argued,
19 that he thought it had been cleared up. Certain-
20 ly if you think it has been cleared up why do
21 you go and alter a social security number and
22 get a drivers license in another name if you
23 think everything is honky-dory with your
24 license and you can drive on it. Not that
25 that is going to be the real issue in the case,

1 but certainly I don't think he can come in here
2 in good faith and say I thought it was okay for
3 me to drive because Franklin County said the
4 Hanover order was no good. If so, why don't
5 you just use your own license or get another
6 one from DMV. Don't go and use another name
7 and another social security number and get
8 another license in somebody else's name.

9 THE COURT: Well all of that is very suspicious, but it
10 still comes back to this order in Hanover
11 County.

12 MR. DUNKUM: Well I agree. It's like I said it's not the
13 issue, but I don't think in good faith you can
14 make that argument.

15 THE COURT: Do you want to try to cite me anything on it?

16 MR. DUNKUM: Judge, I've tried. I've looked and like I've
17 said the only cases I've been able to come up
18 with was the one I cited earlier, Worley.
19 And I don't think that is not really on point
20 with the issue we have before us today. I
21 don't think, I've been unable to find any
22 authority other than the one cited by Mr. Dawson.
23 And I read the case of Ferguson v Gathright,
24 and I think it is basically fairly clear
25 on what it says/is required.

1 MR. DAWSON: Judge, I think there is a final point. I think
2 that if notice and an opportunity can be heard,
3 can be overlooked by one Court in declining
4 him an habitual offender and another Court then
5 can overlook the fact that that Court overlooked
6 giving him the notice and opportunity to be
7 heard in convicting him of driving after his
8 license, after he had been declared an habitual
9 offender. And I think the whole statute may
10 run afoul of the constitution. Because if that
11 statutory provision that satisfies the due process
12 requirements of both the Virginia and U.S.
13 constitutions.

14 THE COURT: (Unintel.) I'm not going to spend a lot of
15 time thrashing at the law on this point. I'm
16 reclined to agree with the position taken by
17 Mr. Dawson that this is probably an order which
18 should not be the bases for finding a conviction
19 guilty of driving after having been declared
20 an habitual offender. But he is clearly
21 operating a motor vehicle without a valid
22 operators license and that can take up to a
23 \$500 fine or six months in jail or both. What
24 do you want? I'm finding him guilty of operating
25 without a valid operators license. What's his

1 record other than what we've got?

2 MR. DUNKUM: Judge, if I may have just a second.

3 THE COURT: Okay.

4 MR. DAWSON: Judge, just for the record, I have some question
5 whether that is a lesser included offense.

6 THE COURT: I don't see why it's not.

7 MR. DUNKUM: Judge, under the circum--

8 MR. DAWSON: I would note an objection just for the record.
9 I'm not real clear on the top of my head
10 whether it is, but --

11 MR. DUNKUM: Judge, under the circumstances I don't want
12 to beat a dead horse, but I think that if the
13 Court is saying that it doesn't think that, or
14 said that it is not going to find him guilty
15 of being an habitual offender certainly the
16 revocation is going to be a second or subse-
17 offense. And there is proof of that. If the
18 Court would allow me to amend it to second
19 or subsequent offense of driving on revocation
20 certainly it is a first offense. And I think
21 the evidence would show if it were brought out
22 at this time it would be a second subsequent
23 offense. Either way --

24 THE COURT: Is this then a lesser included operating under
25 a motor, valid license? That's not a lesser
included offense? I think it is.

1 MR. DUNKUM: Yeah, I think it is. No question about that.
2 I'm just saying I think it is second or subse-
3 quent offense of that.

4 THE COURT: Well, just leave it the way it is. (Unintel.)

5 MR. DUNKUM: All right. I would offer his record then.

6 THE COURT: All right. It's a right depressing record.
7 Well he'd have to be an habitual offender
8 in Hanover if that be as such by driving on
9 revoked license. Like drunk driving and that
10 sort of thing.

11 MR. DAWSON: Judge, the defendant has a drinking problem.
12 I think that's evident from the convictions.
13 He is going to Regency 10 Services for treat-
14 ment of alcoholism in Louisa County and I
15 believe he is going somewhere else as well.
16 He has been to MCV recently looking into
17 programs that they have. Recently his mother
18 has decided to assist him in getting a small
19 business set up. He has signed a business
20 lease to operate a small retail outlet store
21 on Staples Mill Road near the Overhill Lake
22 area. That lease -- I have a copy of the
23 business lease. It was executed on April 15,
24 and he is just beginning to get started and
25 getting situated in getting something going

1 for himself. Prior to that he was not employed
2 and hasn't been for a considerable period.
3 But I think he is doing something to try and
4 get some help with the alcoholism. And he is
5 trying to get a business going that may be
6 of immense benefit to him in getting his life
7 straighten out in the future as well.

8 THE COURT: What sort of business is this?

9 MR. DAWSON: It's a retail outlet store, he tells me that
10 it will be kind of like a clothing outlet and
11 gift shop.

12 THE COURT: Is he running it by himself?

13 MR. DAWSON: Yes, sir. His mother is backing him, you know,
14 finically on it, but she is trying to get him
15 established in something he wants to do.

16 THE COURT: And when is it suppose to open up?

17 MR. DAWSON: It's already open.

18 THE COURT: What are we suppose to do? Forget everything
19 and let him go about his business? It's
20 been a long time since I saw a man with a
21 worst driving record. And they are major
22 things. DUI, driving under revoked license,
23 five (5) of those all together.

24 MR. DAWSON: If the Court sees fit to impose any jail
25 sentence, Judge, I ask the Court to consider

1 work release for the weekend. The store is
2 open 7 days a week. I ask the Court to consider
3 work release. I think this is an opportunity
4 for him to do something to start straightening
5 his life out, you know, getting a business
6 going and getting some treatment for his
7 alcoholism. And, of course, if he is incarcerated
8 (unintel.) the store will have to close.

9 THE COURT: He's almost 30 years old he's had other chances.
10 What you want to say about this Mr. Dunkum?

11 MR. DUNKUM: Judge, despite the fact that he is not an
12 habitual offender any more, it's a simple
13 revocation case when you look at the record
14 as the Court has pointed out and you look at
15 the circumstances of the facts that you have
16 heard today from Officer East about how he
17 was operating, what he was doing, I don't think
18 I can in good conscience recommend to you that
19 you do less than fine him \$200 and give him
20 6 months in jail. And suspend his operators
21 license. As the Court pointed out five (5)
22 ^{prior} convictions/to this of major offenses.

23 THE COURT: All right, let the record show the defendant
24 and counsel are back in court and Mr. Dunkum
25 is here for the Commonwealth. I'm a mite

1 surprised at what I'm finding here. I have
2 said that I am finding this defendant guilty
3 of operating without a valid operators license.
4 Which under, it's in violation of Section 46.1-
5 349. That says on the first conviction the
6 violation of this Section the penalty imposed
7 shall be divided at 46.1387. Which can take
8 up to \$500 and up to six months in jail or
9 both. I guess I'd, you rarely see any penalty
10 like that for not having a valid operators
11 license.

12 MR. DUNKUM: It's a normal penalty under 349. I would
13 submit to you that it is not, it's rare that--

14 THE COURT: It's rare.

15 MR. DUNKUM: Anybody would get six (6) months in jail for
16 that.

17 THE COURT: Very rare you'd have a case that could support
18 that, but --

19 MR. DUNKUM: Of course, it's very rare that you find a person
20 with a record like this.

21 THE COURT: So having found Mr. Edenton guilty of operating
22 a motor vehicle without a valid operators
23 license, which I feel is a lesser included
24 offense for the charge of operating after
25 having been declared an habitual offender. I

1 find him guilty. I'm going to sentence him
2 to six months in jail and cost.

3 MR. DAWSON: Judge, would the Court con--

4 THE COURT: And I will note he has a perfect right to
5 appeal this decision in court. And I want
6 to advise him of that. And --

7 MR. DAWSON: Would the Court consider suspending any of
8 that time, Judge? If he had been declared,
9 if he had been found guilty of the felony
10 charge and got a year in jail or even two
11 years in jail, he might have end/up^{ed} with less
12 time. By the time you figure parole illegibi-
13 lity which is not considered here.

14 THE COURT: Well he will be out in four months now, won't
15 he?

16 MR. DAWSON: If he had gotten a year penitentiary sentence
17 he'd been out sooner than that.

18 THE COURT: Does he want to plead guilty to being an habitual
19 offender?

20 MR. DAWSON: No, sir, Judge.

21 THE COURT: I just think it is a horrible record, Mr. Dawson.
22 I also think the fellow has been playing games
23 with the Commonwealth and I don't really find
24 much sympathy in his position. I just can't
25 do it. I think all I can tell him is this, he

1 has a perfect right to appeal what I have done.
2 If he appeals I'll be glad to appoint you to
3 represent him, because I think you did a fine
4 job in bringing to the Court the things you
5 have brought to the Court. I am not overly
6 opposed to work release in a proper situation.
7 But I'm not sure he's got the kind of job,
8 operation that can function on the work release
9 situation. Seven (7) days a week running some
10 sort of a retail outlet store here off of
11 Staples Mill Road, or wherever. Which is
12 just something he got into the first of this
13 month.

14 MR. DAWSON: May I confer with my client?

15 THE COURT: Sure.

16 MR. DAWSON: Judge, would the Court leave him out on bond.
17 He has indicated to me a desire to want to
18 take an appeal?

19 THE COURT: What sort of bond is he on?

20 THE CLERK: \$1500.00 surety bond.

21 MR. DAWSON: Judge, I would for the record move to satisfy
22 the conviction on, conviction/^{of}no valid operators
23 license, operating with no valid DMV operators
24 license as not being a lesser included offense.
25 The felony charge of driving after he had been

1 adjudicated an habitual offender.

2 THE COURT:

3 All right. You want to stand then, Mr.
4 Edenton. I find you guilty of operating a
5 motor vehicle without having a valid operators
6 license. Which I take to be a lesser included
7 offense the charge of operating a motor vehicle
8 after having been declared an habitual offender.
9 I'm sentencing you to six (6) months in jail
10 on that which I think is the maximum jail
11 sentence you could get on that offense. And
12 I think it is a severe penalty. And I just
13 think it is a terrible record. As I under-
14 stand/ ^{this} evidence, you got your notice from
15 Hanover April 14, 1981. And I can see one
16 driving in Richmond after that, let me see,
17 wait a minute. At least a half a dozen
18 convictions of driving after you received that
19 notice from Hanover. As I've indicated here,
20 you've got a perfect right to appeal what I
21 have done here and I will appoint Mr. Dawson
22 to represent you on the appeal. And I will
23 pursuant to the statute suspend execution of
24 the sentence upon the \$1,500.00 bond, being
25 an appealed bond. We'll issue pending the
appeal. I will tell you this, as soon as the

1 Supreme Court rules on it if they turn the
2 appeal down, you will get a notice to turn
3 yourself in jail within 10 days so watch what
4 sort of business you get yourself involved in,
5 because it's going to be a full, -- As far
6 as I'm concerned it will be a full no work
7 release proposition. Do you understand that,
8 sir?

9 A Yes, sir.

10 THE COURT: All right, thank you very much then.
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