177-881

1569

Record No. 2400

In the Supreme Court of Appeals of Virginia at Richmond

RUFUS McCOY

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF THE COUNTY OF SURRY

RULE 14.

¶5. NUMBER OF COPIES TO BE FILED AND DELIVERED TO OPPOSING COUNSEL. Twenty copies of each brief shall be filed with the clerk of the court, and at least two copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

¶6. SIZE AND TYPE. 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. The record number of the case shall be printed on all briefs.

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

M. B. WATTS, Clerk.

177 Va 881

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 2400

RUFUS McCOY,

versus

COMMONWEALTH OF VIRGINIA

PETITION FOR WRIT OF ERROR AND *SUPERSEDEAS*

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

Your petitioner, Rufus McCoy, respectfully represents that he is aggrieved by a judgment entered against him in the Circuit Court of the County of Surry, Virginia, on August 2, 1940, wherein he was sentenced to serve three years in the State Penitentiary for an alleged violation of the liquor law.

Briefly stated the facts are as follows:

On the 26th day of April, 1940, he was arrested by the law enforcing officers of Surry County and charged with the operation of a distillery.

It was testified on behalf of the Commonwealth that the accused was arrested running from the direction of the distillery and at a distance therefrom; at the time of his arrest he denied having any connection in any way with the same; Sam Butler was arrested and admitted at that time that he

owned the distillery and that he was operating it and that
2* McCoy had nothing whatsoever to *do with it, either in ownership or operation; it was testified by the agent of the ABC Board that this same distillery had been operated several times between February 9th and March 26th, 1940, and that at those particular times McCoy was confined in the jail of Surry County, awaiting trial and for which charge he was later acquitted; both the defendant and Butler testified that McCoy was on his way to the distillery for purpose of getting a drink of whiskey; this was not denied; it was also testified by the Commonwealth's witnesses that in a jocular conversation he said, "You got me this time," but the Sheriff, E. O. Cockes, testified that when McCoy was in jail in February and March, 1940, that he told him if he went to a distillery and was caught there it would go hard with him and warned him to stay away. McCoy admitted the statement, but stated it was in reference to the conversation heretofore referred to while he was in jail talking to Sheriff Cockes and it only meant that they had caught him at a distillery.

The evidence was uncontradicted that McCoy was not seen at the distillery and he denied being there and stated that he had not reached it when he ascertained that the officers were present at the still and he ran to escape from being seen.

3* *The sole assignment of error is that there was not sufficient evidence to establish the guilt of the accused beyond a reasonable doubt.

It is admitted that the presumption from the presence at a still raises *prima facie* guilt. This presumption can be applied only when the accused is at the site of the distillery or in close proximity thereto under the circumstances showing that he was taking part in the operation thereof.

In this case the evidence denies his presence, it is silent as to how close he was to the distillery and fails to show any connection either in the ownership or operation of the same. So it can be rightly concluded that it is no presumption by reason of law as to his guilt as to the ownership or operation of the still.

The only two incriminating circumstances of suspicion were:

First: His fleeing from the neighborhood of the operation of the distillery; and,

Second: The statement made by him that, "You got me this time."

The first one is easily explained and the proper and natural construction is that he was warned not to go near a distillery and he knew the results of being found there and upon finding the officers present, he attempted to get out of that vicinity, very reasonable and proper steps on his part to escape a charge of violation of the liquor law of which he was not guilty, knowing that he would be charged with it.

The second circumstance of suspicion, the statement
4* *"You got me this time," is clearly explained; he had been warned to stay away and he had been told what would happen to him if he was caught; when he was arrested he denied ownership or any connection with the operation of it, then in the jocular conversation in which the officers were joking he said "You got me this time," but he said on his examination that they had him for being at a distillery without meaning that he owned it or was in any way connected with the operation thereof. Even the Trial Judge in summarizing the testimony for the bill of exceptions referred to it as a *jocular conversation,* it being so apparent from the manner of testifying by the officers that they were "kidding" and joking the defendant at the time of his arrest and there were no serious consequences placed upon the remark so far as the ownership or operation of the distillery was concerned.

In the case of *Commonwealth* v. *Johnson,* 142 Va., at page 639, the facts in that case were as follows:

The still was not in an accessible position, but down in a ravine, on the edge of the ravine overlooking the still and not far from it, Johnson was standing talking to a man stirring the mash and looking *sharply* about the surrounding country from time to time, first to the right and then to the left as if he were on the lookout. (Here the witness illustrated his testimony before the jury by leaning forward and
5* looking quickly from side to side as *if peering into the distance). At one time Wickham (the operator) pointed in a certain direction and Johnson immediately looked in that direction.

The Court said in speaking of the evidence, on page 641, "They (jury) have solved it adversely to the accused and while we might not, if on the jury, have solved it in the same way, we are unable to say that the testimony in his favor is so strong that the verdict is plainly contrary to the evidence."

On bottom of page 643 the Court in concluding says:

"In view of this section (20 Prohibition Act) and the testimony for the Commonwealth, as to the position of the accused, and that he was looking *sharply* about the surrounding country from time to time, first to the right and then to the left as if he were on the lookout, the flight of the accused and his bad reputation as a violator of the prohibition law, we are unable to say that the verdict of the jury was *plainly wrong.*"

The Court in Johnson's case plainly stated that they disagreed with the verdict of the jury but were helpless to intervene and in that case it clearly appears that Johnson was looking out for those who were actually employed at that time in operation of the distillery, he had a bad reputation as the violator of the prohibition law, and this court unquestionably decided in that case on his manner of looking around the country and his bad reputation.

In the case at bar we have nothing to indicate that he participated in the operation of the distillery and no
6* bad *reputation, as a violator of the prohibition law other than being convicted in 1937, and too, in the Johnson case he was practically within the inclosure where the still was set up, which is not the case at bar.

It must be remembered here, too, that the owner and operator of the distillery were pointed out, apprehended and punished; that the owner and operator absolved McCoy of any participation in the operation; it must be remembered that the distillery was operated prior to the accused's arrest and when he was confined in the County jail which is conclusive that someone other than the accused was operating it and it was admitted by Butler, the present operator, that he operated it at the time McCoy was in jail.

We cannot escape the conclusion that Butler was the real owner and operator of the distillery from the evidence of both Commonwealth and defendant.

This case is a clear case of where an ordinary average negro desires a drink of whiskey goes to a place where it is accessible without reckoning on the seriousness of it and before he could reach his destination was apprehended and became the victim of slim circumstantial evidence and given the full penalty of law.

7* *In Wooden's case, 117 Va. 930, Judge Caldwell held that, "It is well settled by numerous cases that it is not sufficient to create a suspicion of probability of guilt, but the evidence must go further and exclude every reasonable hypothesis except that of guilt."

"The jury must be satisfied of the guilt of the accused beyond a reasonable doubt. Such a conclusion must be supplied by creditable evidence and cannot rest upon conjecture or suspicion."

Triplett v. *Commonwealth,* 141 Va. 577.
Dixon v. *Commonwealth,* 162 Va. 801.

In the case of *Gamble* v. *Commonwealth,* 161 Va. 1024, although it was a prosecution for unlawful possession of ardent spirits the Court held that the presumption of law as to liquor on the premises could not apply although the defendant was present since the premises were not controlled by him.

In this case Gamble ran and his explanation was that he had been drinking when he saw the officers and that he ran to escape arrest.

Judge Gregory in reviewing the evidence said, "To support a conviction of the charge of unlawful possession of whiskey, there must be something more than the proof of the mere presence of the accused. There must be evidence of his ownership, interest in, or control over it, or the circumstances surrounding his presence must be such that it may be reasonably inferred beyond a reasonable doubt that he was
8* in possession of the whiskey or *had an interest in, or control over it. The conclusion to be deducted from the circumstances shown must be consistent with his guilt and not consistent with his innocence. *Spratley* v. *Commonwealth,* 154 Va. 854.

For the above reasons it is respectfully submitted that the judgment of the Court and the verdict of the jury should be set aside and a new trial awarded to your petitioner.

Respectfully submitted,

RUFUS McCOY,
By W. L. DEVANY, JR.,
Counsel.

I, W. L. Devany, Jr., an attorney practicing in the Supreme Court of Appeals of Virginia do certify that in my opinion the foregoing case should be reviewed.

W. L. DEVANY, JR.

I have this day mailed a copy of the above petition to Ernest R. Goodrich, Attorney for the Commonwealth of the County of Surry, Virginia.

Given under my hand this 12 day of November, 1940.

W. L. DEVANY, JR.

Received November 13, 1940.

M. B. WATTS, Clerk.

November 27, 1940. Writ of error and *supersedeas* awarded by the court. No bond.

M. B. W.

9* *W. L. DEVANY, JR.
Attorney at Law
1122 Bank of Commerce Bldg.
Norfolk, Virginia

December 13, 1940.

Hon. A. B. Staples,
Attorney General,
State Library Building,
Richmond, Virginia.

Dear Mr. Staples:

In filing my petition for writ of error in the case of Rufus McCoy *v.* Commonwealth, I failed to set forth therein that it was my intention to adopt my petition as a brief in that case.

This is to notify you that I shall use the same in lieu of a brief.

Yours truly,

W. L. DEVANY, JR.

WLDjr:JD.

RECORD

Pleas before the Circuit Court of the County of Surry, this first day of October, one thousand, nine hundred and forty.

BE IT REMEMBERED that on the tenth day of May, 1940, there was filed in the Clerk's Office of this Court, the following warrant issued by a Justice of the Peace of this County, to-wit:

"Commonwealth of Virginia,
County of Surry, to-wit:

To the Sheriff, Constable or Special Officer of said County:

WHEREAS, Elbert O. Cockes, Sheriff, has this day made complaint and information on oath before me, D. M. Brown, justice of the said county, that Rufus McCoy and Sam Butler, in said County, did, on the 26th day of April, 1940, unlawfully and feloniously manufacture alcoholic beverages without being licensed.

These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me or the Trial Justice of the said County the body of the said Rufus McCoy and Sam Butler to answer the said complaint, and to be further dealt with according to law. You are further commanded to summon ..... to appear at the same time and place to testify as witnesses.

Given under my hand this 26th day of April, 1940.

D. M. BROWN, J. P. (Seal)"

"Executed the within warrant this 26 day of April, 1940, by arresting (summoning) the within named accused, and bringing *him* before C. G. Rowell, T. J.

ELBERT O. COCKES, Sheriff."

page 2 } "Examination waived.

C. G. ROWELL, Trial Justice."

4/26/40.

Said warrant shows that on April 26, 1940, the said Rufus

McCoy, principal, with E. R. Chappelle, surety, was recognized to appear before the Circuit Court of Surry County at 10 a. m. on 28, May, 1940.

At a Circuit Court held for the County of Surry, Virginia, on Tuesday, May 28th, 1940, the following indictment was presented by the Grand Jury of Inquest then in session:

"Virginia;
County of Surry, to-wit:

In the Circuit Court of Surry County:

The grand jurors of the Commonwealth of Virginia, in and for the body of the County of Surry, and now attending the said Court at its May Term, 1940, upon their oaths present that Rufus McCoy (who has heretofore, to-wit: on the 17th day of February, 1937, been convicted in the Trial Justice Court of Surry County for manufacturing distilled alcoholic beverages in violation of the provisions of the Virginia Alcoholic Beverage Control Act) in the said County of Surry, on the 26th day of April, 1940, unlawfully and feloniously did manufacture distilled alcoholic beverages against the peace and dignity of the Commonwealth of Virginia.

Upon testimony of E. O. Cockes, V. G. Spivey, J. H. Clark, R. E. Arrington, Witnesses sworn and sent by the Court to testify before the Grand Jury.

S. B. BARHAM, JR., Clerk."

page 3 } Which said indictment was by the said Grand Jury that day returned—"A True Bill, O. V. Cockes, Foreman."

Thereupon, subsequently, to-wit: on the 2nd day of August, 1940, the following order was entered:

"Circuit Court for the County of Surry, on Friday, the 2nd day of August, in the year of our Lord nineteen hundred and forty.

Rufus McCoy, who stands indicted for a felony, to-wit: Manufacturing distilled alcoholic beverages, this day appeared in Court in discharge of his recognizance entered into before C. G. Rowell, Trial Justice of this County, on the 26th day of April last, and was set to the bar in the custody

of the Sheriff of this County, and being thereof arraigned, pleaded not guilty to the said indictment. Whereupon came also a jury, to-wit: B. B. Andrews, Foreman, together with H. E. Drewry, M. L. Craft, Clyde L. Hunnicutt, B. E. Cowling, F. S. Cooper, L. R. Wrenn, B. F. Hux, A. J. Brittle, S. E. Rives, W. C. Mitchell and J. T. Atkinson, who being selected in the manner prescribed by law, and sworn the truth of and upon the premises to speak, having fully heard the evidence and argument of counsel, retired to their chamber to consider of their verdict, and after some time returned into Court and upon their oaths do say: 'We the jury find the defendant guilty as charged in the within indictment and fix his punishment at three years in the Penitentiary. B. B. Andrews, Foreman.' Whereupon Counsel for the defendant moved the Court to set aside the verdict as contrary to law and the evidence, which motion the Court doth overrule, to which action of the Court in overruling said motion, the defendant, by Counsel, excepted. Whereupon it being demanded of the prisoner if anything for himself page 4 } he had or knew to say why the Court here should not now proceed to pronounce judgment against him according to law, and nothing further being offered or alleged in delay of judgment, it is considered by the Court that the said Rufus McCoy be confined in the Penitentiary of this State for a period of three years and be required to pay the costs of his prosecution. And the said Rufus McCoy having indicated, by counsel, his intention to apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* to the said judgment, on his motion, execution of the judgment and sentence of the Court this day pronounced against him, is suspended until the first day of October next, that being the 7th day of the September Term, 1940, of this Court, allowing time for noting his appeal. And it is further determined by the Court that the said defendant be confined in the jail of this County, unless he shall execute a bond before the proper officer of this Court, with surety to be approved by said officer, in the penal sum of $1,000.00, conditioned for the personal appearance of the said Rufus McCoy here before this Court on the first day of October, 1940, at ten o'clock a. m. to submit to the execution of the judgment and sentence aforesaid, or to abide and submit to such other action by the Court as in the premises may be proper. And the prisoner was committed to jail."

Thereafter, on the 17th day of August, 1940, the said Rufus McCoy, principal, with J. D. Tynes, surety, entered into bond

before H. C. Land, Bail Commissioner of this Court, in the sum of $1,000.00, conditioned as above directed.

page 5 } And afterwards:

In the Circuit Court for the County of Surry, September 24, 1940.

Commonwealth of Virginia
Against
Rufus McCoy

This day the above named defendant came and presented his bill of exceptions Number One which he prays to be signed and made a part of the record and it appearing to the Court that due notice has been given to the Attorney for the Commonwealth and the same is presented within sixty days, the Court does order and adjudge that the same be and is hereby made a part of the record in this cause.

The following is the bill of exception referred to in the foregoing order:

"In the Circuit Court for the County of Surry.

Commonwealth of Virginia
v.
Rufus McCoy

Be it remembered that at the trial of the above styled cause on the 2nd day of August, 1940, after the jury had been sworn to try the issue, the Commonwealth to maintain the issue on its part, introduced the following evidence:

E. O. Cockes, Sheriff of Surry County, testified that on the morning of the 26th day of April, 1940, that in the company with R. E. Arrington, J. H. Clark and V. G. Spivey, they raided a distillery in the County of Surry about one-half *miles*
page 6 } from the home of the defendant; that the officers scattered and surrounded the distillery and that he did not see the defendant at the still but did see him running through the woods towards him from the direction of the distillery with Butler and again when he was being *brought* back to the distillery by R. E. Arrington, Agent of the ABC Board; that on a direct question to the defendant shortly after the arrest, the defendant denied the owner-

ship of the distillery but he and the other officer joked the defendant and in the jocular conversation, the defendant told him, 'You have got me this time.' On cross examination he admitted that the defendant was in jail in Surry County from February 9th, 1940, until March 26, 1940, and that during this time he visited the distillery approximately ten times, so far as he knew, there was no operation during that period; he admitted that he told the defendant while he was in jail to hereafter stay away from distilleries and that if he was caught it would go hard with him; that the jocular conversation with the defendant was about his being caught at the distillery; he further stated on cross examination that the defendant denied owning the distillery and that Sam Butler, a negro arrested, admitted that it was his distillery and that the defendant, McCoy, had no connection therewith.

J. H. Clark, attached to the ABC Force, testified on behalf of the Commonwealth that he did not see anyone working at the distillery at the time of the raid or just prior thereto; that he arrested Sam Butler, who ran from the distillery and who claimed that it was his and that the defendant, McCoy, had no interest therein or connection therewith; that

page 7 } the defendant, while he and another officer, along with Sheriff Cockes were talking, the defendant said, 'You have got me this time.'

V. G. Spivey, a member of the Internal Tax Unit of the United States Government, testified that he went to the distillery about 6:20 a. m. and that he saw two men working there and that he recognized Sam Butler, but could not swear that the defendant was the other man; that he only saw two people, Sam Butler and later on the defendant in custody of Officer Arrington; that the distillery had been recently operating and that it was a small one.

R. E. Arrington, Agent of the ABC Board, testified that he arrested the defendant about 400 yards from the distillery; that he heard the defendant later on say, 'You got me this time'; that between February 9th and March 26th he had occasion to visit the distillery several times and it was set up and appeared to have been in operation during that period, but he was unable to apprehend the operator.

The Commonwealth introduced the record of the defendant showing that he was arrested for operating a distillery

on the 17 day of February, 1937, and sentenced six months in jail and a fine of $100.00.

This was all of the testimony on behalf of the Commonwealth.

Sam Butler testified that the distillery was his; that he went down that morning to operate the same, and that he told the defendant that if he would come there that morning he would give him a drink; that the defendant never reached the distillery prior to the raid; that the
page 8 } defendant had no interest of any kind in the distillery or was in any way connected with it; that the distillery was his and that he operated it between February 26th and March 26th of 1940 while the defendant was in jail.

On cross examination he testified that he and McCoy were the only people at the distillery on the morning of the raid.

The defendant testified that he was in no way interested or connected with the distillery; that Sam Butler told him that he was going 'to make a run' that morning and that if he would come by he would give him a drink; that he was on his way when he was arrested by the officers; that he had never reached the distillery; that he was convicted in 1937 for violation of the prohibition law and was given six months in jail and a fine of $100.00.

That while he was in jail from February 25th until March 26th, 1940, awaiting trial, for which offense he was acquitted, that the Sheriff told him to stay away from stills and that if he should catch him there he would give him time; that he admitted that he told the Sheriff, 'You got me this time.' But that it was in response to his being at a still and not meaning that he was working or operating one; it was the result and the reply to the conversation had by him and the Sheriff while he was in jail and on the day of arrest was made during the jocular or kidding conversation between him and the officers. But he did not mean that he was operating the distillery.

page 9 } This was all the evidence on behalf of the defendant.

Thereupon, at the request of the Commonwealth, the Court instructs the jury as follows:

The Court instructs the jury that if you believe beyond a reasonable doubt from the evidence that the defendant was at the still where alcoholic beverages were manufactured illegally, then the defendant is *prima facie* guilty of manufacturing the same or of aiding and abetting such manufacture and unless the jury believes from the evidence notwithstanding his presence at the still, he was not engaged in the manufacture or in aiding and abetting in the same, then the jury should find the defendant guilty as charged in the indictment.

2. The Court instructs the jury that it is not necessary that the accused own the distillery apparatus in order to be guilty of manufacturing illegal alcohol; it is sufficient that if it is proven beyond a reasonable doubt that the accused is engaged in operating the distillery at the time of his arrest.'

The Court on behalf of the defendant instructs the jury as follows:

The Court further instructs the jury that the presence of the accused at the distillery if satisfactorily accounted for so as to show that he was not engaged in *in* the operation of the same is not sufficient to justify a verdict of guilty; and going there for the purpose of obtaining a drink does not constitute the offence for which he is charged.

page 10 } 2. The Court instructs the jury that circumstances of suspicion however grave or strong are not of themselves alone sufficient to justify a verdict of guilty.

These are all of the instructions both for the Commonwealth and the defendant.

Thereupon, the jury after considering the instructions of the Court and the evidence returned with the following verdict, to-wit:

'We the jury find the defendant guilty as charged in the indictment, we fix the penalty at three years in the penitentiary.

B. B. ANDREWS, Foreman.'

Thereupon the defendant by counsel moved the Court to set aside the verdict of the jury as contrary to the law and evidence; which motion the Court overruled to which ruling the defendant by counsel duly *accepted* and now 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 sixty days from the judgment of August 2nd, 1940.

FRANK ARMISTEAD, Judge.

September 24, 1940.

"Virginia:

In the Circuit Court of the County of Surry:

Commonwealth of Virginia
v.
Rufus McCoy

Mr. Ernest Goodrich, Attorney for the Commonwealth for the County of Surry:

page 11 } This will hereby notify you that I shall present the bill of exceptions in the above styled matter to the Honorable Frank Armistead, Judge, Williamsburg, Virginia, on the 27 day of September, 1940, at 11 a. m. to have the same certified and signed and to be made a part of the record in this cause and on the 28 day of September, 1940, shall request the Clerk of this Court to make up the record in this cause to be presented to the Supreme Court of Appeals of Virginia.

W. L. DEVANY, JR.,
Attorney for Rufus McCoy.

I accept service of the within notice.

ERNEST W. GOODRICH,
Attorney for the Commonwealth of the County of Surry."

"Filed, September 27, 1940.

S. B. BARHAM, JR., Clerk."

Virginia:

In the Clerk's Office of the Circuit Court of Surry County, October 1st, 1940.

I, S. B. Barham, Jr., Clerk of the Circuit Court for the County of Surry, and as such keeper of the records of said County, do hereby certify that the foregoing is a true transcript of the records of the said Court touching the prosecution of the Commonwealth of Virginia *against* Rufus McCoy, as it appears of record and on file in my said office.

I further certify that said transcript was not made up and completed until the Attorney prosecuting for the
page 12 } Commonwealth had been given and accepted due notice of the intention of the attorney for the defendant to request that this record be made up to be presented to the Supreme Court of Appeals of Virginia.

Given under my hand this 1st day of October, 1940.

S. B. BARHAM, JR., Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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