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Record No. 5890

In the
Supreme Court of Appeals of Virginia
at Richmond

ROSS OAKLEY JOHNSON

v.

TOWN OF DAMASCUS

FROM THE CIRCUIT COURT OF WASHINGTON COUNTY

RULE 5:12 BRIEFS

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5890

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 27th day of April, 1964.

ROSS OAKLEY JOHNSON,

Plaintiff in error,

against

TOWN OF DAMASCUS,

Defendant in error.

From the Circuit Court of Washington County
Thomas L. Hutton, Judge

Upon the petition of Ross Oakley Johnson a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Washington County on the 3rd day of October, 1963, in a prosecution by the Town of Damascus against the said petitioner for a misdemeanor; upon the petitioner, or some one for him, entering into bond with sufficient surety before the clerk of the said circuit court in the penalty of five hundred dollars, with condition as the law directs; but said *supersedeas*, however, is not to operate to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

RECORD

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This day came the Attorney for the Commonwealth, came Joseph P. Johnson, Jr., Esquire and Hugh Cline, Esquire, attorneys for the defendant, and came the defendant in person in obedience to his recognizance; and came also Mrs. Mary Jane Morgan, Court Reporter, who was sworn in a manner prescribed by law.

The case was called heretofore having been set for trial on this date; both sides announced ready; the defendant was arraigned and upon his arraignment, entered in person a plea of not guilty.

Whereupon, a panel of eleven jurors free from exceptions was chosen in a manner prescribed by law from the panel of jurors in attendance for the trial of criminal cases at this term, and from the panel of eleven, five were selected to try the issue in this case, said panel of five being selected by the Commonwealth striking three and the defendant striking three, said strikes being made alternately with the Attorney for the Commonwealth beginning. Said panel of five were found to be free from exceptions and duly qualified, and were further sworn as required by law, and are as follows:

- | | |
|----------------------|---------------------|
| 1. Jack G. Bundy. | 2. Hugh M. Herald |
| 3. Charles C. Payne | 4. William Ray Fore |
| 5. R. L. Wright, Jr. | |

Thereupon, both sides made opening statements, and the Commonwealth proceeded to introduce its evidence. The defendant, by counsel, objected to certain evidence and to introduction of certain exhibits, as will appear from the stenographic record herein, which the Court overruled and defendant, by counsel, excepted. Out of presence of the jury, defendant, by counsel, made motion for mistrial on grounds defendant prejudiced by introduction of former record of defendant, which the Court overruled and to which

page 7] the defendant, by counsel, excepted. At conclusion of evidence of the Commonwealth, and out of the presence of the jury, the defendant, by counsel, moved that the evidence be stricken on grounds that Town of Damascus

ordinance was not proper and should not be introduced, which motion the Court overruled and allowed the Commonwealth to introduce and prove the ordinance.

Whereupon, the defendant introduced his evidence. Certain motions were interposed, as will appear in the stenographic record, for striking the evidence and for a mistrial, which the Court overruled, and defendant, by counsel, excepted.

The Court instructed the jury as to the law, and argument of counsel was heard, at the conclusion of which, defendant, by counsel, objected to argument of Attorney for the Commonwealth on grounds it was prejudicial, which the Court overruled.

Thereupon, the jury retired to their room to consider of their verdict. With the jury out, the defendant, by counsel, renewed motion for a mistrial for reasons assigned and made a part of the stenographic record herein, which motion the Court respectfully denied, and defendant, by counsel, excepted.

After some time the jury returned into open court with the following verdict:

“

10/3/63

We the jury find the Defendant guilty as charged in the warrant and fix his punishment at 30 days in jail & \$200.00 Two-Hundred & no/100 fine.

R. L. WRIGHT, JR.

Foreman

”

Thereupon, the defendant, by counsel, moved the Court to set aside the verdict of the jury on the grounds that same was contrary to the law and evidence and that the Town Ordinance is not proper and legal and for alleged inflammatory statements made by the Attorney for the Commonwealth in his argument to the jury, and that the Court, in telling the jury to disregard the prior conviction, save and except on the quantum of punishment in event the jury found the accused guilty.

Thereupon, the Court heard argument of counsel, and after mature consideration is of opinion to and doth deny said motion, the Court being of opinion that the defendant had a wholly fair trial and that the jury was duly and properly instructed; that on motion of the defendant the jury was told that the former conviction could not prejudice defendant in his trial on the present charge and that the only reason the jury could consider the former conviction was to ascertain

Supreme Court of Appeals of Virginia

the proper punishment in event the accused was found guilty on this charge, to all of which the defendant excepted.

It is therefore ORDERED by the Court, in accordance with the verdict of the jury, that the defendant forfeit and pay to the Town of Damascus the sum of TWO HUNDRED FIFTY (\$250.00) DOLLARS, a fine, and serve a term of thirty (30) days in the County Jail, and pay the costs incident to this prosecution.

Thereupon, the defendant, by counsel, stated to the Court that the defendant desired to apply to the Supreme Court of Appeals for an appeal herein and moved that the execution of the sentence be suspended for a period of sixty days and announced that the defendant was now on appearance bond in the amount of FIVE HUNDRED (\$500.00) DOLLARS, cash bond.

It is ORDERED that execution of said sentence be suspended for a period of sixty days from the date hereof. It appears that defendant has deposited TWO HUNDRED FIFTY (\$250.00) DOLLARS cash with the Clerk of this Court, conditioned for his appearance herein, and on motion of the Attorney for the Commonwealth, it is ORDERED that the defendant or some one for him execute an additional

page 9] bond of TWO HUNDRED FIFTY (\$250.00)

DOLLARS, with surety to be approved by the Clerk of this Court, which was accordingly done.

Thereupon, the defendant is permitted to depart.

Enter: This the 3rd day of October, 1963.

T.L.H.
Judge

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

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You are hereby notified that the undersigned, the defendant in the above styled action, will apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* from a final order and judgment entered in the above style case against the defendant on the 3rd day of October, 1963.

You are further notified that the undersigned will rely upon the following as his

ASSIGNMENTS OF ERROR

The trial Court erred:

1. The Court erred in overruling the motion of the defendant to strike the evidence of the Town of Damascus for the following reasons:

(a). The Court erred in permitting the Town of Damascus to re-open its case and introduce what purported to be the Town of Damascus Ordinance.

(b). The Court erred in permitting the Town of Damascus to re-open its case to attempt to prove defendant was duly committed before a Magistrate in accordance with Virginia Statute.

(c). That the Town of Damascus never proved that the Town of Damascus Ordinance had been duly enacted in the manner prescribed by law.

2. The Court erred in refusing counsel for defendant the opportunity to state his objections to the introduction of defendant's prior conviction of driving under the influence, out of the presence of the jury.

page 11] 3. That the Court erred in permitting the Town of Damascus to introduce defendant's prior conviction of driving under the influence, in the presence of the jury.

4. That the Court erred in permitting the Town of Damascus to introduce an Ordinance that had not been properly proven.

5. That the Court erred in permitting the Attorney for the Town of Damascus to introduce an amendment to the Ordinance.

6. That the Court erred in permitting the Attorney for the Town of Damascus to introduce a so-called amendment to the Ordinance after the jury had been partially instructed.

7. That the Court erred in overruling defendant's motion for a mistrial because of the prejudicial statements, remarks and questions of the Attorney for the Town of Damascus during the course of the trial.

8. The Court erred in permitting certain evidence by the Town of Damascus to go to the jury over the objection of the defendant.

9. That the repeated remarks to the jury, by the Court, concerning the defendant's prior conviction was prejudicial to defendant.

10. That there was no Town of Damascus Ordinance proven

Chester Wilson

upon which a conviction could be sustained.

11. That the Town of Damascus did not show that defendant was taken before a Magistrate forthwith as required by Virginia Statute.

12. The Court erred in not striking the evidence of the Town of Damascus after the defendant rested his case.

13. That the Court erred in overruling defendant's motion to set the jury verdict aside as contrary to the law and evidence and not warranted by the evidence.

Filed this 2nd day of December, 1963.

C. W. SMITH,
Clerk

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CHESTER WILSON

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Sheffey:

page 11] Q. You are Chester Wilson?

A. Yes, sir.

Q. How old are you?

A. Fifteen.

Q. Where do you live, Chester?

A. Lodi.

Q. Chester, were you in Damascus on or about August 12th of this year with Edward Wilson and Danny Tuggle?

A. Yes, sir.

Q. At any time in the night time of that day did you have occasion to see a coal truck?

A. Yes, sir.

Q. Where was it when you first saw it?

A. It was at the Custard Stand when I first seen it.

Q. And who was with you when you saw it?

A. Edward and Danny.

Q. At any time that night, did you have occasion to get into the truck and ride?

A. Yes, sir.

Chester Wilson

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CROSS EXAMINATION

By Mr. Johnson :

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- Q. Did you see any whiskey or beer in the truck?
 A. No, sir.
 Q. Did you see anybody in the truck drinking anything?
 A. No, sir.
 Q. On what side of the Bowling Alley did he park his truck?
 A. Upper side.
 Q. Upper side? The side nearest town — the business part of town?
 A. Yes, sir.
 Q. And what did he do when the truck was stopped?
 A. I don't know. We got out and went in there at Steffey's.
 Q. You went in Steffey's?
 A. Yes.
 Q. And how long did you stay in Steffey's?
 A. About a minute and a half, something like that.
 Q. And what did you do in there?
 A. We told him that he had a load of coal for him.
 Q. Did you all talk to the driver on the way down?
 A. No, sir, I never.
 page 16] Q. Did you talk to him when he stopped?
 A. No, sir.
 Q. Well, how did you know that he wanted to sell Mr. Steffey a load of coal, then?
 A. That's what he said — that he wanted to take that coal down there.
 Q. You did talk to him then?
 A. No, sir, I never.
 Q. Oh, he just talked. Did he ask you all to go in and ask

Chester Wilson

Mr. Steffey about the load of coal?

A. Yes, sir.

Q. Who did he ask?

A. Well, he just asked us to go in.

Q. Who asked Mr. Steffey?

A. Danny.

Q. Did you see the police officer come?

A. No, sir.

Q. Now, did you walk up the road or down the road?

A. Walked down the road.

Q. How far did you go down the road?

A. About a quarter of a mile.

Q. You walked down the road about a quarter of a mile?

A. Yes.

Q. And then you walked back to the Bowling Alley?

A. Yes.

page 17] Q. That would be a half a mile, wouldn't it? Is that right?

A. Yes, sir.

Q. And the truck was still sitting there?

A. Yes, sir.

Q. And then, how far did you go up the road?

A. We didn't. We set in the Bowling Alley a little while.

Q. Then you came back and sat in the Bowling Alley a little while?

A. About a minute and a half.

Q. Now, that is the second time you were in the Bowling Alley?

A. Second time?

Q. Yes. When you got out of the truck, didn't you go in the Bowling Alley?

A. Yes, sir.

Q. So you were back in the Bowling Alley another time?

A. Yes, sir.

Q. Then, did you leave the Bowling Alley?

A. Yes, sir, and the police officers had him out front there.

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page 18]

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Danny Tuggle

DANNY TUGGLE

having been sworn and examined, testified as follows:

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page 19] By Mr. Sheffey:

Q. What is your name, young man?

A. Danny Tuggle.

Q. Danny, when you answer my questions, look up at the Judge.

The Court: Son, will you kindly speak up here to me. Nobody is going to hurt you.

Mr. Sheffey:

Q. How old are you?

A. Sixteen.

Q. Were you with Eddie Wilson and Chester Wilson in Damascus on August 12th of this year?

A. Yes, sir.

Q. At any time that you were there that night, did you see a coal truck?

A. Yes, sir.

Q. And where did you first see the truck, if you remember?

A. Setting at the Custard Stand, I think it was.

Q. And did you get in that truck that night and ride anywhere?

A. Yes, sir.

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page 21]

CROSS EXAMINATION

By Mr. Johnson:

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page 22]

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Q. Did you see any beer in the truck?

A. No, sir.

Beattie Fulcher

Q. Did you see any whiskey or wine?

A. No, sir.

Q. Where were you sitting in the truck?

A. There was the driver, then another man, and then me.

Q. Had you ever seen this gentleman before?

A. No.

The Court:

Q. Did you smell anything on his breath?

A. No, sir.

Mr. Johnson:

Q. When he got to the Bowling Alley, what did he do?

A. Just parked.

Q. Where did he park?

A. He pulled up on the upper side of it, towards
page 23] Town.

Q. And did you get out just as soon as he
parked?

A. Yes, sir.

Q. And what did you do when you got out?

A. Well, I don't know what I done. I think we went in the
Bowling Alley. No, Chester and Ed Wilson went in the
Bowling Alley and I stayed out there.

Q. Did you watch what went on in the truck?

A. No, sir.

Q. Did you ever go back to the truck after you got out the
first time?

A. No, sir.

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page 26]

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BEATTIE FULCHER

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

page 27] By Mr. Sheffey:

Q. Mr. Fulcher, you are on the Police Force
of the Town of Damascus?

A. That is right.

Beattie Fulcher

Q. Now, on August 12, 1963, did you have occasion to see one Ross Oakley Johnson?

A. I did.

Q. Where did you first see him on that day?

A. At the Bowling Alley.

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page 38]

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Mr. Sheffey: That is all for the Commonwealth.
page 39] The Court: You gentlemen may proceed as you may be advised.

Mr. Cline: Does the Commonwealth rest?

Mr. Sheffey: Yes, sir.

Mr. Cline: We wish to make a motion.

The Court: On what grounds?

Mr. Cline: I would like to make it out of the presence of the jury.

The Court: All right, gentlemen, step to your room, please. Now, then, the jury has retired.

Mr. Cline: If it please the Court, defendant, by counsel, moves that evidence for the Town of Damascus be stricken. May I ask, Your Honor, is this a Damascus case or a Commonwealth case?

The Court: Town of Damascus, I understand.

Mr. Cline: We make this motion for two reasons. First of all, there hasn't been any ordinance introduced by the Town of Damascus.

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The Court: Well, I am going to overrule. I think I know what you mean. Has the ordinance been filed here?

Mr. Sheffey: Your Honor, I talked to Mr. Johnson, I believe it was in this case, and it was stipulated that the ordinance was the same.

The Court: You talked to Mr. Johnson and he said what?

C. W. Smith

Mr. Sheffey: I believe it was in this case and stipulated that the ordinance was the same as the Virginia law. We have the ordinance right here.

Mr. Johnson: If Your Honor please, that's not true. I stipulated —

The Court: Well, we will go back and prove the ordinance, then. If the ordinance is filed here, the Court will take judicial notice of it anyway but prove the ordinance.

Mr. Cline: Yes, sir.

The Court: Now, then, bring the jury back. Proceed please.

(Thereupon, the jury returned to the open court
page 41] room)

The Court: The Town ordinances are filed in the Clerk's Office? The Statute says the Court shall take judicial notice — I don't know whether it has been filed or not.

Mr. Cline: I don't know either, sir. There is no proof of it.

The Court: Well, call your witness and prove the ordinance.

Mr. Sheffey: Mr. Smith.

C. W. SMITH

having been duly sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Sheffey:

Q. Mr. Smith, is there on record in the files in the Clerk's Office of the Circuit Court of Washington County what purports to be the Code of the Town of Damascus, Virginia?

A. There is.

Q. I hand you that Code and ask you if there is contained therein what purports to be Section 19-23 — driving vehicles and so forth while intoxicated?

A. There is.

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page 42]

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Bobby Fields

CROSS EXAMINATION

By Mr. Cline:

Q. Mr. Smith, what particular books are on page 43] record in the Clerk's Office, in regard to the Damascus Ordinances?

A. This volume right here — the Code of the Town of Damascus of 1951.

Q. Was it filed in 1951, or do you know when?

A. I can't answer that. I wasn't here in 1951.

Q. What about the loose leaflets in there? Do you know anything about those, sir?

A. No, I do not.

Q. You don't know who put them in or whether they were originally part of the Ordinance or not, do you?

A. I cannot answer that, no, sir.

Q. And where has the book been kept?

A. In the Clerk's Office.

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page 46]

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BOBBY FIELDS

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Cline:

Q. Your name is Bobby Fields?

A. Yes, sir.

Q. Where do you live, Mr. Fields?

A. St. Paul, Virginia.

Q. Do you know Oakley Johnson?

A. Yes, sir.

Q. How long have you known him, sir?

A. Oh, about fifteen years.

Bobby Fields

Q. What is your occupation?

A. Truck driver.

Q. Do you recall the day that Oakley Johnson was arrested in the Town of Damascus?

A. Yes, sir, I do.

page 47] Q. I will ask you whether or not you saw Oakley Johnson on the date, the day, rather, that he was arrested?

A. I saw him that morning and that night, too.

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page 49]

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A. I couldn't tell you exactly how long I stayed there. I guess it was fifteen, twenty or maybe thirty minutes.

Q. Then you left and when did you learn of his arrest?

A. The next morning. He called me to come to Damascus and get him.

Q. Now, when you were there, describe where any drinking, if any, took place.

A. Well, he had some wine in the back, up in under the coal. He had some beer and he set there behind the truck and drunk some.

Q. Did you see Oakley move the truck any, after
page 50] you were there?

A. No, sir, I didn't see Oakley move the truck at all.

Q. He told you that he was parked there to unload in the morning?

A. The next morning when I went and drove his truck back here to Abingdon, it was setting in the same place it was that night when I left him.

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page 51]

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The Court: Well, tell us how much beer and how much wine was there in the coal?

Dave Ryans

Witness: A. Well, he had two quarts of wine that I seen and I guess there was a half a case of beer.

Q. Well, how much was missing?

A. I mean he had that much when I was there with him. We drunk the biggest part of it before I left.

The Court: All right.

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DAVE RYANS

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Cline:

Q. Your name is Dave Ryans — R-Y-A-N-S. Is that correct, sir?

A. Yes, sir.

Q. Mr. Ryans, where do you live?

page 54] A. Castlewood.

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By Mr. Cline:

Q. Tell how long you stayed there and what you did.

A. We stayed about thirty or thirty-five minutes, I guess. We went up and he said he had his coal sold but he couldn't unload it until the next morning and he was going to stay in his truck that night. We stayed there about thirty minutes and we come on — went on home.

Q. Any drinking go on there?

A. Yes, sir, he had something to drink.

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Charlie Fields

CROSS EXAMINATION

By Mr. Sheffey:

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A. I would say it was eight or nine o'clock. Something like that.

Q. And you stayed how long?

A. About thirty or thirty-five minutes.

Q. And how much did Johnson have to drink while you were there?

A. I don't know. While I was there, I would say he couldn't have drunk over a quart, anyhow.

Q. Over a quart?

A. I wouldn't know. He probably didn't drink that much.

Q. How much did he have?

A. He had a bottle or two of wine that I saw.

Q. Did he have any beer?

A. No, sir, I didn't see any beer. He could have had some but I didn't see it.

Q. Do you know how much he had to drink before you all got there?

A. No, sir, I don't.

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CHARLIE FIELDS

having been duly sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Cline:

Q. Your name is Charlie Fields?

A. Charlie Fields, yes, sir.

Q. Mr. Fields, what do you do for a living?

Charlie Fields

A. I drive a coal truck, sir.

Q. How long have you been doing that, sir?

A. About eight year now.

Q. Did you know or learn of the happening involving Oakley *Salyer*, or Oakley Johnson, where he was arrested in Damascus last August?

A. Yes, sir.

Q. I will ask you whether or not on that day you saw Oakley Johnson? If so, where and under what circumstances?

A. I saw him at Damascus, Virginia. I had been to Taylorsville, North Carolina.

Q. Who was with you?

A. Charlie Fannin.

Q. Charlie Fannin?

A. Yes, sir.

page 65] Q. Did you stop to see him?

A. Yes, sir, his truck was setting there beside the Bowling Alley and we stopped.

Q. What prompted you to stop?

A. Well, I knowed him. We had hauled some coal together and I thought maybe there might be something wrong with his truck or something, so we just pulled over and stopped.

Q. Is that customary, when you see a truck parked?

A. Yes, sir, I always do.

Q. And when you stopped there, just tell the Judge and Court here what took place — whether any drinking went on and if so, what it was. Don't hold anything back.

A. Well, they had some wine there and was drinking it, yes, sir.

Q. Did Oakley drink some?

A. Yes, sir.

Q. Do you know approximately what time you arrived there?

A. Approximately — somewhere between nine-thirty and ten, I would say.

Q. Did you make any effort to record the time?

A. No, sir.

Q. How long did you stay there?

A. Well, I would say anywhere from twenty-five to forty minutes. I don't know exactly. We just stayed around there and talked awhile.

page 66] Q. Who left first, you or Bobby?

A. Bobby left first.

Q. Who was with Bobby?

Oakley Johnson

A. Dave Ryans and this Salyers boy.

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page 67]

OAKLEY JOHNSON

having been sworn and examined, testified as follows:

DIRECT EXAMINATION

By Mr. Cline:

Q. You are Oakley Johnson, the defendant in this case?

A. Yes, sir.

Q. Mr. Johnson, how old are you?

A. Thirty-seven.

Q. What is your occupation?

A. Hauling coal.

Q. Were you hauling coal in the Damascus area back in August of this year?

A. Yes, sir.

Q. On that particular date that you were in Damascus, did you see the trucks being driven by Bobby Fields and Charlie Fields?

A. Yes, sir, I saw them pass the road there, where I was at.

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page 68]

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By Mr. Cline:

Q. I will ask you when was the first time that you saw the officer, Mr. Fulcher, that night?

A. The first time I saw him, I saw him pass down there while I was sitting up in there. I was sitting off of the road when he passed the road in a white Ford car.

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page 69]

The Court: Just tell the whole story.

Mr. Cline: Speak up, now. It is your case.

A. I was gone away from the truck and when I came back the boy that was with me in the truck was talking with three

Oakley Johnson

more boys and they wanted to ride down to the Bowling Alley, so I told them they could. It was dark and I couldn't tell how many it was and I heard one say, "Can I ride down to the Bowling Alley?" I said, "Yeah." Well, there was three of them. I didn't hardly have room for them but they got in the truck and I just took them on down to the Bowling Alley. They got out down there. I turned the truck around and parked it and was going to stay there for the night. These boys was talking to the boy that was with me. I didn't know who they was. I hadn't saw them before but they said that they was going to the Bowling Alley.

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Q. They testified you had nothing on your breath — they didn't smell anything. Had you had anything?

A. I hadn't drank anything until I got down there — wine is what I drunk — when I went down there to the Bowling Alley.

Q. Now, did you see any of your friends from St. Paul, Castlewood and Coeburn that night — your trucker friends?

A. Yeah.

Q. Just tell how that happened.

A. Well, they came up to the truck where I was at.

Q. Who came first?

A. Bobby Fields and Danny Salyers and the Ryans — Dave Ryans came up to the truck. Well, we was at the back of the truck drinking and in a few minutes it was another truck come in and it had Charlie Fields and Charlie Fannin in it and we drank wine at the back of the truck. Bobby Fields and them left and Charlie Fannin and them stayed there awhile.

Q. You do admit drinking there on the grounds?

A. I sure do.

Q. I ask you if, after you parked your truck, whether or not you ever pulled the truck out again?

A. It never was moved.

Q. I will ask you whether or not you were drinking any before the truck was parked?

Oakley Johnson

A. No, not as I remember.

page 71] Q. To be more specific, were you drinking any
within five or six or ten hours before the truck was
parked?

A. No, sir.

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Q. How long were you parked there beside the Bowling
Alley? What time did you park your truck there would be a
fairer question?

A. Well, around eight-thirty, I mean, around
page 73] nine-thirty to ten o'clock.

The Court: How long had the boys been gone? The three
little boys who testified here this morning.

A. They had been gone a good bit.

The Court: Well, I don't know what a good bit means.

A. Well, they had been gone, I guess, thirty or forty
minutes, the boys had.

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Mr. Cline: That is all. Defendant rests.

The Court: Anything further, Mr. Sheffey?

Mr. Sheffey: No, sir.

Mr. Johnson: If Your Honor please, we would like to renew
our motion to strike.

The Court: Well, I will hear you on that while the jury
it out.

Mr. Johnson: Yes, Your Honor.

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The Court:

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Now, follow me there, gentlemen and see if this ordinance is the same.

Mr. Sheffey: Your Honor, out of the presence of the jury I would like to make —

page 81] The Court: All right, gentlemen, step right there to your room, or in the hall.

Mr. Sheffey: Your Honor, I would state that we are offering as an ordinance, in addition to the ordinance previously testified to by Mr. Smith, an amendment to that ordinance.

The Court: Well, it is all in that book, isn't it?

Mr. Sheffey: Yes, sir, and the *amandment* defines the punishment.

The Court: All right, look at the amendment, gentlemen.

Mr. Sheffey: We have it here, Your Honor.

Mr. Cline: We have an objection, sir.

The Court: All right, state your objection.

Mr. Cline: My objection, Your Honor, is this, that I have raised an objection about the ordinance. I think it is a valid objection. It should be proven. I asked the Clerk about the loose leafs to the amendment and he knew nothing except that there was a book and I certainly cannot concede that the memoranda that the attorney has here is the ordinance of the Town of Damascus. This memoranda was on file with the Clerk's Office. It has not been properly introduced. And, also I object — if any such ordinance has been enacted — by reference to the Virginia Code and not
page 82] fully set forth as the law requires.

Mr. Sheffey: The Code is set forth —

Mr. Cline: (Interrupting) It may be, sir, I haven't read it.

The Court: You may examine it and take all of the time necessary.

Mr. Cline: Well, my objection is, that I am relving upon sir, is that the ordinance that they are evidently relying upon

has not been properly introduced. I raised the objection and we certainly cannot waive it, sir.

The Court: I am not asking you to waive it. What is the ordinance there that they object to?

Mr. Sheffey: "Any person convicted —

The Court: When was that adopted by the Town?

Mr. Sheffey: In 1962.

The Court: I will give you an opportunity — I have been waiting on them all day to go out and get witnesses if the ordinance is not in. I want to see that both sides have a fair opportunity to be heard. You can call the Town Recorder or Secretary or member of the Council or Mayor, and see if that ordinance has been duly enacted in the manner prescribed by law and I will try something else while that witness is coming. Now, if you care to call any other
page 83] witnesses —

Mr. Sheffey: The ordinance is in evidence and the *amandments* which are contained in the pocket part are a valid part of the ordinance, Your Honor.

The Court: Well, pass it up here and let me instruct the jury then.

Mr. Cline: We except, Your Honor.

The Court: All right. Bring the jury back.

(Thereupon, the jury returned to open court)

The Court:

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Now, if you find the defendant guilty, he shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars and by imprisonment for not less than one month nor more than one year, if you find him guilty. A fine of not less than two hundred nor more than one thousand, and by imprisonment for not less than one month nor more than one year.

If you find him not guilty, so say and no more.

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Mr. Cline: We would like for the record to show that we except to the Court in the oral instructions granted in regard to the punishment which pertains to the ordinance of the Town of Damascus.

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Mr. Cline: Your Honor, I would like to state at this time, while the jury is retired, that we move that we be granted a mistrial and that the jury be retired and the case re-tried, for the reasons stated;

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(Thereupon, the following motion was made in Chambers)

Mr. Johnson: If your Honor please, I respectfully ask His Honor to set aside the verdict as contrary to the evidence. There is no evidence to support the verdict. That is the ground.

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The Court: Your motion, sir, is denied.

Mr. Johnson: We respectfully except and request His Honor to suspend execution in order that we may apply for a Writ.

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A Copy—Teste:

H. G. TURNER, Clerk.

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