

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Elder and Senior Judge Cole
Argued at Salem, Virginia

COMMONWEALTH OF VIRGINIA

v. Record No. 0563-99-4

RICHARD JOHN BEARGIE

MEMORANDUM OPINION* BY
JUDGE LARRY G. ELDER
FEBRUARY 15, 2000

FROM THE CIRCUIT COURT OF FAUQUIER COUNTY
William Shore Robertson, Judge

(Mark L. Earley, Attorney General; Jeffrey A. Spencer, Assistant Attorney General, on brief), for appellant.

No brief or argument for appellee.

Pursuant to Code § 46.2-362, the Commonwealth appeals from an order entered by the Fauquier County Circuit Court on January 8, 1999, declaring that Richard John Beargie "is not an habitual offender." On appeal, the Commonwealth contends the court erred in restoring Beargie's driving privilege pursuant to former Code § 46.2-355(iii) because the statute allowing restoration required that the qualifying convictions be based solely on certain enumerated offenses and only one of Beargie's convictions was for a qualifying offense. We agree and reverse and vacate the circuit court's order of January 8, 1999, which restored Beargie's privilege to drive.

* Pursuant to Code § 17.1-413, recodifying Code § 17-116.010, this opinion is not designated for publication.

On February 18, 1998, the Department of Motor Vehicles declared Beargie an habitual offender (H.O.) and revoked his driving privileges indefinitely, effective March 25, 1998. It is undisputed that declaration was based on Beargie's convictions for the following three offenses committed from 1990 to 1997: (1) driving while intoxicated in violation of Code § 18.2-266; (2) driving on a license suspended for failure to provide proof of financial responsibility in violation of Code § 46.2-302; and (3) driving under a revoked or suspended license in violation of Code § 46.2-301.

Beargie challenged the H.O. declaration, arguing it was invalid because one of his convictions resulted from driving while under a suspension for failure to furnish proof of financial responsibility, an offense included in Code § 46.2-355(iii). The circuit court agreed and held that because Beargie had since provided the required proof of financial responsibility, he was entitled to have his driving privilege restored.

Former Code § 46.2-355 provided in relevant part as follows:

If, pursuant to the show cause proceeding or the hearing as provided for in § 46.2-351.2 or § 46.2-354, the court finds that the person (i) is not the same person named in the transcript or abstract, (ii) is not an habitual offender under this article, or (iii) has qualifying offenses based solely upon convictions as set out in subdivision 1c of § 46.2-351 resulting from a suspension

or revocation ordered pursuant to § 46.2-395 for failure to pay fines and costs, or § 46.2-459 for failure to furnish proof of financial responsibility, and has paid in full all outstanding fines, costs and judgments, or if applicable has furnished proof of financial responsibility, relating to such convictions, the court shall enter an order finding that the person is not an habitual offender and, unless otherwise prohibited, restoring his privilege to drive.

Id. (emphasis added).

We considered the meaning of this code section in Commonwealth v. Wallace, 29 Va. App. 228, 511 S.E.2d 423 (1999), in which the circuit court restored the driving privilege of a person declared an H.O. based in part on a conviction for driving "on a suspension . . . for failing to pay fines and costs, . . . now paid." Id. at 232, 511 S.E.2d at 425. Our opinion did not disclose the nature of the other two predicate offenses but made clear that they were not offenses specified in former Code § 46.2-355(iii). See id. at 235 & n.3, 511 S.E.2d at 426 & n.3. We held in Wallace that the trial court "erroneously determined that . . . a person with only one 'qualifying offense' contemplated by Code § 46.2-355(iii) . . . was not an habitual offender." Id. at 235, 511 S.E.2d at 425. Although no other "qualifying offenses" listed in Code § 46.2-355(iii) were at issue in Wallace, we noted that driving on a suspension for "failure to furnish proof of financial

responsibility" was "additional conduct embraced by Code § 46.2-355(iii)." Id. at 235 n.3, 511 S.E.2d at 426 n.3.

The reasoning of Wallace is equally applicable here. Only one of Beargie's convictions was for a qualifying offense listed in Code § 46.2-355(iii)--driving while his license to operate a motor vehicle was suspended for failure to furnish proof of financial responsibility. Beargie was entitled to have his driving privileges restored after furnishing proof of financial responsibility only if his H.O. declaration was based solely on qualifying offenses listed in Code § 46.2-355(iii). Because it was not, the trial court erred in restoring his privilege to drive.

For these reasons, we reverse and vacate the order of the circuit court restoring Beargie's privilege to drive, and we remand for entry of an appropriate order pursuant to former Code § 46.2-355.

Reversed, vacated and remanded.