

COURT OF APPEALS OF VIRGINIA

Present: Judges Baker, Benton and Bray
Argued at Richmond, Virginia

LINDA EUGENE HALL

v. Record No. 1782-96-2
COMMONWEALTH OF VIRGINIA

OPINION
BY JUDGE JOSEPH E. BAKER
AUGUST 5, 1997

FROM THE CIRCUIT COURT OF THE CITY OF HOPEWELL
James A. Luke, Judge

James M. Goff, II, for appellant.

Margaret Ann B. Walker, Assistant Attorney
General (James S. Gilmore, III, Attorney
General, on brief), for appellee.

Linda Eugene Hall (appellant) appeals from her bench trial conviction by the Circuit Court of the City of Hopewell for violation of Code § 46.2-852¹ (reckless driving). The sole issue presented by this appeal is whether the evidence is sufficient to prove beyond a reasonable doubt that appellant drove a vehicle recklessly on a highway in violation of Code § 46.2-852. We find that the evidence is insufficient and reverse.

Code § 46.2-852 provides:

Reckless driving; general rule. --
Irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving.

¹Although the record contains two references to Code § 46.2-853, the parties agree that appellant was convicted of violating Code § 46.2-852. Thus, our inquiry here is focused upon the application and interpretation of Code § 46.2-852.

Upon familiar principles, we view the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E.2d 415, 418 (1987). On August 28, 1995, Hopewell Police Officer Daniel Pizarck (Pizarck) was informed of "a possible broken down vehicle" near the intersection of 6th Street and Route 10 and proceeded to determine the reason for the stopped vehicle. Pizarck testified that at approximately 11:40 p.m., he arrived at the designated location and found appellant's car stopped in the lane of travel on North 6th Avenue. He said that the operator was "passed out"² behind the wheel and that appellant's car was situated in a "heavily travelled area," particularly at that time of night. Pizarck found that the car's ignition switch and headlights were on, and its battery and alternator indicator lights were illuminated on the instrument panel. Pizarck opined that appellant's car was a traffic hazard which posed a threat to appellant's safety and to the safety of other motorists. However, Pizarck never saw the car in motion prior to or during his investigation. Pizarck confirmed that he had not observed appellant driving the vehicle.

Pizarck tapped on the driver's side window with his flashlight and shined the light in appellant's face attempting to

²Pizarck did not confirm whether appellant had "passed out" from an illness or had merely fallen asleep and appeared to surmise that it was one or the other.

wake her. When she awoke, appellant told him she was "headed home to Chesterfield." Pizarck noted that the direction of her vehicle was such that she was really "coming from Chesterfield."

Pizarck noticed a strong odor of alcohol escaping from the vehicle and discovered two open alcoholic beverage containers therein. Appellant admitted she had been drinking. Her speech was slurred and she was unsteady on her feet. Pizarck arrested appellant for driving while intoxicated. Appellant's certificate of breath analysis showed an alcohol content of ".17 grams per 210 liters of breath."

For reasons not disclosed in the record, the prosecutor elected not to proceed on the charge for which appellant was arrested and amended the charge to reckless driving. To support a conviction for reckless driving in violation of Code § 46.2-852, the Commonwealth must prove beyond a reasonable doubt that the accused drove the vehicle in a reckless manner "so as to endanger the life, limb, or property" of another.

The Commonwealth relies upon Kennedy v. Commonwealth, 1 Va. App. 469, 339 S.E.2d 905 (1986), to support appellant's conviction. Kennedy and his family had been on the road for eight hours when Kennedy ran his van off of the road into a wooded median strip. Id. at 470-71, 339 S.E.2d at 906. This Court affirmed Kennedy's conviction even though no eyewitness testimony proved Kennedy drove in a reckless manner. The Court in Kennedy stated that the circumstances of the accident were

such as to give rise to an inference that the car had been driven in a reckless manner in violation of the Code. Id. at 472, 339 S.E.2d at 907.

The circumstances in which Pissarck found appellant's car were such as to give rise to an inference that appellant drove her car to the location where Pissarck found her. In fact, we have held in similar circumstances that a defendant could be convicted of driving or operating a motor vehicle while intoxicated. See Propst v. Commonwealth, 24 Va. App. 791, 485 S.E.2d 657 (1997). However, the circumstances in appellant's case do not give rise to an inference that she drove her car in a reckless manner.³ See City of Baton Rouge v. Copley, 372 So.2d 1215 (1979); Jenson v. Fletcher, 101 N.Y.S.2d 75 (1950).

In Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970), the Court said:

The word "recklessly" as used in the statute imparts a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb or property

The essence of the offense of reckless driving lies not in the act of operating a vehicle, but in the manner and circumstances of its operation.

³"[W]hile evidence of intoxication is a factor that might bear upon proof of dangerous or reckless driving in a given case, it does not, of itself, prove reckless driving." Bishop v. Commonwealth, 20 Va. App. 206, 210, 455 S.E.2d 765, 767 (1995). "One may be both drunk and reckless. He may be reckless though not drunk; he may even be a total abstainer, and he may be under the influence of intoxicants and yet drive carefully." Id. (quoting Spickard v. City of Lynchburg, 174 Va. 502, 504-505, 6 S.E.2d 610, 611 (1940)).

We hold that under the facts shown by this record, the Commonwealth has failed to prove beyond a reasonable doubt that appellant was guilty of reckless driving in violation of Code § 46.2-852.

Accordingly, the judgment of the trial court is reversed and the case is dismissed.

Reversed and dismissed.