

IN THE  
COURT OF APPEALS OF VIRGINIA  
AT RICHMOND

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RECORD NO. 0164-21-3

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ABIGAIL TULIS,  
PETITIONER,  
v.

COMMONWEALTH OF VIRGINIA,  
RESPONDENT.

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BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

This case comes before the Court upon the appeal of Appellant's *in absentia* conviction of improper driving. Abigail Tulis ("Appellant") appealed her conviction of improper driving from the Smyth County General District Court to the Smyth County Circuit Court on March 3, 2020. (Record 50). The matter was initially set for a bench trial in the Circuit Court on June 29, 2020. (Record 51). Appellant's order for discovery was denied by the trial court judge on May 27, 2020. (Record 54). Appellant then filed a motion for dismissal with prejudice as a matter of law; in the alternative, to dismiss as a matter of equity and justice and memorandum in support on June 19, 2020. (Record 56-97). The Commonwealth filed a motion to continue the June 29, 2020 trial date on June 25, 2020. (Record 127-128). The trial Court granted the Commonwealth's motion to continue and did not address Appellant's motion for dismissal on June 29, 2020. (Record 129).

The matter was then set for a bench trial on September 28, 2020. (Record 129). Appellant then filed a Motion for Dismissal Addendum. (Record 130-134). Despite having notice of the trial date, Appellant failed to appear for the bench trial in Smyth County Circuit Court on September 28, 2020. (Conviction and Sentencing Order Record 135). The trial Court considered Appellant's motions at that time and denied the same. (Conviction and Sentencing Order Record 135). The trial Court reviewed the file and heard the evidence and found Appellant guilty of improper driving and imposed a \$500 fine on September 28, 2020 with the Conviction and Sentencing Order entered on October 28, 2020. (Conviction and Sentencing Order Record 135). Appellant then filed her notice of appeal from the Smyth County Circuit Court finding on November 23,

2020. (Record 136-137).

#### STATEMENT OF THE FACTS

The Commonwealth submits that the transcript that was provided to this Court and referred to by Appellant in her Petition for Appeal was created from Appellant's notes from the Smyth County General District hearing held on February 27, 2020 and is irrelevant to this Court's determination of any trial court errors by the Smyth County Circuit Court. As this Court is aware, appeals from District Courts to Circuit Courts are held as trial *de novo*. *Hill v. Middlesex County*, 12 Va. App. 58, 59 (1991).

Appellant did not appear and did not hear any of the evidence presented at the bench trial in the Circuit Court for the charge and her ultimate conviction of improper driving. (Sentencing and Conviction Order Record 135). As such, Appellant has no ability to create a statement of facts for this Court to consider. To the Commonwealth's knowledge, there was no court reporter recording the proceedings on September 28, 2020.

The Commonwealth can only add that at the bench trial on September 28, 2020 in the Smyth County Circuit Court, the Commonwealth called as its witness the Virginia State Trooper who encountered the Appellant, and that the trial Court heard evidence from the Trooper and found the defendant guilty of improper driving. (Conviction and Sentencing Order Record 135).

#### APPELLANT'S ASSIGNMENTS OF ERROR

- 1. The Commonwealth avers that the Appellant does not state any specific assignments of error, but instead pontificates on for almost 56 pages of the perceived wrongs against her. Further, the Commonwealth argues that none of the enumerated paragraphs in Appellant's petition have any meritorious assignments of error.**
- 2. The Commonwealth will address what it gleans to be the Appellant's**

**assignments of error as enumerated in the Summary of her argument:**

- a. **The Virginia Uniform Summons is sufficient to provide the Appellant notice of the charge against her; and**
- b. **The Appellant was afforded an “evidentiary hearing”, her properly noticed bench trial, in which she failed to participate. The Commonwealth cannot be held accountable for the Appellant failing to appear for her own trial.**

#### APPELLEE’S ASSIGNMENT OF ERROR

The Commonwealth makes no cross-assignments of error.

#### STANDARDS OF REVIEW

As the Appellant is alleging error as to the Virginia Uniform Summons providing her sufficient notice and that is an issue of both law and statutory interpretation, the Commonwealth argues that the standard of review is *de novo*. See *Commonwealth v. Murgia*, 297 Va. 310, 321 (2019) (as to standard of review regarding issues of law) and *Hilton v. Commonwealth*, 293 Va. 293, 299 (2017) (as to standard of review regarding statutory interpretation).

However, as to the sufficiency of the evidence to convict Appellant, the standard is light most favorable to the prevailing party, which in this case is the Commonwealth. *Commonwealth v. Moseley*, 293 Va. 455, 462-463 (2017). As the Appellant has failed to provide this Court with either a transcript or a statement of facts from the Smyth County Circuit Court bench trial, the Commonwealth argues that it must prevail on the sufficiency of the evidence as Appellant has offered no evidence to contradict the Circuit Court’s finding.

#### ARGUMENT AND AUTHORITY

**2.(a). The Virginia Uniform Summons provided Appellant with sufficient notice of the offense charged.**

The Virginia Uniform Summons is authorized by the General Assembly. *Virginia*

*Code* §46.2-388. Its additional use in issuance of traffic offenses is permitted by the General Assembly. *Virginia Code* §19.2-74. In this particular case, the Smyth County Circuit Court had before it a Virginia Uniform Summons alleging improper driving under §46.2-869 as it had been amended from Reckless Driving to Improper Driving by the General District Court Judge (Record 1). The Supreme Court of Virginia has declared that a summons issued by a law enforcement officer must describe the charge against the defendant. *Rule 3A:4 of the Rules of the Supreme Court of Virginia*. Additionally, the Rules of the Supreme Court of Virginia require that an indictment must describe the offense charged and cite the statute that defines the offense. *Rule 3A:6 of the Rules of the Supreme Court of Virginia*. However, the Rule goes on to state that error in citing the statute will not be grounds for a dismissal of the charge or reversal of that conviction unless a Court finds that the error prohibited the defendant from preparing an adequate defense. *Id.*

The Supreme Court of Virginia has recognized that a warrant need not have the same meticulousness of a formal indictment. *Bissell v. Commonwealth*, 199 Va. 397, 399 (1957). Warrants need only to be able to “point out the offense for which the defendant is to stand trial.” *Id.* The Court of Appeals also has acknowledged that when a party understands the charge against her and it is fully supported by evidence, her conviction should not be overturned on appeal. See generally *Parker v. Commonwealth*, 42 Va. App. 358, 380-381 and 389 (2004) aff’d *Parker v. Commonwealth*, 269 Va. 174 (2005).

In this case, the Appellant was able to identify the charge of which she was tried as she quotes it in the motion for dismissal she filed in Circuit Court (Motion For

Dismissal Page 24 found in Record 56-97). The Rule clearly states that dismissal or reversal of a conviction is only warranted when the Court finds that the accused was unable to prepare a defense against the charge. The voluminous record in this case from the Smyth County Circuit Court shows that the Appellant was very capable of making a defense for herself by finding the statute and arguing it in her pleadings. (See generally Defendant's Pleadings Record 56-97, 98-126, 130-134). In addition, the Circuit Court judge heard the evidence, and having none produced by the defendant under oath at trial, found her guilty of improper driving.

**2.(b). The Appellant was afforded an evidentiary hearing and chose not to appear.**

Appellant raises as Error number two, according to her Petition for Appeal summary, that she was denied an evidentiary hearing. The Commonwealth argues that the Appellant had a very lengthy trial in the General District Court of Smyth County in which she was able to question the officer who was the witness against her, and argue the facts and the law. The trial in General District Court in which Appellant participated was in fact an evidentiary hearing on the merits of the charge against her. She acknowledges the same by having filed a "transcript" of that hearing as part of her documents in the Circuit Court case. (Defendant's Addendum #1 to Motion for Dismissal Record 98-120 and Exhibit C Record 151-163).

As this Court is aware, appeals of district court hearings are appeals of right that are heard *de novo* to the Circuit Court of a particular jurisdiction. *Virginia Code §16.1-136* and *Gilman v. Commonwealth*, 275 Va. 222, 230 (2008). Virginia Code §16.1-132 allows for appeals of right from the General District Court to the Circuit Court. *Virginia Code §16.1-132*. This code section grants the accused a whole new trial. See *Hill v.*

*Middlesex County*, 12 Va. App. 58, 59 (1991) citing *Harbaugh v. Commonwealth*, 209 Va. 695 (1969) and *Gaskill v. Commonwealth*, 206 Va. 486 (1965). An appeal of a misdemeanor from General District Court is a *de novo* hearing that the Circuit Court has subject matter jurisdiction over. See *Riddick v. Commonwealth*, 72 Va. App., 132, 143-144 (2020).

Appellant in this case filed multiple pleadings prior to her bench trial. (Record 56-126, 130-134). The Appellant did not appear at the bench trial and therefore produced no evidence for the Circuit Court to consider. The standard of review for sufficiency of the evidence of a criminal conviction is in the light most favorable to the prevailing party at trial, in this case, the Commonwealth. *Commonwealth v. Moseley*, 293 Va. 455, 462-463 (2017).

Appellant in fact had an evidentiary hearing in the Smyth County Circuit Court on September 28, 2020. Appellant neglected to participate in that hearing and therefore, failed to produce any evidence, and the Circuit Court's finding of guilt on improper driving should be undisturbed on appeal. The Commonwealth is able to rely on a presumption of regularity regarding judgments. *Thompson v. Commonwealth*, 27 Va. App. 620, 624 (1998).

### CONCLUSION

For the foregoing reasons, Appellant's appeal of her improper driving conviction should be denied.

Regarding Assignment of Error one, the General Assembly sanctioned Virginia Uniform Summons provided Appellant with sufficient notice of the nature and character of the charge against her. This Court should not grant an appeal on her Assignment of

Error one.

As to Assignment of Error two, the Appellant herself failed to participate in the bench trial of her case. She was afforded the opportunity to have an evidentiary hearing, the trial, but chose not to participate in the judicial process.

Appellant's "rough-hewn" and drawn-out brief in support of her Petition for Appeal is much of the same arguments she made to the Circuit Court *in abenstia* by brief only. It was dismissed by the Circuit Court and it should be dismissed by this Court as well.

For the foregoing reasons, Appellant's appeal should be denied by this Court. The Commonwealth respectfully reserves the right to make oral argument should this appeal be granted.

RESPECTFULLY SUBMITTED

COMMONWEALTH OF VIRGINIA

BY: \_\_\_\_\_

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**CERTIFICATE OF COMPLIANCE**

The undersigned Assistant Commonwealth's Attorney for Smyth County, on behalf of the Commonwealth of Virginia, Respondent, does hereby certify that this Brief in Opposition complies with the requirements of Rule 5A:13 of the Rules of the Court of Appeals of Virginia, containing 1831 words, exclusive of the front cover and certificates.

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Jill Kinser Lawson, VSB No.: 68350

## CERTIFICATE OF SERVICE

The undersigned attorney for the Commonwealth does hereby certify that pursuant to Rule 5A:13 of the Rules of the Supreme Court of Virginia and the Virginia Court of Appeals' Public Advisory Regarding Operating Procedure in Response to COVID-19 dated March 18, 2020, one electronic copy of the Brief in Opposition in PDF is being submitted through the Court's electronic filing system. A true copy of the same will be served to Appellant at the email address she provided, [marie.tulis@gmail.com](mailto:marie.tulis@gmail.com) this the 3<sup>rd</sup> day of May, 2021.

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