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## **STATEMENT OF THE CASE**

The Appellant, Joshua Bristol was convicted on January 22, 2004 by The Honorable Johnny E. Morrison, Judge of the Portsmouth Circuit Court for Maiming Another While Driving Under the Influence in violation of 18.2-51.4 of the Code of Virginia (1950 as amended) and Driving Under the Influence in violation of 18.2-266 of the Code of Virginia (1950 as amended). The Appellant appeals his conviction based on the preserved issue on the validity of an arrest which triggered the implied consent statute of 18.2-268.2 of the Code of Virginia (1950 as amended) to give a blood sample after the accident in this matter.

## **QUESTION PRESENTED**

**Did a valid arrest of the Appellant occur prior to the nonconsensual removal of the Appellant's blood pursuant to 18.2-268.2 of the Code of Virginia (1950 as amended)? (Preserved at Appendix Pages 122-132)**

## **FACTS**

The Appellant was convicted of Maiming Another in Result of Driving Under the Influence of Alcohol in violation of 18.2-514 of the Code of Virginia (1950 as amended) and Driving Under the Influence of Alcohol in violation of 18.2-266 of the Code of Virginia (1950 as amended) on January 22, 2004 in the Portsmouth Circuit Court by The Honorable Johnny E. Morrison. (Appendix 278: 24-25 & 279:1-15). The Appellant does not believe the evidence is not in dispute for the arguments in this case. The Appellant was riding a motorcycle in a parking lot within the City of Portsmouth with a passenger when the Appellant lost control of the motorcycle. His passenger was expelled from the motorcycle. When Officer Doyle of the Portsmouth Police Department arrived at the scene, the Appellant was on the ground being treated by emergency medical technicians. (Appendix 13-16). The Officer investigated the scene by interviewing witnesses and then met the Appellant for the first time at the hospital where the Appellant was transported via ambulance. The first time the Officer met with the Appellant occurred approximately 2 hours after the accident. (Appendix Page 13, Pages 20-21 and Page 23). Officer Doyle testified that the Appellant was under arrest just prior to the reading of the implied consent law, however the Officer did nothing to secure the Appellant's arrest. (Appendix 35:16-19). The arrest of the Appellant by Officer Doyle completely contradicts the testimony of Officer Eberts who took the investigation over from Officer Doyle who testified the Appellant was not under arrest later that morning. (Appendix 103:1-25). At no point prior to or subsequent

to the removal of the blood of the Appellant under the implied consent law, did either Officer Doyle or Officer Eberts go to a magistrate and secure a warrant for Driving Under the Influence of Alcohol. The Appellant did not face charges in this matter until a direct indictment by the Portsmouth Grand Jury was returned in September 2003, which was more than two months from the accident date of July 5, 2003. There was no additional evidence of the Appellant's intoxication other than the certificate of analysis which was Commonwealth's Exhibit 5 and the testimony of Officer Doyle that the defendant had a strong odor of alcohol about his person and his speech was slurred while awaiting medical treatment for head trauma at the hospital. (Appendix 22:10-25, 24:1-6).

## **ARGUMENT**

**Did a valid arrest of the Appellant occur prior to the nonconsensual removal of the Appellant's blood pursuant to 18.2-268.2 of the Code of Virginia (1950 as amended)?**

The evidence is clear that the Appellant was completely incoherent when the blood was drawn from his arm at the hospital for the purposes of analyzing his blood for alcohol content. Officer Eberts of the Portsmouth Police Department testified that the Appellant was "incoherent" when his blood was drawn. (Appendix 97:5-21). The Appellant had been in a major motor vehicle accident and was at the hospital for treatment. The Appellant was never validly arrested after the accident or at any time prior to the extraction of the blood. In fact, Officer Eberts testified that the Appellant was not arrested at the scene nor was he arrested prior to his blood being drawn. (Appendix 99:3-14). For an arrestee to be deemed to have given implied consent under this section, the arrest must

have been lawful; if the arrest was not lawful, consent for blood alcohol testing is not implied, and the results of any such test are not admissible for the purpose of providing a rebuttable presumption of intoxication. [Smith v. Commonwealth, 32 Va. App. 228, 527 S.E.2d 456, 2000 Va. App. LEXIS 281 \(2000\)](#). The Court of Appeals found in [Goodman v. Commonwealth, 37 Va. App 374 \(2002\)](#) that the implied consent law, [Va. Code Ann. § 18.2-268.2](#), allowed the taking and testing of his blood, even though he was unconscious, and [Va. Code Ann. § 18.2-268.3](#), allowing the refusal of blood or breath testing, did not apply. However, the Court did require there to be probable cause for a valid arrest. Specifically, in that case, the probable cause was as follows:

When Police Officer Bonnie Oaks responded to the scene, appellant looked unconscious, but he was "gurgling something" indiscernible and was "incoherent." Oaks watched as emergency personnel removed appellant's unresponsive passenger and then cut appellant from the vehicle. Oaks had observed the beer can in appellant's hand and the cans in his car and on the ground. When Oaks leaned over appellant after he had been placed on a gurney, she "could smell the strong odor of alcohol coming from his person." Oaks then placed appellant under arrest and stayed with appellant while he was transported to the hospital until his blood was drawn for alcohol testing pursuant to the implied consent law.

In this specific case, Officer Doyle of the Portsmouth Police Department was dispatched and observed the Appellant laying on his back in the parking lot in front of a bar beside a

motorcycle. (Appendix 12:3-20). The Officer, through his investigation at the scene, learned that the Appellant and a passenger were riding through a parking lot “showing off” when the Appellant lost control and the passenger fell off of the motorcycle. (Appendix 16:1-7). In fact Officer Doyle never got close to the Appellant at the scene. (Appendix 20). The officer was dispatched to the accident at 1:56am on July 5, 2003. (Appendix 13:12-23). The officer met the Appellant at the hospital at 2:56 am that same day and read the implied consent law to the Appellant. (Appendix 23:7-9). After the Appellant’s blood was drawn, Officer Doyle turned the blood and his investigation over to Officer Ebert. (Appendix 27:9-10). At no point prior to the extraction of the Appellant’s blood was he ever arrested by Officer Doyle. Even if Officer Doyle did utter the words “you are under arrest” the arrest was without probable cause. Officer Doyle did testify that the Appellant was under arrest just prior to the reading of the implied consent law, however, the Officer did nothing to secure the Appellant’s arrest. (Appendix 35:16-19). In fact, the arrest of the Appellant by Officer Doyle completely contradicts the testimony of his supervisor, Officer Eberts who said the Appellant was not under arrest later that morning. (Appendix 101:3-14). Officer Eberts said the only probable cause to arrest the Appellant was an odor of alcohol and slurred speech. (Appendix 40:7-12). That is not enough probable cause to arrest the Appellant. [Coffey v. Commonwealth, 202 Va. 185, 116 S.E.2d 257 \(1960\)](#). Officer Eberts further stated that the Appellant was not under arrest even three days later during a consensual interview regarding this matter. (Appendix 100:14-18). When an arrest is untimely or invalid, the Appellant is not deemed to have consented to the testing of his breath under the "implied consent" law. [Thomas v. Town of Marion, 226 Va. 251, 308 S.E.2d 120 \(1983\)](#) (decided under former

§ 18.2-268). Because police failed to arrest appellant for driving under the influence of alcohol within two hours (now three hours) of the accident, the certificate of analysis was inadmissible at trial. [Castillo v. Commonwealth, 21 Va. App. 482, 465 S.E.2d 146 \(1995\)](#) (decided under former § 18.2-268). The Appellant was clearly not under arrest as he was able to leave the hospital on his own without any further police involvement. In fact, he voluntarily met with the police days later, and still charges had not been taken out. The Virginia Rules of Criminal Practice and Procedure provide that an officer executing an arrest warrant must deliver a copy to the accused at the time of the arrest unless the arrest is for a felony and the officer does not have the warrant in his possession, in which case he must (1) inform the accused of the offense charged and that a warrant has been issued and (2) deliver a copy to the accused as soon as practicable. [Rule 3A:4\(c\) \(ii\), Sup. Ct. \(Va.\)](#). In making an arrest without a warrant, a known peace officer is not bound to disclose his character or authority or give notice of his intention until the party has submitted or has demanded by what authority the arrest is made, as his known official character is sufficient in the first instance to require submission, unless a demand for disclosure of his authority is first made. An officer having reasonable grounds to believe that a person has been driving while drunk may make a warrantless arrest for that offense even though the offense is not committed in his presence. An "exigent circumstance" generally held to justify arrests or searches that would otherwise require a warrant, is the possibility that evidence of crime will be destroyed; this "destruction of evidence" includes the necessity to administer a blood-alcohol test to a person whom officers have observed driving while intoxicated as soon as he could be apprehended, so that he could not metabolize the evidence of his crime. The warrantless arrest of a driver at a hospital

following an accident is proper, however, such a person arrested without a warrant is to be brought forthwith before a magistrate; however, there is no requirement that the magistrate be located in the jurisdiction of the arrest. [Walter v. Commonwealth., 8 Va. App. 485, 382 S.E.2d 484 \(1989\)](#). In this case, the Appellant was never brought before a magistrate. In fact, the Appellant never faced any charges until such time as the Portsmouth Grand Jury indicted him in September 2003. Therefore, even if the Appellant was under arrest, it was an invalid arrest because he was never brought before a magistrate, and therefore the implied consent statute did not apply whereby invalidating the sample results admitted as Commonwealth's Exhibit 5 in the Appellant's trial which was the certificate of analysis.

### **CONCLUSION**

The Appellant prays that this Court reverse the convictions of the Portsmouth Circuit Court on both charges, or alternatively, remand the case with instructions for the Portsmouth Circuit Court to strike Commonwealth's Exhibit 5 from evidence and to make factual findings if the remaining evidence was sufficient for a finding of guilt beyond a reasonable doubt for both charges without that Exhibit in evidence.

**REQUEST FOR ORAL ARGUMENT**

The Appellant request oral argument in this matter before a panel of the Judges of this Court.

**CERTIFICATE OF COMPLIANCE WITH RULE 5A:19**

Counsel certifies that seven copies of this brief have been filed with the Court and three copies have been mailed to opposing counsel at:

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RESPECTFULLY SUBMITTED

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