

SUPREME COURT OF VIRGINIA

Rix v. Commonwealth, 282 Va. 1

714 S.E.2d 561 (2011) · No. Record No. 101737 · Decided June 9, 2011

SUMMARY

The Supreme Court of Virginia affirmed Ellen Marie Rix’s convictions for driving under the influence and refusing a blood or breath test. The court held that Rix was an “operator” of a motor vehicle under Virginia Code § 46.2-100 because she took actual physical control of a fully operational vehicle on a highway while the engine was running, even though the officer did not see her drive the vehicle.

CASE DETAILS

COURT	Supreme Court of Virginia
WRITING FOR THE COURT	Per Curiam
JURISDICTION	Virginia
DECIDED	June 9, 2011
DOCKET	Record No. 101737
DISPOSITION	affirmed
PROCEDURAL POSTURE	Rix appealed convictions for operating a motor vehicle while intoxicated and refusing to submit to a blood or breath test. The Supreme Court of Virginia granted the appeal from the Court of Appeals, which had affirmed the convictions.
STANDARD OF REVIEW	Because the facts were undisputed, the appeal presented only a question of law concerning the legal conclusion to be drawn from those facts.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Virginia
PARTIES	Ellen Marie Rix v. Commonwealth of Virginia

TOPICS

criminal procedure

statutory interpretation

appellate procedure

standard of review

PRACTICE AREAS

Criminal law

Criminal procedure

DUI/DWI

QUESTIONS PRESENTED

1. Whether a person who takes the driver's seat of a fully operational vehicle on a highway, while the engine is running and the ignition is on, is an operator of the vehicle under Code § 46.2-100 even though the person was not observed placing the vehicle in motion.
2. Whether the convictions for operating a motor vehicle while intoxicated and refusing a blood or breath test should be affirmed.

HOLDINGS

1. A person is an operator of a motor vehicle when the person takes actual physical control of a fully operational vehicle on a highway with the ignition key in the on position and the engine running, even if the person was not observed putting the vehicle in motion.
2. The convictions for operating a motor vehicle while intoxicated and refusing to submit to a blood or breath test were properly affirmed.

KEY QUOTATIONS

"operating" a motor vehicle includes "manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion. It means engaging the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle." (282 Va. at 2)

"While the officer watched, she took actual physical control of a fully operational motor vehicle on a highway, with its ignition key in the "on" position and its engine running." (282 Va. at 2)

FACTUAL BACKGROUND

A police officer observed a vehicle weaving on Interstate 264 and stopped it. While approaching, he saw the driver and front-seat passenger exchange seats; Rix was then sitting in the driver's seat, with the keys in the ignition and the engine running. Rix exhibited signs of intoxication, refused field sobriety and breathalyzer testing, and was convicted of driving or operating a motor vehicle while intoxicated and refusing a blood or breath test.

PROCEDURAL HISTORY

Rix was convicted in general district court and appealed to the Circuit Court of the City of Virginia Beach, where she was convicted after a bench trial. The Court of Appeals of Virginia affirmed in a published opinion. The Supreme Court of Virginia awarded an appeal and affirmed the Court of Appeals.

DISPOSITION

affirmed

CASES CITED

- Nelson v. Commonwealth, 281 Va. 212, 707 S.E.2d 815 (2011)
- Stevenson v. City of Falls Church, 243 Va. 434, 416 S.E.2d 435 (1992)

- Rix v. Commonwealth, 56 Va. App. 749, 697 S.E.2d 33 (2010)

OPINION

PER CURIAM.

714 S.E.2d 561 (2011) 282 Va. 1 Ellen Marie RIX, Appellant, v. COMMONWEALTH of Virginia, Appellee. Record No. 101737. Supreme Court of Virginia. June 9, 2011. PER CURIAM. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the Court of Appeals.

On June 21, 2008, Virginia Beach Police Officer B.K. Womble observed a vehicle "weaving" on Interstate 264 in the City of Virginia Beach. He stopped the vehicle and approached it. While doing so, he saw the driver exchange seats with the front-seat passenger.

The driver, Veselina Stoilova, who had been behind the steering wheel while the car was in motion, was in the passenger seat when the officer reached the car. The former passenger was Ellen Marie Rix (the defendant) whom the officer found sitting in the driver's seat behind the steering wheel.

The keys were in the ignition and the engine was running. The officer had the defendant step out of the car. She had a strong odor of alcohol about her person, and exhibited slightly slurred speech. Her eyes were bloodshot and glassy. She swayed when standing and walking. She refused to take a field sobriety test and told the officer that he could not arrest her because she had not been driving.

The officer placed her under arrest and read her the implied consent law. She refused to take a breathalyzer test. Taken before a magistrate, the defendant was charged with operating a motor vehicle while under the influence of alcohol, second offense within five years, in violation of Code §§ 18.2-266 and 270 and with refusal to take a blood or breath test, second offense within ten years, in violation of Code § 18.2-268.3.

The defendant was convicted in general district court and appealed the convictions to the Circuit Court of the City of Virginia Beach. At a bench trial, Officer Womble admitted that he had not seen the defendant put the car in motion. Veselina Stoilova testified that she had driven the car but had asked the defendant to exchange seats with her because she was driving without a permit.

The defendant testified that she exchanged seats with the driver because she thought that the driver would face deportation if arrested. The defendant was convicted of both offenses. She appealed to the Court of Appeals. A panel of that Court, by published opinion, Rix v. Commonwealth, 56 Va.App. 749, 756, 697 S.E.2d 33, 36 (2010), affirmed the convictions.

We awarded her an appeal. Because the facts are undisputed, this appeal presents only the question of the legal conclusion to be drawn from those facts. *562 The defendant does not question the

sufficiency of the evidence of the degree of her intoxication, but contends that she was not the operator of a motor vehicle within the meaning of the relevant statutes.

Code § 18.2-266 makes it unlawful to "drive or operate" a motor vehicle while under the influence of alcohol to a degree that impairs one's ability to drive safely. Code § 46.2-100 includes within the definition of an "operator [of a motor vehicle]" any person who "is in actual physical control of a motor vehicle on a highway." Our inquiry is therefore whether the defendant was in actual physical control of the vehicle.

We recently reviewed our decisions considering variations on this theme in *Nelson v. Commonwealth*, 281 Va. 212, 707 S.E.2d 815 (2011). In that case, Nelson was found slumped over the steering wheel of a vehicle parked in a residential neighborhood, asleep or unconscious.

The car's radio was playing but the engine was not running and the ignition key was turned to the position that allowed the radio to operate while the engine was not running. The gearshift was in the "park" position. *Id.* at 214, 707 S.E.2d at 816.

We affirmed Nelson's conviction because, by turning the ignition key to the "on" or "accessory" position that would allow the radio to operate, he had manipulated the electrical equipment of the vehicle. Applying the test explained in *Stevenson v. City of Falls Church*, 243 Va. 434, 438, 416 S.E.2d 435, 438 (1992), we noted that "operating" a motor vehicle includes "manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion.

It means engaging the machinery of the vehicle which alone, or in sequence, will activate the motive power of the vehicle." *Nelson*, 281 Va. at 216, 707 S.E.2d at 817.[*] Accordingly, we held that Nelson's action was a step which, taken in sequence, would have led to the activation of the motive power of the vehicle. *Id.* at 219, 707 S.E.2d at 818.

In the present case, we do not reach the question whether the defendant took some action which, in sequence, would have activated the motive power of the vehicle. Its motive power was already activated. While the officer watched, she took actual physical control of a fully operational motor vehicle on a highway, with its ignition key in the "on" position and its engine running.

She thus met the statutory definition of an "operator" of a motor vehicle. See Code § 46.2-100. Accordingly, the Court affirms the judgment of the Court of Appeals. The appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages. This order shall be published in the Virginia Reports and shall be certified to the Court of Appeals of Virginia and to the Circuit Court of the City of Virginia Beach.

NOTES [*] We reversed Stevenson's conviction because the engine of his vehicle was not running and we assumed from the evidence that the ignition key was in the "off" position. The

Commonwealth's evidence in that case therefore failed to meet the test for "operating" a motor vehicle. 243 Va. at 438, 416 S.E.2d at 438.

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