



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

June 28, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Scott A. Surovell
Member, House of Delegates
Post Office Box 289
Mount Vernon, Virginia 22121

Dear Delegate Surovell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

With passage of HB 1907, effective July 1, 2013, texting, emailing or reading an email or text message while driving a moving vehicle will be a primary offense.¹ You seek to clarify whether someone who was driving while using a cell phone in a manner not made illegal under this provision could nevertheless be convicted of reckless driving pursuant to § 46.2-852 for driving “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[.]”

Response

It is my opinion that, on and after July 1, 2013, if a driver operates a vehicle on a highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person, while using a hand held personal communication device, that driver can be charged and convicted of reckless driving regardless of whether there are grounds to support a violation of § 46.2-1078.1. It is my further opinion, however, that Virginia case law makes clear that the mere happening of an accident or use of a hand held personal communication device likely would be insufficient, standing alone, to support a conviction of reckless driving.

Applicable Law and Discussion

It is well established in Virginia that “[t]he 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 [and] [t]he mere happening of an accident does not give rise to an inference of reckless driving.”² To prove reckless driving under § 46.2-852, the Commonwealth must, “[i]rrespective of the maximum speeds permitted by law,” establish that the defendant drove “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”³

¹ See 2013 Va. Acts ch. 752.

² Powers v. Commonwealth, 211 Va. 386, 388, 177 S.E.2d 628, 630 (1970) (citations omitted).

³ VA. CODE ANN. § 46.2-852 (2010).

For example, and by way of illustration, the Court of Appeals made clear in the context of driving while intoxicated that simply being intoxicated was not a sufficient fact, standing alone, to support a conviction for reckless driving:

Code § 46.2-852 provides, in pertinent part, that “any person who drives a vehicle on any highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving.” “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 . . . lies not in the act of operating a vehicle, but in the manner and circumstances of its operation.” Thus, “the mere happening of an accident does not give rise to an inference of reckless driving.” To convict, the Commonwealth must “prove every essential element of the offense beyond a reasonable doubt, with evidence which excludes every reasonable hypothesis of innocence and . . . consistent only with . . . guilt”

In *Hall*, we considered the import of intoxication evidence in a prosecution for reckless driving. Hall was discovered by police “passed out” behind the wheel of an automobile stopped in a heavily traveled roadway, with “ignition switch and headlights . . . on and . . . indicator lights . . . illuminated.” Hall smelled of alcohol, was confused, unsteady, slurred in speech and admitted “driving” the vehicle. However, the record was silent with respect to the “manner and circumstances” of Hall’s driving. Guided by *Powers*, we concluded that “such circumstances . . . do not give rise to an inference that [defendant] drove . . . in a reckless manner.” In reversing the conviction, the panel noted “that evidence of intoxication is a factor that might bear upon proof of dangerousness or reckless driving in a given case,” but “does not, of itself, prove reckless driving.” “One may be both drunk and reckless . . . [or] reckless though not drunk . . . [, or] under the influence of intoxicants and yet drive carefully.”

Here, assuming, without deciding, that the evidence proved defendant had been driving the car while intoxicated at the time of the collision, it establishes little else. The record does not disclose the time of the accident, the manner in which defendant drove the car, his blood alcohol level, the road conditions, weather, traffic controls, or other circumstances probative of a Code § 46.2-852 violation. Reckless driving is not a status offense, and defendant cannot be convicted upon “speculation and conjecture as to what caused [him] to lose control of the car.” Thus, under the instant facts, we find the evidence insufficient to support a conviction for reckless driving.^[4]

The Court noted that its conclusion was consistent with an earlier opinion in which the defendant had fallen asleep: “In *Kennedy*, the evidence clearly supported the inference that the accused ‘fell asleep at the wheel,’ resulting in a collision. Manifestly, driving a vehicle while sleeping evinces the disregard for the life, limb, and property contemplated by Code § 46.2-852.”⁵

The use of hypothetical scenarios also may illustrate how the particular facts and circumstances surrounding a driver’s cell phone use could influence which charges a driver may face upon apprehension

⁴ *Thompson v. Commonwealth*, 27 Va. App. 720, 723-25, 501 S.E.2d 438, 439-40 (1998) (citing *Powers v. Commonwealth*, 211 Va. 386, 177 S.E.2d 628 (1970) and *Hall v. Commonwealth*, 25 Va. App. 352, 488 S.E.2d 651 (1997)) (internal citations omitted).

⁵ *Id.* at 725 n.2, 501 S.E.2d at 440 n.2 (citing *Kennedy v. Commonwealth*, 1 Va. App. 469, 339 S.E.2d 905 (1986) (citation omitted)).

by a law enforcement officer. Suppose that on July 1, 2013, a driver has his cell phone in the center console of his vehicle and he is staring at the cell phone's screen which displays a GPS mapping program. The use of the cell phone in this manner would not violate § 46.2-1078.1 because § 46.2-1078.1(B)(3) exempts such conduct.⁶ Adding additional hypothetical acts, imagine the driver runs a stop sign and causes an accident because he is not paying sufficient attention to the roadway. In this instance the driver could be charged with reckless driving. If the hypothetical is changed further such that the driver is looking at his phone and reading an email displayed on its screen at the time of the accident, the driver then could be charged and convicted of a violation of § 46.2-1078.1 and § 46.2-852, provided the Commonwealth is able to meet its burden of proof as to the elements of each offense to the satisfaction of the fact finder.⁷ The reckless nature of the driving is exactly the same in each hypothetical scenario, however, only in the final situation would the driver additionally violate § 46.2-1078.1.

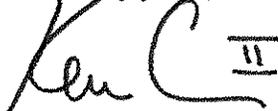
Thus, the facts and circumstances surrounding the manner in which a driver operates a vehicle while using a hand held personal communication device will determine whether the driver is in violation of § 46.2-1078.1 and/or reckless driving in violation of § 46.2-852. Consistent with the existing case law, however, the mere operation of such a device while driving, regardless of a violation of § 46.2-1078.1, would not necessarily result in a reckless driving conviction.

Conclusion

Accordingly, it is my opinion, that, on and after July 1, 2013, if a driver operates a vehicle on a highway recklessly or at a speed in a manner so as to endanger the life, limb, or property of any person, while using a hand held personal communication device, that driver can be charged and convicted of reckless driving regardless whether there are grounds to support a violation of § 46.2-1078.1. It is my further opinion, however, that Virginia case law makes clear that the mere happening of an accident or use of a hand held personal communication device likely would be insufficient, standing alone, to support a conviction of reckless driving.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁶ Section 46.2-1078.1(B) provides that the prohibition of using a handheld personal communication device does not apply to:

1. The operator of any emergency vehicle while he is engaged in the performance of his official duties;
2. An operator who is lawfully parked or stopped;
3. The use of factory-installed or aftermarket global positioning systems (GPS) or wireless communications devices used to transmit or receive data as part of a digital dispatch system; or
4. Any person using a handheld personal communications device to report an emergency.

⁷ Ultimately, whether any particular conduct or combination of factors constitutes a violation of § 46.2-852 is a question of fact that rests with the Commonwealth's Attorney and trier of fact. *See, e.g.*, 2010 Op. Va. Att'y Gen. 99, 103 (addressing elements of illegal gambling).