THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jun 20 2022
S.C. SUPREME COURT

Certiorari - COA
APPEAL FROM GREENWOOD COUNTY
Court of General Sessions
Hon. Donald Hocker, Circuit Court Judge

Appellate Case No. 2022-000571

The State ..... Respondent,

vs.

Adam Rowell ..... Petitioner.

REPLY TO RETURN

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Question I

Did the trial court err in admitting the blood test results from Sample A, the 8:54 pm blood draw, when the hospital records establish that Adam Martyn Rowell did not arrive at the emergency room until 9:00 pm, the records do not establish whether the blood was drawn from his arm or a central line, the blood is unaccounted for for a 30 minute period and a person who allegedly received the blood from the nurse did not testify?

Issue as to admissibility of hospital blood draw as a business record not preserved

The State has waived any argument as to the admissibility of the hospital blood draw being admissible as a business record. In the second and third opinions issued by the court of appeals, the court said, "Although we acknowledge the State submitted a supplemental citation to *Jamison* prior to oral argument and raised this argument in its petition for rehearing, the State did not raise this argument to trial court or in its appellate brief. Thus, we decline to address this argument on the merits." *State v. Rowell*, 436 S.C. 54, 65, 870 S.E.2d 175, 180 (Ct. App. 2022), reh'g denied (Apr. 1, 2022);*State v. Rowell*, Op. № 5832 (S.C.Ct.App. filed August 25, 2021) (Howard Adv.Sh. № 29 at 24, n. 1) . The State did not petition the court of appeals to review the holding nor file a Petition for Writ of Certiorari to this court. It is now the law of the case and cannot be reviewed by this court.

Merits as to Admissibility as a Business Record

The State incorrectly argues that the Sample A, the hospital blood draw, was admissible as a business record under *Jamison v. Morris,* 385 S.C. 215, 684 S.E.2d 168 (2009) and *Ex parte DHEC*, 350 S.C. 243, 565 S.E.2d 293 (2002). The comment from *Jamison,* quoted by the State

on page 8 of its brief, is *obiter dictum*. To say the blood test would be admissible if the hospital tested it, was totally unnecessary to the holding in the case. The point of the case was that the hospital did not test the blood and therefore it was not admissible. Secondly, the suggestion that *Ex parte DHEC,* cited in *Jamison,* also supports such a conclusion ignores the clear holding of *Ex parte DHEC.* In the case, this Court addressed the issue of the admissibility of a hospital drawn blood test and said:

> Although our precedent requires a chain of custody for blood and urine samples taken at the time of an accident or other crime for purposes of prosecution, HIV test results present a different set of circumstances. The DUI cases cited above involve time-sensitive tests taken at the time of an arrest or an accident that cannot be replicated outside of that time frame. . . . Although the blood drawn from Cribb was not drawn initially for prosecutorial purposes, it was used for those purposes ultimately, and, therefore, required a chain of custody because Cribb could not re-test his blood alcohol level later and get an accurate result. HIV test results, on the other hand, can be confirmed or proved false by re-testing at a later date, as HIV is a permanent condition, unlike the level of alcohol or drugs in the bloodstream. Based on this distinction, we find the admission of HIV test results is not controlled by the line of cases discussed above dealing with drug and alcohol tests.
> *Id. at* 248–49, 565 S.E.2d at 296 (2002)(internal citations omitted)[1]

The State's reliance upon *State v. English*, 436 S.C. 338, 872 S.E.2d 191 (Ct. App. 2022), reh'g denied (May 6, 2022) is also misplaced. *English* involved the use of the business record to prove the defendant had a certain sexually transmitted disease. This is a permanent condition that a defendant can easily disprove. This business record fits within the exception cited above.

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[1] One could attempt to argue that this quote from *Ex parte DHEC* is also *dictum.* This would be incorrect. The portion of the decision quoted above was necessary for this Court to explain to the bench and bar the limitations on the use of the business records exception to blood tests performed in a hospital or other medical facility.

In the present case, the result is being used to prove driving under the influence and therefore a complete chain of custody needs to be established.

This Court should reject the invitation of the State to extend the holding of *Jamison* and *Ex parte DHEC.* A reliance on the business records exception to the hearsay rule should have no place in a driving under the influence case where liberty, and not money, is at stake.

Even if this Court were inclined to extend *Jamison* to criminal cases, this is not the appropriate case to use to make such an extension. Rule 803(6) of the South Carolina Rules of Evidence provides the business record is admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." As was discussed in the Petition for Writ of Certiorari, when the business records show the blood sample was taken before the patient arrived at the hospital, lack of trustworthiness has been shown. When the records show two blood tests being taken but only one result, lack of trustworthiness has been shown. When the records show confusion as to who took the blood and whether the blood was taken from a main line or the arm, lack of trustworthiness has been shown.

The Chain of Custody is Defective

The State in its brief discusses the problem with the chain of custody. They admit that Angela Waites simply believes she saw Amanda Baker draw the blood. The State admits that Baker did not remember drawing the blood, but only recognized her identification number. The State admits that the best Baker could do is to testify as to her usual practice. The State admits the lab technician did not remember how he received the blood. The State admits Baker did not remember taking the sample to the laboratory. The State admits Baker said either she or Bill Evans took the blood to be tested. The State admits Bill Evans did not testify. Br. of Resp. at 10.

Such testimony as to a chain of custody is confusing at best.

South Carolina is unique in the use of the phrase "as far a practicable" as to a chain of custody. Unfortunately, it has never been defined. If a key person in a chain of custody is deceased and the state seeks to establish a chain of custody without that person, then the chain has been established "as far as practicable" as a dead person cannot be called to testify. This cannot be the meaning of the phrase.

The phrase was first used in *Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d 534 (1957). The case has been cited in numerous cases and has never been overruled or modified. If *Benton* is to continue to have validity, this case must be reversed. In *Benton,* this Court said, "There was no effort at the trial to produce the vials, the labels, or the request for a blood analysis so as to determine whether or not the technologist could identify them as those he wrapped for mailing." *Id* at 34, 100 S.E.2d at 537. The same is true here. The fact that the vials were destroyed should not cause this Court to conclude the chain has been established "as far as practicable." If the vials were important in *Benton*, they are important here. Destruction of the vials, just as death, should not water down what is practicable.

Furthermore, in *Benton*, this Court also said, "There was no effort at the trial to produce the vials, the labels, or the request for a blood analysis so as to determine whether or not the technologist could identify them as those he wrapped for mailing." *Id.* at 34, 100 S.E.2d at 538. Robert Smith, who tested the blood, stated, "There would be no way I would know if it was tampered with before it got to me." Rec. on App. at 688, ll 23-24. If a person does not know if a blood sample had been tampered with, then he certainly is in the same position as a person who could not identify a vial that was wrapped for mailing.

The State is correct that some of the strict requirements of a chain of custody have been relaxed. But the cases in which the rule may have been relaxed involved cases where the samples were sealed and there was no evidence of tampering. If an unknown person handled a sealed package and the package was still sealed in the same manner when tested, a chain has been established as far as practicable. Those are not the facts of this case. The State seems to argue that simply because the blood was tested in a hospital the requirements of a chain of custody should be relaxed. Errors in a hospital are not uncommon. *See*, *State v. Williams*, 301 S.C. 369, 371, 392 S.E.2d 181, 182 (1990)("Moreover, Williams' E/R record was initially mislabeled as that of Randy Williams."). With the confusion in this case as to the time the sample was taken, an error is very probable. The chain of custody as to Sample A has not been established.

Harmless Error as to Sample A

In arguing that the admission of Sample A is harmless, the State relies to a large part upon the reading in Sample B. What the State ignores is that Sample B has been excluded by the Court of Appeals in its order. Thus, if Sample A is excluded because of an improper chain of custody, there would not be sufficient evidence of Mr. Rowell being under the influence of alcohol. One empty beer bottle and an odor of alcohol is hardly substantial circumstantial evidence to sustain a charge of driving under the influence.[2]

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[2] While the search warrant affidavit stated "multiple open containers," the pictures only showed one red stripe. Rec. on App. at 20, ll 15 to 22. Tierra Boyter, one of the paramedics first on the scene, testified she did smell alcohol while treating Mr. Rowell. Rec. on App. at 943, ll 3 to 10.

Question II

Did the court of appeals err in holding the objection to the admissibility of Sample A, the 8:54 pm blood draw, was not preserved for appellate review when it was raised during the trial and in a post trial motion with no objection from the State?

Error Preservation

The issue as to error preservation perhaps turns on the use of the word "reliability." The State is correct that Mr. Rowell never questioned the reliability of the machine used to test the blood. Mr. Rowell's expert testified that the machine used was reliable. The reliability issue raised below, and ruled upon by the trial judge, was the reliability of the result because about 50% of Mr. Rowell's blood and other body fluids has been replaced before the sample was tested. The Court of appeals correctly found that when approximately 150% of Mr. Rowell's blood and other body fluids have been replaced, the reading, even from an excellent machine, is unreliable.

Mr. Rowell acknowledges this court may find an issue is not preserved even if the parties do not raise it. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012). In that case, this Court also said, "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved." *Id.* 330, 730 S.E.2d at 285. In this case, at a minimum, the preservation issue is doubtful and therefore should be deemed preserved. The issue is not clearly unpreserved.

The same issue as to a result being reliable after massive transfusions, as noted in the Petition, was raised as to Sample A. As noted in the Petition, the trial judge in a post-trial

motion stated he ruled upon the issue during the trial and the ruling remains the same. Rec. on App. at 1380, ll 17-25. An acknowledgment by the trial judge he ruled upon an issue has to preserve it, even if it is otherwise doubtful as to whether he ruled upon it.

At the post trial motion, neither the trial judge nor the assistant solicitor ever said that the issue as to the reliability of Sample A was being raised for the first time in a post trial motion. Thus, all parties agree that reliability as to the blood being tainted was preserved. Had the State believed the issue had not been raised during the trial, a timely objection on that basis would have permitted the trial judge to make a specific ruling on error preservation. As there is at least a question as to whether the issue was preserved, precedent requires this court to hold it was preserved.

Merits

The State misstates the argument of Mr. Rowell. The issue presented to the trial judge as to both samples was that because of the contamination of the blood by massive blood transfusions and saline solutions, the State has the burden, as the party seeking to admit the evidence, to prove it is worthy of being admitted. When blood has been tainted with such massive amounts of blood and saline, is a blood alcohol reading reliable?

The State in its brief argues that Mr. Rowell has the burden of proving the result is not accurate. Br. of Resp. At 16. This is not correct. The State has the burden of proving a tainted blood sample that is tested is reliable. The state offered no evidence as to such blood producing a reliable blood alcohol reading. While common sense would suggest it would dilute the reading, no such scientific testimony exists in this case. The jury should not be permitted to speculate as to the proper conclusion. If the transfusions diluted the blood, that would mean the

proper reading from Sample A would be approximately .2843, an almost lethal level. *See*, *James v. State*, 250 Ga. 655, 655, 300 S.E.2d 492, 492 (1983)(noting .35 is the threshold lethal level for alcohol). From this record, we do not know if saline solution given a person dilutes the blood alcohol level or causes alcohol to leave the tissue and increases the blood level. Such a high level is disputed by the video of Mr. Rowell from Walmart and the testimony of the woman who saw him there. If a tainted blood sample is admissible, the obligation of the government is to explain why the result from tainted blood is reliable. They produced no such evidence in this case.

Question III

Did the court of appeals err in holding the test results from Sample B, the SLED blood draw, was harmless error when it was the basis for an inference charge and the jury could have rejected Sample A as not being proven to be reliable?

Court of Appeals Ruled Sample B was Unreliable

The Respondent has argued "the Court of Appeals opinion did not say, either explicitly or implicitly, whether Sample B was reliable." Br. of Resp. At 17. The court of appeals stated, "Even if the admission of Sample B was so unreliable that its admission was error, this error was harmless." *State v. Rowell*, 436 S.C. 54, 66, 870 S.E.2d 175, 181 (Ct. App. 2022), reh'g denied (Apr. 1, 2022). If the court of appeals did not find Sample B was unreliable, they would have had no reason to make this statement. Implicit in the ruling is the fact the court of appeals found the result to be unreliable.

In addition, in the three petitions for rehearing filed in this matter, Mr. Rowell stated, "This Court found as to Sample B, when over 150% of a person's blood has been replaced by

blood, blood products or saline solution, the result is not admissible." This statement is found on page 6 of each petition for rehearing. The Court of Appeals never corrected this statement in either of its subsequent opinions.

Harmless Error

The court of appals failed to properly apply the harmless error standard established by this court. This court has said, "Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). The facts of this case establish that the error was not harmless.

In arguing that the admission of Sample B was harmless error, the State says, "Petitioner's argument ignores the fact that Sample A could likewise have been used to instruct the jury on the inference of intoxication." Br. of Resp. at 19. This is not correct. The hospital blood draw was not conducted pursuant to the implied consent statute. As the court of appeals has said, "It does not appear from the evidence that the test administered to Carrigan was at the direction of the law enforcement officer who arrested him, as required by subsection (a). Neither does it appear that the test was administered by a person trained and certified by the South Carolina Law Enforcement Division, using methods approved by that agency, as also required by subsection (a)." *State v. Carrigan*, 284 S.C. 610, 615–16, 328 S.E.2d 119, 122 (Ct. App. 1985). As Sample B complied with the implied consent statute, it was the only basis for charging the inferences from the implied consent statute. The court of appeals erred in finding the admission of Sample B harmless.

The State further argues, "The jury absolutely could have convicted on either sample. " Br. of Resp. at 19. In response, Mr. Rowell would simply say, that is the exact reason the court of appeals erred in finding Sample B harmless.

The State in its response does not argue that the harmless error analysis used by the court of appeal complies with *Tapp*. The State does not argue against the position of Mr. Rowell that the jury could have rejected Sample A because of the unreliability of the times and the chain of custody and relied exclusively upon Sample B. The State appears to argue which sample the jury used is not relevant.

They argue, "Because the evidence of Petitioner's intoxication was overwhelming regardless of which sample was admitted, this Court should deny Petitioner's petition for writ of certiorari and affirm the opinion of the Court of Appeals." Br. of Resp. At 19. The "either or" analysis is not an argument that the admission of Sample B was harmless beyond a reasonable doubt as required by *Tapp*.

Question IV

Did the court of appeals err in holding the trial judge did not need to conduct an evidentiary hearing as to a juror who failed to disclose that he had been arrested and had a pending criminal charge being prosecuted by the office of the solicitor for the 8th judicial circuit when such a question was asked during jury voir dire?

The State argues that because Mr. Rowell did not subpoena the juror to the hearing this issue is not preserved. Br. of Resp. at 20. This statement ignores the facts of this case. Defense counsel stated in the email exchange dated December 12, 2017, "The defense believes that a hearing should be conducted so that the juror can be questioned under oath." Rec. on App. at

1442. This email was in response to an email from the assistant solicitor dated December 11, 2017 in which the assistant solicitor stated, "At this point, we think it is appropriate for the Court [to] inquire upon Juror #164 this week to determine whether or not the concealment was intentional. He is represented by Janna Nelson, and I imagine at the Courts [sic] request, he could be available this week to answer any questions you might have." Rec. on App. at 1438. Both parties requested a hearing as to the Juror. The trial court refused to conduct a hearing at which the juror could testify. As both sides requested a hearing, the contention of the State in its brief is not correct.

In addition, in the first two opinions issued by the court of appeals in this matter, the court of appeals found that Mr. Rowell had failed to provide an adequate record to review this issue. The court said, "Rowell failed to provide a sufficient record to support reversal because he failed to subpoena Juror 164 for the post-trial hearing at which the trial court addressed the juror concealment issue." *State v. Rowell*, Op. № 5832 (S.C.Ct.App. filed July 7, 2021) (Shearhouse Adv.Sh. № 23 at 56); *State v. Rowell*, Op. № 5832 (S.C.Ct.App. filed August 25, 2021) (Howard Adv.Sh. № 29 at 26). In the third opinion the court of appeals held the issue was preserved and addressed the merits. The State did not petition the court of appeals for a rehearing and did not apply for a petition for writ of certiorari. The fact that the issue was preserved is the law of the case and the state cannot now argue the issue was not preserved.

Merits as to Juror 164

The State contends, "([T]he manner in which the trial judge presented the questions to the jury panel was ambiguous and confusing." Br. of Resp. at 22. This admission by the State is sufficient grounds to reverse the conviction of Adam Rowell. Mr. Rowell is entitled to a voir dire

by the trial judge that is not ambiguous and confusing. As the United States Supreme Court has said, "The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984). And if a trial judge acknowledges a question asked was ambiguous and confusing, this process has also failed.

The State in its brief has also failed to explain how the trial judge concluded the failure to disclose was not intentional. This conclusion can only be reached with a hearing. A trial judge cannot make a determination as to whether a juror's refusal to answer was unintentional without a hearing. The question asked was clear:

> Question One, any member of the jury panel or any member of your immediate family members or close personal friend ever been arrested and charged with any criminal offense through whatever state, local or federal law enforcement agency.
> Rec. on App. at 56, ll16-20

After all the questions were asked, numerous jurors came forward in response to the questions asked. Of the ones that came forward, 12 were in response to Question One. They included jurors with pending charges or convictions. Rec. on App. at 56, l 16 to 74, l 18. Juror 164 did not come forward.

As the conclusion of the trial judge was without evidentiary support, the trial judge abused his discretion in not conducting a hearing as to the truthfulness of Juror 164 in his answers to the voir dire.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition, this Court should grant the Petition for Writ of Certiorari, reverse the conviction of Adam Rowell and remand this matter for a new trial in which both blood samples are excluded from evidence.

June 20, 2022

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