STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TAMMY DIANNE BROWN,

APPELLANT

APPELLATE CASE NO. 2018-000988

Appeal from Clarendon County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 5914

PETITION FOR REHEARING

On May 25, 2022, this Court affirmed Petitioner's convictions, holding that the indictments against Petitioner were sufficient because they followed the language of the felony DUI statutes. This Court also found that the trial judge did not err in allowing the state to introduce the results of Petitioner's blood sample because the officers provided Petitioner with affirmative assistance in obtaining an independent blood test and because Petitioner did not request an independent blood sample. Finally, this Court held that S.C. Code § 56-5-2950 does not require the collection of a blood sample to be video recorded. State v. Brown, Op. No. 5914 (S.C. Ct. App. filed May 25, 2022) (Howard Adv. Sh. No. 18 at 99). Pursuant to Rule 221(a),

SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

Sufficiency of the Indictment

In holding that the trial judge did not err in refusing to quash the indictments against Petitioner, this Court found that the indictments sufficiently notified Petitioner of the elements of the offenses with which she was charged because they followed the language of the statutes. Brown at 109. However, this Court may have overlooked the fact that the indictments did not include one of the elements of the offenses – the underlying traffic violation that was necessary to form the basis for the felony DUIs.

This Court concluded that the trial judge correctly relied on State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004) which held that a felony DUI indictment was sufficient to *confer subject matter jurisdiction* on the circuit court. This Court did not address in its opinion that Campbell was not a challenge to the sufficiency of the indictment as a notice document but rather a challenge to subject matter jurisdiction. This critical distinction was highlighted by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), which overruled Campbell and noted that "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." Gentry, 363 S.C. at 101, 610 S.E.2d at 499. Therefore, while the trial judge here may have had subject matter jurisdiction over Petitioner's case, that is a separate and distinct question as to whether the indictments sufficiently notified Petitioner of the elements of the offenses for which she was being called to trial. See United States v. Cotton, 535 U.S. 625, 631 (2002) (holding that a defective indictment does not necessarily deprive a court of subject matter jurisdiction).

This Court also minimized the importance of the fact that the defendant in Campbell pled guilty. By pleading guilty, a defendant waives any challenge to the sufficiency of the indictment pursuant to Gentry which held that an objection to the sufficiency of the indictment must be made prior to the swearing of the jury. Gentry, 363 S.C. at 103, 610 S.E.2d at 500. This is very different from a challenge to subject matter jurisdiction which can be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001) (noting that "[i]t is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal . . ."), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

What this Court may have misapprehended about the importance of the context of a guilty plea is that in a guilty plea, the defendant has *admitted* to the elements of the offense which demonstrates the defendant's knowledge of the elements she is pleading guilty to. That is quite different from a defendant who proceeds to trial after having argued the indictment should be quashed because it does not sufficiently notify her of what the elements of the offense are.

Lastly, this Court may have misapprehended the Supreme Court's decision in State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986), which noted that in a prosecution for felony DUI, "the indictment must state with particularity the 'act forbidden by law or . . . duty imposed by law' which will be relied on by the State to support the felony DUI charge." Grampus, 288 S.C. at 397, 343 S.E.2d at 27 n.2. Although Grampus was decided on double jeopardy grounds, the Court still made the point that an indictment in a felony DUI case "must" include the underlying traffic offense the state intends to rely on. This requirement serves the end that a criminal defendant is apprised *of the elements of the offense and what she is called upon to answer at trial.* Because the indictments against Petitioner did not state with particularity the "act forbidden by law" on which the state would rely, Petitioner was not sufficiently notified of what

she would be required to defend at trial. Petitioner respectfully requests this Court grant rehearing.

Affirmative Assistance in Obtaining Independent Sample

In affirming the trial judge's decision to allow the state to introduce Petitioner's blood sample, this Court found that Petitioner did not request an independent sample and that she was provided affirmative assistance because she was at the hospital and advised of her right to obtain an independent sample.

As an initial matter, Petitioner did request an independent sample of her blood. Petitioner testified that when she was getting her blood drawn she told them she needed "[her] proof. . . . [Her] sample." R. 161, ll. 16 – 21. Petitioner said that she did not trust the hospital to provide an accurate test and that she needed her own. R. 162, ll. 8 – 13. Petitioner testified that neither of the officers helped her to get an independent test. R. 162, ll. 19 – 24. Furthermore, despite the fact that there was subsequent testimony that the check mark next to the box indicating that Petitioner had requested an independent sample was done in error, at the time the form was signed, the officers were on notice that Petitioner had requested an independent sample.

This Court opined that Petitioner was provided affirmative assistance because she was advised of her right to obtain an independent sample, she was present at a hospital, and that the officers did not prevent her from obtaining an independent sample. Brown at 113. This Court may have overlooked State v. Wickenhauser, 309 S.C. 377, 423 S.E.2d 344 (1992), where the Supreme Court held that the defendant was given reasonable assistance when the arresting officer transported him to the Lexington Medical Center to get a blood sample *and the sample was given to him.* Wickenhauser, 309 S.C. at 380, 423 S.E.2d at 346. The Supreme Court further held that it was a jury question as to whether law enforcement's affirmative assistance

was negated when the jail was unable to locate the blood sample which had been provided to the defendant. Id. Unlike the defendant in Wickenhauser, Petitioner here was not given a sample that she could obtain an independent test on. Petitioner respectfully requests this Court grant rehearing.

Video Recording of Blood Sample Collection

Finally, this Court determined that the trial judge did not err in allowing the state to introduce the results of Petitioner's blood sample even though the collection of the blood sample was not video recorded. In so finding, this Court held that the recently amended S.C. Code § 56-5-2950 (B) "in no way suggests the legislature intended to mandate videotaping of blood and urine tests." Brown at 116. Instead, this Court determined that the amended version of the statute "simply specifies the time frame when the implied consent rights must be provided." Id. (internal footnotes omitted). This Court pointed to the act which amended the statute and found that the act did not indicate it was creating a new requirement to video record the collection of blood or urine samples.

This Court may have overlooked the fact that the language of the new statute itself says clearly that blood and samples cannot be collected until video recording equipment is activated. Furthermore, this Court may have misapprehended the language from the act which stated, in part, that it was amending S.C. Code § 56-5-2950 "to revise the provisions that provide the procedures for administering breath tests *or obtaining samples*." Act No. 201, 2008 S.C. Acts 1644, 1648. Petitioner submits that the revision to the procedures for obtaining samples included the new requirement that the collection of the samples be video recorded.

"It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." Davenport v. City of Rock Hill, 315 S.C.

114, 117, 432 S.E.2d 451, 453 (1993). The primary rule of statutory construction is to give affect to the intention of the legislature. State v. Hercheck, 403 S.C. 597, 602, 743 S.E.2d 798, 800 (2013). The text of the statute itself is the best evidence of what the legislature intended. Id.

Here, the plain language of the statute requires that tests and samples which are intended to test a person's blood alcohol concentration may not be collected until video recording equipment is activated. This requirement was only added to the statute in 2009 and it is most likely that the South Carolina General Assembly added these words to mean exactly what they say.

Based upon the specific points overlooked and/or misapprehended by this Court in its opinion discussed above, Petitioner requests this Court to rehear the matter.

Respectfully Submitted,

ADAM SINCLAIR RUFFIN
Appellate Defender

This 9th day of June, 2022.

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SC Court of Appeals

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APPELLATE CASE NO. 2018-000988

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Tammy Dianne Brown, #376555, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 9th day of June, 2022.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

From:	Leverett, Scott
To:	"SC - MATTHEWS JONATHAN"
Cc:	Leigh Ann Stone; Ruffin, Adam
Subject:	Tammy Brown - Petition for Rehearing - Appellate Case No. 2018-000988
Date:	Thursday, June 9, 2022 2:57:00 PM
Attachments:	Tammy Brown - Petition for rehearing - Appellate Case No. 2018-000988.pdf AG Coverletter.pdf

Dear Mr. Matthews,

Attached please find a copy of the Petition for Rehearing in the above referenced case that is being filed today, June 9, 2022, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Adam Ruffin
Appellate Defense