STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Clarendon County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 5914 (S.C. Ct. App. Filed May 25, 2022)

THE STATE,

RESPONDENT,

V.

TAMMY DIANNE BROWN,

APPELLANT

APPELLATE CASE NO. 2018-000988

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 23, 2022.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in holding that the indictments against Petitioner for felony driving under the influence (DUI) resulting in death and great bodily injury were sufficient where they did not allege the particular traffic violation that the state was required to prove as an essential element of each offense?

2.

Whether the Court of Appeals erred in holding that Petitioner did not request an independent blood sample and that even if she did, the officers provided her with affirmative assistance as required by S.C. Code § 56-5-2950 (E), and therefore the results of the blood test were admissible against Petitioner where Petitioner requested an independent test due to her distrust of the hospital and the officers retained both blood samples that were collected from Petitioner which denied her the opportunity to obtain an independent test?

3.

Whether the Court of Appeals erred in holding that S.C. Code § 56-5-2950 (B) does not require the collection of a blood sample to be video recorded where this statute was amended in 2009 to state that blood samples cannot be obtained until video recording equipment is activated?

STATEMENT OF THE CASE

Petitioner was indicted by the Clarendon County grand jury for the offenses of felony DUI resulting in death and felony DUI resulting in great bodily injury. R. 710-711. Petitioner's trial was held before the Honorable R. Ferrell Cothran and a jury from May 14 – 18, 2018. Petitioner was represented by Charles Barr and the state was represented by Christopher Durant. R. 1.

The jury found Petitioner guilty as charged and the judge sentenced her to concurrent terms of imprisonment of fifteen years for the felony DUI resulting in death and twelve years for the felony DUI resulting in great bodily injury.

The Court of Appeals affirmed Petitioner's convictions on May 25, 2022. State v. Brown, Op. No. 5914 (S.C. Ct. App. filed May 25, 2022) (Howard Adv. Sh. No. 18 at 99). Petitioner filed a petition for rehearing on June 9, 2022. The Court of Appeals denied the petition for rehearing on June 23, 2022.

This petition for writ of certiorari to the Court of Appeals follows.

ARGUMENT

1.

The Court of Appeals erred in holding that the indictments against Petitioner for felony DUI resulting in death and great bodily injury were sufficient because they did not allege the particular traffic violation that the state was required to prove as an essential element of each offense.

Relevant Facts

Petitioner was involved in a fatal car accident where she hit a truck from behind while traveling east on S.C. Highway 261 between Paxville and Manning, S.C. R. 204, ll. 23 – 25; R. 466, l. 21 – 467, l. 5; R. 515, ll. 6 – 11. The driver of the truck was pronounced dead on the scene. R. 56, l. 17 – 57, l. 3. The passenger of the truck survived but with permanent disabilities. R. 195, l. 11 – 198, l. 24.

Prior to the jury being sworn, defense counsel moved to dismiss the indictments against Petitioner. R. 11, l. 25 – 12, l. 3. Counsel argued that the indictments failed to state with particularity what alleged act she had done that was forbidden by law which would form the basis for the state's case against her. R. 12, l. 3 – 13, l. 10. Counsel cited to State v. Grampus[1] which held that the defendant's right to be free from double jeopardy was violated when the state based its felony DUI prosecution on the same traffic violation for which the defendant had already been convicted of in magistrate court.

The assistant solicitor argued that the indictments were sufficient because they followed the language of the felony DUI statutes. R. 13, ll. 13 – 22. The assistant solicitor further argued that "it's certainly no secret that the law that [Petitioner] violated is speed." R. 13, ll. 22 – 24.

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[1] 288 S.C. 395, 343 S.E.2d 26 (1986) abrogated by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).

Defense counsel argued that Grampus supported his argument that if the state intended to rely on speed as the traffic violation to satisfy a necessary element of the offense of felony DUI, then the indictment must state that with particularity. R. 14, l. 12 – 15, l. 9. The trial judge denied Petitioner's motion to dismiss the indictment by relying on State v. Campbell.[2]

Discussion

The trial judge erred in denying Petitioner's motion to dismiss the indictments by improperly relying on Campbell. In Campbell, the defendant argued that the indictment *to which she pled guilty* was insufficient to confer subject matter jurisdiction on the Court. Campbell, 361 S.C. at 531, 605 S.E.2d at 577. Unlike the defendant in Campbell, the objection Petitioner made was to notice, not subject matter jurisdiction. The Court of Appeals did not address in its opinion the fact 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 Gentry, 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 was 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).

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[2] 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

Although Campbell held that an indictment for felony DUI was sufficient to confer subject matter jurisdiction on the circuit court even though it did not state with particularity the underlying traffic offense which the state intended to rely on in establishing an essential element of that offense, it did so only in the context of a guilty plea. Campbell, 361 S.C. at 533, 605 S.E.2d at 579. By pleading guilty, a defendant waives any challenge to the sufficiency of the indictment pursuant to Gentry, which holds 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 . . .").

Petitioner's case is distinguishable from Campbell because she did not plead guilty, and she objected to the sufficiency of the indictment prior to the swearing of the jury. Contrary to the trial judge's assertion that Campbell was directly on point, by not pleading guilty and challenging the sufficiency of the indictment, Petitioner in no way conceded this issue as was the case in Campbell. If a defendant pleads guilty on an indictment "it is clear she was aware of the nature of the charge against her." Campbell, 361 S.C. at 533, 605 S.E.2d at 579. 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.

In order to determine whether an indictment is sufficient, the court must determine, in part, whether the defendant was apprised of the elements of the offense and what she was called upon to answer at trial. Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500. The indictments against Petitioner read as follows:

> Count One – Felony Driving Under the Influence, Death Results: That in Clarendon County, South Carolina, on or about August 30, 2014, while driving a vehicle under the influence of alcohol, drugs or a combination of alcohol and drugs, the Defendant, Tammy Dianne Brown *did an act forbidden by law or neglected a duty imposed by law in the driving of said vehicle*; and such act proximately caused the death of Guillermo Lopez-Arenas . . .
>
> Count Two – Felony Driving Under the Influence, Great Bodily Injury Results: That in Clarendon County, South Carolina, on or about August 30, 2014 while driving a vehicle under the influence of alcohol, drugs or a combination of alcohol and drugs, the Defendant, Tammy Dianne Brown *did an act forbidden by law or neglected a duty imposed by law in the driving of said vehicle*; and such act proximately caused great bodily injury to Arturo Murrieta-Blas . . .

R. 710-711 (emphasis added). The emphasized language above did not notify Petitioner what underlying traffic offense she would be required to defend against at trial.

Defense counsel argued that in a prosecution for felony DUI, the state must charge in the body of the indictment what underlying traffic offense it intends to rely on in establishing that element of the offense in order to satisfy the notice requirement. Petitioner pointed to Grampus, 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." 288 S.C. at 397 n.2, 343 S.E.2d at 27 n.2.

Grampus was a case decided only on double jeopardy grounds because the defendant in that case did not challenge the sufficiency of the indictment. The Court still made the point, however, 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. Accordingly, Petitioner's convictions should be reversed because the trial court and the Court of Appeals erred in holding that the indictments against Petitioner were sufficient.

2.

The Court of Appeals erred in holding that Petitioner did not request an independent blood sample and that even if she did, the officers provided her with affirmative assistance as required by S.C. Code § 56-5-2950 (E), and therefore the results of the blood test were admissible against Petitioner because Petitioner requested an independent test due to her distrust of the hospital and the officers retained both blood samples that were collected from Petitioner which denied her the opportunity to obtain an independent test.

Relevant Facts

Petitioner moved to suppress the results of the blood tests and the trial judge held an in camera hearing. Jeffrey Minnix and his supervisor Paige Dubose, both troopers with the Highway Patrol, testified at the hearing. Petitioner also testified on her own behalf. Minnix admitted that he did not do anything to assist Petitioner in obtaining an independent test on her blood. R. 99, ll. 4 – 24. He also admitted that even though two blood samples were taken from Petitioner, neither of them was given to her. R. 100, l. 23 – 101, l. 8.

Dubose also admitted that she did "[n]othing" to affirmatively assist [Petitioner] in getting an independent test on her blood. R. 139, ll. 17 – 21. On the SLED blood collection report that was filled out regarding Petitioner's blood, there was a box checked that read: "A blood sample is requested by the subject for his/her own independent test." R. 702. Dubose claimed that Petitioner never requested an independent test and that she believed the check mark on the SLED blood collection report was a mistake. R. 140, ll. 4 – 25.

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.

Defense counsel moved to suppress the blood sample that was taken from Petitioner at the hospital based on law enforcement's failure to provide her with affirmative assistance in getting an independent test done on her blood as required by S.C. Code §56-5-2950(E). R. 171, l. 11 – 172, l. 19. Defense counsel argued that both Dubose and Minnix, who were present at the hospital with Petitioner after the car accident, were on notice that she wanted an independent sample because the box requesting an independent sample on the SLED blood collection report was checked. R. 172, ll. 1 – 9; R. 702. Counsel argued that the officers did nothing to assist Petitioner in getting an independent sample even though they were required to do so. R. 172, ll. 15 – 20.

The assistant solicitor argued that Petitioner failed to make a clear and unambiguous request for an independent test and that the check mark on the form indicating that Petitioner had requested an independent test was simply a mistake. R. 180, l. 8 – 181, l. 10. The assistant solicitor further argued that even if Petitioner was entitled to receive affirmative assistance in getting an independent test done on her blood, that the officers had given her such assistance because she was already at a hospital and that if the subject does not request the independent test to be performed by a particular person the default is for SLED to test it. R. 181, l. 11 – 182, l. 2. Petitioner's blood sample was in fact tested by SLED in this case. R. 182, ll. 1 – 3.

The trial judge ruled that law enforcement "complied with the statute as far as giving her substantial assistance" and denied Petitioner's motion to suppress the blood sample. R. 190, ll. 11 – 17.

Discussion

A person who submits to blood or breath tests under South Carolina's implied consent law has a right to have an independent test performed on their blood at their expense. S.C. Code §56-5-2950(B)(3). This statute further provides that:

> The arresting officer shall provide affirmative assistance to the person to contact a qualified person to conduct and obtain additional tests. Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED shall test the blood sample and provide the result to the person and to the arresting officer. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in a judicial or administrative proceeding.

S.C. Code §56-5-2950(E).

In State v. Wickenhauser, this 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.* 309 S.C. 377, 380, 423 S.E.2d 344, 346 (1992). This 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.

In State v. Knighton, the defendant submitted to a breathalyzer and then requested an independent blood test. 334 S.C. 125, 128, 512 S.E.2d 117, 118 (Ct. App. 1999). The arresting officer called a local hospital and was informed that a blood test would cost fifty-two dollars. Id. Knighton was also informed that he needed to have a family doctor order the test. Id. Knighton

did not have a family doctor or enough money to pay for the test and therefore did not get a blood test done. Id. This Court held that the officers were not required to obtain money or a doctor's order to authorize the defendant's blood test for him. Id. at 133, 512 S.E.2d at 121.

Petitioner testified that she requested a sample for an independent test because she did not trust the hospital to do an accurate test. R. 162, ll. 8 – 13. She further asserted that she was informed by the nurse drawing her blood that she would get her own sample. However, instead of giving Petitioner her own sample, the officers collected both of the blood samples that were taken from her and retained them for themselves.

The fact that Petitioner was already at the hospital is not dispositive because that is what §56-5-2950(E) requires *at a minimum.* Petitioner's request for an independent test was corroborated by the check mark on the SLED blood collection report. Furthermore, even though 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.

The officers' testimony that they believed the check mark was a mistake was pure conjecture and they never followed up with Petitioner to ask if she wanted her own sample done. Defense counsel argued to the lower court: "[the officers] both signed this report and they would have . . . if they read it, they would have had to see that [Petitioner] had requested an independent test." R. 172, ll. 4 – 6. Defense counsel continued: "[T]hey assisted [Petitioner] in reading it. So they can't come to court today and say, well, no, she never asked us." R. 172, ll. 14 – 16.

The officers should have ensured that Petitioner was provided her own sample to take to a qualified testing site of her choosing. Instead, they retained both vials of blood that were taken

from Petitioner and therefore denied her the right to an independent test. The trial judge and the Court of Appeals erred in finding that Minnix and Dubose complied with the statute in providing Petitioner with affirmative assistance when they retained both samples that were taken from her. The blood sample results should have been suppressed pursuant to S.C. Code §56-5-2950(E).

3.

The Court of Appeals erred in holding that S.C. Code § 56-5-2950 (B) does not require the collection of a blood sample to be video recorded because this statute was amended in 2009 to state that blood samples cannot be obtained until video recording equipment is activated.

Relevant Facts

Defense counsel objected to the admissibility of Petitioner's blood alcohol concentration. R. 408, l. 15 – 18. Counsel argued that S.C. Code § 56-5-2950 (B) required that any blood sample that is obtained by a suspect of felony DUI must be obtained on videotape. R. 409, l. 5 – 410, l. 19. Counsel specifically cited to the language in that section which provides that "no test may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure." R. 410, ll. 4 – 8. The trial judge responded that was not his interpretation of the statute and he had never seen a case where the blood draw itself was videotaped. R. 411, l. 23 – 412, l. 1.

The assistant solicitor argued that the language regarding video recording in § 56-5-2950 was referring to S.C. Code § 56-5-2953 which dealt only with video recording at the incident site and at the breath test site. R. 412, ll. 12 – 15. The assistant solicitor then argued that § 56-5-2953 has a number of exceptions to the video requirement including when the defendant needs emergency medical treatment. R. 412, ll. 15 – 20. The trial judge allowed the testimony about Petitioner's blood alcohol concentration over her objection. R. 417, l. 18 – 418, l. 2.

Discussion

S.C. Code § 56-5-2950 (A) provides in relevant part that:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. . . . Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

This statute also mandates that "[n]o tests may be administered or samples obtained unless, *upon activation of the video recording equipment and prior to the commencement of the testing procedure*, the person has been given a written copy of and verbally informed that: . . ." S.C. Code § 56-5-2950 (B) (emphasis added).

The emphasized language above was added to this statute on February 10, 2009. Up until that date, this section simply provided that "[n]o tests may be administered or samples obtained unless the person has been informed in writing that: . . ." S.C. Code § 56-5-2950 (A) (effective to February 9, 2009). Beginning in 2009, the General Assembly added language to this section of the statute to provide that no tests or samples could be obtained unless video recording equipment was activated prior to the commencement of the testing procedure.

"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.

The Court of Appeals 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, the Court of Appeals 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). The 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. However, the language from the act 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.

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.

Furthermore, the state's argument that the new language added to § 56-5-2950 (B) was meant only to refer to § 56-5-2953 belies the plain reading of the text. Nothing in §56-5-2950 makes a cross reference to § 56-5-2953. In fact, §56-5-2950 (B) which states that "*no tests may be administered or samples obtained,*" is referring to all tests and samples taken pursuant to the implied consent law. The language in § 56-5-2953, on the other hand, refers specifically to conduct at the incident site and breath tests only. There is no such limitation in the language of

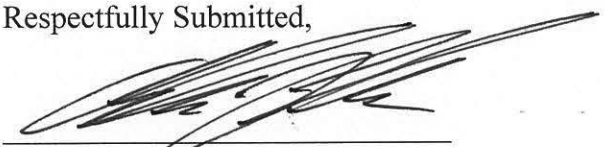
§56-5-2950 (B) and thus the implied consent statute cannot be read to be limited by the exceptions in § 56-5-2953, which deals only with the incident site and breath tests.

The Court of Appeals erred in affirming the trial judge's ruling allowing the state to introduce testimony regarding Petitioner's blood alcohol concentration because her blood sample was obtained without the officers activating video recording equipment to capture the collection of the samples. Consequently, Petitioner's conviction should be reversed and remanded for a new trial.

CONCLUSION

Based upon the foregoing argument, Petitioner respectfully requests that this Court grant her petition for writ of certiorari to the Court of Appeals to allow full briefing on the issues presented.

Respectfully Submitted,



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of July, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Clarendon County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 5914 (S.C. Ct. App. filed May 25, 2022)

THE STATE,

RESPONDENT,

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TAMMY DIANNE BROWN,

APPELLANT

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 Writ of Certiorari in this case has been served on William M. Blitch, Jr., 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; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 22nd day of July, 2022.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER