STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
The Honorable Thomas G. Cooper, Jr.

Case No.: 2009-GS-28-1164; 1171
Appellate Case No.: 2012-212391

State of South Carolina,

Respondent,

vs.

Donnie Thigpen, Jr..

Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes: S.C. Code Ann. §56-5-2946
S.C. Code Ann. §56-5-2950

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT IMPROPERLY ALLOWED THE INTRODUCTION OF EVIDENCE AND TESTIMONY OF THE DATAMASTER PROCESS AND VIDEO AFTER FINDING THAT THE TEST WAS GIVEN BEYOND THE STATUTORY TWO (2) HOUR LIMITATION.

II. WHETHER THE CIRCUIT COURT IMPROPERLY DENIED DEFENSE COUNSEL'S MOTION TO SUPRESS THE STATEMENT MADE BY THE APPELLANT.

STATEMENT OF THE CASE

On June 20, 2009, the Appellant was charged with the offenses of Felony DUI - Death (Indictment No.: 2009-GS-28-1164), Leaving the Scene – Death (Indictment No.: 2009-GS-28-1171 and Failure to Render Aid – Death, (Ticket No.:D881819 – Dismissed Not Indicted).

A jury was empanelled and the Appellant was tried by Jury on March 19-23, 2012 before the Honorable Thomas G. Cooper, Jr. The Appellant was represented by Alex Postic and Derek Chiarenza, Attorneys at Law. The State was represented by Brett Perry and Ron Moak, Deputy Solicitors.

The Appellant was found guilty of Leaving the Scene of an accident Death and Felony DUI – Death. He was sentenced to ten (10) years on each count to run concurrent. He was also Ordered to pay a fine in the amount of $10,000.00.

The Appellant filed a timely Notice of Appeal. This initial brief follows:

STATEMENT OF FACTS

On the early morning of June 20, 2009, a 1997 blue Jeep Cherokee was found in the brush off of Twenty-Five Mile Creek Road in Kershaw County. The vehicle was registered to the Appellant, Donnie Thigpen, Jr. The investigation of the Midlands M.A.I.T. team of the South Carolina Highway Patrol found that the vehicle had crossed the center line of the roadway and ran off the left side of the road hitting a tree. The vehicle came to rest upside down. The passenger side of the vehicle was severely damaged. The passenger of the vehicle was found deceased still buckled in his seat belt. The driver of the Jeep was not found at the scene.

Upon determining the registered owner of the vehicle the police went to the Appellant's house located approximately a quarter of a mile from the scene of the accident. Testimony was given by the arresting officers that upon arrival at the Appellant's home they spoke with the Appellant. He appeared to be intoxicated. The officers observed fine glass shards in his beard and hair. He also had a cut above his eye and appeared to have bruises on his body. Based upon their observations, he was placed under arrest and was read his Miranda rights at that time.

He was initially taken to the scene of the accident. In an attempt to remove what the officer thought was a blue paint chip lodged in his ear. After an unsuccessful attempt to gather the chip he was taken to the hospital for a blood draw and urine sample. The Blood was collected at 12:40 p.m. (Tra. p. 336) From there he was taken to the Kershaw County Detention Center.

Upon arrival at the Detention Center the Appellant was take to the DataMaster Room and a video recording was begun of this proceeding (Tra. p. 336). This video was admitted into evidence with objection. (Tra. p. 337) Testimony was presented by the DataMaster operator. The office was asked if the test was performed within two hours of the arrest at 11:29 the

morning of June 20, 2009. The officer testified that it was over the two hour period. The time of the DataMaster test was 1:42 p.m. The blood draw was within two (2) hours of the arrest. (Tra. p. 339)

Later that afternoon, at approximately 5:20 p.m. the Appellant was questioned by law enforcement officers. The Appellant was again given his Miranda rights. This interview was audio recorded and during this process Law enforcement asserts that the Appellant admitted to driving the car. This audio recording was played for the jury.

Members of the M.A.I.T. and other Law enforcement officers testified regarding reconstruction of the accident and that certain blood and DNA evidence was collected. DNA evidence was compared to a sample taken from the Applicant. A DNA profile was suitable for interpretation on three items of evidence. A cutting from the fabric headlines of the Jeep, back of the driver side air bag and from the front of the driver's side air bag. (Tra. p. 551)

The sample from the headliner and from the back of the driver side air bag matched the Appellant. The sample from the front of the airbag was from an unidentified male. (Tra. p. 551)

Testimony was presented by Defense witnesses that the Appellant was not driving the vehicle on the night in question. That his bruises and cuts came from a fight at a local bar and that the Appellant had a habit of lending out his car or giving the keys to someone else if he had too much to drink.

The Appellant testified at the trial. The Appellant stated that he wanted to drive his vehicle from the bar, Trackside, but was prevented from doing so. That the Victim drove him to his house and wanted to borrow his car. With Appellants permission the victim left with his car. The Appellant testified that he had no personal knowledge of what happened at the incident.

After closing arguments, the Judge charged the Jury in part regarding the statement made by the Appellant and the inference of under the influence by the use of chemical analysis of Appellant's blood

No exception was taken to the charge. The Jury began their deliberations at 1:03 p.m. A verdict was returned at 2:58 p.m.

ARGUMENT

I. WHETHER THE CIRCUIT COURT IMPROPERLY ALLOWED THE INTRODUCTION OF EVIDENCE AND TESTIMONY OF THE DATAMASTER PROCESS AND VIDEO AFTER FINDING THAT THE TEST WAS GIVEN BEYOND THE STATUTORY TWO (2) HOUR LIMITATION.

The Appellant was arrested at 11:29 a.m. Blood was drawn at 12:40 p.m. and a breath sample was taken at 1:42 p.m. (Tra. p. 339) The DataMaster reading was .19. (Tra. p. 78)

Pre-trial objection was made by Defense Counsel to Suppress the DataMaster reading. (Tra. p. 72) The Basis of the Motion was that §56-5-2946 South Carolina code of Laws, as amended, states that the sample must be taken within two hours of the arrest. In this case the sample was taken two hours and thirty six minutes after arrest. (Tra. p. 73) Counsel argued that the reading should be suppressed pursuant to §56-5-2950 and §56-5-2946 (Tra. p. 73).

The State responded that pursuant to §56-5-2946 and §56-5-2950 when the Appellant was charged with Felony DUI, he had no option but to submit to the blood draw (Tra. p. 80). The State conceded that the DataMaster test was outside of the two hour window as prescribed by law.

However, the State argued that even if the DataMaster result is not admitted for the purpose of the issue of under the influence, that they were entitled to use it as part of the toxicologist hypothesis that the Appellant's blood alcohol was in the process of being eliminated

and that the DataMaster video itself was admissible even if the results were suppressed (Tra. p. 78).

The Court relies upon the cases of State v. Long, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005) and State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005) in its analysis of Defense Counsel's objection. The Court concludes:

> "Now, although the court in Long and Cuevas doesn't say specifically that it incorporates the two hour requirement and the three hour requirement, it does say that the technical provisions of 2950 are applicable to 2946, so by the language of Long, Section 56-5-2950 prescribes the technical testing requirements, and incorporates and says that law enforcement must follow the guidelines of 2950 (A), which is the two hour --- amount other things, among other things, is the two hour requirement."
>
> "So I think because this breath test was taken in excess of the two hour requirement that the breath test reading, DataMaster reading, would not be admissible."

The Court grants the Motion to Suppress the evidence of the DataMaster reading. (Tra. p. 155). The Court further finds that if the State is going to use the DataMaster video, then the State is going to have to either redact it or stop it prior to evidence of the Appellant's blood level. In regards to the testimony of the toxicologist testimony, the court rules that the State can say that a test was given and can say that the level was less than the blood alcohol but cannot use the suppressed amount. (Tra. p. 156)

Upon arrival at the Kershaw County Detention Center, the Appellant was taken into the DataMaster Room. (Tra. p. 336) Counsel again made objection to DataMaster evidence being introduced and it was admitted over objection. (Tra. p. 337) The video was played to the Jury. (Tra. p. 337)

The complete process of giving a breath test was explained to the Jury as well as the conduct and appearance of the Appellant. (Pgs. 339-342). Additional testimony was given about

his statement that someone took his car on a joy ride and that he was running his fingers through his hair. The Officer makes reference to a blue paint chip noticed in his ear and alluding to the glass shards found in his hair earlier. (Pgs. 340-341)

Generally the admission or exclusion of evidence in general is within the sound discretion of the Trial Court Fields v. Regional Medical Center of Orangeburg, 363 SC 19, 609 SE2d 506 (2005). In this case the Court found that the results of the DataMaster should be excluded. But allowed testimony and evidence associated with the excluded test to be admitted. Including the video of the Appellant in the DataMaster Room. Given the testimony of the officers and DataMaster reading the Appellant was obviously intoxicated. That error allowed the State to back door the evidence they were prohibited from introducing given the Court's ruling.

In this case, the Judge's decision to allow the testimony and evidence (video) of the DataMaster process was clearly an error and produced prejudice to Appellant. This error would require a reversal of the Appellant's conviction.

II. WHETHER THE CIRCUIT COURT IMPROPERLY DENIED DEFENSE COUNSEL'S MOTION TO SUPRESS THE STATEMENT MADE BY THE APPELLANT.

The Appellant made an incriminating statement after arrest in the afternoon of June 20, 2009. Defense counsel made a pre-trial Motion to Suppress the Appellant's oral statement. (Tra. p. 85)

The Appellant was arrested at his home and at that point is read his Miranda rights. He denied involvement in the accident. However, based upon his appearance, he is placed under arrest. He is allowed to make a phone call and is taken to the hospital to give a blood sample at 12:40 p.m. His blood alcohol registers .21. He is then transported

to the Kershaw County Detention Center where he is given a breath test at 1:42 p.m. (Pg .339) with a DataMaster reading of .19. He is booked into the Detention Center. Later that afternoon he gives a statement that is audio recorded. In this statement he implicates himself in the incident. (Tra. p. 87) Although he was questioned about the incident in the DataMaster room. (Tra. p. 87) this is the only incriminating statement that he gives.

Just before the afternoon interrogation he is re-mirandized. At 6:00 p.m. the Appellant makes a statement confessing to driving and to leaving the scene. (Tra. p. 88)

At the initial arrest and reading of the Appellant's rights he had a blood alcohol level of almost .23. Defense counsel argued that the Appellant would be too intoxicated to understand his rights at that point, (Tra. p. 89) the point of his initial arrest. Counsel further argues that the Appellant would have still been intoxicated at the time of the 4:20 p.m. interrogation to voluntarily give his statement to law enforcement. In argument at trial, the State even opines that the Appellants blood alcohol level at the time of questioning could have been .10. (Tra. p. 706)

A Jackson v. Denno hearing was held to determine the voluntariness of the confession. Testimony was given that upon arriving at the home of the Appellant and speaking with him, that he physically appeared intoxicated. (Tra. p. 94)

That he was read his Miranda rights prior to being placed under arrest. (Tra. p. 96) At that point testimony was presented that the Appellant did not ask for an attorney and denied that he had any involvement in the incident. (Tra. p. 97-98) This was 11:29 a.m. (Tra. p. 104)

The Appellant was read his Miranda Rights for the second time before the interview the afternoon of the incident. This was between the hours of 5:20 p.m. and 6:40 p.m. (Tra. p. 128) Testimony was given by Officer Coats that:

> "(He) ultimately admitted he was driving.
>
> That he stated "I checked. He didn't have a pulse." And that "he took responsibility for what he had done that night". (Tra. p. 114)

The Court rules that:

> "Once Miranda rights are validly and voluntarily waived, the waiver continues until such time as the individual being questioned revokes the waiver or circumstances are such that his will is overborne and his capacity for self-determination is critically impaired.
>
> So it's ---the Miranda rights that are given continue throughout the interrogation. I don't think --- I mean, I think that's pretty well established law. You don't have to give them over and over again during the course of an interrogation..."

The question presented is whether the Appellant's statement was made voluntarily even in the afternoon given his level of intoxication.

The objection to the introduction to the statement was made again during officer Borowski's testimony (Tra. p. 322) and During the testimony of Officer Coates (Tra. p. 429). The recording of the Appellant's interview was played for the Jury (Tra. p. 433-434).

The Appellant testified that during the afternoon interrogation that he didn't remember being read his rights (Tra. p. 789) That he "felt threatened. I was drunk, confused, scared." (Tra. p. 790) The Appellant stated he was told that he was driving the car and had killed his friend (Tra. p. 790) and that ultimately he had no memory of being in the vehicle. (Tra. p. 790-791)

Testimony of the State's witness, Robert Sears, forensic toxicologist, indicated that:

> "Research that's being done in the field of alcohol toxicology has shown that everyone is impaired, that is their opportunity or ability to operate a motor vehicle is appreciably and materially impaired at levels exceeding .05."

If the Appellant's ability to drive was impaired at a blood alcohol level of .05, then surely his ability to make a voluntary statement would have been impaired with a blood alcohol level of around .10.

The process for determining whether a statement is voluntary, and thus admissible, is bifurcated: it involves determinations by both the Judge and the Jury. First, the trial Judge must conduct an evidentiary hearing, outside the presence of the Jury, where the State must show the confession was voluntarily made by a preponderance of the evidence.

Under Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, a defendant is entitled to a "reliable determination as to the voluntariness of his confession by a tribunal other than the Jury charged with deciding his guilt or innocence.

The State bears the burden of showing the confession was voluntary. Von Dohlen, 322 S.C. 243, 471 S.E. 2d 695.

During the Jackson v. Denno hearing, the trial Judge must examine the totality of the circumstances surrounding the confession and determine whether the State has carried its burden of showing the confession was voluntarily made.

Once the trial Judge determines that the confession is admissible, it is up to the Jury to ultimately determine whether the confession was voluntarily made.

In the Court's charge to the Jury, the Judge addresses the issue of the statement. He charges that he has determined that the statement was admissible but instructs the Jury that they must make the ultimate decision of whether or not the Appellant made the statement (Tra. p. 927).

The voluntariness of a confession is determined from an examination of the totality of the circumstances. Von Dohlen. The totality of the circumstances in this case show that he was intoxicated

at the time of the statement. The statement was not voluntarily given, nor were his rights voluntarily waived.

That the Court abused its discretion in allowing the introduction of the statement.

That the Appellant's conviction should be reversed.

CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,

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August 16,, 2013

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In The Court of Appeals

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Case No.: 2009-GS-28-1164; 1171
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DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

The Respondent designates that the following matter be included in the Record on Appeal pursuant to Rule 208, SCACR.

1. Transcript of Record, State of South Carolina v. Donnie Thigpen, Jr. dated March 19-23, 2012 in its entirety.
2. Indictments
3. Sentencing sheets.
4. Recorded statement of Appellant
5. Video Recording of DataMaster

I certify that this designation contains no matter which is irrelevant to this Appeal.

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August 16, 2013

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No.: 2012-212391

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DONNIE ROLAND THIGPEN,

APPELLANT.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for Appellant in the above action, hereby certify that I placed in the United States Mail, a copy of an Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal with postage prepaid, and the return address clearly shown on said envelope to Salley Elliott, Esq. at:

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August 16, 2013