ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEVEN KRANENDONK,

APPELLANT

APPELLATE CASE NO. 2012-210207

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

The issue of whether evidence of appellant's blood alcohol content should have been excluded is preserved for appeal.

The State contends that the most hotly contested issue of this five-day trial is unpreserved. The State contends that appellant waived this issue by failing to make a contemporaneous objection. The State's contention is without merit and the Court should consider the merits of this important and interesting issue.

Appellant moved *in limine* to exclude evidence of his blood alcohol content ("BAC"). Two police officers testified *in camera* regarding the blood draw. The first officer, Kevin Roosen ("Roosen"), testified that he performed a field sobriety test on Kranendonk and that Kranendonk passed. R. 19, l. 18 – 22, l. 20. Roosen did not charge Kranendonk with any offense, did not place him under arrest, and did not even given Kranendonk the DNR equivalent of a traffic ticket. R. 26, ll. 15 – 23.

The second officer to testify *in camera* was DNR officer Rhett Bickley ("Bickley"). Bickley **admitted** that he did not have probable cause to seize Kranendonk's blood. R. 49, l. 15 – 51, l. 2. After taking the matter under advisement for the evening recess, the trial judge then *sua sponte* recalled Officer Bickley and rehabilitated his testimony in favor of the State. R. 99, ll. 1 – 3. The trial judge then ruled the BAC test results were admissible. R. 107, ll. 20 – 22.

"[W]hen a trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection." State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009). In Wiles, the Supreme Court reversed this Court's holding that an issue was unpreserved for failure to make a contemporaneous objection. Id. at 157, 679 S.E.2d at 175. The evidence in Wiles "was not immediately introduced after the motion *in limine*." Id. Nonetheless, in Wiles,

the trial judge's actions and the circumstances of the trial clearly indicated the *in limine* ruling was final. Id. Among these circumstances were the trial judge's comments and the fact that the State referenced the evidence in its opening statement. Id.

Just as in Wiles, the circumstances of this case show that the trial judge's ruling was final. The trial judge himself recalled a witness who testified favorably for appellant in order to lay a foundation for admitting the BAC evidence. R. 99, ll. 1 – 3. The solicitor told the jury in her opening statement that Kranendonk's BAC level was .11. R. 111, ll. 10 – 14. Under these circumstances, it seems frivolous to argue that the trial judge's ruling was subject to change.

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The State's preservation argument hinges on the fact that when Exhibits 52 and 53 were introduced into evidence, the following is printed in the court reporter's transcript:

> THE COURT: Over the defense objection; is that correct?
>
> (Pause).
>
> MR. HARVEY: No objection, Your Honor.[1]

R. 423, ll. 12 – 15. Relying on this one line to exclude from appellate review the central issue in the case amounts to a game of "gotcha." Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring). In Atlantic Coast

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[1] Hopefully, this case presents the judiciary with the opportunity to revisit the logic behind Rule 607(i) of the Rules Governing the Administration of the Courts. Rule 607(i) explains when a court reporter must retain recordings of a proceeding. Under this rule, the tapes of all proceedings, including many of which will never be transcribed or be subject to review by any appellate court, must be retained for five years. However, recordings of proceedings which are transcribed are allowed to be destroyed after thirty days. This logic is perverse. It guarantees the destruction of the most important recordings while mandating the preservation of the least important recordings. The idea that transcripts will be reviewed for errors within thirty days is a fiction and not based in practice.

Appellant's case shows the folly of this rule. "No objection" by trial counsel is almost certainly a transcription error. In all likelihood, he said "Over objection," which sounds similar. Upon reading this portion of the transcript, appellate counsel immediately contacted trial counsel, who was shocked and horrified to learn what the transcript said. Trial counsel was Jonathan Harvey, who is a well-respected trial lawyer and former solicitor. Appellate counsel then contacted both court reporters in an attempt to hear the original recordings, but they had been destroyed pursuant to Rule 607(i). With the advent of new technology that allows for the digital storage of recordings, it seems the rationale behind this rule—preservation of physical storage space—is gone. It makes far more sense to have a single five-year retention requirement whether a proceeding is transcribed or not. If the recordings in this case had been preserved, then perhaps counsel for both sides could have agreed on the record instead of wasting this Court's time with a preservation challenge.

The other danger presented by this likely transcription error is that it could leave Kranendonk without a remedy. The usual remedy for dealing with trial counsel's failure to preserve an issue for appeal is PCR. In this case, trial counsel will testify that he believed he did lodge a contemporaneous objection. A PCR court could conceivably find that trial counsel did not perform deficiently even if this Court rules the error is not preserved.

Builders, Chief Justice Toal eloquently explained the purpose of our State's error-preservation rules:

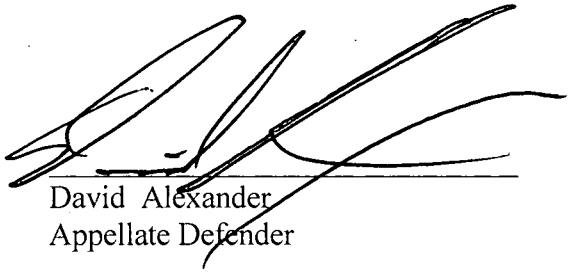
> In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. To be clear, I do not discount the importance of our issue preservation rules. As an appellate court, we sit to review decisions of lower courts for error. As such, "it is axiomatic that an issue cannot be raised for the first time on appeal." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). **However, I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients.** This practice ignores the fact that behind every party name in the caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. **In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.**

Id. (emphasis added). The issue of the admissibility of Kranendonk's BAC was clearly raised to and ruled on by the trial court. If the Court refuses to reach this issue, then it is condoning the State's game of "gotcha" and hobbling its own power to review this important issue. Instead, the Court should follow the reasoning of the Chief Justice and interpret the record of this case as a whole. The issue of appellant's BAC was extensively argued and consider by the trial court and therefore is ripe for appellate review.

CONCLUSION

For the foregoing reasons, the Court should ignore the State's arguments concerning procedural bars, reach the merits of both issues in this case, and reverse.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2013.

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THE STATE,

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STEVEN KRANENDONK,

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Appellate Case No. 2012-210207

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31ST day of October, 2013.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

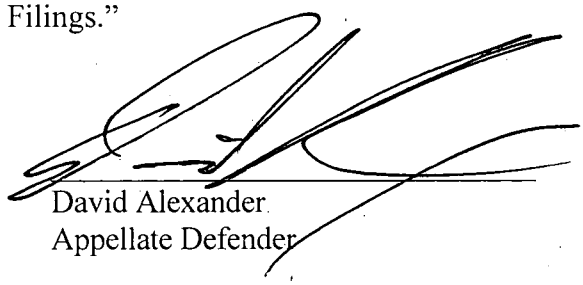
SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 31, 2013



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