STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWN BARRETT,

APPELLANT

APPELLATE CASE NO. 2013-002085

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in failing to direct a verdict of acquittal on the charge of driving under the influence where the prosecution failed to present any direct evidence or substantial circumstantial evidence that Appellant was driving an automobile while under the influence of alcohol where Appellant was found unconscious in the backseat.

STATEMENT OF THE CASE

On January 10, 2012, the Oconee County Grand Jury indicated Appellant for driving under the influence, less than 0.10, second offense in violation of S.C. Code Ann. § 56-5-2930(A) for an incident alleging occurring on September 11, 2011. R. 187. The prosecution, represented by Blair L. Stoudemire, called the case for trial on September 17, 2013 before the Honorable Alexander S. Macaulay and a jury. R. Daniel Day represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 167, line 20 – Tr. 168, line 1. Judge Macaulay sentenced Appellant to one year imprisonment and a fine of $3,100 suspended upon the service of seven days' imprisonment and the payment of a fine in the amount of $1,100 and probation for five years. R. 179, lines 13-19; R. 189.

Appellant filed a timely notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to direct a verdict of acquittal on the charge of driving under the influence where the prosecution failed to present any direct evidence or substantial circumstantial evidence that Appellant was driving an automobile while under the influence of alcohol where Appellant was found unconscious in the backseat.

Relevant facts

Between 10 p.m. and 10:15 p.m. on September 11, 2011, Deputy Adam Poore with the Oconee County Sheriff's Office responded to a call regarding a car in a ditch. R. 47, line 22 – R. 49, line 11; R. 53, lines 10-16. Poore found the car in the ditch, the engine not running, and driver's seat empty. R. 49, lines 19-22; R. 54, lines 2-3. However, he found a female unconscious in the backseat. He was unable to rouse her, but she did not appear to be injured. R. 49, line 22 – R. 50, line 8.[1] Poore claimed a purse was found in the front seat. R. 51, lines 23-25. After EMS arrived, the female occupant regained consciousness. Poore claimed her speech was slurred and there was a "strong odor of alcohol" about her. R. 52, lines 5-23. Poore further claimed that slurred speech indicated intoxication to him. R. 52, line 24 – R. 53, line 3.

Michael Taylor, a trooper with the Highway Patrol, arrived on the scene around 10:30 p.m. R. 56, lines 14 – 16; R. 57, lines 16-18; R. 58, lines 2-12.[2] Taylor observed a SUV nose down in a ditch with its left rear tire in the air and the key in the ignition. R. 58, lines 13-21; R. 101, lines 15-17. The only person in the car at that time was

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[1] Deputy Poore did not identify Appellant as the person he found in the backseat and was unable to remember the occupant's name at the time of the trial. R. 52, lines 1-2.

[2] Trooper Taylor's car was equipped with video capabilities. He began video recording the encounter upon his arrival. The video was made an exhibit at trial and is on file with this Court. R. 95, lines 7-9; R. 96, line 1 – R. 97, line 21.

Appellant. Taylor identified her after finding her purse on the front passenger's seat. Taylor also identified the SUV as being registered to Appellant. R. 58, line 25 – R. 59, line 15. Taylor claimed that the "back seats [were] fixed almost like a bed." He further claimed the driver's seat was slightly reclined. Although he used the term "slightly" to describe the reclined position, he stated that it was not "in a position where someone would normally drive a vehicle." R. 60, lines 4-10. He elaborated on this point: "It was not all the way up against the steering wheel like as far as, as far forward as the seat would go. It was slightly back, not all the way back to the full rear. It was somewhere in between, a little bit, a little bit closer to the steering wheel, but, like I said, not all the way, not all the way up to the full forward position." R. 61, lines 1-8.

On the passenger side of the SUV, Taylor "immediately" smelled alcohol and vomit. The odor was so strong, "it just about took [his] breath." R. 61, lines 17-23. He found Appellant lying in the backseat with her head toward the passenger door. R. 61, line 25 – R. 62, line 1. According to Taylor, Appellant was revived only "momentarily" by EMS as she was "in and out" of consciousness. R. 63, line 25 – R. 64, line 4. Appellant was unaware of where she was. Tr. 64, lines 5-15. In fact, Taylor testified that Appellant's condition was so bad that he did not ask her to perform field sobriety tests for safety concerns and she was unable to sign the advisement of implied consent rights and notice of suspension. Tr. 67, lines 1-14; Tr. 89, line 19 – Tr. 90, line 2; Tr. 93, line 20 – Tr. 94, line 13; R. 185 (state's exhibit #2); R. 186 (state's exhibit #3).[3]

During this swings in the pendulum between consciousness and unconsciousness, Appellant admitted to drinking alcohol that day, but denied driving the SUV. When

[3] At the hospital, Appellant refused a blood test. R. 93, lines 15-16.

questioned by Taylor on this point, she stated that someone else – Casey or Corey- had been driving. R. 64, line 21 – R. 65, line 6. Appellant told Taylor that someone named Casey or Corey drove the car into the ditch, then called a friend who picked him up, and left Appellant there. Appellant also stated that someone had run them off the road. R. 65, line 18 – R. 66, line 3. However, Taylor claimed he saw no one else at or around the scene. R. 66, lines 4-6. Taylor was forced to admit that Appellant informed him that she had been at the Tiki Hut in Seneca earlier that evening and that he conducted no investigation to determine if Appellant had left with anyone named Casey or Corey or if any witnesses saw Appellant driving. R. 104, line 25 – R. 106, line 2.

Next, Taylor opined that Appellant "was absolutely under the influence of alcohol." R. 99, lines 19-25. He also opined that Appellant appeared to be "impaired to the point that she was materially and appreciably impaired that would prevent her from being able to operate a motor vehicle." He also "thought" she was impaired to the point that this was a "driving under the influence situation." R. 66, lines 10-25. Taylor opined that "[t]he positioning of the car was totally inconsistent ... with a vehicle being ran off the road." R. 101, lines 7-14. Taylor charged Appellant based on "[t]he totality of the circumstances," including his identification of her as the owner of the car, the seat position, and the alleged "inconsistencies in the stories." R. 100, lines 17-25.

At the conclusion of the prosecution's case, Appellant moved for a directed verdict based upon a failure of the prosecution to present evidence "to meet the threshold required to prove all the elements of the crime charged." As explained, the prosecution was unable to present evidence to place Appellant behind the while of the car at the particular time in which the police claimed the crime was committed. R. 121, line 19 –

R. 122, line 1; R. 123, lines 1-8. The trial judge denied the motion, finding the established facts, including Appellant being found in the car, Appellant's ownership of the car, and her purse being found in the front passenger's seat, created a question of whether Appellant was driving the automobile. R. 124, line 3 – R. 125, line 10.

Discussion

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon

facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

South Carolina law provides that a person who drives a motor vehicle within this State while under the influence of alcohol and/or drugs to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired is guilty of operating a motor vehicle while under the influence of alcohol or drugs. S.C. Code Ann. § 56-5-2930(A). Our appellate courts have held that the corpus delicti of DUI based upon alcohol is (1) driving a motor vehicle; (2) within this State; and (3) while under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired. State v. Russell, 345 S.C. 128, 134, 546 S.E.2d 202, 205 (Ct. App. 2001); see also State v. Osborne, 335 S.C. 172, 180, 516 S.E.2d 201, 205 (1999). This Court held "[a]ll that the first element requires is that the state sufficiently prove that someone drove the automobile." City of Easley v. Portman, 327 S.C. 593, 596, 490 S.E.2d 613, 615 (Ct. App. 1997)(emphasis in original).

In State v. Russell, 345 S.C. 128, 133, 546 S.E.2d 202, 205 (Ct. App. 2001), Russell challenged the introduction of his alleged admissions to driving the vehicle based upon a lack of corroboration where the primary issue was whether Russell was the driver. A passerby observed Russell's car in the ditch on the side of the road. When the passerby stopped to offer help, Russell jumped out of the backseat. No one else was present. The passerby claimed Russell initially said he was driving, but later denied driving. Id. at 131, 546 S.E.2d at 204. When the police arrived, Russell initially said he was driving the car, but later denied that he had been driving. Id. This Court found that sufficient independent evidence was presented supporting the trustworthiness of the Russell's

statements that he had been driving the car, including Russell's ownership of the car, Russell as the only occupant of the car when the passerby arrived, the presence of the keys in his jacket pocket, and the warmth of the car's hood, to allow introduction of the statements into evidence. Id. at 133, 546 S.E.2d at 205.

In another case, this Court affirmed the denial of a directed verdict where the defendant was at the scene of a car accident in an apparent intoxicated state, smelled of alcohol, and failed the Breathalyzer. State v. McCombs, 335 S.C. 123, 127, 515 S.E.2d 547, 549 (Ct. App. 1999). While patrolling a residential area, a police officer heard glass shattering. Shortly thereafter, he found McCombs' truck sitting crossways in a street having hit a parked car. No one was in the driver's seat. McCombs was standing outside the driver's door, and two injured passengers were in the truck. The officer observed that McCombs had bloodshot eyes, slurred speech, and smelled of alcohol. Id. at 125-26, 515 S.E.2d at 548. Although no witnesses testified to seeing McCombs driving his truck that night, this Court held the prosecution presented enough circumstantial evidence independent of McComb's statements to create an issue of fact for the jury. Id. at 127, 515 S.E.2d at 549.

In State v. Smith, 328 S.C. 622, 625-626, 493 S.E.2d 506, 508-509 (Ct. App. 1997), this Court held the state presented sufficient evidence, other than Smith's own statements, establishing corpus delicti of DUI when two individuals present at the scene of the single car accident told police that Smith was driving at the time of the wreck.

This Court found sufficient evidence of corpus delicti of DUI where the automobile had left the road and rested against a tree, an officer testified that the manner in which the automobile left the road indicated the driver had been impaired, the

defendant rested his head against the automobile, the defendant smelled of alcohol and slurred his speech, and the officer believed the defendant was under the influence of alcohol. City of Easley v. Portman, 327 S.C. 593, 596-597, 490 S.E.2d 613, 615 (Ct. App. 1997). Therefore, this Court concluded the admission of the defendant's statement that he had been driving the automobile and was drunk was not in error. Id. at 597, 490 S.E.2d at 615.

The South Carolina Supreme Court affirmed the denial of a directed verdict where the uncontradicted evidence presented was that the defendant was found alone on the passenger side of a wrecked car, which had gone down an embankment on the right side of the highway, a passerby, who arrived fifteen minutes after the accident, testified the defendant smelled of alcohol and appeared to be under the influence, the defendant was rambling at the hospital, but admitted to driving the car at the time of the accident, and an open bottle of an alcoholic beverage was found in the automobile. State v. Gilliam, 270 S.C. 345, 347, 242 S.E.2d 410, 411 (1978).

This Court found sufficient circumstantial evidence to submit the case to the jury where the defendant was found at the scene where his car had been involved in a wreck, the defendant smelled like alcohol, failed field sobriety tests, appeared to be intoxicated, and blew a 0.21 on the Breathalyzer. State v. Townsend, 321 S.C. 55, 58, 467 S.E.2d 138, 140 (Ct. App. 1995).

In Boyleston v. Baxley, 243 S.C. 281, 283, 133 S.E.2d 796, 796 (1963), the civil case cited by the trial judge in rendering his directed verdict ruling, the South Carolina Supreme Court noted that there was no direct testimony that the decedent was driving at the time the car went out of control, but held there was evidence to support such a

conclusion. Not only did the car belong to the decedent's wife, but witnesses saw the decedent driving and a passenger leaving a gas station about three miles from the scene. Another witness saw the decedent about a mile from the scene and identified the decedent as the driver. Several witnesses testified they had not known the passenger to drive a car in over thirty years. According to the Court, this "took the question of which occupant was the driver out of the realm of conjecture and into the field of legitimate inference from established facts." Id. at 283-284, 133 S.E.2d at 796-797 (internal citations omitted).

The prosecution failed to present substantial circumstantial evidence that Appellant was driving an automobile while under the influence of alcohol and/or drugs to the extent that her faculties to drive the automobile were materially and appreciably impaired. The evidence showed Appellant was found in the backseat of the automobile with the keys remaining in the ignition. There was no evidence that Appellant had been driving the car in an impaired state. The officers conducted no investigation to determine if anyone saw Appellant or anyone else in the driver's seat of the car shortly before the call to dispatch or at any point that day. Although the car was in a ditch, there was no evidence to suggest when the car had been driven into that position. In fact, the engine was not running when police arrived. Neither officer testified to having touched the hood to determine its warmth or to have engaged in any investigation concerning how or when the car arrived on that road and in that position.

CONCLUSION

Appellant respectfully requests this Court direct a verdict of acquittal in her favor on the charge of driving under the influence.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of June, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWN BARRETT,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shawn Ashley Barrett states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Alexander S. Macaulay, which was held on September 18, 2013, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Shawn Ashley Barrett.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of June, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Alexander S. Macaulay, Circuit Court Judge

THE STATE,

RESPONDENT,

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript dated September 17 & 18, 2013;
(2) State's Exhibit #2;
(3) State's Exhibit #3;
(4) True–billed indictment;
(5) Sentence sheet

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

June 5, 2014

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 5, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

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THE STATE,

RESPONDENT,

V.

SHAWN BARRETT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Shawn Ashley Barrett, at 304 West North Second Street, Seneca, SC 29678, this 5th day of June, 2014.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of June, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .