THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2013-CP-26-0006943

The State of South Carolina, Respondent,

v.

Kylie Lauren Nielson, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN AFFIRMING THE LOWER COURT'S RULING FAILING TO GRANT CONTINUANCE TO APPELLANT?

2. DID THE TRIAL COURT ERR IN AFFIRMING THE LOWER COURT'S RULING REQUIRING THE STATE TO PROVIDE COMPLETE VIDEO TAPING OF THE APPELLANTS TRAFFIC STOP?

3. DID THE TRIAL COURT ERR IN AFFIRMING THE LOWER COURT'S RULING ALLOWING THE CASE TO GO FORWARD WITHOUT A SWORN AFFIDAVIT BY THE ARRESTING OFFICER EXPLAINING WHY THE APPELLANT WAS NOT VIDEO TAPED THROUGHOUT HER TRAFFIC STOP.

4. DID THE TRIAL COURT ERR IN AFFIRMING THE LOWER COURT'S RULING ALLOWING XANAX BE INTRODUCED INTO TESTIMONY?

STATEMENT OF THE CASE

The above named appellant, Kylie Nilson, by and through her attorney, Greg McCollum, is appealing her October 8, 2013 jury trial in absentia conviction, following her December 4, 2011 arrest under the State's Driving With an Unlawful Alcohol Concentration statute. That conviction was upheld by Horry County Circuit Court Judge, Benjamin H. Culberson on March 14, 2014.

FACTS

On December 4, 2014 at approximately 2:15 am Ms. Nilson was detained by Trooper Wilkes, an off-duty state trooper who was returning from a family emergency when he observed Ms. Nilson driving erratically. After following Nilson for ¼ - ½ mile, Trooper Wilkes initiated his blue light, without manually starting his video recording equipment. He then pulled appellant over to the side of Postal Way Road. Trooper Wilkes approached the vehicle and determined Ms. Nilson may be under the influence of alcohol. Trooper Wilkes then returned to his police vehicle and called dispatch who then summoned an on-duty officer, Trooper Weldon. After dispatch called Trooper Weldon and he responded, he initiated his blue light which automatically began his video recording equipment on his patrol car. Testimony at trial did not determine when Trooper Weldon turned on the video camera, only that he did so en route to the scene of Trooper Wilkes car stop. Once the recording began, it took two and a half minutes before Weldon parked behind Nilson's stopped vehicle. When Trooper Weldon arrived, his first

question to Wilkes was whether a recording had been made. It appears from the roadside video, which is garbled to some degree, that Wilkes responded, "trying to get the button to work". Returning from a personal trip in his marked highway patrol car, Trooper Wilkes observed a vehicle driven by Appellant Kylie Nilson and decided to pull the car over for a traffic stop. The vehicle being observed was not videotaped as it drove in front of Trooper Welden. The activation of the blue lights and stop were not video recorded. The approach to the vehicle by Trooper Weldon was not videotaped, the conversation between Ms. Nilson and Trooper Weldon was not video recorded, nor was the taking of Ms. Nilson's driver's license, nor the wait for an on–duty trooper to arrive.

Wilkes, a 15 year veteran, testified his video equipment was in working order. No video of the stop was provided to the defense and both troopers testified no recording was made until Trooper Weldon began recording his route to Ms. Nilson's traffic stop.

No sworn affidavit explaining why no video had been made was provided to the defense.

During observation at the J. Reuben Long Detention Center, while waiting to take the breath test, Ms. Nilson admitted she had taken a Xanax. This was recorded and allowed into evidence at trial.

ARGUMENTS

I. BECAUSE APPELLANT HAD NOT RECEIVED PROPER NOTICE BY THE COURT AND WAS NOT PRESENT FOR TRIAL THE TRIAL COURT ERRED BY NOT GRANTING A CONTINUANCE.

The defense requested a continuance based upon the discovery that the appellant had not been properly notified by counsel. Counsel telephoned appellant the day prior to remind her of her trial and learned she had not received notice either from the defense counsel's office or the Court and that she had moved to California and would be unable to attend her trial the following day. Counsel apologized to the Court and explained that his office was in transition and that both of the legal secretaries hired in his firm had been replaced the previous month. Furthermore, Counsel stated that Kylie Nilson had not received any notice served by the Court but relied on counsel's office to advise her of her trial date.

Appellant acknowledges that "the authority of the Court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases," Williams v. Bordon's Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). Appellant is not sure the Court was aware of the number of times the case had been "continued" by the State. Because Ms. Nilson's case was, for whatever reason, missing from the Solicitor's docket which is provided to the Judge at the respective roster meetings, Ms. Nilson's case was originally scheduled for jury trial on July 18, 2012. Nine times during the prosecution of her case, August, September, October, November, December 2012 as well as February, March, April, May, and June of 2013 Ms. Nilson's case was not on the court trial roster and was not set for trial during those terms of court. Ms. Nilson was present in Court for trial July 18, 2012; August 15, 2012;

and January 7, 2013; all three (3) were continued by the State. The two (2) continuances granted the defense were a result of defense counsel's unavailability to attend Magistrate's Court due to Court obligations in General Sessions Court on both the August 8, 2013 trial date and the August 13, 2013 roster meeting. A trial was never scheduled for the September term.

At issue, which Appellant believes is significant, are the occurrences or practice where cases are not scheduled for trial because it is inconvenient for the State to go forward. As in this case, because the Appellant was charged with the offense of Driving With an Unlawful Alcohol Concentration, it was necessary for the State to present an expert witness from the South Carolina Law Enforcement Division (SLED) to establish that the DataMaster machine was working properly. If a witness is unavailable to the State, the State has been allowed to exercise an option of not setting the case for trial, which is done by taking the defendant's name off the jury trial roster. The court roster is maintained by the Solicitor's office and provided to the judge. The Court is not asked to rule on a continuance motion because it is not aware that any case was omitted from the roster. These instances where the case does not appear on the court trial roster, the defense believes, are continuances allowed to be unilaterally done by the State without the Court's involvement.

Consequently, as a result of the prosecution's actions from the September 15, 2012 trial date until the June 2013 roster, Ms. Nilson was not listed on the roster or called for trial but one time, that being January 7, 2013 which was the State's third (3rd) continuance. For a period of nine (9) months her case was not listed on the Solicitor's jury trial docket and therefore, it was not continued by the Court. Ms. Nilson's case was, de facto, continued by the Solicitor's office without the Courts involvement.

While this activity may not have been apparent to the Court, it is a normal pattern of calling cases to trial within Horry County and throughout South Carolina. It flows from the solicitor's control of the criminal docket. This practice allows the State to continue a case without penalty or Court supervision or intervention. As the Court is aware, Section 1-7-330 S.C. Code of Laws, 1976 (as amended), which vested "control of the criminal docket in the circuit solicitor" was ruled unconstitutional in State vs. Langford, 235 S.E.2d 471 (S.C. 2012). Langford specifically took the docket from the solicitor's control confirming it "violated the separation of powers doctrine . . . ." and Section 1-7-330 was ruled unconstitutional by the South Carolina Supreme Court.

It appears to this appellant that the Horry County Solicitor is, and continues to be, in control of the Horry County Magistrate's docket. The solicitor's agent not only chooses which case to prosecute but also chooses any case to continue without the involvement of the Judge or any legislative authority.

Secondly, the Court's reliance on Chief Justice Toal's Order 2011-03-21-27 regarding Disposition of Criminal Summary Court Cases dated February 14, 2011, specifying that no case shall be continued which is older than one year appears to be erroneous.

The order actually provides that any case in which a jury trial has been requested shall be held, "within one-hundred twenty (120) days of the return of the charging paper to the Court." Ms. Nilson's initial jury trial roster meeting was scheduled June 19, 2012, which was one hundred sixty (160) days after her January 10, 2012 original bench trial date. Despite Chief Justice Toal's order, it took 160 days for Appellant's case to appear on the docket. The trial judge was not aware that the case was pending for jury trial until after the time restrictions

ordered by Chief Justice Toal had lapsed.

II. BECAUSE OF THE STATE'S FAILURE TO VIDEO TAPE AS REQURIED UNDER SECTION 56-5-2953, THE TRIAL COURT ERRED BY NOT DISMISSING THE CASE.

Trooper Wilkes, a fifteen (15) year veteran of the South Carolina Highway Patrol, was off duty returning from a "family emergency" in his marked patrol car. He was dressed in a training uniform. Trooper Wilkes initiated his blue light at some point prior to the time of arrest stated on Ms. Nilson's ticket or police report. Testimony on the actual time Ms. Wilson was stopped was never recorded on any police document and was not recorded on any video recordings made. Trooper Wilkes had the apparent ability to video tape the stop, but chose not to the turn on the vehicles video recording device.

Once Ms. Nilson stopped, Trooper Wilkes approached the vehicle and began questioning her. Upon determining Ms. Nilson may be intoxicated, Wilkes returned to his patrol car and called South Carolina Highway Patrol (SCHP) dispatch who, in turn summoned an on-duty officer, Trooper Weldon. According to testimony, Trooper Weldon arrived at the scene sometime later. From the time Trooper Weldon's video began recording his route to Ms. Nilson's traffic stop it took approximately 2 ½ minutes to arrive at the incident site.

Immediately, Weldon asked Wilkes if he had recorded the incident. Wilkes replied that he had not, even though he testified his video equipment was operable at the time he initiated his blue light. Wilkes testified that his patrol car did not have automatic videotaping instead he is required to flip a switch to activate it. This action would seem routinely automatic for a fifteen (15) year veteran, but for whatever reason it was not done and no recording was made of the

defendant's alleged, erratic driving, stop, initial interrogation or subsequent wait for the on-duty officer to arrive. From listening to Weldon's roadside video, it appears Wilkes tried to explain to Trooper Weldon something about a button. In any event, this failure to videotape or produce an affidavit is a violation of Section 56-5-2952 (A)(1)(a)(i) SC Code of Law, 1976 (as amended), which reads videotaping shall "not begin later than the activation of the officer's blue light." This statute does not state the "arresting" officer, as it refers to later in section (B). It simply states the "officer's" blue light. Section (A) clearly states, "not begin later than the activation of the officer's blue light." It is the appellant's belief that the legislature clearly meant, "the activation of the officer's blue light." and requires any uniformed State Trooper, driving a marked State Highway Patrol vehicle, equipped with a blue light, a siren and an operable video camera to begin recording immediately. Trooper Wilkes initiated his blue light but did not record the incident for a period of time which was never accurately determined by testimony. In reality, Ms. Nilson was detained, unable to leave without her driver's license which Trooper Wilkes was holding, until the on-duty Trooper Weldon arrived some 3-10 minutes later.

III. BECAUSE THE STATE DID NOT FURNISH A SWORN AFFIDAVIT EXPLAINING WHY THE STOP AND ARREST WERE NOT VIDEO TAPED, THE TRIAL COURT ERRED BY NOT DISMISSING THE CASE.

While the arresting officer is responsible for the administration of the case and has the duty to "provide the sworn affidavit," 56-5-2952(B)(1), the statute does not specify that the videotaping begin by the arresting officer, simply that the arresting officer provide the affidavit. The South Carolina Highway Patrolman, Trooper Weldon, was required to provide a sworn affidavit that the stop was not videotaped by Trooper Wilkes prior to Trooper Weldon arriving on the scene. This failure to videotape does not comply with South Carolina law regarding

videotaping of DUI and DUAC arrests.

The State cited State vs Landis, 362 S.C. 97 (S.C. 2004) wherein Trooper Davis observed:

> "a vehicle driven by Landis headed northbound on Interstate 85. Landis was weaving and straddling the center lane. A State Transport Officer had taken a position immediately behind Landis' vehicle. The State Transport Officer initiated blue lights and pulled Landis over to the side of the interstate. Trooper Davis then pulled behind the Transport Police Officer."

In Landis, Trooper Davis was the arresting officer and, in fact, he did supply a sworn affidavit stating that his video equipment was inoperable at the time. Furthermore, the Court held that the affidavit, "has undisputedly been prepared and is in defense counsel's possession at trial." Trooper Davis' sworn affidavit explained that his equipment was inoperable.

The Court of Appeals affirmed Landis' conviction relying on the facts:

1. The State Transport Officer and Trooper Davis arrived simultaneously.

2. A sworn affidavit had been provided by the defense by the arresting officer.

In Nilson's case the officers arrived at separate times and no affidavit was provided by either trooper explaining why Wilkes had failed to initiate his videotaping equipment even though it was operable at the time.

The defense argued State vs. Johnson, 720 S.E.2d 516 (S.C.App. 2011), a case heard eleven (11) years later than Landis. The Court of Appeals held that, "because Trooper Patterson moved Johnson off-camera to administer the breath test" and "did not submit an affidavit regarding either videotape." Johnson's case was dismissed. The Court ruled,

> "Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable

> cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person [396 S.C. 188] needed emergency medical treatment, or exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal."

Summarizing Johnson, the arresting officer needed to produce an affidavit in the event excusable reasons existed that no videotape is available. In the present case, no affidavit was produced and both Troopers had working video equipment.

The defense cited City of Greer v. Humble 742 S.E.2d 15 (S.C. App. 2013) where the Court held that even though the City provided an affidavit, reasons were insufficient.

> "the legislature's decision to amend the statute from only requiring the affidavit to state reasonable efforts were made, to requiring *which* reasonable efforts were made, evidences a legislative intent to require specific facts in the affidavit to allow a reviewing court to make a determination of whether the law enforcement agency provided a valid reason for failing to produce a videotape."

The defense contends that even had the State produced an affidavit in the current case, that affidavit would not rise to the level Greer requires and would require the lower Court to dismiss the case. Here, however, no affidavit was prepared or produced.

Relying on the Landis 362 S.C. 97, in this case, the trial Court ruled that the, "arresting officer ***was*** (emphasis added) Trooper C.D. Weldon, and he did not need to produce a sworn affidavit because he, upon arrival, immediately started recordation.".

Appellant contends that the Court's ruling on the failure to videotape the stop at the scene is erroneous for obvious reasons. One, no affidavit was provided. Secondly, even if an affidavit

were to have been provided, it would state that videotaping equipment was available, that it was operable, but that for whatever reason, it was either never turned on or was never provided to the defense.

IV. BECAUSE ANOTHER INTOXICANT (XANAX) WAS INTRODUCED AT THE TRIAL THE COURT ERRED IN ALLOWING THE STATE TO PRESENT TESTIMONY OF PRESCRIPTION DRUG USE IN A DRIVING WITH AN UNLAWFUL ALCOHOL CONCENTRATION DUAC TRIAL.

Ms. Nilson was arrested for Driving with an Unlawful Alcohol Concentration and was transported to J. Reuben Long Detention Center. During the videotaping in the BA room Ms. Nilson mentioned that earlier she had taken a Xanax.

Defense moved to exclude the admission of ingesting a prescription narcotic based upon the fact that she was charged with Driving with an Unlawful Alcohol Concentration. If the State wanted to include the Xanax, Ms. Nilson should have been charged with Driving Under the Influence. Once the State elected to proceed at trial with the offense of DUAC, evidence of intoxicants other than alcohol is clearly not admissible to prove guilt.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

Greg McCollum
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Myrtle Beach, SC
June 27, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2013-CP-26-0006943

The State ..... Respondent.

v.

Kylie Nilson. ..... Appellant.

CERTIFICATE OF SERVICE

I, Heather Townsend, do hereby certify that I have, on this 27th day of June, 2014, served a copy of the within and foregoing to:

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

there to with a the original Appellant's Initial Brief along with six (6) copies, to been filed with the Clerk of Court to Jenny Abbott Kitchings, Clerk of Court for the South Carolina Court of Appeals, at her office in Richland County.

June 27, 2014
Myrtle Beach, SC

Heather E. Townsend

Heather Townsend, Paralegal
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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CERTIFICATE OF SERVICE

I, Heather Townsend, do hereby certify that I have, on this 27th day of June, 2014, mailed a copy of the within and foregoing to:

Austin Thomas, Assistant Solicitor
15th Judicial Circuit
PO Box 1276
Conway, South Carolina 29528

there to with a copy of the Appellant's Initial Brief which has been filed with the South Carolina Court of Appeals to Austin Thomas, Assistant Solicitor, at his office in Horry County.

June 27, 2014
Myrtle Beach, SC

Heather E Townsend

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2013-CP-0006943

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CERTIFICATE OF SERVICE

I, Heather Townsend, do hereby certify that I have, on this 27th day of June, 2014, mailed a copy of the within and foregoing to:

Sally Elliott, Deputy Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

there to with a copy of the Appellant's Initial Brief which has been filed with the South Carolina Court of Appeals to Sally Elliot, Assistant Solicitor, at her office in Horry County.

June 27, 2014
Myrtle Beach, SC

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
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CERTIFICATE OF SERVICE

I, Heather Townsend, do hereby certify that I have, on this 27th day of June, 2014, mailed a copy of the within and foregoing to:

Jimmy Richardson, Solicitor
15th Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29528

there to with a copy of the Appellant's Initial Brief which has been filed with the South Carolina Court of Appeals to Jimmy Richardson, Solicitor, at his office in Horry County.

June 27, 2014
Myrtle Beach, SC

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June 27, 2014

Honorable Jenny Abbot Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **State of South Carolina vs. Kylie Lauren Nilson**
Appeal from Common Pleas
Case No.: 13-26-CP-6943
The Honorable Ben Culberson, Conviction Affirmed
Driving With Unlawful Concentration of Alcohol, Ticket No.: F408081
Incident Date: December 4, 2011
Arresting Officer: C.D. Weldon, SCHP

Dear Ms. Kitchings:

Please find enclosed the original Appellant's Initial Brief along with six (6) copies. Additionally, please find enclosed a copy of the Proof of Service serving the Initial Brief upon all respondants.

If you need anything further, please do not hesitate to contact my office.

With warm regards, I remain,

Yours truly,

M. Gregory McCollum

/sjem

Enclosures

cc: Honorable Alan Wilson, SC Attorney General (via U.S. Mail)
Jimmy Richardson, 15th Circuit Solicitor (via U.S. Mail)

1012 38th Avenue North, Suite 202, Myrtle Beach, SC 29577