THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Garrison D. Hill, Circuit Court Judge

Case No. 2012-GS-23-2124
Appellate Case No.: 2013-000883

State of South Carolina, ... Respondent,

v.

Johnie Allen Devore, Jr., ... Appellant.

INITIAL BRIEF OF APPELLANT

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Counsel for Appellant

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CERTIFICATE

I certify that on July 14, 2014, I served the INITIAL BRIEF OF APPELLANT and the DESIGNATION OF MATTER by the Appellant on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, as indicated below:

Salley W. Elliott, Assistant Deputy General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully submitted,

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Greenville, SC 29601
Counsel for Appellant

July 14, 2014.

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Appellant designates the following matter to be included in the Record on Appeal:

Trial Transcript pages 1-175;
Rule 29 Motion Hearing Transcript 1-14;
Exhibits: S-1; S-3; S-4; D-1; C-1 through C-5;
Defendant's Memorandum from Rule 29 Motion Hearing

I certify that all of the matter designated was before the trial court and relevant to the issues on appeal.

Respectfully submitted,

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that the incident site video was sufficient where it did not contain the entire Miranda warning on the video?

2. Did the court err in refusing to accept the defendant's stipulation and instead allow the State to introduce the implied consent warning as to an administrative suspension for refusing the breath test, as evidence of guilt?

3. Did the court's failure to answer the jury's question about being deadlocked 11-1 allow undue pressure on minority juror?

STATEMENT OF THE CASE

Appellant was indicted by the grand jury in Greenville County for the offense of Driving Under the Influence 2nd offense. A jury trial was held on March 14, 2013, the Honorable D. Garrison Hill presiding. The Appellant was found guilty and sentenced to 90 days in the county detention center and a fine of $3,000, suspended to five days HIP and a fine of $2,100, and probation for six months, MADD victim impact panel meeting, and substance abuse counseling. Elizabeth C. Major, Assistant Solicitor, represented the State at trial. Steve Sumner, of Greenville, represented the Appellant at trial. J. Falkner Wilkes represents the Appellant on the appeal of this case.

ARGUMENT

I. The Court Erred in Failing to Dismiss Where Roadside Video Fails to Show the Appellant Being Advised of His Miranda Rights in its Entirety Pursuant to S.C. Code Section 56-5-2953.

The Appellant was pulled over by a South Carolina State Trooper in Greenville County. The Trooper's in-car video was running when the Trooper initiated the stop. The Trooper conducted several field sobriety tests, all of which can be seen on the video. After the field sobriety tests, the Trooper then walked the Appellant out of the camera's view as he began advising the Appellant of his Miranda rights. As a result, the Appellant's Miranda warnings were not captured in their entirety on video. 6. The defense moved to dismiss based on the state's failure to comply with the video taping requirements of S.C. Code Section 56-5-2953. 6.

In response to the defense motion, the State offered the testimony of the arresting Trooper. 8. During his testimony the Trooper's gave no explanation for his decision to walk the Appellant out of the camera's view before the Appellant had been fully advised of his rights under Miranda. 8-11. Ex. S-1 Video. The video does not show the Appellant being fully advised of his Miranda rights.

Although it offered no evidence in support, the State argued: "These cameras don't have a 360-degree view. We're working within budget constraints here." 11. l, 18-20. The State took the position at trial that the court should "read the statute as a whole" to overlook the Trooper's failure to comply with the clear requirements of 56-5-2953. Contrary to the state's argument, there was no impediment to the Trooper's ability to

comply with the statute. The record shows clearly that the Trooper simply walked the Appellant out of the camera's view before completing the Miranda advisement. The State stipulated at trial that the video did not show the entire advisement. The record fails to show the existence of any statutory exception to the advisement being videoed in its entirety.

The plain language of the Section 56-5-2953 requires not only that there be an incident video, but specifically that the video must **show** the advisement of Miranda. The provisions of 56-5-2953 have repeatedly been construed as mandatory. Since the trial of this case, the Court in State v. Sawyer, 27393 (S.C. 6-4-2014) has ruled that a videotape from the breath test site that lacks the audio portion of the reading of Miranda rights and the informed consent law did not satisfy the requirements of S.C. Code Ann. § 56-5-2953(A)(2) (2006). The video, as contemplated in 56-5-2953, clearly includes both its visual and audio components. In Sawyer the Court held that "A silent video simply cannot meet these statutory requirements." Likewise, a video without the defendant on screen equally fails to meet the statutory requirements, regardless of whether it contains audio. Section 56-5-2953 requires that the incident location video "(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and ***show*** the person being advised of his Miranda rights." S.C. Code Section 56-5-2953(iii). Here the incident location video fails to show the Appellant being fully advised of his Miranda rights.

While the state would have the court began to interpret just how much of a part of Miranda is enough to satisfy 56-5-2953, under the reasoning of the Court's prior rulings,

the state must video the entire advisement of Miranda, not just a portion of it. Anything less than the full advisement falls short of strict compliance and dances upon the proverbial slippery slope. Because the visual component is an essential part of the video requirement, and no exception applies, the court erred in failing to suppress evidence from the stop and dismiss the Appellant's charge.

II. The Court Erred in Refusing to Accept the Defendant's Stipulation and Allowing the State to Offer the Existence of a Statutory Six Month Administrative Suspension for a Refusal as Evidence of Guilt.

The defendant objected to the admission of any reference to the implied consent warning relating to the six-month administrative suspension for refusing a breath test. 21-32; 89-91; St. Ex. 4. In conjunction with the objection, the defense stipulated that the defendant was "properly given and offered the SLED test." 25, l. 23-24. While the defense agreed that the refusal itself could be considered against the defendant, it argued that the potential for a six-month administrative suspension for a refusal was irrelevant to the criminal case. 22. The state sought to introduce the Appellant's refusal in light of the potential administrative penalty as evidence of guilt. 24. The court ruled that the risk of administrative suspension of the Appellant's license for refusing to give a breath sample was relevant to the issue of guilt and not overly prejudicial. 91.

In addressing the admissibility of the implied consent warning the Court has held that the reference to the failure to request additional tests was improper. State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001). In Henderson the Court reasoned:

> Given the offer to stipulate by Henderson's counsel, there was no plausible reason why this language should have been read to the jury. Unlike the situation in Wilson, the State was not required to lay a foundation for the Datamaster test results. While we recognize that a stipulation usually involves the consent of all parties, the State's consent was not necessary here, where, by statute, "a person's . . . failure to request additional blood or urine tests is not admissible against the person in the criminal trial." § 56-5-2950(a). It was thus error for the municipal court judge to allow it to come before the jury.

State v. Henderson, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001).

Although the additional tests language was redacted in this case, the State still admitted the remainder of the advisement, specifically the administrative penalty for refusal, to establish evidence of guilt. Although the Court in Henderson did not reach the admissibility of the potential for administrative penalty for a refusal, the result should be the same.

S.C. Code Section 56-5-2950(B)(1) provides that a person "does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his *refusal* may be used against him in court". Similarly, Section 2946(B) provides: " The resistance, obstruction, or opposition to testing pursuant to this section is evidence admissible at the trial of the offense which precipitated the requirement for testing." Nowhere, however, is there any provision that provides for the admissibility of the potential administrative penalty for a refusal as further evidence of guilt.

In offering evidence of the administrative suspension the State seeks to have the jury infer guilt based on the willingness of a defendant to risk the potential hardship caused by an administrative suspension. This risk would vary from person to person based upon

each person's particular situation. The administrative penalty would be more severe on those heavily dependent on a driver's license than those non-reliant on the ability to drive. Without more evidence, it is impossible for the jury to evaluate the effect of the penalty on any particular defendant. This leaves the jury to speculate as to the effect of the penalty, and thus, how to evaluate the refusal in light of any given length of potential suspension. This also places the defendant in a position of having to offer evidence to allow the jury to quantify the effect of a potential suspension. Otherwise, the jury would not be able determine what weight to place on the defendant's decision to risk a suspension to exercise a statutory right. Placing a defendant in the position of having to introduce evidence to justify the exercise of a statutory right is simply untenable. The admission of the potential administrative penalty to establish guilt was therefore error.

In the Appellant's case there was less than overwhelming evidence of guilt. Where there is less than overwhelming evidence, the improper admission of evidence is not harmless. *See* State v. Henderson, *supra*; State v. Sweet, 342 S.C. 342, 349, 536 S.E.2d 91, 94 (Ct.App. 2000).

III. The Court Erred in Failing to Answer the Jury's Question about Being Deadlocked 11-1 And Allowing Undue Pressure on Minority Juror.

After hours of deliberation the jury sent out two or more notes, one of which indicated that the jury was split in their verdict. 163; C-1; C-2. The jury wanted to know what would happen if they could not reach a unanimous verdict. Without a lot of discussion, the court brought out the foreman and asked him to find out if they wanted to stay and continue to deliberate, or come back in the morning. The foreman inquired

about seeing the video again and returned to the jury room. The court did not anser the jury's question concerning what would happen if they could not reach a unanimous verdict. The foreman subsequently sent word that they would continue deliberating.

The failure of the court to answer the jury's question had the effect of placing undue influence on the minority juror. Although a *de novo* issue, the law relating to an *Allen* charge is instructive. The jury in this case had deliberated for over two hours and it was after six o'clock in the evening. The court commented that the jury was getting tired. 163. There had been numerous questions from the jury. (Jury Notes). One of the questions revealed that the jury was deadlocked 11 to 1. The jury specifically asked the question: "What happens when a one juror has a different verdict from the others?" p. 163, l. 9-10; C-__. The court simply chose not to answer the jury's question. 163. It then let the foreman of the grand jury to "inquire" as to wether they wanted to continue or come back in the morning. The foreman reported that the jury wanted to continue on that evening. The jury was not instructed, questioned or polled by the Court. Presumably, either the foreman, or the majority was allowed to make the decision to continue deliberations into the night.

Providing no instruction on how long they would be kept that evening, or what could happen if hopelessly deadlocked, undue influence was allowed to enter the jury deliberations. Failing to answer the jury's question as to what happens with a hung jury, or to give the jury any idea of how late into the evening they would have to stay, was coercive in regards to the minority juror. It allowed the majority to effectively hold

the minority juror hostage indefinitely unless he or she changed his or her verdict. The failure of the court to answer the jury's question acted to coerce the jury into a verdict and focused naturally on the minority juror.

Although the unsolicited disclosure of the jury's division by a juror is not by itself grounds for a mistrial, in this case once the court became aware of the numerical split in the jury it was incumbent upon it to prevent undue influence from being injected into the deliberations.

In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. *See* State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996). It is not coercion to charge every juror has a right to his own opinion and need not give up the opinion merely to reach a verdict. State v. Singleton, 319 S.C. 312, 460 S.E.2d 573 (1995). Green v. State, 351 S.C. 184 (2002).

South Carolina adopted the standard set by the United States Supreme Court in Lowenfield to determine whether an *Allen* charge is unconstitutionally coercive. Tucker v. Catoe, 346 S.C. at 492, 552 S.E.2d at 716 (*citing* Lowenfield v. Phelps, 484 U.S. at 237, 108 S.Ct. 546) Those factors are:

(1) Does the charge/ or in this case, the lack thereof, speak specifically to the minority juror(s);

In this case the situation allowed undue pressure on the minority juror. From the record we know we have a minority juror, and that the jury was deadlocked at 11-1. The record also shows that the jury specifically had a question concerning their inability to reach a unanimous verdict. The court's failure to answer the question about a hung jury, to give an *Allen* charge, or to determine whether continuing would be appropriate, allowed undue pressure on the minority juror. (Part of an *Allen* charge includes the instruction that a juror need not abandon his convictions).

(2) Does the charge/ or in this case, the lack thereof, indicate that the jury had to reach a decision in this case;

By not answering the question about the potential for mistrial, or polling the jury as to continuing, the court allowed the majority to exert undue pressure on the minority juror forcing the jury to reach a verdict. The minority juror was left in a position of being stuck there indefinitely unless he or she changed his or her verdict.

(3) Was there an inquiry into the jury's numerical division, which is generally coercive;

Although the Court did not inquire of the division, the split was clear from the jury note. The court was therefore aware of the numerical division so that any action (or inaction) it took would be seen by the minority as directed at him or her.

(4) The time the jury takes to return a verdict after the Court's action.

A verdict returned shortly after a supplemental charge, suggests a possibility of coercion. Although in John Devore's case counsel did not object to the Court's failure to respond to the jury question, or continuation of deliberations further into the evening,

the lack of objection is only a factor to weigh in the analysis. The Short Time after the Question That Went Unanswered Increases the Likelihood That the Minority's Change in Verdict Was Influenced by the Court's Decision Not to Answer the Question.

Applying a Tucker analysis, the record in John Devore's case shows that the Court's failure to respond to the jury's question allowed undue influence into the jury deliberations. This was due in part to the circumstances of the trial. The jury was deadlocked 11-1. The numerical split was known to the Court. The jury had already deliberated for over two hours and was noticeably tired. It was after six o'clock in the evening and the jury had not had a break for dinner. The majority was allowed to make the decision to continue to deliberate without any inquiry, questioning, or polling of the jury by the Court. The majority was therefore allowed to essentially hold the minority juror in deliberations. The minority juror was not given any response to the question, nor any indication of how long into the night court would continue because of that juror's position. As a result, the lack of an *Allen* charge or other instruction, allowed for undue pressure on minority juror to change his or her verdict.

CONCLUSION

Based on the foregoing arguments the Appellant's conviction should be reversed.

Respectfully submitted,

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July 14, 2014.

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Respectfully submitted,

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July 14, 2014

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
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Re: State v. Johnie Allen DeVore, Jr.
C.A. No.: 2012-GS-23-2124
Appellate Case No.: 2013-000883

Dear Ms. Kitchings,

I am enclosing herewith the Initial Brief of Appellant Johnie DeVore, along with the Appellant's Designation of Matter. I am also enclosing a Certificate of Service.

Respectfully,

J. Falkner Wilkes

c.
Salley W. Elliott, Assistant Deputy General
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