STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

Appellate Case No. 2012-212639

REPLY OPPOSING MOTION TO DISMISS APPEAL DUE TO DEATH OF APPELLANT

Appellant's undersigned counsel herein submits this Reply Opposing the Respondent's Motion to Dismiss Appeal Due to Death of Appellant, mailed August 22, 2014 and received August 25, 2014.

FACTUAL BACKGROUND

Appellant was charged with a single count of felony DUI involving the death of Alvaro Garcia on December 8, 2008. Appellant was released on a surety bond December 9, 2008, but in April, 2011, he was indicted on two counts of felony DUI. The first involved the death of Alvaro Garcia and the second involved great bodily injury to the Jose Davila, the passenger in Garcia's vehicle. A jury trial was held in Charleston County before the Honorable Deadre Jefferson between October 24, 2011 and November 1, 2011. The jury acquitted Appellant of the felony DUI charge involving

injury to Jose Davila but convicted him of felony DUI in the death of Alvaro Garcia. Appellant was sentenced to twelve years imprisonment. Timely post-trial motions were filed, including a motion for a new trial and a motion to dismiss for the officers' failure to record Appellant's conduct at the time of his arrest in the hospital parking lot at MUSC following treatment. All post-trial motions were denied in an Order dated July 18, 2012. Appellant timely filed a notice of appeal. Appellant's Motion for Bond and Stay of Sentence was filed with Appellant's Initial Brief on July 17, 2013, but Appellant's Motion for Bond and Stay of Sentence was denied. The case was briefed and oral argument was heard in this Court on June 5, 2014. This Court has not yet issued an opinion in the case.

ARGUMENT

This Court is urged to render a decision in the instant case despite the fact that a new trial cannot be granted due to Appellant's death. The first two issues raised by Appellant and argued June 5, 2014 have not been previously decided by our appellate courts.[1] Exceptions to the mootness doctrine were included in this Court's decision in *State v. Passmore*, 363 S.C. 568, 611 S.E. 2d 273 (Ct.App. 2005). In *Passmore*, this Court noted:

> "The mootness doctrine is subject to several exceptions, however. In *Curtis v. State*, **345 S.C. 557, 549 S.E.2d 591** (2001), our supreme court enunciated the three primary exceptions to the doctrine:
>
> First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in

[1] The first issue from Appellant's Brief argued before this Court on June 5, 2014 was: "The trial court committed reversible error by declining to instruct the jury on driving under the influence, S.C. Code § 56-5-2930, as a lesser-included offense of felony DUI, § 56-5-2945, since there was evidence the decedent himself was at fault in proximately causing the collision, so that appellant would have been guilty of only the lesser offense". The second was, "The trial court committed reversible error by declining to instruct the jury that felony DUI, S.C. Code § 56-5-2945, requires proof that 'the person's faculties to drive a motor vehicle [were] materially and appreciably impaired,' as provided by § 56-5-2930, the DUI statute"

> matters of important public interest. Finally, if a decision by the trial court may affect future events, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.
>
> *Id.* at 568, **549 S.E.2d at 596** (citations omitted).
>
> We find the first and third exceptions applicable, and, thus, refuse to dismiss Appellant's appeal as moot." *Passmore* at 582

Whether DUI is a lesser included offense of felony DUI and should have been included in the trial court's instructions to the jury, as requested by trial counsel and argued by Appellant on appeal, is a novel issue. Likewise, whether "a conviction for felony DUI, S.C. Code § 56-5-2945, requires proof that 'the person's faculties to drive a motor vehicle [were] materially and appreciably impaired,' as provided by § 56-5-2930, the DUI statute", is a novel issue not previously decided by our appellate courts. Both issues are capable of repetition and evading review if this appeal is dismissed.

In *Nelson v. Ozmint*, 390 S.C. 432, 702 S.E.2d 369 (2010), the South Carolina Supreme court rendered a decision raised by Appellant despite the fact that he had previously been released from the custody of the South Carolina Department of Corrections:

> "At the outset, we note petitioner was released from SCDC in August, 2010, making his underlying claim moot. *See Sloan v. Deft of Transp.*, 379 S.C. 160, 666 S.E.2d 236, 240 (2008) (This Court "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy."). If, however, an issue raised is capable of repetition but generally will evade review, the Court can address the issue. *Id" Nelson* at 434-435.

The Supreme Court clarified the law and found that a person sentenced for CDV 3rd must serve the mandatory minimum sentence of one year without any reduction or award of statutory good time and earned work credits that would normally advance an inmate's release date.

Appellant asserts there is a third issue (Issue 6 in Appellant's Brief),[2] that is capable of repetition and evading review that should be decided by this Court. South Carolina Code § 56-5-2953 mandates (subject to exceptions contained therein) that the arresting officers record the arrest of a suspect charged with felony DUI, S.C. Code § 56-5-2945. Even if an exception to the recording mandate initially exists, the statute continues, "as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section." See *State v. Henkel*, S.C.Ct.App. Op.No. 5159, filed July 10, 2013.

There does not appear to be any case in South Carolina that squarely addresses the specific issue raised by Appellant that gives meaning to the following language of the recording statute,

> "as soon as practicable in these circumstances, video recording must begin and conform with the provisions of this section." S.C. Code § 56-5-2945

Following his initial treatment at MUSC, Mr. Barclay was escorted from the hospital by the deputies who allowed him to smoke a cigarette near their police cruiser equipped with a video camera in the parking lot. Deputies could have and should have activated their video camera to record Appellant's conduct as they placed him in handcuffs (under arrest) and advised him of his rights pursuant to *Miranda v. Arizona*.

CONCLUSION

DUI laws in South Carolina are matters of important public interest. For the reasons set forth Above, this Court is urged to render decisions on the three issues discussed herein that would clarify the law and establish rules of benefit to both the bench and bar in future cases.

Respectfully submitted:

John B. Shupper, SC Bar #9374
Attorney at Law

[2] Issue 6 in Appellant's Brief: "The trial court committed reversible error by declining to dismiss the charges against appellant due to the failure of the arresting officers to record appellant's conduct when they initially transported him from the hospital to the detention center, as required by S.C. Code § 56-5-2953"

P.O. Box 90623
Columbia, South Carolina 29290
Phone: (803) 606-7859

ATTORNEY FOR APPELLANT

September 2, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

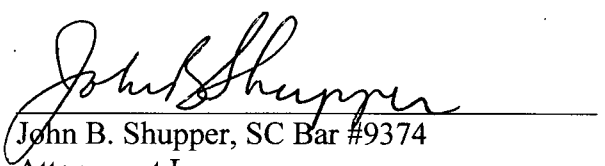
V.

WALTER DOUGLAS BARCLAY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Reply Opposing Motion to Dismiss in the above referenced case have been served upon Christina Catoe, Esquire, by hand delivery at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of September, 2014.



John B. Shupper, SC Bar #9374
Attorney at Law
P.O. Box 90623
Columbia, South Carolina 29290
Phone: (803) 606-7859

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

SEP 0 2 2014

SC Court of Appeals

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Reply Opposing Motion to Dismiss in the above referenced case have been served upon Christina Catoe, Esquire, by hand delivery at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of September, 2014.

John B. Shupper, SC Bar #9374
Attorney at Law
P.O. Box 90623
Columbia, South Carolina 29290
Phone: (803) 606-7859

ATTORNEY FOR APPELLANT