THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-08-02704

The State..Appellant,

v.

Nicholas M. Blair...Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN DETERMINING THAT THE STATE FAILED TO PRESERVE THE ISSUE OF THE STATE'S RIGHT TO A JURY TRIAL?

II. DID THE MAGISTRATE ERR IN DENYING THE STATE'S REQUEST FOR A JURY TRIAL?

STATEMENT OF THE CASE

On October 7, 2013, Cpl. C. M. Wooten of the South Carolina Highway Patrol cited the Respondent with Driving Under the Influence in violation of S. C. Code of Laws § 56-5-2930. (Uniform Traffic Ticket # G449285) This matter came before the Honorable Whilden V. Baggett, Magistrate Judge for Berkeley County, on November 6, 2013 for a pre-trial hearing. (Uniform Traffic Ticket # G449285; Notice of Appeal and Appeal filed on December 5, 2013 in Berkeley County bearing C.A. No. 2013-CP-08-2704)

At the pre-trial hearing, the Respondent requested a bench trial. (Magistrate's Return filed January 14, 2014 in Berkeley County; Notice of Appeal and Appeal; Audio of November 6, 2013 Hearing before Judge Baggett) The State then requested a continuance or, in the alternative, that the matter be set for a jury trial; both motions were denied by Judge Baggett.[1] (Magistrate's Return; Notice of Appeal and Appeal; Audio of Hearing) On the issue of the State's request for a jury trial, Judge Baggett ruled that the defense alone has the right to request a jury trial. (Magistrate's Return; Notice of Appeal and Appeal; Audio of Hearing) The Respondent then moved to dismiss the case for lack

[1] Judge Baggett also denied the request for a continuance, but that ruling has not been appealed.

of prosecution, and Judge Baggett granted the motion. (Magistrate's Return; Notice of Appeal and Appeal; Audio of Hearing)

The State then filed an appeal of the magistrate's ruling denying the State's request for a jury trial with the Berkeley County Circuit Court. (Notice of Appeal and Appeal) The appeal was called for oral argument on March 17, 2014 before the Honorable Deadra L. Jefferson, Circuit Court Judge.

By order filed April 15, 2014, Judge Jefferson ruled that the State failed to preserve the alleged error and dismissed the State's appeal. (Order of Judge Jefferson) The State received notice of said Order on April 15, 2014 and then filed a Notice of Appeal with the South Carolina Court of Appeals. (Notice of Appeal and Appeal)

ARGUMENT

The State properly preserved its argument on appeal regarding the jury trial request. The audio from the pre-trial hearing as well as the magistrate's return both confirm that the State plainly made a jury trial request. The magistrate heard argument on the issue and explicitly ruled on the request for a jury trial. The circuit court therefore erred in holding that the issue was not preserved for review. Insofar as the issue was properly preserved, the magistrate's order should be reversed because the State was entitled to insist on a jury trial over Respondent's request to proceed without a jury.

I. THE STATE PRESERVED ITS ARGUMENT REGARDING THE JURY TRIAL REQUEST.

The circuit court dismissed the State's appeal because it found "the State failed to preserve the alleged error to the appellate court...." (Order of Judge Jefferson) The circuit

court concluded "that the State merely requested the case be continued because its witness was unavailable." (Order of Judge Jefferson) Further, it held that "at no time during the proceedings did the State specifically request a jury trial or oppose a bench trial." (Order of Judge Jefferson) A review of the magistrate's return as well as the audio from the hearing itself indicates that this holding was in error.

In his return, the magistrate correctly stated that the pre-trial hearing began with a plea of not guilty and a request for a bench trial. (Magistrate's Return) This request was followed by a request from the State for a continuance or a jury trial. (Magistrate's Return) "Trooper Wooten stated that he wanted a continuance or a jury trial." (Magistrate's Return) The magistrate then noted that the Respondent objected to the request and "argued that the state did not have the right to a jury trial...." (Magistrate's Return) After hearing arguments from both sides, "Trooper Wooten's request for a jury trial was denied." (Magistrate's Return)

The audio of the hearing further confirms the recitation of the proceedings in the return. (Audio of Hearing) Respondent opened the hearing by announcing that she wished to waive her right to a jury trial and proceed with a bench trial. (Audio of Hearing) The State responded by requesting a jury trial. (Audio of Hearing) The defense countered by arguing that the State was prohibited from requesting a jury trial. (Audio of Hearing) After hearing arguments from both sides on the issue, the magistrate ruled that the "request for a jury trial [was] denied." (Audio of Hearing)

The magistrate's return and the audio from the hearing both demonstrate that the State preserved the issue of its entitlement to a jury trial. "'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been

(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'" S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). Here the State met all four elements. Trooper Wooten specifically requested a jury trial at the pre-trial hearing. (Magistrate's Return; Audio of Hearing) The parties then argued the issue in detail and the magistrate made a specific ruling on the jury trial request. (Magistrate's Return; Audio of Hearing) The jury trial issue was "sufficiently clear to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the judge." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). This Court should reverse the circuit court's holding that the jury trial request was unpreserved.

II. THE MAGISTRATE ERRED IN DENYING THE STATE'S REQUEST FOR A JURY TRIAL.

Insofar as it was error for the appellate court to dismiss the appeal based on error preservation grounds, this Court should proceed to consider the merits of the underlying appeal. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494 (2013) ("Having found the issue preserved, we find it appropriate; in the interest of judicial economy, to consider the merits of [the] appeal instead of delaying the proceedings with a remand....").

A. The State Has, by Rule and Case Law, the Right to a Jury Trial.

The South Carolina Constitution establishes a criminal defendant's right to a trial by jury. S.C. Const. art. I, 14. This Court has recognized that "'[a] defendant's only constitutional right concerning the method of trial is to an impartial trial by jury'" and no such right exists to a bench trial. State v. Senter, 396 S.C. 547, 554, 722 S.E.2d 233, 237

(Ct. App. 2011) (quoting Singer v. United States, 380 U.S. 24, 34 (1965)) see also State v. Burgin, 255 S.C. 237, 249, 178 S.E.2d 325, 329 (1970) *rev'd on other grounds*, 404 U.S. 806 (1971) ("There is no right to waive trial by jury guaranteed by the United States Constitution.").

If the defendant requests to proceed with a bench trial, our state courts have long recognized that this request is conditioned on the consent of the trial judge and the State. In effect, this allows the State to insist on a jury trial because it can withhold its consent to the bench trial request. This mechanism is currently articulated in the South Carolina Rules of Criminal Procedure. "A defendant may waive his right to a jury trial *only with the approval of the solicitor and the trial judge*." Rule 14(b), SCRCrimP (emphasis added). Although currently expressed in Rule 14, the conditional jury trial rule predates the 1988 adoption of the Rules of Criminal Procedure. The earliest reported statement of this rule appears in the case of State v. Burgin, 255 S.C. 237, 250, 178 S.E.2d 325, 329 (1970) *rev'd on other grounds*, 404 U.S. 806 (1971). In Burgin, the South Carolina Supreme Court observed that it could "find no constitutional impediment to conditioning a waiver of the jury trial right on the consent of the prosecuting attorney and the trial judge...." Id. (quoting Singer v. United States, 380 U.S. 24, 36 (1965)). Following Burgin, South Carolina has repeatedly recognized the State's right to insist on a jury trial by means of withholding consent. See e.g., State v. Hanson, 285 S.C. 543, 544, 331 S.E.2d 782, 782 (1985) ("A defendant's waiver of a jury trial is conditioned upon the consent of the prosecutor and the trial judge. If either objects to the waiver, the defendant must be tried by a jury."); State v. Shuck, 278 S.C. 441, 442, 298 S.E.2d 95, 96 (1982) ("We hold that a defendant in a non-capital criminal case may waive his right to a jury

trial with the consent of the prosecuting attorney and the trial judge."). Importantly, this conditional jury trial rule has been held to apply at all trial levels, including magistrates courts. See Hanson, 285 S.C. at 544, 331 S.E.2d at 782 ("This same rule applies in magistrate's court."); see also Rule 37, SCRCrimP (stating the Rules of Criminal Procedure, including Rule 14, apply "insofar as practicable in magistrate's courts ... to the extent they are not inconsistent with the statutes and rules governing those courts.").

Our jurisprudence makes clear that a defendant has no right to a bench trial because the prosecution may always insist on a jury trial despite the defendant's protests. Respondent was free to waive her right to a jury trial, but her waiver was only effective if both the trial judge and the State consented. "When the State objected to the [Respondent's] waiver of a jury trial, the trial judge should have empaneled a jury." Hanson, 285 S.C. at 544, 331 S.E.2d at 782; see also Burgin, 255 S.C. at 250, 178 S.E.2d at 329 ("[I]f either [the judge or the prosecution] refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury....").

B. The Repeal of § 22-3-230 Had No Effect on the State's Right to a Jury Trial.

The magistrate's denial of the State's request for a jury trial was rooted in his belief that the repeal of S.C. Code Ann. § 22-3-230 eliminated the State's ability to request a jury trial. (Magistrate's Return) He reasoned that the repeal of § 22-3-230 left § 22-2-150 as the exclusive mechanism for seeking a jury trial in a criminal trial before a magistrate. This position was erroneous because § 22-2-150 says nothing about the State's right to request a jury trial, and the repeal of § 22-3-230 had no impact on the longstanding rule that the defendant's waiver of a jury trial is conditioned on the consent of the State.

1. Section 22-2-150 Does Not Deprive the State of the Right to Demand a Jury Trial.

While § 22-2-150 does provide the right to a jury trial to criminal defendants in magistrates court, the statute cannot be read to exclude the State from the well-recognized right to a jury trial discussed above. Section 22-2-150 provides that "[e]very person arrested and brought before a magistrate charged with an offense within his jurisdiction shall be entitled on demand to trial by jury which shall be selected as provided in this chapter." S.C. Code Ann. § 22-2-150 (2013). It does nothing more than recognize the defendant's right to a jury trial before a magistrate. Section 22-2-150 says nothing about the State's right, and the statute cannot be read to imply anything further. "A court must take the statute as it finds it, giving effect to the legislative intent as expressed in the language of the statute, and cannot, under its power of construction, supply an omission in a statute." State v. Johnson, 396 S.C. 424, 429, 721 S.E.2d 786, 788-89 (Ct. App. 2012) (citations omitted).

As discussed above, our courts have long acknowledged that the defendant's right to a jury trial is conditioned on the consent of the prosecution. Beginning with Burgin and through its current formulation in Rule 14, South Carolina has long recognized that the State can insist on a jury trial by withholding its consent to the defendant's bench trial request. Burgin and its progeny make no reference to any statutory authority as the source of the State's right to a jury trial. Rather, these cases make clear that the State's right to insist on a jury trial exists independent of any statutory grant, and § 22-2-150 is therefore irrelevant to that question.

2. The Repeal of § 22-3-230 Did Not Affect the State's Right to Jury Trials Because It Did Not Apply to Criminal Trials at the Time of its Repeal.

In denying the State's request for a jury trial, the magistrate held that the State's right to a jury trial in a criminal proceeding emanated solely from older statutory language identical to that appearing in § 22-3-230, a statute that has since been repealed. The Magistrate's Return reflects that his ruling was based on an opinion of the South Carolina Attorney General. (Op. S.C. Att'y Gen. (Aug. 15, 1980) (1980 WL 120825)). This opinion and another like it, (Op. S.C. Att'y Gen. (Feb. 12, 1980) (1980 WL 121029), relied on an older opinion of the South Carolina Supreme Court, State v. Nash, 51 S.C. 319, 28 S.E. 946 (1898), for the proposition that § 22-3-230 authorizes the State to request a jury trial in criminal matters before a magistrate. The magistrate ruled that once § 22-3-230 was repealed, the authority of the State to request a jury trial was also lost. (Magistrate's Return) However, the repeal of § 22-3-230 had no impact on the State's ability to request a jury trial; because the magistrate erred in holding that the State's current right to a jury trial derived exclusively from § 22-3-230.

In Nash, the court recognized that the State was entitled to request a jury trial in criminal actions pursuant to § 884 of the Civil Statutes of South Carolina. Section 884 was the precursor to § 22-3-230 and provided that "[e]ither party to a suit before a Magistrate shall be entitled to a trial by jury." 1868 S.C. Acts § 884. The defendant in Nash had questioned whether § 884 allowed the prosecution to request a jury trial because the applicability of § 884 to criminal trials was unclear. The Nash court found that indeed the State was a "party to a suit" and thus entitled to request a jury trial.

Section 884 was codified in 1868 under a provision entitled "An Act to Provide for the Temporary Appointment of Magistrates, and to Define Their Powers and Duties." Id. In later versions of the Code, the language of § 884 was relocated, but the headings indicated that the provision was still applicable to magistrates generally. See 20 S.C. Code Ann. § 3710 (1942) (under heading "Magistrates and Constables"); 20 S.C. Code Ann. § 3710 (1932) (same); 20 S.C. Code Ann. § 986 (1902) (under heading "Magistrates"). Importantly, some of the statutory provisions dealing with magistrates in these prior versions of the Code drew distinctions between the procedures to be used in criminal versus civil cases, but some, including § 884, made no such distinction. See 20 S.C. Code Ann. § 3710 (1942) ("Either party to a suit before a Magistrate shall be entitled to a trial by jury."); 20 S.C. Code Ann. § 3710 (1932) (same); 20 S.C. Code Ann. § 986 (1902) (same); 1868 S.C. Acts § 884 (same). These generic magistrate provisions thus, by their own words, applied with equal force in civil and criminal matters.

An important change occurred in 1952. For the first time, the statutory provisions regarding magistrates were organized into separate sections dealing with criminal actions, civil actions, real estate actions, and claim and delivery actions. The 1952 revision created seven separate articles within Title 43:

- Article 1 (Civil Jurisdiction)
- Article 2 (Criminal Jurisdiction)
- Article 3 (Procedure in Civil Actions, Generally)
- Article 4 (Procedure in Criminal Cases)
- Article 5 (Provisions Applicable to Both Civil and Criminal Cases)
- Article 6 (Proceedings when Title to Real Estate is Involved)
- Article 7 (Proceedings in Claim and Delivery)

Former provisions that were previously located under a general "Magistrate" heading were now placed within specific articles. Significantly, the language from former § 884

was placed within Article 3 ("Procedure in Civil Actions Generally"). See 43 S.C. Code Ann. § 93 (1952). The original language from § 884 eventually became § 22-3-230 and retained its classification within Article 3 (eventually renamed "Civil Procedure Filing and Execution of Judgments") until its repeal in 2008.

By placing the § 884 language within an article designated as civil in nature, the 1952 revision indicates the legislature intended to make § 884 and its progeny applicable to civil cases only. The Nash court was correct to read § 884 as applicable to civil and criminal matters alike, because the statutory scheme at the time classified the law as applicable in magistrates courts generally. However, the move of former § 884 to an article expressly delineated as dealing with civil procedure makes clear that the language of § 884 was no longer intended to apply as broadly as it had been construed in Nash.

The magistrate thus erred in holding that the repeal of § 22-3-230 eliminated the State's right to a jury trial. He incorrectly reasoned that the State's right to a jury trial was premised exclusively on § 22-3-230 as articulated in Nash. In fact, the repeal of § 22-3-230 had no impact on the State's right to a jury trial because the right did not emanate from the statute or Nash, as it has been continued to be recognized by court rule and case law long after the aforementioned 1952 revision to the Code. See Burgin, 255 S.C. 237, 178 S.E.2d 325; Hanson, 285 S.C. 543, 331 S.E.2d 782; Shuck, 278 S.C. 441, 298 S.E.2d 95; Rule 14, SCRCrimP (promulgated in 1988).

3. The Legislature Did Not Intend to Eliminate the Prosecution's Recognized Right to a Jury Trial.

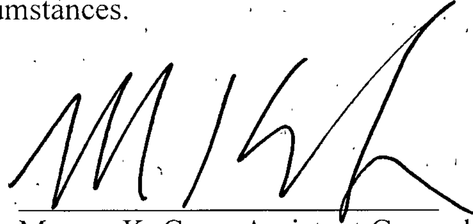
The magistrate's ruling based on the repeal of § 22-3-230 presumes that the legislature intended to eliminate a well-established right of the prosecution. "The Legislature is presumed to enact legislation with reference to existing law...."

Hoogenboom v. City of Beaufort, 315 S.C. 306, 318, n. 5, 433 S.E.2d 875, 884 n. 5 (Ct. App. 1992) (citations omitted). The more appropriate reading of the intent behind the repeal of § 22-3-230 is that the statute was simply eliminated as superfluous. Both Rule 14 and multiple cases establishing the State's right to request a jury trial predated the recent repeal of § 22-3-230, and the repeal should not be read to imply the elimination of a long-established rule. "It must be presumed that the legislature intended to achieve a consistent body of law." State v. Ramsey, 311 S.C. 555, 562, 430 S.E.2d 511, 516 (1993). The legislation which repealed § 22-3-230 (Act No. 267) was denoted as "an Act to amend Article 3, Chapter 3, Title 22, Code of Laws of South Carolina, 1976, relating to *civil procedure in magistrates court*." Act No. 267, 2008 S.C. Acts 121 (emphasis added). Act 267 had no impact on Articles 5, 7, or 9, which are the articles dealing with criminal procedure.

The preamble further clarifies that the legislature understood the limited impact of the repeal. The preamble to Act 267 noted that its purpose was to "revise the Article substantially in order to delete provisions that have been provided by the South Carolina Rules of Magistrates Court." Act No. 267, 2008 S.C. Acts 121. The Rules of Magistrates Court only apply in civil cases. Rule 2, SCRMC ("These rules shall govern all civil suits in the magistrates court.") Further, Magistrates Court Rule 13 permits either party in a civil action to request a jury trial. Rule 13, SCRMC The preamble to Act 267 therefore makes clear that the legislature understood that the sole impact of the repeal of § 22-3-230 was to civil matters.

CONCLUSION

The State, having asserted its grounds and legal authority in support thereof, hereby asks this Court to reverse the circuit court order and grant such other relief as the Court deems just and proper under the circumstances.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2013-CP-08-02704

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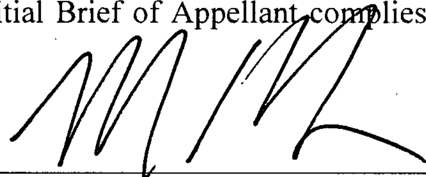
CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Appellant complies with Rule 208, SCACR.



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Dated: August 29, 2014

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The Honorable Deadra L. Jefferson, Circuit Court Judge

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The State..Appellant,

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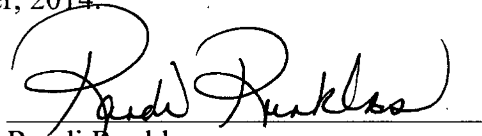
Nicholas M. Blair..Respondent.

PROOF OF SERVICE

I hereby certify that I have served the Initial Brief of Appellant on the Respondent, Nicolas M. Blair, addressed to his attorney of record, Gregory A. DeLuca, DeLuca & Maucher, LLP, P. O. Box 9, Goose Creek, SC 29445, via United States Mail, postage prepaid, on this 2nd day of September, 2014.



Randi Runkles
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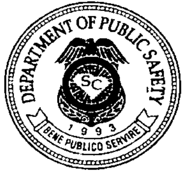
Dated: August 29, 2014



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August 29, 2014

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Re: The State vs. Nicholas M. Blair
Appeal from Berkeley County
The Honorable Deadra L. Jefferson
C/A 2013-CP-08-02704
Appellate Case No. 2014-001003

Dear Ms. Kitchings:

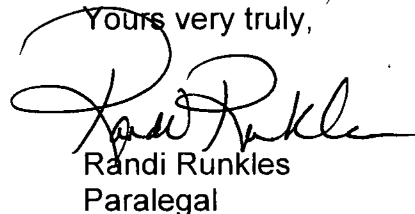
Enclosed please find the following to be filed in the above matter:

1. Initial Brief of Appellant
2. Certificate of Counsel
3. Proof of Service
4. Appellant's Designation of the Matter to be included in the Record on Appeal
5. Certificate of Counsel
6. Proof of Service

Also enclosed is an additional copy of each document above. Please clock-in the copies enclosed and return them to me in the envelope provided herein.

Thank you for your attention to this matter.

Yours very truly,



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/rr

Enclosures

cc: Gregory A. DeLuca, Esq.

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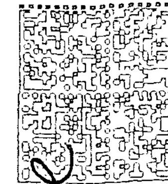

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