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CASE NUMBER: 2013-CP-40-3784

Terry A. Whigham

SEP 17 2014

PLAINTIFF(S)

DEFENDANT(S)

SC Court of Appeals

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : See Attached Order.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge *Retard* Judge Code 2164 Date August 14, 2014

For Clerk of Court Office Use Only

This judgment was entered on the 19 day of Aug, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 19 day of Aug, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

David Fernandez

John A. O'Leary

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court *Jeanette W. McBride*

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
City of Columbia,
Respondent,
v.
Terry A. Whigham,
Appellant.

IN THE COURT OF COMMON PLEAS
C.A. No. 2013-CP-40-3784

ORDER

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RECORDED & INDEXED
C.C.P. CLERK

This matter came before the Court on October 25, 2013, on appeal from the City of Columbia Municipal Court. The Appellant was represented by John A. O'Leary, and the Respondent City of Columbia was represented by David A. Fernandez.

BACKGROUND

Appellant Terry A. Whigham was arrested and charged with Driving under the Influence on December 28, 2008. On March 23, 2009, Appellant was convicted by a bench trial in the Municipal Court of the City of Columbia before the Honorable Dana D. Turner, and sentenced to Nine Hundred and Ninety-Seven dollars (\$997.00), or thirty days in jail. Appellant timely filed his appeal on June 25, 2013 with the City of Columbia Municipal Court.

STANDARD OF REVIEW

“In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception.” *Rogers v. State*, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct.App. 2004), citing *City of Landrum v. Sarratt*, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct.App. 2002). Further, “the circuit court, sitting in its appellate capacity, may not engage in fact finding.” *Id.*, 358 S.C. at 270. On appeals from municipal court “[t]he appeal must be heard by the Court of Common

Pleas upon grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court... [a]nd the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70 (Supp. 2008). The admission of evidence is and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011).

FACTS

On December 28, 2008, Appellant left the parking lot of the Carolina Ale House, located in the Harbison area of Columbia, and turned left onto Columbiana Drive. At this time, Officer Snider of the Columbia Police Department received a radio transmission and located Appellant's vehicle, which had been described to him, and activated his lights. Appellant engaged his turn signal and turned right into the parking lot of Gateway Academy, located at 400 Columbiana Drive, approximately 200 to 300 yards from the location where Officer Snider activated his lights. Officer Snider testified that he saw the Appellant's vehicle coming down Columbiana Drive, pulled out behind the vehicle and initiated a stop. Trial Transcript pp. 30-31. Appellant was subsequently arrested and charged with Driving under the Influence.

Counsel for Appellant, in preparation for trial, filed a Motion for Discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure and a Motion to Produce Radar Information. Appellant's Counsel also served subpoenas for radio logs in 2010 and 2012. The City of Columbia failed to produce the requested radar information and failed to respond to the Appellant's subpoenas for radio logs.

At the bench trial, motions were made regarding the City's failure to comply with both the Motion to Produce and the subpoenas for radio logs. The lower court held that the Appellant was not entitled to the requested items and that the subpoenas were not proper due to their issuance by defense counsel rather than signed by a judge or Clerk of Court. The Appellant was subsequently convicted. The following issues were raised on appeal:

I. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO REQUIRE THE CITY OF COLUMBIA TO RESPOND TO A MOTION TO PRODUCE RADAR INFORMATION AND RADIO LOGS, WHICH SERVED AS THE SOLE BASIS FOR THE INITIAL STOP.

A criminal defendant is guaranteed a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006). A violation of Rule 5 of the South Carolina Rules of Criminal Procedure as it pertains to discovery is not reversible unless prejudice is shown. *State v. Hughes*, 336 S.C. 585 (1999). The South Carolina Court of Appeal held that a failure to disclose specific records for maintenance of the Breathalyzer pursuant to Rule 5 does not necessarily warrant suppression of test results absent showing the records were material to the defense. *State v. Salisbury*, 330 S.C. 250 (YEAR). The South Carolina Supreme Court found that SLED's failure to provide detailed DataMaster records significantly hampers the defense and shows prejudice. *State v. Landon*, 370 S.C. 103 (2006). Once a defendant makes a prima facie showing of prejudice, the burden shifts to the State to prove that the defendants were not prejudiced. *State v. Quattlebaum*, 338 S.C. 441 (2000).

In the matter before this Court, the records from the radio and dispatch were kept exclusively by the City of Columbia. Failure to provide these records and documents to the Appellant were sufficient as a prima facie showing of prejudice and the State failed to offer any rebuttal proving the Appellant was not prejudiced.

In reviewing the court documents and transcript of the initial hearing, it is clear that the City of Columbia disregarded and failed to make an effort to produce radar information. The Appellant properly filed discovery motions and a specific Motion to Produce. The City disregarded these motions and failed to provide the requested documents.

II. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO REQUIRE THAT THE CITY OF COLUMBIA COMPLY WITH PROPERLY SERVED SUBPOENAS FROM 2010 AND 2012 REFERENCING RADIO LOGS WHICH WERE CRITICAL TO THE APPELLANT'S CASE.

In reviewing the law and court rules, the trial court erred in its finding the subpoena was not legitimate. The trial court stated, "I think Mr. Fernandez is right through in that subpoenas have to be signed by the Clerk or one of our judges." Trial Transcript p. 3. Further, Assistant City Attorney for the City of Columbia, David Fernandez, argued that the subpoena was improper but admitted that he had not seen the subpoena. Rule 23(a) of the South Carolina Rules of Magistrate's Court states, "The Court may issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice." *See also* S.C. Code Ann. § 14-25-45, which allows municipal courts the same jurisdiction as magistrate courts in criminal matters.

The Appellant argued that the purpose of the subpoena was to obtain radio logs from the City of Columbia Police Department members working the evening of the Appellant's arrest and that the subpoenaed records would show a "honey hole" on Columbiana Drive for monitoring back parking lots of restaurants, sports bars, and licensed establishments for DUI arrests. The Appellant argued that the records would have shown officers working in conjunction with each

other to stop vehicles as they left the parking lots of these establishments, a "scheme" to monitor all vehicles leaving late-night restaurants and bars in the Columbiana Drive area.

The radio logs were material to the Appellant's defense, and it was prejudicial to his defense when the City failed to comply with his request.

It is hereby ordered that the conviction of the Appellant is REVERSED.

AND IT IS SO ORDERED.



Robert E. Hood
Fifth Judicial Circuit

Columbia, South Carolina
August 13, 2014