STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-210 (S.C. Ct. App. filed 6/4/2014)

11-GS-40-05469, 05472

THE STATE,

RESPONDENT,

V.

STEVEN KRANENDONK,

PETITIONER

APPELLATE CASE NO. 2014-002044

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 25, 2014.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming Petitioner's conviction after a DNR investigator was qualified by the trial court as an expert in navigational rules and allowed to offer opinions reconstructing the accident, which exceeded her qualification?

2.

Whether the Court of Appeals erred in affirming the admission of evidence of Petitioner's blood alcohol content because the State lacked probable cause to seize appellant's blood under the Fourth Amendment, Fourteenth Amendment, and section 15-21-116 of the South Carolina Code?

STATEMENT OF THE CASE

On November 2, 2011, Steven Kranendonk (" Kranendonk") was indicted for two counts of reckless homicide by operation of a boat. On March 5 – 9, 2012, Kranendonk was tried before the Honorable G. Thomas Cooper, Jr. and a jury. R. 1. Jonathan Harvey represented Kranendonk. R.1. April Sampson, Foster Matthews, and Carter Potts represented the State. R.1. The jury convicted Kranendonk on both counts. R. 666, l. 18 – 667, l. 7. Judge Cooper sentenced Kranendonk to concurrent terms of ten years' imprisonment. R. 673, l. 23 – 674, l. 3. On March 15, 2012, Kranendonk filed and served his notice of appeal.

On April 8, 2014, the court heard oral argument. App. 1. The panel consisted of Chief Judge Few, Judge Short, and Judge Geathers. App. 2. On June 4, 2014, the court affirmed Kranendonk's convictions in an unpublished *per curiam* decision. App. 1-2. After denial of a timely petition for rehearing, this petition for certiorari follows.

ARGUMENT

1.

The Court of Appeals erred in affirming Petitioner's conviction after a DNR investigator was qualified by the trial court as an expert in navigational rules and allowed to offer opinions reconstructing the accident, which exceeded her qualification.

Relevant Facts

On the night of May 1, 2010, a tragic boating accident occurred on Lake Murray in Richland County. A boat driven by appellant Kranendonk ("Kranendonk Boat") collided with a boat driven by Rob Christofoli ("Christofoli Boat"). Both boats were traveling at speeds in excess of twenty miles per hour during the nighttime when the accident occurred. Two passengers in the Christofoli Boat were killed. Passengers in the Kranendonk Boat were injured.

Testimony from the Kranendonk Boat

The passengers in the Kranendonk boat were Kranendonk, Eric Hair ("Hair"), Mallory Collins ("Collins"), and Jenna Breland ("Breland"). Kranendonk and Hair were good friends. R. 223, ll. 6 – 10. On the morning of the incident, Hair called Kranendonk and asked about going out on Lake Murray in Kranendonk's parents' boat. R. 224, l. 23 – 225, l. 1. Hair grew up on the lake. R. 244, ll. 21 – 22. He had been on boats since he was a young child. R. 244, ll. 23 – 25. Hair and Kranendonk had known each other for ten years. R. 223, 4 – 5. They went out on Lake Murray together "a couple times a month." R. 225, ll. 21 – 23. Going out on the boat was a normal and ordinary experience for these two friends. R.225, l. 24 – 2226, l. 1.

Kranendonk and Hair met Collins and Breland and began preparing for their day on the lake. They went to a grocery store and to Total Wine. R. 226, l. 220 – 226, l. 11. Hair could not

remember exactly what was purchased at Total Wine. R. 229, ll. 6 – 8. The group then went to Pine Island where Kranendonk's boat was kept. R. 243, ll. 13 – 19. The group left Pine Island at approximately 4:00 or 5:00 PM and went to an island in Lake Murray called Sandy Beach. R. 245, ll. 4 – 11; R. 235, ll. 7 – 9. They anchored and tied up to other boats. R. 245, ll. 6 – 13. Hair described Sandy Beach as a place to listen to music and socialize. R. 245, ll. 14 – 25. Hair said that it is normal for people to share beer and alcohol at Sandy Beach. R. 246, ll. 10 – 17.

When it began getting dark, the Kranendonk Boat left Sandy Beach and went to Johnson's Marina, also known as Lighthouse Marina. R. 232, ll. 4 – 6; R., 355, ll. 16 - 20. They went to a restaurant at Johnson's Marina called the Quarter Deck. R. 247, ll. 3 – 19. The Quarter Deck is also known as The Rusty Anchor. R. 234, ll. 21 – 23. Hair remembered Kranendonk having a drink but did not know exactly what it was. R. 234, ll. 6 – 8. He remembered that it was in a cup with a straw. R. 234, ll. 6 – 8. Kranendonk was acting "normal." R. 234, ll. 9 – 10. The Kranendonk group decided to leave. R. ll. 1 – 3.

They got into the Kranendonk Boat and left the Quarter Deck. R. 235, ll. 14 – 16. It was dark. R. 234, ll. 24 – 25. The area around the marina had a no wake zone. R. 235, ll. 17 – 19. After leaving the no wake zone, the Kranendonk boat, driven by Kranendonk, "throttled up." R. 23

235, l. 17 – 19. Hair said, "About the time we planed out, we were coming up toward the point. I saw the other boat. By the time I saw it, I felt the boat slow down. I knew we were going to impact." R. 235, ll. 20 – 23. Hair said that he knew there would be an impact "because the boat was close enough that there was no way to avoid it." R. 236, ll. 1 – 2. The boat that was hit was, of course, the Christofoli Boat.

Boats are equipped with navigation lights for nighttime travel. The left side of a boat has a red light. R. 482, l. 25 – 483, l. 2. The right side of a boat has a green light. R. 483, ll. 3 – 4. The

back of a boat has a white light. R. 483, ll. 5 – 9. Hair described the Christofoli boat as coming from their right. Just before impact, Hair saw green lights. R. 251, ll. 1 – 20; R. 239, ll. 10 – 15.

Kranendonk was driving. Hair was sitting in the front of the boat. R. 236, ll. 8 – 10. Collins was sitting in the front of the boat to the left of Hair. R. 236, ll. 18 – 22. Collins, Kranendonk, and Breland were ejected from the boat. R. 236, l. 3 – 238, l. 14; R. 200, ll. 20 – 22. Hair realized he was the only one left in the boat. R. 237, ll. 4 – 6. He took control of the boat and put it in neutral. R. 237, ll. 7 – 10. He called 911 and told them "we've been hit by another boat. My friends are in the water." R.237, ll. 13 – 16.

Hair then put 911 on hold and began looking for his friends. R. 237, ll. 13 – 21. He heard Kranendonk respond and drove towards him. R. 238, ll. 12 – 17. Once he pulled his friends into the boat, Hair realized he had been injured. R. 238, ll. 15 – 17. Hair suffered a broken arm. R. 240, ll. 1 – 5. Collins had a gash on her face. R. 203, ll. 9 – 11. Breland hurt her shoulder. R. 203, ll. 17 – 19.

Kranendonk took over control of the boat. R. 238, ll. 21 – 22. They looked around to see if there were other boats, but did not see any. R. 262, ll. 10 – 17. Kranendonk then drove the boat to Lake Murray Marina. R. 262, ll. 18 – 20. Hair testified that both before and after the accident, he had no concerns about Kranendonk's operation of the boat. R. 262, l. 21 – 265, l. 20. He testified that nothing about Kranendonk's driving led him to believe that Kranendonk was proceeding in an unsafe manner. R. 265, ll. 14 – 20.

Breland's testimony corroborated Hair's testimony. Breland was sitting beside Kranendonk at the time of the accident. R. 198, ll. 9 – 18. She saw the Christofoli Boat coming from her right side. R. 198, ll. 18 – 21. She saw red and green lights on the Christofoli boat. R. 198, ll. 22 – 25. Breland testified that Kranendonk was not distracted and was operating the boat normally at the

time of the accident. R.212, l. 18 – 216, l. 1. She stated that Kranendonk was paying attention and had a good field of vision. R. 215, ll. 9 – 21.

Kranendonk's written statement was admitted into evidence as State's Exhibit 54. R. 680. Kranendonk wrote:

> As we left the no-wake zone I got the boat on plane and proceeded towards the direction of Pine Island. As soon as we passed the point on the starboard side I noticed a boat coming in our direction. I saw that they were heading in our direction and I immediately put the boat in neutral to slow down and give them right of way. After I had come off plane and slowed down, they proceeded to steer into us and then hitting our boat.

R. 680. Kranendonk told officers from the Department of Natural Resources ("DNR") that he was traveling approximately thirty miles per hour when he first saw the Christofoli Boat. R. 471, ll. 3 – 6. Both Hair and Kranendonk stated that their boat slowed before impact. Breland could not recall whether the Kranendonk Boat slowed, but she remembered Kranendonk honking the horn and flashing lights. R199, ll. 5 – 14.

The Location of the Accident and the Two Boats

Defendant's Exhibits 1 and 2 help explain how this accident occurred. Defendant's Exhibit 1 is an aerial view of the lake. Exhibit 2 is a photograph of the GPS unit on the Kranendonk boat. R. 610, l. 9 – 612, l. 5. In the middle of Exhibit 2, the GPS track shows a quick turn and small uneven movements by the Kranendonk boat. (Defendant's Exhibit 2). These movements likely show the location of the accident.

When compared with Defendant's Exhibit 1, it is apparent that the accident occurred near a point. Hair told the police that the Christofoli boat "looked like they were coming right off the point." R. 242, ll. 7 – 9. Defendant's Exhibit 1 depicts Johnson's Marina/Lighthouse Marina on its left-hand side. (Defendant's Ex. 1). The Kranendonk Boat came from the direction of this marina. R. 235, ll. 14 – 16. At the bottom right-hand corner of defendant's Exhibit 1 is Susie Ebert Island. R. 612, ll. 8 – 9. The Coast Guard's auxiliary station is at the bottom center of Defendant's Exhibit 1 and sits on a peninsula, white in color that points directly at Susie Ebert Island. (Defendant's Exhibit 1). The Christofoli boat came from the Lexington side of the lake and passed between the Coast Guard station and Susie Ebert Island. R. 292, l. 16 – 293, l. 8. Another peninsula obscures the view of Johnson's Marina/Lighthouse Marina when traveling from Lexington between the Coast Guard station and Susie Ebert Island. R. 298, l. 19 – 299, l. 1. It is likely that the Christofoli Boat was coming around this point and into the Kranendonk Boat's path when the accident occurred.

According to DNR, this area of Lake Murray has the most boat traffic of any spot on the entire lake. R. 387, l. 21 – 388, l. 1. There was no dispute at trial that the lake was dark that night. Colt Lax ("Lax"), a passenger in the Christofoli Boat, described it as "very, very dark." R. 314, ll. 13 – 17. A DNR officer described the "black hole" effect on an operator's night vision on Lake Murray:

> So during the day you got some – you know, some really good visibility. Now, once you start getting into nighttime, you know, again I guess it depends on moonlight, so on and so forth, your visibility is vastly restricted. I mean, you're not going to be able to see, you know, from pitch black dark. You don't have – because of the vastness of the lake and the vast expanse, whatever background lights you may have, they would be so far away that it's not going to illuminate what's – what's around you and what you're looking at. So it makes things that are, you know, out in front of you, you know, much darker, **refer to it as a black hole out in front of you, so.**

R. 606, ll. 12 – 25. Both the Christofoli Boat and the Kranendonk Boat would have been faced with this "black hole."

The two boats differed greatly in size and weight. The Kranendonk Boat was 23 feet long and made of fiberglass. R. 561, l. 14 – 561, l. 15. It had a center console. R. 561, ll. 3 – 5. It weighed approximately 3,500 pounds. R. 607, ll. 4 – 11. A DNR officer described the Kranendonk Boat as a "substantial size boat." R. 561, ll. 2 – 3. The Christofoli Boat was an 18 foot aluminum boat. R. 274, ll. 12 – 16. It had a deep V hull. R. 274, ll. 12 – 16. It was made for striper fishing. R. 274, ll. 12 – 16. It had only two seats in it. R. 274, ll. 12 – 24. It was twenty years old. R. 291, ll. 3 – 6. Two of the passengers in the Christofoli Boat were not sitting on chairs affixed to the boat's frame, but instead sat on fold-out lounge chairs. R. 278, ll. 12 – 16; R. 289, ll. 15 - 22. The Christofoli Boat weighed approximately 2,000 – 2,200 pounds, almost 1,300 pounds less than the Kranendonk Boat. R. 607, ll. 12 – 13. The great disparity in the boats' size helps explain the disparity in the injuries of the two boats' passengers.

Testimony from the Christofoli Boat

Christofoli described Lax as his "right-hand man" ever since they were four years old. R. 271, ll. 11 – 18. Christofoli and Lax took their girlfriends, the decedents, Amber Golden ("Golden") and Kelli Bullard ("Bullard") to eat dinner at O'Charley's on the night of the accident. R. 273, ll. 22 – 25. Christofoli and Golden had previously spent the day fishing on the lake. R. 273, ll. 8 – 20. The two couples went to O'Charley's at 8:00PM. R. 288, ll. 4 – 6. Christofoli claimed he had only two beers at O'Charley's. R. 288, ll. 4 – 10.

Afterwards, they decided to take the Christofoli Boat to Lighthouse Marina to meet friends and drink R. 288, ll. 14 – 17; R. 288, ll. 18 – 21. Christofoli repeatedly testified that he was heading towards Lighthouse Marina, which is the same marina from where the Kranendonk Boat was leaving. R. 288, l. 14 – 298, l. 23. While they were in unrestricted water, Christofoli drove the boat at 40 mph. R. 291, ll. 3 – 6. Christofoli testified that he did not feel such a speed at night was unreasonable. R. 291, ll. 7 – 12.

The Christofoli boat encountered a pontoon boat between the Coast Guard auxiliary station and Susie Ebert Island. R. 292, ll. 13 – 18. The pontoon boat was coming from Lighthouse Marina. R. 293, ll. 18 – 23. Christofoli was concerned about whether the pontoon boat could see his boat. R. 295, ll. 12 – 16. Even though Christofoli claimed he would have had the right-of-way, the pontoon boat did not slow down and maintained its course. R. 279, l. 24 – 280, l. 15. Christofoli slowed his boat to approximately 20 – 25 mph to avoid the pontoon boat. R. 280, ll. 6 – 15. In his statement to DNR, Christofoli said that he "bumped the throttle up a little" after the pontoon boat passed. R. 295, l. 23 – 296, l. 3. He also said that he guessed that the pontoon boat had not seen him. R. 296, ll. 2 – 3.

Christofoli stated that the accident occurred in water where the speed limit is not restricted. R. 299, ll. 7 – 9. On direct examination, Christofoli claimed that soon after the encounter with the pontoon boat, he looked to his left and all he could see was "white," which was the Kranendonk Boat. R. 281, ll. 15 – 25. Christofoli did not remember anything between the impact and making it to shore. R. 281, l. 22 – 282, l. 5. Christofoli's leg was broken in the accident. R. 282, ll. 6 – 11.

Lax stated that the radio was playing at the time of the accident. R. 322, ll. 1 – 4. Lax stated that the accident happened between 15 and 30 seconds after their encounter with the pontoon boat. R. 322, ll. 5 – 10. When Lax looked to his left, all he could see was the white hull of a boat. R. 322, ll. 5 – 10. In his statement to DNR, Lax said that he "Saw white hull V-bottom boat off portside probably 20 yards at nine o'clock." R. 347, l. 15 – 348, l. 11.

Lax claimed that they were going to the Dockside restaurant at Lake Murray Marina. R. 355, ll. 3 – 24. Lake Murray Marina is depicted on the center-right of Defendant's Exhibit 1. It is recognizable because its white docks protrude from shore. Lax agreed on cross-examination that if they had been going to Lighthouse Marina, as stated by Christofoli, they would have had to turn into its channel. R. 349, ll. 16 – 21. It would have required a different path than if they had been going to Lake Murray Marina. R. 349, ll. 22 – 24. Lax denied that Christofoli turned the boat to head into Lighthouse Marina because they were going straight, heading towards Lake Murray Marina. R. 355, ll. 16 – 24. Bullard and Golden were tragically killed in the accident. DNR found beer cans in the Christofoli Boat. R.457, ll. 23 – 25.

The DNR Investigator

The State originally called Sergeant Robin Camlin ("Camlin") to testify about her investigation of this matter. She worked in a different region and was only "somewhat familiar"

with Lake Murray. R. 450, ll. 19 – 23. She testified about her interview of Kranendonk. R. 459, l. 19 – 462, l. 18.

The solicitor then began questioning Camlin about boating terminology and the rules of navigation. R. 466, ll. 7 – 467, l. 20. She testified that the most efficient way to operate a boat is when it is on plane. R. 466, ll. 7 – 18. She testified that the navigational rules require a boat operator, if he sees a red light on another vessel, to either stop or alter his direction. R. 466, ll. 22 – 25. If an operator sees a green light on the other vessel, he should interpret that as meaning he should maintain his course and speed. R. 484, ll. 15 – 22. All boats have the responsibility to remain alert and do whatever they can to avoid a collision with another boat. R. 485, ll. 11 – 18.

Camlin claimed that during her interrogation of Kranendonk, he told her that he saw the Christofoli Boat on his boat's radar. R. 469, ll. 13 – 15. She claimed that Kranendonk began telling her that he saw red and green lights, then supposedly changed his story and said the lights were red and finally told her they were red and green. R. 469, l. 22 – 470, l. 6. She also claimed that Kranendonk could not tell her what the proper response was if a boat operator saw a red and white light on another vessel. R. 470, ll. 5 – 11. On cross-examination, Camlin admitted that Kranendonk gave her this statement after being awakened on the day after the accident, when he had been in the hospital until at least 4:00 AM. R. 471, l. 13 – 473, l. 18.

On redirect examination, the prosecutor asked Camlin if Kranendonk "had only seen a green light, based on your experience, would he have been able to cause this kind of damage on the side of the boat?" R. 489, ll. 23 – 25. Defense counsel's objection was sustained because the answer called for speculation. R. 490, ll. 1 – 9. The solicitor then attempted to ask which way the boats were facing and another objection was sustained. R. 490, ll. 11 – 18. The court again sustained an

objection when the solicitor attempted to ask Camlin which boat had the right-of-way. R. 491, ll. 7 – 16. Judge Cooper stated, "She wasn't there. She can't re-create the accident." R. 491, ll. 15 – 16.

After yet another attempt to elicit opinion testimony from Camlin, Judge Cooper stated, "I sustain the objection to this entire line of questioning. She is not in a position to re-create the accident. She can say what she saw. She can say what he did but asking her opinion about how the accident happened is outside the rules." R. 492, ll. 1 – 5. After another objection, Judge Cooper held a bench conference and then dismissed the jury. R. 496, ll. 6 – 19.

Outside of the presence of the jury, the solicitor told the court she wanted to qualify Camlin "as an expert in boat regulations." R. 496, ll. 21 – 25. After Judge Cooper asked her, "For what purpose?" the solicitor responded:

> In order to ask her questions about what regulations [were] violated or could have been violated since there seems to be some question as to what the regulations are and aren't and what was done and wasn't done by both the victim and the defendant.

R. 497, ll. 2 – 6. Trial counsel objected on the grounds that the testimony would be cumulative and prejudicial under rule 403. He also stated that her testimony would not aid the trier of fact. R. 498, l. 15 – 499, l. 7. Judge Cooper ruled that he would allow her to testify "given the burden on the State." R. 500, l. 17 – 19. Trial counsel then asked for a continuing objection to this testimony. R. 500, ll. 20 – 25.

During voir dire, it was determined that Camlin's captain's license had expired. R. 502 ll. 7 – 23. Camlin had never published any articles in the area of boating navigation. R. 506 ll. 9 – 11. None of her opinions had ever been subjected to peer review. R. 506, ll. 12 – 15. She had never been a presenter at a seminar. R. 507, ll. 15 – 16. Trial counsel objected to her being qualified as an expert. R. 507, l. 19. After stating that she was qualified under rule 702, Judge Cooper then

responded to a question from defense counsel as to whether she would be prevented from reconstructing the accident by stating, "Well, she can offer an opinion based on a hypothetical that if ABC and D occurred, is that within the navigational rules or does it comply with the navigational rules in the State of South Carolina. I think she can offer that." R. 507, l. 20 – 661, l. 3. At this point, the jury returned to the courtroom. R. 509, ll. 5 – 6.

Before the jury and subject to Kranendonk's objection, the trial court qualified Camlin "as an expert in the field of boating rules and regulations." R. 511, ll. 2 – 7. The solicitor asked what navigational rules and regulations Kranendonk violated. R. 511, ll. 10 – 15. Camlin testified that Kranendonk did not keep a proper lookout. R. 511, ll. 14 – 15. Despite further objections from defense counsel that were overruled, Camlin stated that if you keep a proper lookout, you have to "see it, know what it is and interpret it and take action to avoid a collision." R. 513, ll. 1 – 15. Kranendonk objected to this answer and the objection was overruled. R. 513, ll. 12 – 15.

Camlin then testified that Kranendonk should have throttled down completely. R. 514, ll. 9 – 17. She testified that Kranendonk violated Rule6 of the navigational rules because he failed to keep a safe speed. R. 514, l. 18 – 515, l. 14. She testified that Kranendonk violated a rule of navigation because he did not take into consideration "all prevailing circumstances" to avoid the risk of collision. She claimed that Kranendonk had "ample time to prevent a collision." R. 515, l. 15 – 516, l. 1. She opined that Kranendonk violated Rule 8 of the navigational rules because he did not "alter his course in time or slow down in time to avoid a collision." R. 516, ll. 7 – 13. She opined that Kranendonk violated Rule 15 of the navigational rules by failing to change his course or slow down to allow the boat approaching from the right to maintain its course and speed. R. 516, ll. 14 – 21. Finally, she opined that Kranendonk violated Rule 16 of the navigational rules by not

taking early and substantial action to avoid a collision because he was the "give-way" vessel. R. 517, ll. 7 – 18.

The Court of Appeals' Opinion

Petitioner argued that allowing Camlin to recreate the accident exceeded the scope of her qualification and could not have been a valid opinion. Citing only standard of review cases, the Court of Appeals affirmed in summary fashion. App. 2. Petitioner pointed out in his petition for rehearing that the court failed to address the issue that Camlin's opinions exceed the scope of her qualification, but the court made no changes to its opinion. App. 3-4. App. 10.

Discussion

All of this testimony amounted to recreation of the accident, which Judge Cooper had previously ruled was inadmissible. This exceeded the scope of her qualifications. "[A]n expert's testimony may not exceed the scope of his expertise." State v. Commander, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011) (holding that forensic pathologists may not testify regarding the state of mind or the guilt of the accused). Camlin was only qualified as an expert in navigational rules. Therefore, she should only have been allowed to testify as to what rules existed. Furthermore, Judge Cooper ruled that she could only testify concerning hypothetical situations. The solicitor repeatedly asked Camlin for her opinions on what Kranendonk specifically did wrong. Having been "improperly imbued with the imprimatur of an expert witness," this testimony severely prejudiced Kranendonk on the main issues at trial. See State v. Whitner, 399 S.C. 547, 732 S.E.2d 861, 867 (2012).

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), the Supreme Court reversed and ordered a new trial because a police officer testified outside of the scope of his qualifications. In Ellis, an officer was qualified as an expert in crime scene processing and fingerprint

identification. Id. at 177-78, 547 S.E.2d at 491-92. The officer testified as to his conclusions concerning the location of the victim and the position of the body at the time of a shooting. Id. The Supreme Court stated that the officer was improperly allowed to give his opinion on the ultimate issue in the trial, which was self-defense. Id. Just as in Ellis, Camlin, who was also a law enforcement officer, was allowed to exceed her knowledge of navigational rules and offer an opinion on the ultimate issue in this trial: whether Kranendonk acted recklessly. The fact that this testimony came from an individual qualified as an expert heightened the prejudice to Kranendonk. Id. "An officer's improper opinion which goes to the heart of the case is not harmless." Id. See also, Fordham v. State, 325 S.E.2d 755, 756 (Ga. 1985) (holding that an officer's opinion as to whether a defendant acted with malice required reversal).

An expert may only offer an opinion on the ultimate issue at trial if the expert is properly qualified. See State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991) (holding that a properly qualified psychiatrist could testify about state of mind in a battered woman's syndrome case); Ellis at 178, 547 S.E.2d at 491; SCRE 704. In the recent case of In re Thomas S 402 S.C. 373, 741 S.E.2d 27 (2013), the Supreme Court reversed because a social worker, who was not qualified to give an opinion on whether a sexually violent predator would reoffend, improperly gave such an opinion. The State attempted to avoid this problem by not qualifying the social worker as an expert. Id.

Similarly, in this case, the State attempted to hide the ball by first qualifying Camlin as an expert in navigational rules who would be presented with hypotheticals, and then immediately eliciting testimony concerning specific actions or non-actions taken by Kranendonk. Judge Cooper seemed to realize that it had been a mistake to allow Camlin's testimony. As she was leaving the stand, he told her, **"Next time somebody asks you to be an expert, you might want**

to think twice about it." R. 540, ll. 4 – 5 (emphasis added). This Court should grant certiorari, reverse, and grant Kranendonk a new trial.

2.

The Court of Appeals erred in affirming the admission of evidence of Petitioner's blood alcohol content because the State lacked probable cause to seize appellant's blood under the Fourth Amendment, Fourteenth Amendment, and section 15-21-116 of the South Carolina Code.

Relevant Facts

Prior to trial, Kranendonk moved to suppress evidence of his blood alcohol test ("BAC"). R. 13, ll. 21 – 25. At the pretrial hearing, the State first presented the testimony of DNR officer Kevin J. Roosen ("Roosen"). Officer Roosen went to Lake Murray Marina on the night of the accident. R. 14, ll. 24 – 25. At the marina, he saw Kranendonk, who told him that he was the driver of his boat. R. 16, ll. 5 – 9. Roosen did not find any alcohol on his boat. R. 16, ll. 22 – 25. Roosen performed a field sobriety test on Kranendonk. R. 19, ll. 9 – 15. He gave Kranendonk the test at approximately 12:15 AM. R. 19, ll. 13 – 15.

Kranendonk performed each of the following tests satisfactorily: reciting the alphabet; backwards counting; finger counting; palm at; finger to nose test; horizontal gaze nystagmus. R. 19, l. 18 – 22, l. 20. After successfully completing the field sobriety test, Roosen released Kranendonk. R. 26, ll. 12 – 14. He was not charged with any offense, was not placed under arrest, and was not even given the DNR equivalent of a traffic ticket. R. 26, ll. 15 – 23. Roosen testified that had he seen any signs of impairment, he would have consulted with his superiors, which he did not do. R. 27, l. 17 – 28, l. 1.

The next person to testify at the pretrial hearing was DNR Officer Rhett Bickley ("Bickley"). Bickley went to Palmetto Richland Hospital to investigate the incident. R. 28, ll. 18 –

20. Bickley spoke with Kranendonk at 3:30 AM. R. 35, ll. 16 – 23. Bickley claimed that Kranendonk had bloodshot eyes and smelled of alcohol. R. 36, ll. 17 – 25. However, nothing in Bickley's report mentioned the odor of alcohol and bloodshot eyes. R. 49, ll. 4 – 8. Bickley told Kranendonk that because there had been a fatality, he was required to give a sample of his blood. R. 27, ll. 14 – 19.

At the time of the blood draw, Bickley admitted that he "did not know if [Kranendonk] was at fault or not." R. 38, 21 – 24. Bickley did not know that Kranendonk had passed the field sobriety test. R. 54, 1 – 11. He knew, by Kranendonk's own admission, that Kranendonk had consumed alcohol that day, but he did not know at what time Kranendonk consumed any alcoholic beverages. R. 99, ll. 6 – 9.

At this point, Bickley then admitted that he did not have probable cause to draw Kranendonk's blood:

> Q. Other than the occurrence of an accident, okay –
>
> A. Yes, sir.
>
> Q. – and other than his admission that he had consumed alcohol, at the time you asked for blood under the felony BUI statute, you didn't know what had happened, correct?
>
> A. Correct.
>
> Q. And you'll agree with me that you told the solicitor at the time you asked for blood, quote, "You did not know his position in the accident", correct?
>
> A. I did not know if he was at fault or not, correct.
>
> Q. All right. So you had no reason – you didn't have any probable cause, did you? You didn't know what happened, correct?
>
> A. Correct, sir.

THE COURT: That was two questions.

BY MISTER HARVEY:

Q. The answer is correct to both questions?

A. Well, just state them both as separate questions, and I'll answer each one.

Q. Fair enough. When you responded to the solicitor's question about why you sought blood, you answered you didn't know his position in the accident, correct?

A. Correct.

Q. At the time you asked for blood –

A. The probable cause question, correct.

A. You didn't have any probable cause, did you?

A. Based on that statement, correct, sir.

(Pause).

THE COURT: Based on what? Based on what?

THE WITNESS: Sir?

THE COURT: What did you say? Based on –

THE WITNESS: Based on – based on not knowing who was at fault in the accident, based on – based on the fact that you have an accident with two operators not knowing specifically that one was at fault or one was not at fault or both were contributing parties. I could not specifically say that Mr. Kranendonk was the offending party.

R. 49, l. 15 – 51, l. 2 (emphasis added). The trial judge suspended review of Kranendonk's motion in limine. R. 55, ll. 19 – 22.

After jury selection, the trial court heard additional argument on whether to suppress the BAC test. R. 57, l. 18 – 74, l. 20. Kranendonk argued that at the time of the blood draw, the

State had failed to prove it had probable cause for the seizure of Kranendonk's blood. Kranendonk also argued that knowledge of the field sobriety test was imputed to Bickley. R. 61, ll. 21 – 24. Court recessed for the day without Judge Cooper making a decision on the suppression motion.

The next day, instead of ruling on the suppression motion, Judge Cooper *sua sponte* recalled Officer Bickley. R. 91, ll. 9 – 12. Under intense questioning from Judge Cooper, Bickley recanted his earlier testimony that he did not have probable cause but stated that in order to draw blood he "simply had to understand that [Kranendonk] was involved in it." R. 99, ll. 1 – 3. After additional argument, the trial court ruled that the BAC test was admissible. R. 107, ll. 20 – 22. The solicitor used the information that Kranendonk's blood alcohol level was .11 in her opening statement. R. 111, ll. 10 – 14.

The Court of Appeals' Opinion

In summary fashion, the Court of Appeals held that probable cause existed. App. 2. The court's opinion only addresses the knowledge of Officer Bickley. App. 2. It did not address the knowledge of Officer Roosen or whether his knowledge that Kranendonk passed a field sobriety test was imputed to Officer Bickley. App. 2. Kranendonk asked the court to address this issue and the question of imputed knowledge in the petition for rehearing. App. 6-8. The court declined to alter its decision. App. 10.

Discussion

As demonstrated by Bickley's own admission when subjected to adversarial testing, he lacked probable cause to seize Kranendonk's blood. Therefore, this seizure was improper under both the Fourth Amendment and section 50-21-116 of the South Carolina Code. See U.S. Const. amends. IV and XIV; S.C. Code Ann. § 50-21-116. Taking evidence from a citizen's body

constitutes a search and seizure under the Fourth Amendment. State v. Simmons, 384 S.C. 145, 174, 682 S.E.2d 19, 35; Schmerber v. California, 384 U.S. 757 (1966). Searches and seizures without a warrant are *per se* unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967). Evidence obtained from an illegal search must be suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

The State needed probable cause to seize Kranendonk's blood. See State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006) (dealing with DNA evidence). Section 50-21-116 incorporates the probable cause standard from the Fourth Amendment. It states, "Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs, if there is probable cause to believe that the person violated or is under arrest for a violation of [the felony BUI statute]" S.C. Code Ann. § 50-21-116.

Bickley lacked probable cause. The only three facts that Bickley knew that supported a finding of probable cause were that Kranendonk said he had been drinking during the day, Bickley claimed Kranendonk had bloodshot eyes, and Kranendonk supposedly smelled of alcohol. None of these facts are reliable in this case. Bickley did not know when Kranendonk consumed alcohol. Bickley failed to note the two most important facts—the bloodshot eyes and the alcohol smell—in his report. By the time Bickley saw Kranendonk, it was 3:30AM and he had been in a serious accident, so it would be expected that Kranendonk would have bloodshot eyes.

Against these shaky facts, is the concrete fact that Bickley admitted he did not have probable cause. Bickley had limited facts about the accident, mostly consisting of the fact that

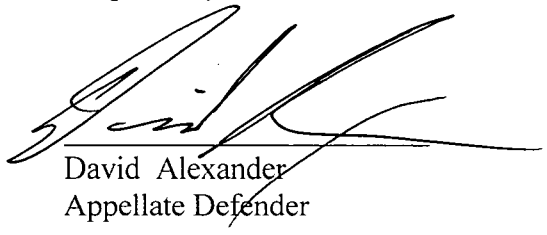
Kranendonk was the driver of one boat and Christofoli was the driver of another boat. Kranendonk had passed a field sobriety test. This knowledge is imputed to Bickley as the State is one entity and officers are presumed to have the facts of other officers. See United States v. Morales, 238 F.3d 952 (8th Cir. 2001) (stating that probable cause may be based on officers' collective knowledge); United States v. Rosario, 543 F.2d 6, 8 (2nd Cir. 1976) (stating that the test for probable cause "is whether, based on the collective knowledge of the police, rather than that of the arresting officer alone, the facts available to the police at the time of arrest were sufficient to warrant a prudent man in believing that the petitioner had committed . . . an offense."); cf. State v. Dunbar, 361 S.C. 240, 603 S.E.2d 615 (Ct. App. 2004) (holding that because officer did not have personal knowledge or hearsay knowledge of facts in his affidavit, that warrant was invalid for lack of probable cause).

This doctrine certainly should apply in cases where one officer has exculpatory facts, but does not relay them to another officer. The police are not allowed to withhold information from each other in order to bolster an officer's probable cause determination. It presents an important constitutional question that appears to be a novel issue in South Carolina. Rule 242(b)(1) and (4), SCACR. In this case, where Roosen knew the highly exculpatory fact that Kranendonk had passed a field sobriety test with no difficulty, the failure to communicate this information to Bickley cannot inure to Kranendonk's detriment. For these reasons, and considering the totality of the circumstances, law enforcement lacked probable cause and the seizure of Kranendonk's blood violated his rights under the Fourth Amendment and under section 50-21-116 of the South Carolina Code. The evidence of Kranendonk's BAC was highly prejudicial and likely made the difference in this close case. Therefore, this Court should grant ceritorari, reverse, and order a new trial.

CONCLUSION

For the above-stated reasons, this Court should grant the petition, order further briefing, and ultimately reverse Petitioner's convictions and grant him a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 6th day of October, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2014-UP-210 (S.C. Ct. App. filed 6/4/2014)
11-GS-40-05469, 05472

THE STATE,

RESPONDENT,

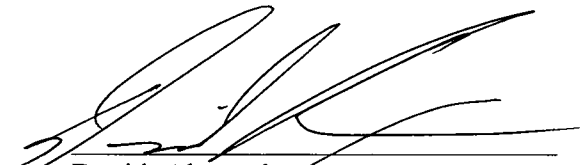
V.

STEVEN KRANENDONK,

PETITIONER

CERTIFICATE OF SERVICE

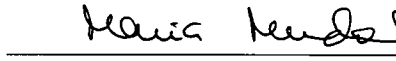
I certify that a true copy of the petition for writ of certiorari to the Court of Appeals and a copy of the appendix, in this case has been served on J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals, this 6th day of October, 2014.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 6th day
of October, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.