

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
Court of General Sessions

Honorable Edgar W. Dickson, Circuit Court Judge

Opinion No. 5252 (S.C. Ct. App. Filed July 30, 2014)

Appellate Case No. 2014-002198

RECEIVED
DEC 17 2014
S.C. Supreme Court

THE STATE,

Respondent,

vs.

DAISY LYNN MIMMS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY AFFIRM THE REFUSAL TO CHARGE THE JURY THE LAW RESPECTING CRIMINAL INTENT FOR DRIVING UNDER THE INFLUENCE WHEN S.C. CODE ANN. § 56-5-2930 IS A STRICT LIABILITY STATUTE?

STATEMENT OF THE CASE

The State charged Petitioner Daisy Lynn Mimms with driving while under the influence (“DUI”), first offense, pursuant to S.C. Code Ann. § 56-5-2930 (2006). (R. p.4 [Uniform Traffic Ticket]). On April 11, 2011, Petitioner was tried in the Magistrate’s Court of Orangeburg County before the Honorable Meree D. Williamson. (R. p.2 [Magistrate’s Return, p. 2]). Petitioner was represented at trial by Assistant Public Defender Mark Wise. The jury found Petitioner guilty of DUI, and the Judge Williamson sentenced her to a 30 day sentence suspended upon payment of a fine of \$997.00. (R. p.3; R. p.26 [Magistrate’s Return, p. 3 and Attachment IV - Jury Verdict Form). A Notice of Appeal was filed on April 21, 2011. (R. p.27 [Attachment V of Magistrate’s Return]). The appeal to the circuit court was heard by the Honorable Edgar W. Dickson on January 5, 2012. (R. p.32) Mr. Wise again represented Petitioner, and Assistant Solicitor Anne Hutto represented the State. Id. Judge Dickson issued an Order dated September 6, 2012, finding that there were no legal or factual grounds constituting error on the part of the magistrate and dismissing the appeal with prejudice. (R. p.53 [Circuit Court Order dated September 6, 2012]). Petitioner filed and served notice of appeal dated September 14, 2012. After full briefing and oral argument, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Mimms, 410 S.C. 32, 763 S.E.2d 46 (Ct.App. 2014). Petitioner filed and served a petition for rehearing on August 14, 2014 and which was denied by order of the Court of Appeals dated September 17, 2014.

Petitioner thereafter filed and served a Petition for Writ of Certiorari and this Return of the State follows.

STATEMENT OF FACTS

The trial summary of the facts in the Magistrate's Return is as follows:

The State's only witness was Trooper Jamie Burris. After being sworn Burris stated that he was responding to a dispatch call to look out for a driver who was reported driving erratically. Trooper Burris saw a car fitting the description and upon coming off the ramp onto the interstate the vehicle ran off the roadway. The trooper proceeded with the traffic stop. The trooper stated he smelled a strong odor of alcohol and proceeded to have the defendant get out of the car. The roadside video was put into evidence and the horizontal gaze nystagmus test was performed. Burris stated that the defendant was unable to keep her balance and felt the roadside was unsafe to administer any further field sobriety tests. The trooper stated that by the defendant's mannerisms and appearance she appeared to be under the influence of alcohol. He also stated that the defendant did tell him she was also taking medication. The video tape included testimony by the defendant that she had consumed alcohol and that she has cancer. Upon cross-examination the trooper explained in detail the three elements used in the HGN test to determine if the defendant was under the influence. (R. p.30 [Magistrate's Return, p. 9]).

Notably, the audio transcript of Trooper Burris' testimony at trial reveals that Petitioner did not successfully complete the horizontal gaze nystagmus test and, that based upon his lengthy experience and training as well as Petitioner's appearance and mannerisms and the totality of the circumstances, Petitioner was driving her vehicle while impaired. Trooper Burris stated that he saw Petitioner drive her vehicle off the roadway as he responded to the dispatch call about an erratic driving. ([Magistrate Audio Transcript transported and filed separately]). He also narrated for the jury when the video recording from his patrol car was presented at trial "You just saw her going off the roadway right there?" ([Magistrate Audio Transcript transported and filed separately]). After pulling Petitioner over, Trooper Burris said "You was weaving all over the roadway!" [Magistrate Audio Transcript transported and filed separately]). He also testified about the enhanced or synergy effect that can arise when alcohol is consumed in combination with medication. Petitioner presented no evidence at trial. ([Magistrate Audio Transcript transported and filed separately]).

ARGUMENT

THE COURT OF APPEALS CORRECTLY AFFIRMED THE REFUSAL TO CHARGE THE JURY THE LAW RESPECTING CRIMINAL INTENT FOR DRIVING UNDER THE INFLUENCE WHEN S.C. CODE ANN. § 56-5-2930 IS A STRICT LIABILITY STATUTE.

In the opinion respecting Petitioner's appeal, the Court of Appeals determined that the circuit court did not err in dismissing Petitioner's appeal for the magistrate judge's failure to charge criminal intent as an element of S.C. Code Ann. section 56-5-2930, the statute proscribing driving under the influence. In her Petition for Rehearing, Petitioner urged the Court of Appeals to hold that, in driving under the influence cases involving impairment as a result of consumption of drugs, if evidence is presented that the defendant is unaware of the effect of the drugs, the jury should be allowed to consider the defendant's criminal intent. She argued that other jurisdictions that have found driving under the influence statutes to be strict liability offenses, have limited the application to charges based solely upon alcoholic content and not alcohol coupled with drugs. She asked the Court of Appeals to distinguish between matters in which an individual is charged with driving under the influence as a result of consumption of alcohol and drugs as opposed to being charged as a result of consumption of alcohol alone. She conceded that strict liability should apply to the latter but not the former. (Appendix [hereinafter App.], pp. 99 – 101). Petitioner now contends in the petition for writ of certiorari that driving under the influence is not a strict liability crime and, when lack of criminal intent is raised by the evidence, due process requires a jury instruction on criminal intent.

Respondent submits, first, that Petitioner is limited to presenting to this Court only the argument raised in her Petition for Rehearing which includes her concession that the statute in question is a strict liability for some purposes but not others. TNS Mills, Inc. v. S.C. Dept. of Revenue, 331 SC 611, 503 S.E.2d 471 (1998) (an issue conceded in the lower court may not be

argued on appeal). In order for an issue to be considered by this Court on review of a decision of the Court of Appeals by writ of certiorari, the issue must have been raised in a petition for rehearing before that court. Rule 242(d)(2), SCACR; State v. Johnson, 334 S.C. 78 n. 1, 512 S.E.2d 795 (1999) (stating this Court will decline to consider an issue the Court of Appeals did not address and that was not raised in petition for rehearing); Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995), overruled on other grounds (same); see Rule 242 (d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”).

Second, Respondent submits that the Court of Appeals properly affirmed the circuit court’s determination that the magistrate judge correctly denied Petitioner’s request to charge the jury on criminal intent for driving under the influence because S.C. Code Ann. section 56-5-2930 is a strict liability offense and the magistrate court correctly denied the jury charge on criminal intent.

“[S]trict liability offenses or absolute liability offenses depend on no mental element, but consist only of forbidden acts or omissions. Strict liability allows for criminal liability absent the element of mens rea found in the definition of most crimes. To prove a violation of a strict liability statute, the state need only prove the accused engaged in a voluntary act or an omission . . .” 21 Am. Jur. 2d Criminal Law section 132. A per se violation or strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent. State v. Harrison, 846 P. 2d 1082 (New Mexico 1993). In effect, the legislature forbids the act and makes its commission criminal without regard to intent of the defendant. Id. The rationale for strict liability statutes is that the public interest in the area governed by the statute is

so compelling or the harm caused so great that the public interest outweighs the interests of the individual charged. Id.; State v. Rios, 980 P. 2d 1068 (N.M.1999).

As the Court of Appeals correctly opined, whether an offense is one of strict liability is a question of legislative intent. State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994). In Jefferies, this Court indicated that when the statute does not expressly state whether a *mens rea* is required, the court looks to the common law and development of the statute to determine whether the legislature intended the crime to require a *mens rea*. See also Morrisette v. United States, 342 U.S. 246 (1952).

The State submits that nothing in the plain language of S.C. Code Ann. section 56-5-2930 suggests anything but strict liability. A review of the legislative enactments pertaining section 56-5-2930 suggests anything but strict liability. See S.C. Code Ann. § 46-343 (1952); S.C. Code Ann. § 46-343 (Supp. 1960); S.C. Code Ann. § 46-343 (1962); S.C. Code Ann. § 56-5-2930 (Supp. 1987); S.C. Code Ann. § 56-5-2930 (Supp. 1998); S.C. Code Ann. § 56-5-2930 (Supp. 2000); S.C. Code Ann. § 56-5-2930 (Supp. 2008). Further, no case law in South Carolina suggests § 56-5-2930 is anything but a strict liability statute. In State v. Long, 186 S.C. 439, 195 S.E.2d 624 (1938) and State v. Mouzon, 231 S.C. 655, 9 S.E.2d 672 (1957), our courts concluded that driving under the influence is *malum prohibitum* and *malum in se*. The intent for *malum prohibitum* is simply the intent to do the act which results in a violation of the law. Crossley v. State, 582 S.E.2d 204 (Ga.App. 2003). Unlike with the crime of kidnapping where the common law and development of the kidnapping statute reveals the legislative intent that the *mens rea* of “knowledge” is required, the rationale, purpose and development of the law respecting DUI is distinguishable. See State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994).

The plain wording of section 56-5-2930 provides that the only proof necessary is evidence that a defendant was driving a vehicle under the influence of alcohol and/or drugs or other substances and that the defendant's faculties were materially and appreciably impaired. Our courts have repeatedly recognized that the corpus delicti of driving under the influence is established by proof that a person is driving a vehicle while materially and appreciably impaired and the impairment is caused by the use of alcohol, drugs, or other substances or a combination thereof. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) and S.C. Code Ann. section 56-5-2930; see also State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001); State v. McCombs, 335 S.C. 123, 515 S.E.2d 547 (Ct. App. 1999); State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (1996); State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966). Petitioner's argument that that because the offense has been characterized as *malum in se* in addition to *malum prohibitum* indicates that criminal intent is necessary is without merit. We have also concluded the offense is *malum prohibitum*. By definition, criminal intent is not a prerequisite for *malum prohibitum*.

The State also submits that the Court of Appeals correctly acknowledged the public interest in deterring intoxicated individuals from driving motor vehicles while materially and appreciably impaired to protect the drivers, the innocent individuals who are injured and killed by these drivers and the families and loved ones of innocent victims and enacted the statute without requiring proof of intent to secure a conviction for violating the statute. See State v. Harrison, 846 P.2d 1082 (N.M. 1993); City of Wichita v. Hull, 724 P.2d 699 (Kan. 1986). This Court recognized the legislative intent and public policy in State v. Long, 186 S.C. 439, 195 S.E.2d 624, 627 (1938), when it concluded:

“the purpose of the statute is to prevent accidents and preserve person from injury, and the reason for it is that an

intoxicated person has so befuddled and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding the instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operation to be in possession of his faculties.”

See also Dixon v. Weir Fuel Co., 251 S.C. 74, 160 S.E.2d 194 (1968) (“One violates the traffic statute if he partakes of alcohol to the extent that he cannot drive a motor vehicle with reasonable care, or if he cannot drive as a prudent driver would operate a vehicle.”). Other jurisdictions have construed driving under the influence statutes as strict liability offenses for these reasons. State v. Zaragoza, 209 P.2d 629 (Az. 2009); State v. Young, 795 P. 2d 285 (Haw.App. 1990); People v. Thorson, 496 N.E.2d 304(Ill. 1986); Burns v. State, 556 N.E.2d 955 (Ind.Ct.App. 1990); City of Wichita v. Hull, 724 P.2d 699 (Kan. 1986); State v. McDole, 734 P.2d 683 (1987); City of Defiance v. Kretz, 573 N.E.2d 2(Ohio 1991); State v. Miller, 788 P.2d 974 (Or. 1990); State v. Polk, 927 A.2d 514 (N.H. 2007); State v. Sims, 236 P.3d (N.M. 2010); State v. Bernhardt, 584 A.2d 854 (N.J. 1991); State v. Glass, 620 N.W.2d 146 N.D. 2000); State v. Kain, 24 S.W.3d 816 (Tenn. 2000); State v. Carter, 810 S.W.2d 197 (Tex.Crim.App. 1001); State v. Caibaiosai, 363 N.W.2d 574(Wis. 1985); see also Begay v. United States, 553 U.S. 137 (2008) (stating that statutes that forbid driving under the influence are strict liability crimes).

The charge requested by Petitioner would defeat the public policy, obstruct the purpose of the statute, and lead to an absurd result that would allow a defendant to argue that his intentional consumption of alcohol or other substances impaired his ability to know he was impaired or to form conscious intent to drive drunk. State v. Williams, 698 P.2d 732 (Az. 1985);

see Morrisette v. United States, 342 U.S. 246 (1952). Petitioner's argument that a showing of criminal intent is necessary when a defendant knowingly consumes drugs but not when alcohol alone is ingested, if accepted, is also contrary to the purpose and public policy considerations of the statute and would lead to an inconsistent and absurd application of the law. The requested charge is also inconsistent with the longstanding precedent that voluntary intoxication does not relieve an individual from criminal responsibility. State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993); State v. Hartfield, 300 S.C. 469, 388 S.E.2d 802 (1990); see also State v. Gurule, 252 P.2d 823 (N.M. 2011).

The State also notes that the right to operate a motor vehicle on a public highway in South Carolina is not a property right but is merely a privilege subject to reasonable regulation under the police power in the interest of the public safety and welfare. Chisolm v. S.C. Dept. Motor Vehicles, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). South Carolina has a substantial interest in protecting its citizens from the injury, death and harm caused by individuals who drive vehicles while materially and appreciably impaired by alcohol, drugs, other substance or combination thereof. The statute as enacted promotes the health, safety and welfare of the citizens of South Carolina and was clearly intended as a strict liability offense to accomplish these goals.

Moreover, a reading of the statute as a whole reflects further legislative intent that the offense is one of strict liability. Subparts I and J of the statute which set forth certain factors a defendant may challenge or introduce when charged and tried for the offense does not include the factor which formed the basis for the requested charge. See City of Camden, 326 S.C. 556, 486 S.E.2d 492 (1997)(stating that in construing a statute, the court looks to its language as a

whole in light of its manifest purpose and stating that driving while intoxicated is a traffic offense).

Lastly, if this Court determines intent is required, the wording of the statute makes the **act of driving** a motor vehicle within the State after consuming alcohol, drugs or other substances the gravamen of the offense. State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (1996). Therefore any charge respecting intent would be limited to Appellant's the intent to drive after imbibing some amount of these substances. Any error in failing to give this charge is harmless because there is no question in this case Appellant consumed alcohol and was on medication and made a conscious decision to drive the vehicle. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (1998).

The Magistrate Judge and the circuit court correctly ascertained and effectuated the intent of the legislature, as required. Pittman, 373 S.C. at 561, 647 S.E.2d at 161. Because § 56-5-2930 is a strict liability statute in which criminal intent is not required, the Court of Appeals correctly affirmed the denial the request to charge. City of Orangeburg v. Carter, 303 S.C. 290, 400 S.E.2d 140 (1991) (stating the trial judge properly charged the jury that "DUI is established by proof the defendant's ability to drive was materially and appreciably impaired."). The Petition for Writ of Certiorari must be denied.

CONCLUSION

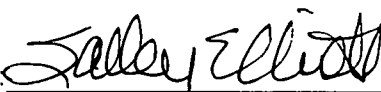
The South Carolina Court of Appeals applied the correct law and properly resolved the question presented. This Court should decline to exercise its discretionary review.

Respectfully submitted,

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December 17, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
Court of General Sessions

Honorable Edgar W. Dickson, Circuit Court Judge

Opinion No. 5252 (S.C. Ct. App. Filed July 30, 2014)

Appellate Case No. 2014-002198

THE STATE,

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DAISY LYNN MIMMS,

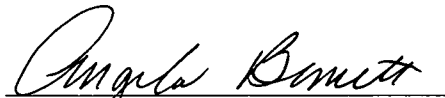
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Assistant Public Defenders Mark Wise and Breen R. Stevens, First Public Defender's Office, P.O. Box 1112, Orangeburg, SC 29116.

I further certify that all parties required by Rule to be served have been served.

This 17th day of December, 2014.



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ALAN WILSON
ATTORNEY GENERAL

December 17, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: The State v. Daisy Lynn Mimms
Appellate Case N: 2014-002198.

RECEIVED
DEC 17 2014
S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: Assistant Public Defender Mark Wise
Assistant Public Defender Breen R. Stevens
Ms. Trisha Allen