STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTINA REECE,

APPELLANT

APPELLATE CASE NO. 2013-000656

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# INITIAL BRIEF OF APPELLANT

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1.

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2.

Whether appellant's conviction for felony driving under the influence must be vacated where the trial court was without subject matter jurisdiction to try appellant because her case was on appeal, the appellate court had exclusive jurisdiction, and the remittitur had not been returned to the trial court?

3.

Whether the court erred by refusing to direct a verdict of acquittal where there was no direct or substantial circumstantial evidence that appellant was under the influence or appreciably impaired at the time of the automobile accident within the meaning of the felony DUI statute?

## STATEMENT OF THE CASE

Appellant was indicted at the June 19, 2012 term of the Pickens County Grand Jury for the three counts of felony driving under the influence resulting in great bodily injury. R.p. *. Appellant's case was called for a suppression hearing before the Honorable Letitia H. Verdin on January 28, 2013. Richard Warder represented appellant. Lisa Bentley was the assistant solicitor. Supp. Tr. 1.

At the conclusion of the hearing, the judge rejected the defense argument that appellant's blood was illegally drawn because the blood was drawn at the order of law enforcement, and because the state did not attempt to obtain a search warrant. Supp. Tr. 54, l. 17 – 57, l. 23. An order stating that the state did not need a warrant, and that it had probable cause to seize appellant's blood without a warrant was issued. R. p. *.

On March 19, 2013, appellant's case was called for trial. Defense counsel informed the court that he had previously filed a notice of intent to appeal from the denial of his motion to suppress appellant's blood. Tr. 1; Tr. 8, l. 16 – 10, l. 21. The judge ruled that the appeal was interlocutory, and that the trial would go forward despite the fact counsel had filed a notice of intent to appeal. Defense counsel objected to the trial going forward while the case was on appeal. The judge acknowledged she understood the objection. Tr. 9, l. 14 – 10, l. 21.

At the conclusion of the bench trial the judge found appellant guilty of three counts of felony DUI. Tr. 257, ll. 13-17. The judge sentenced appellant to ten years imprisonment concurrent on each count. Tr. 263, ll. 9-14. Appellant filed a notice of intent to appeal.

Undersigned appellant counsel filed a motion to vacate appellant's convictions because the trial court did not have jurisdiction to try appellant because her case was on appeal. A trial in the lower court was improper where jurisdiction was vested in the Supreme Court. R. p. *. This Court,

through the Chief Judge, denied the motion. Subsequently, on September 12, 2014 petitioner filed a motion for rehearing. R. p. *. On September 26, 2014 the Clerk of this Court returned the petition for rehearing and the return to rehearing stating that "'the appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.' No action will be taken on your petition for rehearing." R. p. *.

This brief of appellant follows.

ARGUMENT

1.

The court erred in refusing to suppress the results of appellant's blood draw where the police ordered her blood drawn after a car accident, without a warrant, since the belief of a police officer that alcohol may be in the suspect's blood stream does not create a *per se* exception to the Fourth Amendment's search warrant requirement allowing a non-consensual blood draw, in violation of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

**Relevant Facts**

A pre-trial suppression hearing was held on January 28, 2013 regarding law enforcement ordering appellant's blood drawn at the hospital because they believed the car accident was the result of a felony DUI. Defense counsel noted that Missouri v. McNeely, 133 S.Ct. 1552 (2013), on this issue of drawing DUI suspect's blood without her consent, and without a warrant, had been argued in the United States Supreme Court, but not decided, at the time of the suppression hearing. McNeely was argued on January 9, 2013.

Pickens County EMS worker, Eric Patterson, testified he responded to a two-car motor vehicle head-on collision on April 30, 2011. Supp. Tr. 7, ll. 3-15. Patterson transported "Ms. Medygyesy [the driver of the other vehicle] . . . and another patient and my partner and the rescue driver" to the hospital. Patterson did not remember who the other patient was at that time. Supp. Tr. 10, ll. 5-8.

The other EMS worker, Brad West, remembered Appellant Christina Reece was the driver of the truck, and that she had to be "extricated" from it. Supp. Tr. 13, ll. 1-21. Appellant was injured, and West opined that she would not have been able to give a breath sample as a potential

DUI suspect. Supp. Tr. 14, ll. 17-22. Appellant was taken to Greenville Memorial Hospital. Supp. Tr. 14, l. 17 – 15, l. 15.

Highway Patrolman James Greer testified he contacted his supervisor, J.S. Black, who "told me that there was a possible felony DUI situation. He asked me to get my camera and start taking some pictures." Supp. Tr. 18, l. 21 – 19, l. 13.

Greer said there was "a good bit of clutter inside the truck as well. Also, there were several beer cans that were lying around in the bed of the truck, behind the seat of the truck." Supp. Tr. 19, ll. 9-24.

Greer found two arrest warrants inside appellant's truck in a "lighter colored bag." One of the warrants was for possession of methamphetamines, and the other one was for manufacturing methamphetamines. Supp. Tr. 21, ll. 2-4. Greer did not recall how old the arrest warrants were that he found in the truck. Supp. Tr. 22, ll. 13-16. Greer said he also found a pipe which he said was "commonly used for smoking methamphetamines." Supp. Tr. 21, ll. 2-11.

Highway Patrolman Joey Baldwin testified he responded to the scene of the car accident on April 30, 2011. Baldwin said he determined that appellant's vehicle had crossed the centerline. Supp. Tr. 28, ll. 7-17. Baldwin was directed to go to Greenville Memorial Hospital. Supp. Tr. 30, l. 14 – 31, l. 6.

Trooper Greer said he determined that appellant had been injured and the occupants of the other vehicle had sustained what he determined to be "great bodily injury." Supp. Tr. 33, l. 5 – 34, l. 16. The solicitor examined Trooper Greer concerning his order to draw appellant's blood at the hospital:

> Q. But based on - - based on your communications with Corporal Mayfield, what did you do at the hospital?
>
> A. Based on my communications, Corporal Mayfield

had indicated to me that he had spoken to a supervisor at Highway Patrol. And it was our course of action at that time that we would *get a legal blood draw for the charge of Felony DUI.*

*Q. And did you proceed to draw Ms. Reece's blood?*

*A. I did not draw it. I proceeded to the trauma bay with the blood draw kits to have it drawn.*

*Q. And did you stay there and observe it - - pardon me. Did you direct hospital personnel to conduct that blood draw?*

A. *I did and I have paperwork on that as well.*

Supp. Tr. 36, l. 23 – 37, l. 11. (emphasis added).

On cross-examination Greer testified that he would have made "the felony DUI charge regardless of the information that Corporal Mayfield had told me." Greer said it was his decision to have the blood drawn from appellant. Supp. Tr. 38, ll. 4-22. Greer confirmed that he never spoke with appellant, and he offered "she was, like I said earlier, unconscious, sedated, something to that effect, in the trauma bay." Supp. Tr. 39, ll. 10-15.

Highway Patrol Officer Mayfield added: "I felt like we may have a possible situation where we had a felony DUI here if the injuries were serious enough." Supp. Tr. 47, ll. 12-20. The following occurred on direct examination of Trooper Mayfield:

> You were the on-scene supervisor. Was it your final determination to do the blood draw or would that have been up to Trooper Baldwin who was at the hospital?
>
> A. Well, I conveyed to him what I would have had, that it would have been at his discretion. Obviously, I conferred with my supervisor, which is in our chain of command. It's a command staff. I relayed to him what I have and then we confer about what we need to do. At that point, I would get with Trooper Baldwin and we would confer. And I talked to him. It was relayed to him what we had and the situation, it looked like a felony DUI.

> Gave him the facts. *Then he made a decision to draw the blood with our conferring together.*

Supp. Tr. 50, l. 21 – 51, l. 8. (emphasis added).

At the conclusion of the suppression hearing, the assistant solicitor argued that the state had met its burden of proving there was probable cause to draw appellant's blood without her consent. Supp. Tr. 53, l. 12 – 54, l. 10. The judge confirmed to defense counsel Warder that he was limited to arguing probable cause as defined in the statute. Defense counsel argued that there was "no question in my mind, that if it went before a neutral and detached magistrate, we'd have a different result." Counsel argued: "I'll be honest. What bothers me about this case when we're rushing through it is that the issue is before the United States Supreme Court right now. It was argued on the 13th of January [Missouri v. McNeely, 133 S.Ct. 1552 (2013)]. They were going to address this whole issue, I think, of what relevance Schmerber [Schmerber v. California, 384 U.S. 757 (1966)] would have in today's world and whether or not you can ever take a blood sample." Supp. Tr. 54, l. 13 – 56, l. 25.

Defense counsel continued: "We don't know what happened. People were hurt bad. What we're going to do is we're going to take her blood and send it down and if it comes back, we'll charge her. That is improper." Supp. Tr. 54, l. 13 – 56, l. 25. The judge stated that she was ruling "under the law as it is today, I find that there was probable cause that a reasonable officer would have in that circumstance believed that blood draw was necessary. I believe [the police] had probable cause to draw blood in the circumstance." Supp. Tr. 57, l. 1-18.

Appellant's case was called to trial on March 19, 2013 before Judge Verdin. Richard Warder again represented appellant. Lisa Bentley and D. Graham Buckner were the solicitors. Appellant waived her right to a jury trial. Defense counsel at the beginning of the trial noted that the Judge Verdin at the prior hearing had found probable cause to take appellant's blood at the

hospital. Defense counsel told the judge that the defense had filed a "notice of intent to appeal from that order." Tr. 8, ll. 2-25.

Defense counsel said that the judge had informed him that the trial was going forward "despite the fact that I've appealed." The judge confirmed that was correct. Defense counsel then objected to the trial going forward given that the appeal was pending in the appellate court. Tr. 9, ll. 1-12.

As will be seen in Issue 2 below, the judge stated that after reviewing the case law she found appellant's appeal was from "an interlocutory order that was not subject to immediate appeal." Defense counsel then repeated his contention that the statute, South Carolina Code §56-5-2926 was unconstitutional in that it allowed a police officer the discretion to find probable cause to draw appellant's blood rather than a neutral detached magistrate. The judge noted that she had denied that motion at the earlier suppression hearing. Tr. 9, l. 1 – 11, l. 12.

**Discussion**

Defense counsel correctly argued that Missouri v. McNeely, 133 S.Ct. 1552 (2013) was pending at the time of the suppression hearing and trial, and would control this case. McNeely was argued on January 9, 2013. The suppression hearing was held on January 28, 2013, and the bench trial was held March 19-20, 2013. McNeely was decided on April 17, 2013.

In Missouri v. McNeely, the Supreme Court held that the natural metabolization of alcohol in the blood stream **did not present a *per se* exigency** that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. The Supreme Court held that "consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances." Missouri v. McNeely, 133 S.Ct. 1552, 1556 (20130).

In McNeely, the Court further held that in drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn, the Fourth Amendment mandates that they get a warrant. Missouri v. McNeely, 133, S.Ct. at 1561.

Appellant is entitled to the benefit of Missouri v. McNeely because her case is pending on direct appeal before this Court. It is apparent that the nonconsensual blood draw was seizure of appellant's blood in this case mandated its suppression under McNeely. The statute that allowed the nonconsensual draw of appellant's blood without a warrant, and without an exigency, was unreasonable and violated the Fourth Amendment as the Court held in McNeely.[1]

Further, the accident here occurred at approximately 5:00 in the afternoon, and appellant was taken to Greenville Memorial Hospital. Greenville is a major metropolitan area, and there was no reason to conclude that a search warrant could not have been readily obtained. Appellant should be granted a new trial.

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[1] During the bench trial SLED chemist Quintus Young testified that appellant's blood draw tested positive for methamphetamine, and "also screened positive for THC metabolite.' Young said the level of meth was above what would be used "therapeutically" for ADD, ADHD or "appetite suppressant dosage." Young could not tell when appellant last used marijuana, or a "meth product." Tr. 151, l. 14 – 166, l. 6. Appellant testified the accident occurred because she was "talking to the girl behind me in the back of my truck trying to hear her, turning my attention from the road." Appellant said the meth she used two or three days before the accident did not have anything to do with her being distracted. Tr. 235, l. 15 – 237, l. 19.

2.

The appellant's conviction for felony driving under the influence must be vacated where the trial court was without subject matter jurisdiction to try appellant because her case was on appeal, the appellate court had exclusive jurisdiction, and the remittitur had not been returned to the trial court.

**Relevant Facts**

The relevant facts of this case as they pertain to this issue follow:

Appellant Christina Reece was indicted on June 19, 2012 for three counts of felony DUI resulting in great bodily injury. R. p. *. A suppresssion hearing was held before Judge Letitia H. Verdin on January 28, 2013. Richard Warder represented appellant, and Lisa Bentley was the assistant solicitor. Counsel Warder argued that the results of the blood evidence ordered taken from appellant had to be suppressed. Counsel noted that the probable cause determination had been made by Trooper James Greer, and not a neutral and detached Magistrate. Counsel reminded the judge that he had urged her to defer ruling on this issue because the United States Supreme Court had heard arguments on the issue on January 13, 2013.[2] See Missouri v. McNeely, 133 S.Ct. 1552 (2013). Supp. Tr. 39, ll. 5-9; tr. 53-57. R. p. *.

The judge ruled "under the law as it is today [Janurary 28, 2013], I find there was probable cause that a reasonable officer would have in that circumstance believe [a] blood draw was necessary." Supp. Tr. 39, ll. 5-9; tr. 53-57. R. p. *. The judge issued a written order dated February 26, 2013 denying the Motion to Supress (R. p. *).

[2] The oral argument before the Supreme Court was actually held on January 9, 2013.

Defense counsel then prepared a Notice of Intent to Appeal from the judge's pre-trial refusal to suppress the results of the blood draw which it served on March 12, 2013. Counsel filed that notice of intent to appeal to the Supreme Court on March 13, 2013. R. p. *.

On March 19, 2013 the Supreme Court issued an order dismissing the appeal without prejudice as interlocutory since appellant had not been sentenced. R. p. *.

Appellant's bench trial started *the same day* the Supreme Court dismissed the appeal, March 19, 2013. Defense counsel Warder *objected* to the trial going forward since he had filed a notice of intent to appeal the judge's refusal to suppress appellant's blood sample. The judge noted that while appellant argued the case was stayed on appeal, the appeal was interlocutory. "In fact, this case is not concluded until there's either – there's some – either a finding of guilty or not guilty in this case. But your record is protected that you certainly did make that motion." Tr. 8, l. 16 – 10, l. 1). R. p. *.

Defense counsel then moved for the judge to find the felony DUI statute unconstitutional inasmuch as it allows a police officer and not a neutral and detached Magistrate to make a determination of probable cause to order a defendant's blood drawn from her. The judge denied the motion. As stated, appellant then waived her right to a jury trial, and she was convicted of three counts of felony DUI resulting in great bodily harm on March 20, 2013. She was sentenced to ten years imprisonment. Tr. 1-11; tr. 14; tr. 257; tr. 263. R. p. *.

However, it was not **until April 4, 2013 that the remittitur in this case was sent from the Supreme Court to Pickens County returning jurisdiction to the trial court**. R. p. *.

Undersigned appellate counsel discovered the trial court's lack of jurisdiction to conduct appellant's March 19-20, 2013 trial while working on this case to file the brief and designation of matter, and he filed a motion to remand the case for a new trial, and to dismiss the appeal. R. p. *.

Appellate Counsel argued the trial court was without jurisdiction because the remittitur had not been issued by the appellate court until April 4, 2013, therefore the March 19-20, 2013 trial in this case was a nullity, and appellant's convictions were void. He further noted that although defense counsel timely objected to the trial going forward, the trial court overruled the objection. Finally, he noted that the lack of subject matter jurisdiction could be raised at any time as undersigned counsel had again done upon this discovery as noted above. See State v. Sheppard, 391 S.C. 415, 422, 706 S.E.2d 16, 19 (2011).

The Chief Judge denied the motion to vacate appellant's convictions, and to remand her case for a new trial. Appellant filed a petition for rehearing on September 12, 2014 requesting that this Court reconsider its order, grant rehearing, vacate appellant's convictions, remand her case to Pickens County Court of General Sessions for a new trial, and to dismiss this appeal without prejudice. Petition for Rehearing at 4. R. p. *.

On September 26, 2014 the Clerk returned appellant's petition for rehearing and the return to the petition for rehearing stating "the appellate court will not entertain petitions for rehearings on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." This court stated that "no action will be taken on your petition for rehearing." R. p. *.

**Discussion**

Once a notice of intent to appeal is served, the Supreme Court has exclusive jurisdiction over the appeal, except the lower court retains jurisdiction to entertain petitions for supercedeous under Rule 225. The appellate court retains jurisdiction of the case until the remittitur is issued and the proceeding returned to the circuit court. When the remittur is returned to the circuit court, that court re-acquires subject matter jurisdiction to enforce the judgment and take any action consistent

wih the appellate court's ruling. Bunkum v. Manor Properties, 321 S.C. 95, 99, 467 S.E.2d 758, 760 (1996), *citing* Muller v. Myrtle Beach Golf and Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993).

In Lancaster v. Georgia-Pacific Corporation, et al., 403 S.C. 136, 742 S.E.2d 867 (2013), the Court held "pursuant to Rule 205, SCACR, upon service of a notice of appeal, the appellate court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court." The Court further stated "therefore, the trial court cannot take action as contemplated by the parties unless the case is remanded to that court." Lancaster v. Georgia-Pacific Corporation, et al., 403 S.C. at 137, 742 S.E.2d at 868.

When the appellate court has exclusive jurisdiction of a case by way of a properly filed notice of intent to appeal, the lower court is deprived of power to address a particular issue or matter during the pendency of the appeal. Tilghman v. Oakes, 398 S.C. 245, 251, n. 3, 728 S.E.2d 45, 51, n. 3 (2012).

Conversely, "it has frequently been decided that, when the remittitur has been properly sent to the court below, the Supreme Court loses jurisdiction, and thereafter neither the court nor any Justice thereof can make any order in the case." Thomas v. Lynch, 87 S.C. 44, 68 S.E.2d 817 (1910).

Rule 205, SCACR, provides upon service of the notice of appeal the appellate court shall have *exclusive jurisdiction over the appeal. . .*" (emphasis added). Rule 221(b), SCACR provides "the remittitur shall contain a copy of the judgment of the appellate court . . . [and] shall not be sent to the lower court until fifteen days have elapsed . . . if a petition for rehearing is received before the

remittitur is sent, the remittitur shall not be sent pending disposition of the petition to the court." See Bunkum v. Manor Properties, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct.App. 1996).

Appellant's case was pending on appeal when the judge held a bench trial over appellant's objection, and during that trial appellant was convicted of the current offenses. The appellate court had exclusive jurisdiction over appellant's case at the time of the bench trial, and holding of the bench trial while appellant's case was pending on appeal in the Supreme Court, and before the remittitur was returned to the circuit court, meant the lower court was without jurisdiction to try appellant, and her trial was therefore a nullity. This Court should respectfully issue an order vacating appellant's conviction, and remanding this case for a new trial.

3.

The Court erred by refusing to direct a verdict of acquittal where there was no direct or substantial circumstantial evidence that appellant was under the influence or appreciably impaired at the time of the automobile accident within the meaning of the felony DUI statute.

**Relevant Facts**

In his opening statement to the judge, the trier of fact, defense counsel stated that this case involved a tragic car accident, and the defense did not dispute that the occupants in the other automobile were injured. Counsel said the other driver was not at fault.. However, the sole issue in this case was whether appellant was "under the influence" of drugs or alcohol making this otherwise tragic car accident a felony DUI. Tr. 30 ll.17, tr. 31, l.10

Highway Patrol Trooper Joey Baldwin testified that in his opinion, appellant's vehicle crossed the center line causing the collision. Tr. 35, l. 24, tr. 37, l.12. Baldwin said it was difficult to understand why the car accident occurred since the collision was at 5:35 in the afternoon, and the sun was behind appellant. Tr. 37, ll. 4-11.

As seen, beer cans were found in the bed of the truck, and a meth pipe was also found in a duffel bag in the truck along with arrest warrants against appellant for meth offenses. Tr. 45, l. 3, tr. 47, l.18. As will be seen infra, the judge ruled that the pipe and arrest warrants could not be considered since they were illegal seized without a warrant.

Trooper James Greer testified, and opined that the pipe had been used at some point because it appeared to have been burned from some "heat source" inside the bowl of the pipe. Tr. 88, l. 9 - 89, l. 4. However, as also will be seen infra, the state did not present any evidence on the last time appellant drank or used meth.

As stated, the trial court ultimately ruled that the arrest warrants and meth pipe found during a search of a duffle bag within the vehicle were going to be excluded because the trooper should have gotten a search warrant. The judge said she would not consider the meth pipe or the arrest warrants in making any determination of appellant's guilt. Tr 135, l. 5 -. 136, l. 10.

Toni Broome was a SLED toxicologist. The following occurred:

> Q: I'm going to show you what's been marked as State's Exhibit 18.
>
> A: Okay. The result of the, uh, -- the results of the screening test were a negative, Benzodiazepine, Oxycodone. Then we did a screen by a dipping method, Florescene Polarization Immunoassay. And that was negative for cocaine or opiates.
>
> Q: Okay. And did you perform additional screening?
>
> A: No, I did not. That was all the screening I did.
>
> Q: So the results of your screens were negative?
>
> A: The – actually – the positive results were confirmed by another test. The test that I did, they were *positive for THC and methamphetamine*.
>
> Q: Okay. And what did you do after receiving that result back?
>
> A: After that, it was – basically, the sample is packaged back and sealed properly in order for the next test to be done.
>
> Q: Who does the next test?
>
> A: The next analysis (sic).

Tr. 141, ll. 3-24. (emphasis added).

The second toxicologist was Quintus Young of SLED. Tr. 150, ll. 5, Tr. 154, l. 2.

Young also testified appellant's blood tested positive for THC and methamphetamine.. Tr. 156, ll. 14-20. Young admitted he could not testify when the last time appellant may have smoked marijuana but added: "It's present in the blood, up to maybe 36 hours of so." Tr. 157, ll. 12-15.

Young also opined that the .29 milligrams per liter of methamphetamines found in appellant's blood was above "any therapeutic level" for "ADD, ADHD or, appetite suppressant dosage, if they were to follow a prescribed dosage from a physician, those are the levels you would typically except to see. Tr. 157, l. 22 - 158, l. 15.

Young admitted he could also not say when the last time appellant used or consumed methamphetamines. Young speculated that the methamphetamine could cause someone to be "agitated, paranoid...anxious, jittery," and he opined that methamphetamines affected the eyes. "It dilates the pupils which affects how light is actually transmitted into the – into the eye." Tr. 160, ll. 9-18.

On cross-examination, Young admitted he had no medical training. He again stated his opinion that a methamphetamine "high" could last up to three hours. Tr. 162, l 22 - 163, l.10. Young admitted that methamphetamine could stay in a person's blood for days. Tr. 163, ll. 14-18.

Defense counsel asked Young to admit that like marijuana, meth which could stay in someone's system for days, but the person djid not remain "high" for days. Young hedged on answering the question about "methamphetamine being the same thing [as marijuana in the bloodstream]." Young maintained that "it actually might be a little longer than the three hours that you've peaked." "The effects will diminish over time as it is metabolized..." Tr. 164, ll. 4 –

18. Young said a methamphetamine high was for "a short time," and a person would have to use more methamphetamines to get high again. Tr. 164, l 4 - 165, l. 3.

On redirect testimony Young claimed that as long as methamphetamine was found in a person's system, "you are experience some effects of the methamphetamines." Tr. 165, l 23 -. 166, l. 6.

**Directed Verdict Motion**

Defense counsel moved for directed verdict arguing the State had not provided sufficient evidence that appellant was under the influence of drugs or alcohol. He argued there was no evidence that appellant was impaired on meth or alcohol. Counsel analogized meth use to consuming alcohol without being "under the influence" to make it was illegal to drive. Tr. 222 ll. 13 - 223, l. 10. The judge denied the directed verdict motion. Tr. 223, ll. 11-16.

**Discussion**

The state failed to introduce any direct or substantial circumstantial evidence that appellant was under the influence of meth or alcohol which made it illegal for her to drive. The state's evidence was pure speculation that appellant may have been under the influence.

In State v. Dantonio 376 S.C. 594, 658 S.E.2d 337 (Ct.App., 2008), there was evidence from which the defendant could be found guilty since there was testimony which indicated Dantonio had been drinking during the hours prior to the accident, ,and his blood alcohol concentration suggested he was under the influence of alcohol. There was no such evidence in this case, and all the SLED witnesses could say was appellant had a meth level in her system that was above the level which one would expect for legitimate use of the contents of the drug. There was no evidence that appellant used meth that day.

In State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct.App. 1991), this Court was also presented with evidence that after the accident, Goode was found in his car seriously injured and semiconscious. Assisting officers smelled a strong scent of alcohol coming from Goode's person. Goode was transported to a local hospital, however, and while there his blood was tested. The test revealed alcohol in his blood. See, also, State v. Nathari, 303 S.C. 188, 399 S.E2d 597 (Ct.App. 1990).

Respectfully, the court finding that there was direct or substantial circumstantial evidence that appellant was under the influence of meth and driving impaired was based on pure speculation. The judge ruled she would not consider any circumstantial evidence regarding the meth pipe and arrest warrants because they were the result of an illegal seizure without a warrant. There was simply a lack of competent evidence in this case for the case to continue beyond the directed verdict stage.

As for circumstantial evidence, the trial judge is only required to submit the case to the jury -- appellant realizes this is a bench trial with the same standard -- if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001) If the state fails to produce substantial circumstantial evidence the defendant committed the particular crime the defendant is entitled to a directed verdict. State v. Rothschild, 351 S.C. 238, 569 S.E.2d 346 (2002); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002). .

The circumstantial evidence in this case did not even rise to the level of that in cases where the Supreme Court held a directed verdict should have been issued. See State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011); State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004); State

v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

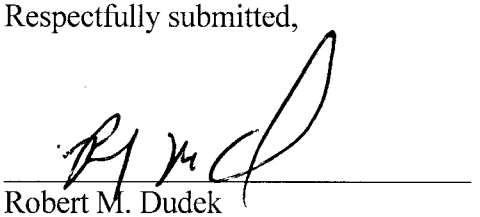
The refusal to direct a verdict a verdict in this case essentially made felony DUI traffic accident a strict liability offense. The state utterly failed to prove appellant was under the influence and driving impaired. There was an unfortunate traffic accident in this case, and appellant bore the responsibility for that accident. She admitted she was distracted in her conversation while driving, and she took her eyes off the road in the manner someone would do to change stations on their radio, or look at their phone. However, appellant had not used meth in the three or four days before the accident. Tr. 236, l. 2 – 237, l. 16.

Appellant Christina Reece should have been granted a directed verdict in his case, and this Court, most respectfully, should now issue that order directing a verdict.

## CONCLUSION

By reason of the foregoing arguments, a directed verdict of acquittal should be issued. In the alternative, appellant's conviction should be reversed, and this case remanded to the Pickens County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of February, 2015.