

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SEP 16 2015

**SC Court of Appeals**

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Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

(  
RESPONDENT,

V.

CHRISTINA REECE,

APPELLANT

APPELLATE CASE NO. 2013-000656  
\_\_\_\_\_

FINAL REPLY BRIEF OF APPELLANT  
\_\_\_\_\_

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ATTORNEY FOR APPELLANT

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## ARGUMENT IN REPLY

### Issue 1

The state's argument that the Schmerber v. California, 384 U.S. 757 (1966) and Missouri v. McNeely, 133 S.Ct. 1552 (2013), Fourth Amendment issue in this case is not preserved for appellate review is not only incorrect, it is the ultimate form over substance procedural argument. Missouri v. McNeely was pending in the Supreme Court following oral argument when the suppression hearing on appellant's blood sample was held in this case.

Defense counsel frankly told the judge of his concern that she was "rushing" to make a ruling on the suppression issue where the Supreme Court's dispositive in Missouri v. McNeely was imminent. R. 55, l. 13 – 57, l. 25. The judge stated that she was ruling "under the law that is today," and she refused to suppress the blood sample based upon the Fourth Amendment argument. R. 58, ll. 1-18.

When the judge refused to defer her ruling pending the decision in Missouri v. McNeely, 133 S.Ct. 1552 (2013), and filed a written order dated February 26, 2013 denying the motion to suppress, defense counsel filed a notice of intent to appeal. The notice of intent to appeal was served on March 12, 2013, and filed in the Supreme Court on March 13, 2013.

It is difficult to imagine what more defense counsel could have done to preserve this Schmerber and McNeely issue for appellate review. However, he did more. After the Supreme Court issued an order dismissing the appeal without prejudice as interlocutory on March 19, 2013, appellant's case was immediately called for trial that same day. Defense counsel added the additional Fourth Amendment argument that DUI statute allowing a

police officer, as here, to order a blood sample taken without a warrant because **he believed** probable cause existed that the crime of felony DUI had been committed was unconstitutional. The judge clearly indicated that she understood this Fourth Amendment argument as well, and she denied the motion to declare the DUI statute unconstitutional. R. 69, l. 1 – 71, l. 2.

The remittitur had not been sent to the lower court but the judge, over objection, tried appellant anyway. R. 68, l. 16 – 70, l. 1. R. 332. Any objective reading of the record in this case shows the trial judge was well aware of the defense's Fourth Amendment objection based upon Schmerber and McNeely to the warrantless blood draw in this case. The judge ruled pre-trial on the issue the Schmerber - McNeely issue, she knew appellant appealed the issue to the Supreme Court because he strongly felt the judge erred, and the state's case could not survive without the blood sample evidence. The same matter was raised when the judge went forward with the trial over objection.

When the state went to introduce the laboratory report based on the blood sample through SLED forensic toxicologist Quintus Young, defense counsel added the additional objection that the lab report would be cumulative to Young's testimony. R. 216, l. 19 – 217, l. 12. By any error preservation standard as it being fairness to the trial judge, and not using procedural default as a "gotcha" game, this Schmerber and McNeely Fourth Amendment issue was well understood by the trial court, and preserved for appellate review.

## Issue 2.

There can be no doubt in this case that defense's appeal in this case was in good faith even though it was eventually dismissed without prejudice as interlocutory. Consequently, the state's concern that "a litigant can temporarily deprive a court of jurisdiction at every critical juncture" such a concern is wholly inapplicable to the facts of this case. Respondent's brief at 40-41.

Once the notice of intent to appeal was served, the Supreme Court had exclusive jurisdiction over the appeal, except that the lower court retained jurisdictions to entertain petitions for supersedeas under Rule 225. The state's argument that the trial court is free to proceed with the trial while a case is on appeal where the remittitur had not been sent to the lower court makes the aggrieved party's important right to petition for rehearing within fifteen days of the order or opinion meaningless.

The state urges a results-oriented analysis to affirm appellant's conviction where the lower court did not have jurisdiction because the remittitur had not been returned encourages a dangerous precedent. This Court and the Supreme Court have granted rehearing, or changed parts of an order or opinion in the past based on petitions for rehearing. Throwing out the rules of the appellate procedure, and the importance of the issued remittitur returning jurisdiction to the lower court at the conclusion of the appellate process, because *a good faith appeal* is technically incorrect in some technical fashion, flies in the face of established precedent. Lancaster v. Georgia-Pacific Corporation, et al., 403 S.C. 136, 742 S.E.2d 867 (2013); Bunkum v. Manor Properties, 321 S.C. 95, 99, 467 S.E.2d

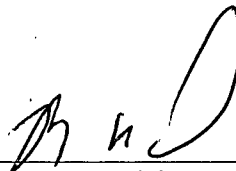
758, 760 (1996), *citing* Muller v. Myrtle Beach Golf and Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993).

The entire judicial system is essentially premised on the good faith of attorneys in following the Rules. The state gets to pre-trial a suppression, e.g., State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), if it has a significant effect on the outcome of the case. This record is entirely devoid of any evidence that defense counsel improperly sought to delay the proceedings. Rather the trial court chose to “push” the case even though a significant Supreme Court case was forthcoming that (as argued in issue one) should have resulted in the suppression of the results of the blood search, and, as a practical matter, dismissal of the charges.

### CONCLUSION

By reason of the arguments in the initial brief of appellant, and the arguments in this reply brief, appellant's conviction should be vacated because the court lacked jurisdiction, and because a directed verdict of acquittal should have been 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,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

This 16th day of September 2015.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 16, 2015



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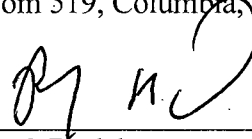
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CERTIFICATE OF SERVICE

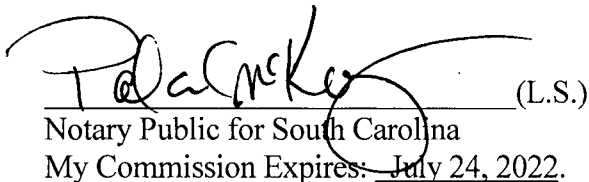
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Christina C. Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of September, 2015.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 16th day of September, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.