THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge
App. Case No. 2014-000632

THE STATE

Respondent,

v.

KYLIE NILSON

Appellant.

Final Reply Brief of Appellant

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May 7, 2015
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ARGUMENTS IN REPLY

I. The trial court erred by denying Appellant's motion for continuance because Appellant was in no way at-fault for her failure to appear on October 8, 2013 and the penalty for such failure was unjustly placed on Appellant.

In this case, there is undisputed evidence, as indicated in the Initial Briefs of both Appellant and Respondent, that Appellant did not receive adequate notice of her trial date. (R. p. 15, lines 1-13). Consequently, on October 8, 2013, Appellant was tried *in absentia* and was found guilty of Driving with an Unlawful Alcohol Concentration ("DUAC").

Traditionally, the attorney-client relationship has been one of agency. However, in recent years, most notably in the Third and *Fourth Circuits*, the agency theory in the attorney-client context has failed to command consistent acceptance. Courts that have addressed this issue have strayed from the agency theory and have tended to force responsibility for errors and/or mistakes on the attorney rather than the client, all in an effort to avoid placing an undue burden on a blameless client. For instance, according to the Fourth Circuit United States Court of Appeals in the 1988 case Augusta Fiberglass, there is a clear distinction between the fault of counsel and the fault of a party personally and that "justice . . . demands that a *blameless party not be disadvantaged by the errors or neglect of [her] attorney.*" Augusta Fiberglass Coatings v. Fodor Contracting, 843 F.2d 808, 811 (4th Cir. 1988) (citing U.S. v. Moradi, 673 F.2d 725 (4th Cir. 1982) (emphasis

added)). In U.S. v. Moradi, the Court reasoned that it is inherently unjust for a *final and involuntary termination of proceedings* to occur in any given case if the attorney, alone, is the at-fault party. Moradi, 673 F.2d at 728.

In this case, as mentioned above, there is no question that Appellant—*due to no fault of her own*—did not receive adequate notice of her trial and that, ultimately, this lack of notice resulted in her failure to appear on October 8, 2013. (R. p. 15, lines 1-13). However, if viewed in the light of Augusta and Moradi, because Appellant was *in no way at-fault* for said lack of notice, the trial court should have granted Appellant's request for a continuance and failure to do so is reversible error.

II. As indicated by Appellant's "Designation of Matter," Appellant has met her burden to produce and the record will be sufficient for this appeal.

In its Initial Brief, Respondent alleges that Appellant has failed to provide this Court with sufficient record; however, as evidenced by Appellant's "Designation of Matter" dated July 10, 2014 and filed with the S.C. Court of Appeals on July 14, 2014, Appellant has every intention of providing sufficient record to the Court as required by S.C. Appellate Court Rule 209. S.C. APP. CT. R. 209. Specifically, in accordance with S.C. Appellate Court Rule 210, S.C. APP. CT. R. 210, within thirty (30) days of the service of this brief this Court will be provided with the following records:

1) Horry County Common Pleas Appeal;
2) Respondent's Answer;
3) Transcript of Proceedings;
4) Order, March 2014;
5) Roadside Video Recording; and...
6) B.A. Test Video Recording

Further, once these documents are available, Appellant's Final Brief will be cross-referenced accordingly to reflect the record.

Therefore, Appellant has met her burden to produce and this Court will be provided with sufficient record on appeal.

III. The decision in State v. Langford is controlling; Respondent has misinterpreted the Langford ruling as applied to Appellant's case; and Appellant was clearly prejudiced by Respondent's misuse of its authority under S.C. Code Section 1-7-330.

Respondent has misinterpreted the Langford decision's applicability to Appellant's case. In Langford, the Supreme Court of South Carolina held that S.C. Code Section 1-7-330 violates the separation of powers as mandated by Article 1, Section 8 of the South Carolina Constitution and is, therefore, "unconstitutional beyond a reasonable doubt." State v. Langford, 735 S.E.2d 471, 478, 479 (2012); S.C. Const. art. I, § 8; (R. p. 287, lines 7-14). In support of this finding, the Court reasoned that Section 1-7-330 vested the Solicitor, as an executive officer of the state, with the exclusive power to set the criminal trial docket—a power which is *inherently judicial in nature* and, therefore, a prerogative of the court. *Id.*

Nevertheless, despite the unconstitutionality of Section 1-7-330, the Court in Langford declined to reverse Langford's conviction because he had suffered no prejudice from its application to his case. *Id.* at 479. "To warrant reversal, [an appellant] must demonstrate that [she] sustained prejudice as a result of the solicitor setting when [her] case was called for trial." *Id.*

In Appellant's case, unlike the defendant's case in Langford, Appellant was *clearly prejudiced* by Respondent's misuse of its authority under Section 1-7-330. Despite Appellant's presence on July 18, 2012; August 15, 2012; and January 7, 2013 the trial was never set for a date certain. (R. p. 285, lines 21-25). Additionally, Appellant's case was absent from the trial docket for the next nine (9) months. (R. p. 286, lines 14-15). In fact, Respondent failed to place Appellant's case on the trial docket until October 8, 2013 (R. p. 284, lines 1-4)—approximately *twenty-two (22) months after* her initial arrest on December 4, 2011 and a date in which Appellant was not aware of due to *no fault of her own.* In total, Respondent had Appellant's case continued a total of eight (8) times (R. p. 286, lines 17-19), a number which is clearly excessive when compared with Appellant's mere two (2) continuances, which were based purely on conflicts with Defense Counsel's court mandated schedule.

Undoubtedly, in Appellant's case and likely present in many other cases, Respondent was the beneficiary of an unfettered power to continue its cases under

the authority of S.C. Code Section 1-7-330—a power which Appellant has not been afforded. Appellant was clearly prejudiced by this power and, consequently, her due process rights as mandated by Article 1, Section 8 of the South Carolina Constitution have been violated. Her request for continuance, which Respondent exercised many times, was denied; she was unable to attend her trial; she was unable to adequately defend herself; and she was found guilty *in absentia*.

For the aforementioned reasons, this Court should reverse the trial court's decision to deny Appellant's motion for a continuance.

IV. The trial court erred by refusing to dismiss Appellant's case based on stopping officer Wilkes' failure to activate his video camera at the correct time as mandated by S.C. Code Section 56-5-2953.

S.C. Code Section 56-5-2953 mandates that any time a person is stopped by police in South Carolina for allegedly driving in violation of S.C. Code Section 56-5-2930, 2933, or 2945 their conduct must be recorded at both the incident and breath test sites. S.C. Code Section 56-5-2953. Specifically, the incident site recording must:

i. Not begin later than the activation of *the officer's* blue lights;
ii. Include any field sobriety tests that are administered;
iii. Include the actual arrest of the person; and
iv. Show the person being advised of their Miranda rights.

Id. Any violation of these provisions, even *if no prejudice is shown*, may result in the outright dismissal of the charges. City of Rock Hill v. Suchenski, 646 S.E.2d 879, 881 (S.C. 2007).

Here, in relying on State v. Landis, Respondent has attempted to force a narrow interpretation of S.C. Code Section 56-5-2953 on this Court and, in doing so, has circumvented a very important aspect of the statute. State v. Landis, 362 S.C. 97 (2004). Section 56-5-2953(A)(1)(a)(i) reads that the video must "not begin later than the activation of the *officer's blue lights*." (emphasis added). This subpart is a decisive factor in determining when the recording actually begins and, consequently, what it must contain. Contrary to what this Court held in Landis, Appellant submits that it is *not the arresting officer* that must begin the recording. Instead, it is *any officer* that performs a stop on a person for allegedly violating S.C. Code Section 56-5-2930, 2933, or 2945, be them the stopping officer, the arresting officer, or both.

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." State v. Elwell, 743 S.E.2d 802, 806 (S.C., 2013). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* When determining the intent of the legislature in any given statute, such intent should be ascertained primarily from the statute's plain and ordinary language. State v. Morgan, 352 S.C. 359, 366 (2002).

According to the Court in Kiriakides v. United Artists Communications, Inc., a court should reject a statutory interpretation which "is so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Kiriakides v. United Artists Communications, Inc., 440 S.E.2d 364, 366 (S.C., 1993).

Appellant submits to this Court that the legislature, through omission of narrow terms such as "arresting" or "stopping" and including only the term "officer" intended a broad, all-encompassing reading of the statute more in sync with both protecting individual rights and ensuring that most, if not all, traffic stops are recorded. Conversely, much like Respondent's recommendation to this Court, a narrow, less-inclusive reading may inadvertently infringe upon those ends. Use of the general term "officer" clearly indicates that the legislature erred on the side of broad, rather than narrow, and intended for the entire stop to be recorded from start to finish no matter who the person that triggers the recording may be.

Pursuant to a statutory reading in accord with both Elwell and Morgan, Trooper Wilkes, as the stopping officer (R. p. 106, line 17 – p. 108 line 17), had a duty under S.C. Code Section 56-5-2953 to begin recording Appellant's stop at the moment his blue lights were triggered and simply failed to do so. (R. p. 131, lines 14-18). Further, in accordance with the holding of Kiriakides, a narrow interpretation of 56-5-2953 clearly stretches beyond the more broad interpretation

the legislature likely intended. Because of this, the trial court's failure to dismiss Appellant's case should be reversed.

V. The trial court erred by refusing to exclude evidence of Appellant's Xanax use because whether or not Appellant was under the combined effect of Xanax and alcohol is entirely irrelevant to the charge of Driving with an Unlawful Alcohol Concentration.

Under S.C. Code 56-5-2933, "it is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more." Therefore, per the statute, all the State must prove is that a defendant's blood alcohol level was in excess of .08 at the time of his stop or shortly thereafter. However, a DUAC charge under 56-5-2933 is very different and distinct from a charge under 56-5-2930 for operating a motor vehicle while under the influence of alcohol and/or drugs, commonly referred to as DUI. S.C. Dep't of Motor Vehicles v. Blackwell, 689 S.E.2d 770, 771 (S.C., 2010). Thus, unlike a DUAC charge, a DUI charge requires that a person be under the influence of alcohol *and/or drugs* to the extent that their faculties are both materially and appreciably impaired. *Id.* (citing S.C. Code Section 56-5-2930).

"The admissibility of evidence is within the sound discretion of the trial judge" and such rulings "will not be reversed on appeal absent an abuse of discretion . . . which results in prejudice to the defendant." State v. Mansfield, 343 S.C. 66, 77 (S.C. App., 2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. Cope, 748 S.E.2d 194, 203

(S.C., 2013). For a piece of evidence to be admissible in any proceeding against a defendant it must be relevant. S.C. R. EVID. 402. "For [a court] to reverse a case based on erroneous admission or exclusion of evidence . . . prejudice must be shown." State v. Bell, 393 S.E.2d 364, 369 (S.C., 1988).

In the case at hand, while in the DUI setting, evidence tending to show that a defendant was under the combined effect of *alcohol and drugs* is relevant to prosecution under 56-5-2930 (i.e. the statute specifically says "alcohol and/or drugs" and includes an element of impairment) such evidence is *not relevant* to prosecution under 56-5-2933. This is so because a charge of DUAC requires *only* that the State prove that a defendant's blood alcohol level is in excess of .08.

Therefore, the trial court's refusal to exclude evidence of Appellant's Xanax use should be reversed as it was an abuse of discretion; the evidence was utterly irrelevant to the charge of DUAC; and it was extremely prejudicial to Appellant. (R. p. 76, line 7 – p. 78, line 8).

CONCLUSION

For the reasons stated above, this Court should reverse the lower court's rulings accordingly.

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Respectfully submitted,

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May 7, 2015
Myrtle Beach, South Carolina

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief is in full compliance with Rule 211(b).

May 7, 2015

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PROOF OF SERVICE

The undersigned attorney hereby certifies that on May 8, 2015, **original and unbound copies** of both of Appellant's Final Briefs as well as fourteen (14) true copies of the same have been served upon:

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Re: **State of South Carolina vs. Kylie Lauren Nilson**
Appellate Case No.: 2014-000632

Dear Ms. Kitchings:

Please find enclosed the following:

1) Unbound versions of Appellant Kylie Nilson's Final Briefs;
2) Fourteen (14) bound versions of Appellant's Final Briefs;
3) A corresponding Certificate of Service; and...
4) A copy of Appellant's Certificate of Service on opposing counsel.

If you have any questions or concerns, do not hesitate to contact my office.

With best regards,

Jeffrey T. Lucas II, Esq.
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JTL

Enclosure (as stated)