STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case No. 2009-GS-32-5283

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER,

v.

ANDRA JAMISON,

PETITIONER/RESPONDENT.

PETITIONER/RESPONDENT'S PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner/Respondent hereby certifies that a petition for rehearing was made and was finally ruled upon by the South Carolina Court of Appeals.

QUESTION PRESENTED

I.

Whether the Court of Appeals ignored relevant precedent from this Court in determining that the State admitted overwhelming evidence that the Petitioner/Respondent was intoxicated?

STATEMENT OF THE CASE

The Petitioner/Respondent Andra Jamison was indicted in Lexington County for felony driving under the influence resulting in death. On October 12, 2009, the Petitioner/Respondent proceeded to trial by jury on this charge. At the conclusion of the trial, the Petitioner/Respondent was found guilty as charged. The Honorable R. Knox McMahon, presiding circuit judge, sentenced the Petitioner/Respondent to eighteen years' imprisonment.

The Petitioner/Respondent timely filed an appeal to the South Carolina Court of Appeals. In an unpublished opinion, the Court of Appeals affirmed the Petitioner/Respondent's conviction and sentence. State v. Jamison, Op. No. 2012-UP-58 (S.C. Ct. App. filed Feb. 1, 2012). Both the Petitioner/Respondent and the Respondent/Petitioner petitioned the Court of Appeals for rehearing. The Court of Appeals denied both petitions for rehearing.

The Petitioner/Respondent's petition for rehearing was denied by the Court of Appeals. The Petitioner now seeks a writ of certiorari.

ARGUMENT

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 67 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id.

I. The Court of Appeals ignored relevant decisions of this Court when it found that the evidence that the Petitioner/Respondent was intoxicated was overwhelming.

A. How the Issue Arose Below

In the late evening hours of July 31, 2008, the Petitioner/Respondent's vehicle collided with a bicycle ridden by the decedent Jessie Gamble. The decedent would not survive the injuries he received from the accident. Several witnesses testified that the Petitioner/Respondent was unsteady on his feet, appeared intoxicated, and slurred his speech. See generally App. p. 134, line 21-p. 135, line 1 (Officer Michael Stone); p. 229, lines 11-24 (Officer Adam Smith); p. 257, lines 4-8 (Sergeant Robert Marzol); p. 553, line 17-p. 554, line 12 (paramedic Daniel Boyce); p. 647, lines 6-12 (Randall Fitzgerald). The Petitioner/Respondent refused to take field sobriety tests at the scene. App. p. 139, lines 12-25. A beer bottle was found outside the Petitioner/Respondent's vehicle and several unopened beer bottles were found inside the vehicle. App. p. 374, line 6-p. 375, line 7; p. 377, line 15-p. 378, line 3. However, there were no witnesses at trial who testified that they saw the Petitioner/Respondent actually drink any alcohol prior to or after the accident.

The Petitioner/Respondent was then arrested at the scene and taken to the Cayce Police Department for the administration of a breathalyzer test. App. p. 268, lines 14-19. The Petitioner/Respondent did not take the test in the time provided, so his failure to take the test was

written up as a refusal. App. p. 280, lines 8-18. The Petitioner/Respondent was then taken to the Lexington Medical Center so that his blood could be drawn. App. p. 282, line 5-p. 283, line 10. While at the hospital, the Petitioner/Respondent told Doctor Stephen Hayes, who was there to oversee the blood draw, that "he was there for a blood test." App. p. 382, line 8. Steven Wickers, a phlebotomist, drew two vials of blood from the Petitioner/Respondent and gave them to the arresting officer. App. p. 395, lines 2-11. The Petitioner/Respondent was then transported to the Lexington County Detention Center and the vial of blood that had been provided to him for his own use and testing was lost by the jail prior to his release. App. p. 427, lines 1-13. The State tested the vial of blood that it obtained at the hospital. The Petitioner/Respondent's blood alcohol content was calculated to be "0.225 percent weight per volume of ethanol." App. p. 496, line 14.

At trial, the Petitioner/Respondent argued that the loss of his blood by the Lexington County Detention Center resulted in the deprivation of his right to a reasonable opportunity to have his blood tested.[1] App. p. 96, line 11-p. 98, line 20; see also p. 104, line 11-p. 105, line 13. Accordingly, the Petitioner/Respondent argued that the blood test results obtained by the State should be suppressed. The trial court denied the motion. App. p. 108, lines 20-21.

On appeal, the Court of Appeals found that "the State denied Jamison a reasonable opportunity to obtain testing of his own blood sample, and therefore the trial court erred in admitting the results of testing the State performed on its sample of Jamison's blood." State v. Jamison, *supra*; App. p. 832. However, the Court of Appeals found that the error was harmless and affirmed the Petitioner/Respondent's conviction and sentence. Id.; App. p. 832. The Petitioner/Respondent subsequently filed a petition for rehearing arguing that the evidence was

[1] This argument was predicated on S.C. Code Ann. §56-5-2945(a), this Court's decision in State v. Lewis, 266 S.C. 45, 221 S.E.2d 524 (1976), and Lewis's progeny.

not overwhelming and requesting factual findings as to what evidence the Court of Appeals found to be overwhelming. App. pp. 841-847. This petition was denied. App. pp. 848-849. The Petitioner/Respondent now contends that the Court of Appeals erred in finding evidence of the Petitioner/Respondent's guilt overwhelming.[2]

B. Discussion

"To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Prejudice occurs when there is a reasonable probability the wrongly admitted evidence influenced the jury's verdict." Id. "[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (quoting State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)).

As detailed above, the State admitted testimony from several witnesses that the Petitioner/Respondent appeared intoxicated at the scene. On appeal, the Respondent/Petitioner argued, and the Court of Appeals agreed, that this evidence was overwhelming evidence that the Petitioner/Respondent was intoxicated at the time of the accident. Compare App. p. 814 ("Multiple witnesses, including the responding officers, bystanders, and paramedics, testified Appellant was confused, slurred his speech, smelled of alcohol, was unsteady on his feet, and appeared intoxicated following the accident") with Jamison, *supra*; App. p. 832 ("we find the error to be harmless"). Based on this Court's precedents, which will be discussed in detail below, witness testimony that a defendant appeared intoxicated is not overwhelming evidence of

[2] The Petitioner/Respondent does not challenge the Court of Appeals' finding that the trial court erred in failing to suppress the blood test results. The Respondent/Petitioner, however, has filed a certiorari petition contesting that finding. The Petitioner/Respondent's response to this argument will be made in its Return to the Respondent/Petitioner's certiorari petition.

guilt. Accordingly, the Petitioner/Respondent respectfully requests that this Court grant certiorari to review the Court of Appeals' failure to follow this Court's decisions addressing harmless error in the context of a DUI case.

The charge of felony DUI has several elements:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence.

S.C. Code Ann. §56-5-2945(A). Fundamentally, as an element of the crime, the State must prove beyond a reasonable doubt that the defendant drove a vehicle while under the influence of alcohol or drugs. This burden of proof is no different in a felony DUI case than in any other driving under the influence charge. See generally S.C. Code Ann. §56-5-2930(A) (setting forth the requirements for the offense of driving under the influence). Similarly, the Petitioner/Respondent's right to a reasonable opportunity to test his blood under S.C. Code Ann. §56-5-2950(a) in a felony DUI case is the same as a defendant's right to a reasonable opportunity to test his blood who is charged with violating §56-5-2930.

By the Petitioner/Respondent's count, there are five prior decisions by this Court that have addressed an alleged violation of a defendant's to a blood test pursuant to §56-5-2950(a) that either reversed the defendant's conviction and discussed the evidence of intoxication or found there to be overwhelming evidence of intoxication: State v. Wilson, 296 S.C. 73, 370 S.E.2d 715 (1988) (finding overwhelming evidence of intoxication); State v. Degnan, 305 S.C. 369, 409 S.E.2d 346 (1991) (same); City of Columbia v. Ervin, 330 S.C. 516, 500 S.E.2d 483 (1998) (same); State v. Pipkin, 294 S.C. 336, 364 S.E.2d 464 (1988) (reversing a defendant's

conviction); State v. Masters, 308 S.C. 433, 418 S.E.2d 552 (1992) (same). The Petitioner/Respondent submits that a comprehensive review of each of these decisions reveals that witness testimony that a defendant who appears intoxicated is not sufficient to establish overwhelming evidence of intoxication.

In Wilson, this Court found overwhelming evidence of intoxication because the defendant admitted to the police "that he had consumed a half pint of Vodka." 296 S.C. at 74, 370 S.E.2d 715. Unlike the Petitioner/Respondent, the defendant had also taken a breathalyzer test "which registered a blood alcohol content of .28." Id. This Court found that the blood test results were clearly "cumulative to the other evidence" of intoxication. Id. at 76, 370 S.E.2d at 716.

In Degnan, this Court found overwhelming evidence of intoxication because the defendant "admitted drinking five or six beers, was unable to complete the alphabet, was dazed, had trouble walking and had to lean on the car." 305 S.C. at 372, 409 S.E.2d at 348. This Court found that this evidence prevented the defendant from showing "prejudice in admission of her refusal to submit to the breathalyzer." Id.

In Ervin, the defendant was exceedingly belligerent following his arrest because he "cursed the officers, made verbal threats towards them, and tried to kick the window out of the patrol car." City of Columbia v. Ervin, 325 S.C. 644, 646, 482 S.E.2d 781, 782 (Ct. App. 1997). Additionally, the defendant continued to be abusive towards the arresting officer when he was transported to the hospital. City of Columbia v. Ervin, 330 S.C. 516, 522, 500 S.E.2d 483, 486 (1998) (footnote 6) ("A RMH nurse testified Ervin was verbally and physically abusive to the arresting officer"). This Court found that this evidence constituted "overwhelming evidence of his intoxication." Id. at 522, 500 S.E.2d at 486.

Unlike Wilson, Degnan, and Ervin, this Court did not find overwhelming evidence of intoxication in Pipkin even though the State admitted evidence that the defendant "failed a sobriety test" and that the arresting officer "smelled alcohol on Pipkin's breath and noticed a slurring of his speech." 294 S.C. at 337, 364 S.E.2d at 465. Despite this evidence, this Court found that the violation of the defendant's rights "mandate a suppression of both the breathalyzer and blood test results." Id. at 338, 364 S.E.2d at 465.

In Masters, this Court overturned a conviction even though "the officer observed that Masters was unsteady on his feet and 'glassy-eyed,' smelled strongly of alcohol, and spoke in a very slurred and disjointed manner." 308 S.C. at 436, 418 S.E.2d at 554 (Moore, J., dissenting). Despite this evidence of intoxication, this Court found that the deprivation of the defendant's right to a blood test required "dimiss[al of] the charges against the defendant." Id. at 435, 418 S.E.2d at 553.

Consequently, the Petitioner/Respondent submits that this Court has drawn a line of demarcation as to what evidence must be admitted to demonstrate overwhelming evidence of intoxication in DUI cases. This Court's precedents make it clear that lay witness opinion testimony that a defendant is intoxicated is insufficient to establish overwhelming evidence of guilt; instead, there must be more extensive evidence of intoxication. In the decisions finding overwhelming evidence of intoxication, there is evidence more substantial than witness testimony that the defendant appeared to be intoxicated. In Wilson and Degnan, the defendant admitted to drinking alcohol to the arresting officer. In Ervin, the defendant acted in an extremely belligerent manner.

This Court's decisions in Pipkin and Masters further establish the demarcation line. In both of those decisions, the arresting officer noticed slurred speech and an odor of alcohol about

the defendant, in addition to the failing of a sobriety test by the defendant in Pipkin and an unsteady gait by the defendant in Masters. In other words, the fact that witnesses, even trained police officers, believe an individual is intoxicated is simply not enough to constitute overwhelming evidence of intoxication.

As a final consideration, the demarcation line is especially prudent in a DUI case. In DUI cases, the blood alcohol content can determine whether or not a defendant can be charged with violating S.C. Code Ann. §56-5-2933.[3] Additional penalties are prescribed for defendants who have higher levels of intoxication than other defendants. See S.C. Code Ann. §§56-5-2930(A); 2933(A). The jury is required to make findings of the degree of increased intoxication. See S.C. Code Ann. §§56-5-2930(L); 2933(L). Whether or not an individual is intoxicated is a technical inquiry that cannot reasonably be conclusively established by lay witness opinion testimony. Finding witness testimony that a defendant appears intoxicated to be overwhelming evidence of guilt would be akin to finding witness testimony that a quantity of drugs appeared to be over a certain weight threshold was overwhelming evidence of guilt. This Court would not permit such testimony to serve as overwhelming evidence in a drug case. The Petitioner/Respondent respectfully submits that this Court should not allow the Court of Appeals to do so in a DUI case.

The Petitioner/Respondent's case is on the Pipkin/Masters side of the demarcation line. The Petitioner/Respondent did not admit to drinking alcohol. Furthermore, the Petitioner/Respondent was not belligerent, did not curse at the officers, and appeared to be in complete control of his faculties in the video evidence admitted at trial.[4] There is no testimony from anyone who actually saw the Petitioner/Respondent drink alcohol. There was no evidence

[3] Technically, a violation of §56-5-2933 is termed "driving with an unlawful alcohol concentration," not driving under the influence. However, the provision criminalizes driving a motor vehicle with a blood alcohol content of .08 or greater.

[4] These videos were filed with the Court of Appeals. See App. p. 5.

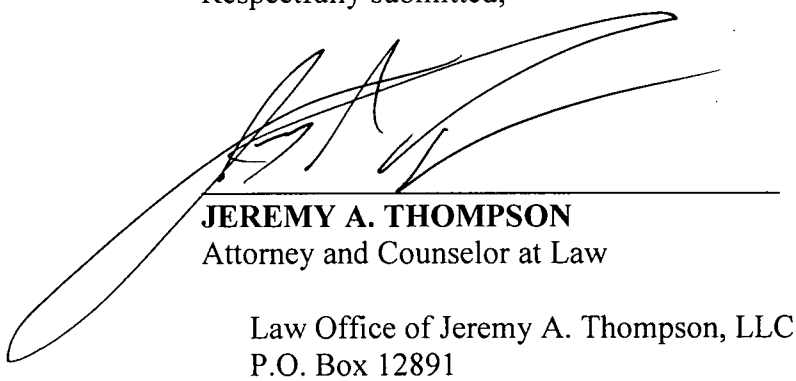
admitted whatsoever that rose to the level of intoxication present in Wilson, Degnan, or Ervin. Stated differently, evidence that a defendant "failed a sobriety test" and that the officer "smelled alcohol on [the defendant's] breath and noticed a slurring of his speech," Pipkin, *supra*, at 337, 364 S.E.2d at 465, is indistinguishable from evidence that a defendant "was confused, slurred his speech, smelled of alcohol, was unsteady on his feet, and appeared intoxicated following the accident." App. p. 814 (Final Brief of Respondent). Since the latter evidence was the only evidence of intoxication, aside from the excluded blood test results, the Court of Appeals' decision is in clear conflict with Pipkin, Masters, Wilson, Degnan, and Ervin inasmuch as it found that the evidence of intoxication against the Petitioner/Respondent was overwhelming. The State's lay witness opinion testimony that the Petitioner/Respondent appeared intoxicated did not "conclusively," Bailey, *supra*, at 5, 377 S.E.2d at 584, establish that the Petitioner/Respondent "while under the influence of alcohol ... [drove] a motor vehicle." S.C. Code Ann. §56-5-2945(A).[5] The Court of Appeals' opinion to the contrary is unmistakably erroneous. The Petitioner/Respondent respectfully submits that certiorari is warranted to review this portion of the Court of Appeals' decision.

[5] While an empty beer bottle was found outside the Petitioner/Respondent's vehicle, no one actually saw the Petitioner/Respondent drink from the bottle. Additionally, assuming that the Petitioner/Respondent drank the beer prior to the collision, this fact would not constitute overwhelming evidence of intoxication.

CONCLUSION

For the reasons stated, the Petitioner/Respondent asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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This 2nd day of May, 2012.

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ANDRA JAMISON,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner/Respondent's Petition for a Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Mark R. Farthing, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 2nd day of May, 2012.

JEREMY A. THOMPSON
ATTORNEY FOR PETITIONER/RESPONDENT

SWORN TO BEFORE me this 2nd day of May, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 2/22/2018

LAW OFFICE OF
JEREMY A. THOMPSON
LLC

May 2, 2012

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211-1330

RE: State of South Carolina v. Andra Jamison; 09-GS-32-5283

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Petition for a Writ of Certiorari in the above-captioned matter. I would appreciate your filing the original and six copies, clocking the extra copy, and returning the extra copy to me. The State has already filed the Appendix in this case. With my thanks for the Court's assistance in this matter, and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures
cc: The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals (w/ enclosure)
Mark Farthing, Assistant Attorney General (w/ enclosure)
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