

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

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AUG - 4 2016

SC SUPREME COURT

DONNIE R. THIGPEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002280

APPENDIX

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JESSICA KINARD
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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**THE FOLLOWING EXHIBIT IS ON FILE
WITH THIS COURT:
STATE'S EXHIBIT #135 (CD AUDIO)**

rights, notwithstanding that Appellant had been drinking the night before. Importantly, the confession was given around 6:00 pm, and Appellant had stopped drinking early that morning around 5:30 am. (R. p. 320, lines 12-17; p. 436-50; p. 778, lines 23-24). The testimony of the officers - and the recording of the statement itself - supported that Appellant had sobered up. (See R. p. 112-116; p. 127-31; p. 320, lines 7-13; see State's Exhibit 135, Audio Recording). This evidence also supported that Appellant fully understood his rights, understood what he was doing, and freely and voluntarily gave his confession. (See R. p. 112-116; p. 127-31; p. 320, lines 7-13; see State's Exhibit 135, Audio Recording). Significantly, the trial judge, after listening to the recording of Appellant's statement, concluded that Appellant's will was not overborne and that his capacity for self-determination was not critically impaired.⁴ (R. p. 137, lines 7-12). See State v. Kennedy, 325 S.C. at 305, 479 S.E.2d at 843. Appellant's argument that he could not make a voluntary statement because his ability to drive would have been impaired is without support in the record or in the law. (See Brief of Appellant, p. 12). See State v. Saxon, 261 S.C. at 529, 201 S.E.2d at 117. Accordingly, the trial judge properly admitted Appellant's confession, and his ruling should be upheld. See State v. Collins, 266 S.C. 566, 573, 225 S.E.2d 189, 193 (1976) (the evidence regarding the defendant's intoxicated condition at the time he made a statement to police "presented a factual situation which the judge determined unfavorably to the defendant. We cannot say

⁴ Notably, Appellant did not testify at the Jackson v. Denno hearing. (See R. p. 133, lines 7-9). Therefore, the officers' testimony regarding Appellant's condition was unrefuted at the time the trial judge ruled the confession admissible and at the time the confession was admitted into evidence at trial. See State v. Dye, 384 S.C. 42, 48-49, 81 S.E.2d 23, 27 (Ct. App. 2009) (citation omitted) (because no competing testimony was introduced to contradict the officer's statements, the circuit court was free to accept the officer's version of events in making its voluntariness determination); State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (pointing out that the appellant did not testify at the Jackson v. Denno hearing and his attorney's questions did not constitute evidence; therefore, there was no evidence in the record to contradict the officers' version of events).

that he erred."); see also State v. White, 311 S.C. 289, 294-95, 428 S.E.2d 740, 743 (Ct. App. 1993).

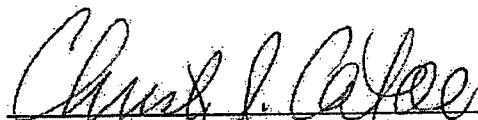
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


CHRISTINA J. CATOE
S.C. Bar No. 73562

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 3, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2012-212391

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

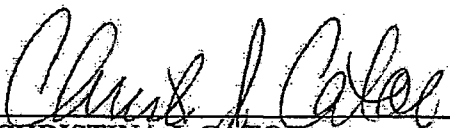
v.

DONNIE THIGPEN, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.


CHRISTINA J. CATOE

Office of the Attorney General
Post Office Box 11549
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(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 3, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2012-212391

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

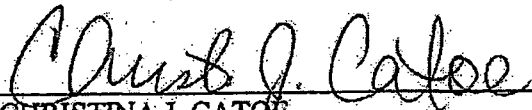
v.

DONNIE THIGPEN, JR.,

APPELLANT.

AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Tommy A. Thomas**, Post Office Box 88, Irmo, South Carolina 29063, this 3rd day of March, 2014.


CHRISTINA J. CATOE
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

SWORN to before me this 3rd day of March, 2014.


Notary Public for South Carolina.
My Commission Expires: 5/11/2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2012-212391

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DONNIE ROLAND THIGPEN,

APPELLANT

FINAL REPLY BRIEF

TOMMY A. THOMAS
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Christina Catoe, Esq.
Attorney for Respondent
P.O. Box 11549
Columbia, SC 29211-1549

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MAR 31 2014

SC Court of Appeals

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STATEMENT OF THE ISSUE ON APPEAL

- II. APPELLANT'S ISSUE REGARDING THE VOLUNTARINESS OF HIS CONFESSION IS NOT PRESERVED FOR APPELLATE REVIEW WHERE APPELLANT MADE A DIFFERENT ARGUMENT FOR SUPPRESSION BELOW. IN ANY EVENT, THE TRIAL JUDGE PROPERLY ADMITTED APPELLANT'S CONFESSION, WHICH WAS MADE AROUND 6:00 p.m. WHERE THE EVIDENCE REFLECTED THAT, ALTHOUGH APPELLANT HAD BECOME INTOXICATED THE NIGHT BEFORE, HE HAD STOPPED DRINKING IN THE EARLY MORNING HOURS, AND WHERE THE OFFICERS' TESTIMONY AND THE AUDIO RECORDING OF APPELLANT'S STATEMENT INDICATED THAT APPELLANT HAD SOBERED UP SIGNIFICANTLY AND THAT HE UNDERSTOOD HIS RIGHTS AND GAVE HIS STATEMENT FREELY AND VOLUNTARILY.

REPLY ARGUMENT

In response to the Respondent's Initial Brief, more specifically Issue II, the Appellant would state as follows:

ISSUE TWO

The Respondent contends that the Appellant's issue of voluntariness of his confession is not preserved for Appellate review. That Defense counsel's objection to the Appellant's confession is limited solely to the issue that immediately prior to Appellant's 5:20 p.m. interview the Miranda warning failed to include advising the Appellant that he could stop the questioning process (ROA p. 88, lines 12-24).

The Appellant was first given his Miranda warnings around 11:30 a.m. Defense Counsel argues that the Appellant is questioned over and over again about the event and that he denies involvement in the incident dozens of times. (ROA p. 87, lines 19-22) He gives a blood alcohol sample at 12:40 p.m. and his blood alcohol registers .21. He later is given a breath test at 2:05 which registered a .19. That he is re-interviewed, and this interview is audio taped. (ROA. p.

87, lines 13-14) In the afternoon interview, before the questioning starts, he is re-mirandized and in that Miranda warning, the State leaves out the fifth (5) prong, where he is not told that he has the right to stop questioning at any time. (ROA p. 88, Lines 12-17) Counsel further argues that at 6:00 p.m. the Appellant finally makes a statement in which he confesses to driving and leaving the scene. (ROA p. 88, lines 20-22) Defense Counsel argues that "the basis of our Motion is that the statement was involuntary".

Counsel acknowledges that there are three hurdles that he must address regarding his suppression Motion:

1. Whether an initial advisement of rights by Trooper McKenzie controls all the way through to the final interview. Counsel argues that at this time, the Appellant was severely intoxicated to the point of having a blood alcohol level of almost .23, an hour after the Miranda rights were given. Counsel argues that the Appellant was too intoxicated to understand his rights at that point.

2. Defense Counsel argues and acknowledges that case law tends to say that Defendant must be almost "knocked out" to give an involuntary statement; and

3. Defense Counsel acknowledges that there are no promises or threat made to the Appellant and the only thing kept from him was having a phone call, which he had asked for on several occasions. (ROA p. 90, lines 15-24)

The Court initiates a Jackson v. Denno, 378 U.S. 368 (1964), hearing on the voluntariness of the confession. (ROA p. 91, lines 6-7) After the Jackson v. Denno hearing, the Court rules that once Miranda Rights are validly and voluntarily waived, the waiver continues until such time as the individual being questioned revokes the waiver or circumstances are such that he his will is overborn and his capacity for self-determination is critically impaired (ROA

143, lines 4-17). The Court further holds that you don't have to give Miranda Rights over and over again during the course of the interrogation. Only when it is apparent that the Defendant's will is overborn in its capacity for self-determination is critically impaired does there become a problem, State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 2002). (ROA 143, lines 6-11)

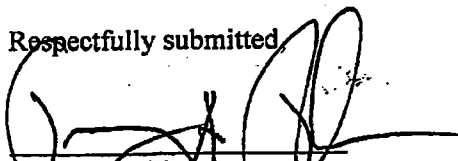
Further, the Respondent argues that there was clear evidence presented supporting that the Appellant's confession was given freely, voluntarily and with a full understanding of his rights. Notwithstanding the fact that the Appellant had been drinking the night before. Likewise, there is evidence on the record that indicates that the Defendant was extremely intoxicated. There is clearly evidence that the Defendant was intoxicated at the time of the first Miranda warnings. The Appellant would assert that the intoxication of the Appellant would have rendered him unable to give a voluntarily confession.

Therefore, the Appellant would contend that this issue is preserved for appeal and that the Circuit Court did improperly deny Defense Counsel's Motion to suppress a statement made by the Appellant.

CONCLUSION

Based on the foregoing reasons and on the Appellant's Initial Brief, the Appellant respectfully requests that the relief requested be granted.

Respectfully submitted,



Tommy A. Thomas
Attorney for the Appellant

March 28, 2014

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Donnie Roland Thigpen, Appellant.

Appellate Case No. 2012-212391

Appeal From Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-386
Submitted September 1, 2014 – Filed November 5, 2014

AFFIRMED

Tommy Arthur Thomas, of Irmo, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Christina J. Catoe, both of Columbia,
for Respondent.

PER CURIAM: Donnie Roland Thigpen appeals his convictions for felony driving under the influence and leaving the scene of an accident, arguing the trial court erred in (1) admitting a video recording and officer testimony about the administration of a DataMaster breath test and (2) denying his motion to suppress

his statement. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

(1) As to whether the trial court erred in admitting a video recording and officer testimony describing the administration of the DataMaster test: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *State v. Benton*, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (stating an issue conceded at trial cannot be argued on appeal).

(2) As to whether the trial court erred in denying the motion to suppress his statement: *State v. Russell*, 345 S.C. 128, 133, 546 S.E.2d 202, 205 (Ct. App. 2001) ("Issues not raised to and ruled upon in the trial court will not be considered on appeal."); *id.* ("A party cannot argue one ground for an objection at trial and an alternative ground on appeal.").

AFFIRMED.¹

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 21, 2014

The Honorable Joyce McDonald
PO Box 1557
Camden SC 29021-1557

REMITTITUR

Re: The State v. Donnie R. Thigpen
Lower Court Case No. 2008GS2801164
Appellate Case No. 2012-212391

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Tommy Arthur Thomas, Esquire
Alan McCrory Wilson, Esquire
Christina Catoe Bigelow, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW)

DONNIE R. THIGPEN #350243)

Full name and prison number (if any) of Applicant.)

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Walden Correctional Institution, 4340 Broad River Road
Columbia, SC 29210.
2. Name and location of Court which imposed sentence Kershaw County General Sessions
Court, 1121 Broad Street, Camden, SC 29020
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 09-GS-28-1171 - Hit & Run-Death Result
 - (b) 09-GS-28-1164 - Felony DUI-Death Result
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

- (a) March 23, 2012- Ten (10) years
- (b) March 23, 2012 - Ten (10) years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. November 5, 2014
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Unpublished Opinion No.: 2014-UP-386
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____

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JOYCE KENDALL
CLERK OF COURT
Kershaw County, S.C.

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) _____

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

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JOYCE MCANALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

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JOYCE R. DONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Alex Postic and Derek Chiarenza
 - (c) your sentencing? Alex Postic and Derek Chiarenza
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Tommy A. Thomas
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Alex Postic, P.O. Box 11926, Columbia, SC 29211
 - ii. Derek Chiarenza, P.O. Box 340, Lexington, SC 29071
 - iii. Tommy A. Thomas, P.O. Box 88, Irmo, SC 29063
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial and Sentencing
 - ii. Trial and Sentencing
 - iii. Direct Appeal
19. State clearly the relief you seek in filing this application:
- _____
20. Are you now under sentence from any other court that you have not challenged?
- _____

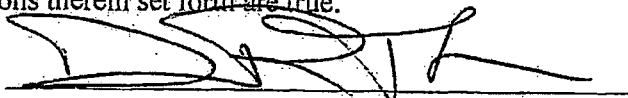
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2014 DEC 30 PM 1:07
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

STATE OF SOUTH CAROLINA

County of Richland

VERIFICATION

I, Donnie R. Thigpen, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.



SWORN to and subscribed before me this 17th
day of December, 2014.

Jolanda Long (L.S.)
Notary Public

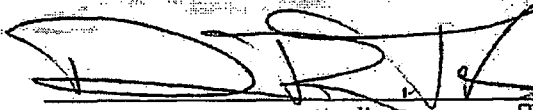
My Commission Expires: 1/20/2022

FILED FOR RECORD
2014 DEC 30 PM 1:07
JOYCE McDONALD
CLERK OF COURT
Kershaw County, S.C.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Donald R. Thigpen, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
17th day of December, 2014.


Notary Public

My Commission Expires: 1/20/2022

FILED FOR RECORD
2014 DEC 30 PM 1:07
JOYCE McDONALD
CLERK OF COURT
BERSHAW COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Donnie R. Thigpen , #350243,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-28-1207

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed December 30, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Kershaw County. Applicant was indicted at the March 2012 term of the Court of General Sessions for Kershaw County for Hit and Run – Death Result (2009-GS-28-1171) and Felony DUI – Death Result (2009-GS-28-1164). Applicant was represented by Alex Postic, Esq., and Derek Chiarenza, Esq. Applicant proceeded to trial on March 23, 2012. He was convicted as indicted. The Honorable G. Thomas Cooper, Jr. sentenced Applicant to concurrent terms of ten (10) years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tommy A. Thomas, Esq. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Thigpen, No. 2014-UP-386 (filed November 5, 2014). The Remittitur was issued on November 21, 2013.

Attached herewith and incorporated herein by reference are the records of the Kershaw County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial

hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

III.

Applicant's claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCF 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCF Rule 11. Filings by inmates will not be considered at the PCR hearing.

V.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

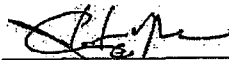
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
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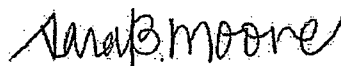
June 4th, 2015

STATE OF SOUTH CAROLINA	)	
COUNTY OF KERSHAW	)	IN THE COURT OF COMMON PLEAS
	)	
	)	2014-CP-28-1207
DONNIE R. THIGPEN, #350243	)	
Applicant,	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tommy Arthur Thomas, Esquire
7588 Woodrow St
Irmo, SC 29063

DATED this 4th day of June, 2015.



Sara B. Moore, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2014-CP-28-1207

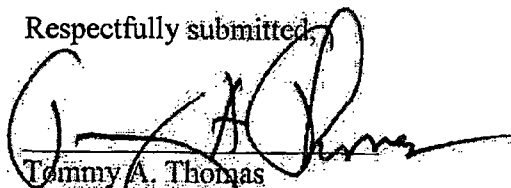
DONNIE R. THIGPEN #350243)
)
 Applicant,)
 v.)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent,)

AMENDMENT TO APPLICATION
 FOR POST CONVICTION RELIEF

The Applicant by and through his attorney, Tommy A. Thomas would respectfully amend and supplement his original application for Post-Conviction Relief filed December 30, 2014, by adding the following:

1. That the Applicant specifically re-alleges his claim of ineffective assistance of counsel.
2. That trial Counsel was ineffective for the following additional reasons:
 - a. That Counsel failed to properly object to the introduction of evidence and testimony of the datamaster examination; including the datamaster video.
 - b. Failure of counsel to properly preserve this objection for Appeal.
 - c. That Counsel failed to properly object to the Statement made by the Applicant admitting his involvement in the accident.
 - d. Failure of counsel to properly preserve this objection for Appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tommy A. Thomas', written over a horizontal line.

Tommy A. Thomas

Attorney for the Applicant

Post Office Box 88

Irmo, South Carolina 29063

(803) 732-5507

August 19, 2015
Irmo, SC

1 STATE OF SOUTH CAROLINA

2 COUNTY OF KERSHAW

CIRCUIT COURT
2014-CP-28-01207

3

4

5 DONNIE R. THIGPEN,
6 Applicant,

6

7 -vs-

TRANSCRIPT OF RECORD

7

8

STATE OF SOUTH CAROLINA,
Respondent.

9

10

Post-Conviction Relief Hearing

11

Heard on Tuesday, August 25, 2015

12

Columbia, South Carolina

13

14 BEFORE:

15

THE HONORABLE TANYA A. GEE

16

17 APPEARANCES:

18

Counsel on Behalf of the Applicant:
Tommy A. Thomas, Esq.

19

Counsel on Behalf of the Respondent, State of SC:
J. Clayton Mitchell, Esq.

20

21

22

23

Cheri L. Young, RPR
Circuit Court Reporter
P O Box 5232
Aiken, SC 29803-5232

24

25

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1 ON TUESDAY, AUGUST 25, 2015 AT 9:47 A.M.:

2 THE COURT: Is there an amended application
3 in this case?

4 MR. THOMAS: There is, Your Honor.

5 THE COURT: Okay. I do not have the
6 amended application in my packet. If you could
7 just pass that up.

8 MR. THOMAS: Sorry about that. I'll get
9 it, Your Honor.

10 Your Honor, may I approach?

11 THE COURT: Yes.

12 MR. THOMAS: Good morning. (Document
13 handed to the Judge.)

14 MR. MITCHELL: Your Honor, may it please
15 the Court.

16 THE COURT: Yes, sir.

17 MR. MITCHELL: This is Donnie Thigpen
18 versus the State of South Carolina,
19 2049-CP-28-1207. Mr. Thigpen was indicted March
20 of 2012 for felony DUI with death resulting and
21 hit and run with death resulting.

22 He was represented on those charges by
23 Mr. Alex Postic. He proceeded to trial in March
24 2012. He was convicted as indicted. This was
25 before Judge Cooper.

1 THE COURT: I think you said he was
2 indicted in March of 2012.

3 MR. MITCHELL: Yeah, that's definitely
4 wrong. It was 2009. Excuse me.

5 THE COURT: Okay. And then the trial was
6 March of 2012?

7 MR. MITCHELL: That's right. I think they
8 amended the indictment at some point.

9 THE COURT: Okay.

10 MR. MITCHELL: So there was -- I think they
11 still had the 2009 number on that. It was
12 re-presented.

13 THE COURT: Okay.

14 MR. MITCHELL: He was sentenced to 10
15 years. A notice of appeal was filed. And that
16 was filed by Mr. Tommy Thomas who represents
17 Mr. Thigpen at this PCR hearing.

18 MR. THOMAS: Good morning.

19 THE COURT: Good morning.

20 MR. MITCHELL: The Court of Appeals
21 affirmed that conviction. Remittur was issued in
22 November of 2013. This application was filed in
23 December of 2014 or December 2013, I believe, and
24 in this application he's alleged ineffective
25 assistance of counsel relating to

1 Datamaster-related evidence coming in, and
2 counsel's failure to have that suppressed.

3 The second issue deals with the
4 voluntariness of his confession or statements
5 alleging confession to the statements. He's
6 alleging that he was too intoxicated to
7 understand Miranda and what, the statement that
8 he was giving.

9 Another issue. One thing I do want to
10 bring to the Court's attention is that since
11 Mr. Thomas represented Mr. Thigpen on the direct
12 appeal, I'd ask that he waive any allegations
13 against appellate counsel by going forward with
14 Mr. Thomas here today.

15 And I think he's prepared to speak on that,
16 Judge.

17 THE COURT: Okay. And had he raised issues
18 with regard to appellate counsel?

19 MR. MITCHELL: He had not.

20 THE COURT: Okay. So since that's not even
21 an issue that's been raised in the application,
22 is there any reason why we'd have to --

23 MR. MITCHELL: I just want -- I guess I was
24 going to ask if you could advise Mr. Thigpen that
25 by going forward with Mr. Thomas he would not be

1 able to raise any allegation of ineffective
2 assistance of appellate counsel.

3 THE COURT: When he takes the stand.

4 MR. MITCHELL: Yes, ma'am.

5 THE COURT: All right. Mr. Thigpen, let's
6 go ahead and get you sworn in, please.

7 (Applicant placed under oath.)

8 THE BAILIFF: State your name for the
9 record.

10 THE APPLICANT: Donnie, D-O-N-N-I-E,
11 Thigpen, T-H-I-G-P-E-N.

12 THE COURT: All right. Mr. Thigpen, I just
13 want to talk to you about a couple of things
14 before we start this hearing.

15 First I want you to know that when we do a
16 PCR hearing, when you ask for a post-conviction
17 relief, as you have asked for, there are two
18 things that can happen.

19 First if I find that you're not entitled to
20 post-conviction relief then you will just serve
21 out the remainder of your sentence. But if I
22 grant you post-conviction relief I would vacate
23 your conviction and you would start from
24 scratch. Do you understand that?

25 THE APPLICANT: Yes, ma'am.

1 THE COURT: This isn't something that I
2 would change what your sentence was. You would
3 start from scratch and you would go back to trial
4 or plead guilty as the case may be. Do you
5 understand that?

6 THE APPLICANT: Yes, ma'am.

7 THE COURT: And that's what you wish to do,
8 you want to go forward --

9 THE APPLICANT: I do.

10 THE COURT: -- with your action? I have
11 looked over your application and understand that
12 you are making arguments with regard to your
13 trial counsel. And you've not raised any issues
14 with regard to effective assistance of appellate
15 counsel in either your initial application or
16 your amended application; is that correct?

17 THE APPLICANT: That's correct.

18 THE COURT: Sometimes during PCR hearings
19 another issue could come up during testimony.
20 That issue may not have been in a written
21 application. And you are being represented at
22 your post-conviction relief action by your
23 appellate counsel. Do you understand that?

24 THE APPLICANT: Yes, ma'am.

25 THE COURT: It would be -- if something

1 were to come up with regard to your appellate
2 counsel, we would have to stop this hearing and
3 reevaluate your counsel because that would be a
4 conflict of interest for him to be representing
5 you while you were making arguments about why he
6 was ineffective. Does that make sense?

7 THE APPLICANT: Yes, ma'am.

8 THE COURT: All right. Do you have any
9 complaints about appellate counsel that you
10 intend to bring up today? And it's okay if there
11 are. I don't want to stop you from bringing up
12 any of those issues. I just want to know before
13 we begin whether you want to go forward with
14 Mr. Thomas as your attorney.

15 THE APPLICANT: I do.

16 THE COURT: And you understand that by
17 going forward with him as your attorney you would
18 be waiving any sort of argument you have with
19 regard to ineffective assistance of appellate
20 counsel?

21 THE APPLICANT: Yes, ma'am.

22 THE COURT: All right. Well, understanding
23 that, I'll allow this hearing to go forward.
24 And, Mr. Thomas, I'll let you take it away from
25 here.

1 MR. THOMAS: Your Honor, if it please the
2 Court. Just a few administrative things to go
3 through.

4 If -- there is a letter from the Court of
5 Appeals in regards to exhibits. There were
6 exhibits in this case that have been returned to
7 the clerk's office.

8 THE COURT: Okay.

9 MR. THOMAS: Just wanted to bring that to
10 the Court's attention.

11 There is a Datamaster video and also an
12 audio of the Appellant's statement or the
13 Applicant's statement in this case. And if the
14 Court wishes, I think I would need a court order
15 from the Court to obtain those. I thought we
16 would have the case, let you hear it and
17 determine whether or not you wish to listen or
18 review those exhibits.

19 THE COURT: Okay. Thank you for letting me
20 know that.

21 MR. THOMAS: Yes, ma'am.

22 In addition, there is a final decision in
23 regards to this case from the Court of Appeals.
24 I don't know if it's in your packet. If it's not
25 I'll be more than happy to provide a copy which

1 basically says that the two issues, the two main
2 issues that we're going to present today were not
3 preserved for appeal and they did not render a
4 decision on those issues.

5 THE COURT: And I do not have that opinion
6 in my packet.

7 MR. THOMAS: Your Honor, if it please the
8 Court. May I approach?

9 THE COURT: Yes, please.

10 (Document handed to the Judge.)

11 THE COURT: Thank you.

12 MR. THOMAS: Your Honor.

13 THE COURT: Do you happen to have your
14 brief?

15 MR. THOMAS: Yes, ma'am, I do.

16 THE COURT: I would like copies of those as
17 well.

18 MR. THOMAS: Your Honor, I only brought
19 with me the -- let's see. I think I have all
20 three. These are my copies, Your Honor, but I
21 don't have any problem with giving them to the
22 Court. I don't think I'll need them.

23 THE COURT: Okay. Thank you.

24 (Documents handed to the Judge.)

25 THE COURT: Let me look at one thing, and,

1 -- I just wanted to see if the State argued in
2 their brief regarding issue preservation which
3 they did.

4 MR. THOMAS: Your Honor, in addition just a
5 final housekeeping matter. I met with my client
6 last week. I called the Attorney General and
7 spoke with him about these issues. There are
8 kind of other issues that kind of revolve around
9 the main issue. I'd be more than happy to put
10 those on the record for you if you wish, or if
11 you wish for me just to bring them out in
12 testimony.

13 THE COURT: Why don't you go ahead and let
14 me know what those are so I can be paying
15 attention to them.

16 MR. THOMAS: Yes, ma'am.

17 THE COURT: That would be helpful for me.

18 MR. THOMAS: Your Honor, in passing on the
19 ineffective assistance of counsel. In
20 questioning defense counsel -- there was
21 evidently a phone number on the deceased's
22 phone. This was an automobile collision, Your
23 Honor. Basically the car went off the road and
24 collided with a bridge. There was a phone number
25 in there. And I will want to ask the defense

1 counsel why he didn't follow or if he followed
2 through on that phone number and if that could
3 have been a potential driver of the vehicle. My
4 client's defense in this case was that he was not
5 the driver of the vehicle at the time of the
6 incident.

7 Also, in regard about the stipulation to
8 the chain of custody. We will ask about the
9 audio. There is -- the two main issues, Your
10 Honor, are a statement that was given later in
11 the day that was recorded. And I will ask about
12 that audio interview and any attempts to exclude
13 it.

14 Also, there was some promises made and
15 suggestions made in the interview room in regards
16 to the statement being given. I'll ask counsel
17 about that. I'll ask him about the DNA evidence
18 in this case.

19 Also there was some allegation that there
20 was someone found in the woods which didn't
21 involve or didn't develop at trial. I just
22 wanted to ask him about that potential person.

23 And also in regards to the DNA follow up,
24 there were glass shards that were found and I'll
25 ask about if there was any DNA evidence that was

DONNIE THIGPEN - DIRECT BY THOMAS

1 ascertained on those shards.

2 THE COURT: All right. You can call your
3 first witness.

4 MR. THOMAS: Your Honor, we'll call
5 Mr. Thigpen to the stand.

6 THE COURT: Mr. Thigpen, you are already
7 sworn in, so you remain under oath to tell the
8 truth.

9 THE APPLICANT: Okay.

10 THE COURT: Mr. Thigpen, you are already
11 sworn in.

12 DONNIE R. THIGPEN, having been duly sworn,
13 was examined and testified as follows:

14 MR. THOMAS: If it please the Court?

15 THE COURT: Yes, sir.

16 DIRECT EXAMINATION

17 BY MR. THOMAS:

18 Q. Mr. Thigpen, would you state your name for the
19 record?

20 A. Donnie Thigpen.

21 Q. Mr. Thigpen, where are you being housed?

22 A. Walden Correctional Institution.

23 Q. And what custody level is that?

24 A. One.

25 Q. And you've worked your way through the Department

DONNIE THIGPEN - DIRECT BY THOMAS

1 of Corrections in regards to custody?

2 A. Yes, sir.

3 Q. By good behavior?

4 A. Yes, sir.

5 Q. All right. And you're serving time for what crime?

6 A. Yes, sir.

7 Q. What crime are you serving time for?

8 A. Felony DUI with death and failure to render aid --
9 or leaving the scene, excuse me, involving death.

10 Q. And what type of sentence did you receive for that?

11 A. Ten years for both to run concurrent.

12 Q. All right. So -- and what is your maxout?

13 A. September 2020.

14 Q. All right. Now, you're being housed, you say, at
15 Stevenson; is that correct?

16 A. Yes, sir.

17 Q. And do you have any disciplinaries?

18 A. I have not.

19 Q. Under -- do you understand the post-conviction
20 relief process? We've talked about that.

21 A. Yes, sir.

22 Q. Do you understand that today the best that you can
23 ask -- the only thing that you can ask for is a new
24 trial?

25 A. Yes, sir.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. Do you understand that that new trial carries risks
2 with it?

3 A. I do.

4 Q. That your conviction could be set aside if the
5 Court decides to do that, and that you could be placed
6 back in the position that you were prior to trial?

7 A. Yes, sir.

8 Q. And that under some circumstance you might be able
9 to be retried and given a lengthier sentence?

10 A. Yes, sir.

11 Q. Are you willing to accept that risk?

12 A. I am.

13 Q. And you want to go forward today?

14 A. I do.

15 Q. Mr. Thigpen, why don't you tell us just briefly for
16 the Court what happened in this case? What, what was the
17 incident that occurred?

18 A. Well, me and Melvin, that's the deceased in the
19 case --

20 Q. Is he a friend of yours?

21 A. Yes, sir.

22 Q. Okay.

23 A. We had been hanging out that night and we were --
24 we went back to my house. I let Melvin borrow my truck
25 and he left. And I don't know where he was going or what

DONNIE THIGPEN - DIRECT BY THOMAS

1 he did, but evidently he had let an unidentified
2 individual drive my vehicle which resulted in them
3 running off the road and Melvin passing away.

4 Q. All right. So, it was not your defense that you
5 were not drinking because you had been drinking?

6 A. Oh, yes, sir. I had been drinking that night.
7 Yes, sir.

8 Q. And you were pretty intoxicated?

9 A. Yes, sir.

10 Q. It was your theory of defense or defense in this
11 case that you were not the driver of the vehicle?

12 A. Exactly.

13 Q. All right. And you were arrested later after this
14 fact?

15 A. Yes, sir. About 11:30 the next day.

16 Q. Were you arrested at the scene?

17 A. No, sir.

18 Q. You were arrested where?

19 A. At my place of residence. My house.

20 Q. All right. And at that point in time when you were
21 arrested, were you read your Miranda rights?

22 A. No, I don't think so. No.

23 Q. All right. Do you remember when you were read your
24 Miranda rights?

25 A. When they had me at the county jail.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. All right. And when you were arrested at your
2 home, where were you taken?

3 A. To Kershaw County Detention Center.

4 Q. All right. Did they take you to the hospital as
5 well?

6 A. As a matter of fact, yes, they did. They took me
7 to the hospital first and then they took my blood results
8 to a lab of theirs, I don't know, and then to the jail.

9 Q. And then when you arrived at the detention center,
10 were you given a breathalyzer?

11 A. I was.

12 Q. Okay. And a recording was made of that
13 breathalyzer?

14 A. Yes, sir.

15 Q. Now the physical evidence that they had against you
16 was the blood test to show that you were intoxicated?

17 A. Yes, sir.

18 Q. And, was there some sort of paint chip?

19 A. They say there was a paint chip in my ear, but it
20 was never in the trooper's statement and they don't have
21 it in evidence.

22 Q. What was the significance of that?

23 A. Of the blue paint chip?

24 Q. Yeah.

25 A. They said that that was paint from the vehicle.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. Okay. To try to connect you with being, driving
2 this vehicle?

3 A. Yes, sir.

4 Q. And there was also supposedly found glass shards?

5 A. Yes, sir.

6 Q. And what significance were these glass shards?

7 A. They said the glass came from the windshield or the
8 windows of the vehicle.

9 Q. Okay.

10 A. But they were never placed in evidence.

11 Q. All right. And there are also some allegations
12 that you had broken into your own home?

13 A. Yes, sir.

14 Q. And why was -- was it a break-in?

15 A. Melvin had my keys and the door was locked, so I
16 had to force my way in, in the house.

17 Q. Now, Donnie, you were arrested and a blood sample
18 was taken and then you were taken and given the
19 breathalyzer?

20 A. Yes, sir.

21 Q. Did you retain counsel or were you appointed
22 counsel?

23 A. I retained counsel.

24 Q. And who did you retain?

25 A. Mr. Postic.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. Now did you remain in the detention center or did
2 you make bond?

3 A. I made bond.

4 Q. And how long were you in the detention center?

5 A. I think it was three days.

6 Q. And how long did it take for this case to come up
7 for trial?

8 A. Almost three years.

9 Q. Now during that period of time you met with your
10 attorney?

11 A. Yes, sir.

12 Q. And did you formulate some sort of theory of
13 defense? Did he explain how he was going to defend you
14 in this case?

15 A. Yes, sir.

16 Q. And what was that theory?

17 A. Exactly what I just told you.

18 Q. That you were not the driver of the vehicle?

19 A. Yes, sir.

20 Q. Now, how did you prepare -- what did you do with
21 your attorney? Did you go over the evidence or the
22 discovery?

23 A. Yes, sir.

24 Q. And he discussed with you what evidence that the
25 State had against you?

DONNIE THIGPEN - DIRECT BY THOMAS

1 A. He did.

2 Q. And what was that evidence, do you remember?

3 A. They say that I had marks on my arms that were
4 consistent with airbag burns. They said my DNA was on
5 the back of the airbag, that there's an unidentified
6 male's DNA on the front of the airbag. They -- like I
7 said, there was a statement saying that Trooper McKenzie
8 had a blue paint chip, but they didn't have that in
9 evidence. And glass, they didn't have that in evidence.

10 There was a statement of course.

11 Q. Let me ask you this. How did they place you at the
12 scene?

13 A. They didn't place me at the scene.

14 Q. Okay. So you took this into consideration in
15 talking with Mr. Postic about whether to take this case
16 to trial?

17 A. Yes, sir.

18 Q. And, were you ever offered a plea?

19 A. Ten to 15 years.

20 Q. All right, sir. And you did not accept that plea?

21 A. Correct.

22 Q. Obviously?

23 A. Correct.

24 Q. Okay. And why did you not accept that plea?

25 A. Because I'm innocent.

DONNIE THIGPEN - DIRECT BY THOMAS

- 1 Q. And you wanted a trial?
- 2 A. Yes, sir.
- 3 Q. If you win this post-conviction relief you would
- 4 want a new trial?
- 5 A. Yes, sir.
- 6 Q. All right. Let me ask you then in more specifics
- 7 about the BA level and the blood test. You were
- 8 arrested, I think, about 11:20, I think; is that correct?
- 9 A. I believe so. Yes, sir.
- 10 Q. And that's in the morning?
- 11 A. Yes, sir.
- 12 Q. And the officers came to your home?
- 13 A. They did.
- 14 Q. Okay. Now, you said that you were taken to the
- 15 hospital. Which hospital were you taken to?
- 16 A. The Camden Hospital.
- 17 Q. Okay. And a blood draw was done at 12:40; is that
- 18 correct?
- 19 A. I'm not sure, positive about the time but, yes, a
- 20 blood draw was taken.
- 21 Q. All right. And do you remember what your BA level
- 22 was from the blood draw?
- 23 A. I think it was .219 maybe.
- 24 Q. Okay. So it was high?
- 25 A. Yes, sir.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. And then after you went to the hospital, were you
2 admitted to the hospital or were you released after?

3 A. I was released.

4 Q. And you were taken to the detention center?

5 A. Yes, sir.

6 Q. Now at that detention center, you were taken into
7 the breathalyzer room; is that correct?

8 A. Yes, sir.

9 Q. And were you given the breathalyzer?

10 A. I was. Yes, sir.

11 Q. And you voluntarily took the test?

12 A. Yes, sir.

13 Q. And that was, do you remember, was it at 1:42; is
14 that correct?

15 A. I believe so. Yes, sir.

16 Q. And you had a BA level of .19?

17 A. Yes, sir.

18 Q. And that was almost two o'clock in the afternoon?

19 A. Yes, sir.

20 Q. Okay. Do you remember talking to your attorney
21 about trying to suppress those results?

22 A. Yes, sir.

23 Q. All right. And what was -- what were your thoughts
24 about those levels being -- or those levels being
25 suppressed or not being able to be introduced at trial?

DONNIE THIGPEN - DIRECT BY THOMAS

- 1 A. If -- I mean, if it was according to law they
2 shouldn't have been allowed into, into the trial. Then
3 of course I was, I was glad for that, but --
- 4 Q. But the breathalyzer sample, the breath test itself
5 was done two hours, over two hours from your time of
6 arrest?
- 7 A. Yes, sir. Yes, sir.
- 8 Q. And at trial, counsel was able to keep that BA
9 level number from coming in?
- 10 A. Yes, sir.
- 11 Q. Okay. How about the video itself, was it
12 introduced into evidence?
- 13 A. It was.
- 14 Q. Okay. And then also there was one of the police
15 officers, the BA officer, he testified in regards to that
16 exam?
- 17 A. Yes, sir. He did.
- 18 Q. And that was allowed in?
- 19 A. It was.
- 20 Q. Despite the fact that the BA level itself was kept
21 out?
- 22 A. Correct.
- 23 Q. Okay. Do you believe that that testimony and that
24 video harmed you in any way?
- 25 A. Greatly.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. And why do you think that it harmed you?

2 A. Because the jury --

3 MR. MITCHELL: Objection. He's asked for a
4 legal conclusion.

5 THE COURT: Overruled. Go ahead.

6 THE WITNESS: The jury hears that there was
7 -- well, the trooper testified that there was a
8 blue, there was a blue paint chip in my ear and
9 there was glass in my beard. He said that to me
10 in the video. And the jury sees that, and
11 anybody in their right mind would say, "Well, his
12 Jeep is blue, he's got a blue paint chip in his
13 ear and glass in his beard."

14 BY MR. THOMAS:

15 Q. Okay.

16 A. "So he must have been driving."

17 Q. Where were they saying the glass came from, the
18 glass shards?

19 A. From the windshield or the side windows.

20 Q. All right.

21 A. But they didn't have this evidence. They didn't
22 have the blue paint chip or the glass but the jury hears
23 this. So, like I said, anybody in their right mind is
24 going to think, well, he had to be the driver if there's
25 a blue paint chip in his ear and glass in his beard.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. So is it your belief that that evidence helped to
2 convict you?

3 A. I do.

4 Q. It placed you at the scene?

5 A. Yes.

6 Q. Now -- Your Honor, if I could beg the Court's
7 indulgence just for a second.

8 THE COURT: Yes, sir.

9 (Pause.)

10 BY MR. THOMAS:

11 Q. Now, was there -- they used a toxicologist. Do you
12 remember that?

13 A. They did.

14 Q. And this was some gentleman who the State had
15 called as a witness?

16 A. Yes, sir.

17 Q. And what was the toxicologist, what was his role in
18 all of this?

19 A. I guess just to testify as an expert as to my level
20 of toxicity.

21 Q. Okay. And they were saying that -- that you were
22 so intoxicated that you were gradually, I guess,
23 becoming, for lack of a better word, less intoxicated as
24 the day went on?

25 A. Yes, sir.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. Okay. And were they saying that you were still
2 highly intoxicated in the afternoon?

3 A. Yes, sir.

4 Q. Now what happened during the time which you took
5 the breathalyzer. I guess it was given at 1:42, close to
6 two o'clock in the afternoon. What happened after that?

7 A. They put me in the holding cell for a while and
8 then they took me into the interview room and interviewed
9 me.

10 Q. Okay. All right. Now, they questioned you in the
11 interview room?

12 A. They did.

13 Q. And as far as Miranda rights, you had been given
14 Miranda rights, when? The first time.

15 A. In that room?

16 Q. In that room?

17 A. Yes, sir.

18 Q. Were you given Miranda rights when you were
19 arrested?

20 A. No, sir.

21 Q. And what was your condition at the time that you
22 started talking with them?

23 A. I was highly intoxicated.

24 Q. Okay. And, did you ask for an attorney at that
25 time?

DONNIE THIGPEN - DIRECT BY THOMAS

- 1 A. I did not, no.
- 2 Q. Did you understand what was going on?
- 3 A. Not really. No, I didn't.
- 4 Q. Okay.
- 5 A. I didn't even know who was in the car.
- 6 Q. Okay. And what, if anything, did the officers say
- 7 to you to encourage you to give them a statement?
- 8 A. They told me it would be better if I just came
- 9 clean with them.
- 10 Q. They --
- 11 A. I need to help myself.
- 12 Q. Help yourself?
- 13 A. Help them so I could help myself.
- 14 Q. Did they promise to help you in any way?
- 15 A. That's what they said. They didn't promise me
- 16 anything, no, but they said I needed to help them so I
- 17 can help myself.
- 18 Q. Okay. Now, you eventually did give a statement; is
- 19 that correct?
- 20 A. I did.
- 21 Q. And this process was being recorded?
- 22 A. It was.
- 23 Q. Did you know that it was being recorded?
- 24 A. Yes, sir.
- 25 Q. All right. They told you?

DONNIE THIGPEN - DIRECT BY THOMAS

1 A. Yes, sir.

2 Q. All right. And what time, do you remember, in this
3 process when you gave a statement?

4 A. Towards the end of the interview.

5 Q. Do you remember what time the interview started?

6 A. It was around 4:45, maybe five o'clock, I do
7 believe.

8 Q. So this was a little, a couple hours after you had
9 taken the breathalyzer?

10 A. Yes.

11 Q. And how long did the interview process last?

12 A. I think it was just short of two hours.

13 Q. Two hours?

14 A. Maybe an hour and a half. I'm not sure.

15 Q. And you gave a statement at the end of that --

16 A. Yes, sir.

17 Q. -- two-hour period of time?

18 A. Yes, sir.

19 Q. Okay. What, what did you say?

20 A. Basically that I was driving.

21 Q. All right. And why did you say that?

22 A. Because I, I didn't know what else to say. I mean,
23 they just kept pushing me and telling me they know I was
24 driving. So I was just -- the thoughts were just racing
25 in my head and I'm thinking, well, maybe I was driving

DONNIE THIGPEN - DIRECT BY THOMAS

1 and, I mean, I just basically told them what they wanted
2 to hear.

3 Q. All right. When you made that statement, do you
4 feel like you were still intoxicated?

5 A. Yes, sir.

6 Q. And you said that you thought that you may have
7 been driving?

8 A. Yes, sir.

9 Q. Were you sure if you were driving the car or not at
10 that point in time?

11 A. I mean, the way they made it out to be, they said I
12 was driving. So, I mean, the way I took it, well, maybe
13 I was driving but, I mean, I wasn't.

14 Q. Okay. And what time was it that you felt like that
15 you were able to be more clearheaded without the
16 influence of alcohol?

17 A. Probably the next day.

18 Q. Okay. You and the deceased, who -- he was a friend
19 of yours?

20 A. Yes, sir.

21 Q. You had been drinking pretty heavily?

22 A. Yes, sir.

23 Q. And I think the testimony is that you had been to
24 several different bars?

25 A. Yes, sir.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. So when you became clearheaded, did you attempt to
2 tell the police that that story was not true?

3 A. I did not.

4 Q. All right. And why didn't you?

5 A. I, I didn't know I could do that.

6 Q. Okay. All right. Now, I'll ask you today: Were
7 you driving that vehicle?

8 A. No, sir.

9 MR. THOMAS: Your Honor, may I beg the
10 Court's indulgence just for a second?

11 THE COURT: Sure.

12 (Pause.)

13 BY MR. THOMAS:

14 Q. Did you testify at trial?

15 A. Yes, sir.

16 Q. Your testimony today is consistent with what you
17 said at trial?

18 A. Yes, sir.

19 Q. That, what the officers had told you --

20 A. Yes, sir.

21 Q. -- that you were intoxicated? Okay. And I think
22 that you said that, that you were drunk at the time, that
23 you were confused and that you were also scared?

24 A. Yes, sir.

25 Q. Were you scared?

DONNIE THIGPEN - DIRECT BY THOMAS

1 A. Absolutely. Yes.

2 Q. Okay. Now, the video of the BA that was presented
3 and shown to the jury, did it show the blue paint chip?

4 A. It did not, no.

5 Q. Was the blue paint chip ever found?

6 A. No, sir.

7 Q. Did they testify as to the blue paint chip?

8 A. Yes, sir. They did.

9 Q. And, did the BA operator testify as to the chip; do
10 you remember?

11 A. I don't remember if he testified exactly to that
12 blue paint chip. I know Trooper McKenzie did.

13 Q. And he was the arresting officer?

14 A. Yes, sir.

15 Q. And basically I think he testified that he had
16 tried to preserve it but was unable to?

17 A. Yes, sir.

18 Q. Now, did they talk about the blue paint chip when
19 you were being interviewed with the police?

20 A. I don't think so, no.

21 Q. Okay. Now as far as when the arresting officer
22 talked about the chip, do you remember if your defense
23 attorney, did he question him about that chip?

24 A. I don't think so, no.

25 Q. All right.

DONNIE THIGPEN - DIRECT BY THOMAS

1 A. Well --

2 Q. Do you remember?

3 A. Uh, I don't remember.

4 Q. Okay. There was testimony that they had attempted
5 to preserve it, right?

6 A. Yes, sir.

7 Q. Okay. And I think he tried to obtain some sort of
8 device or tweezers or something to be able to do that?

9 A. Yes, sir. He left my house and drove down the
10 street to get a Q-tip of some sort, and he said when he
11 got back it was gone.

12 Q. Was there a blue paint chip in your ear?

13 A. No.

14 Q. Okay. Now how about the shards of glass? I think
15 that the arresting officer also testified that there was
16 shards of glass in your hair.

17 A. Yes, sir.

18 Q. And do they comb out shards of glass; do you know?

19 A. No.

20 Q. Were there any shards of glass presented in
21 evidence at the trial?

22 A. I think there was, they said there was one -- a
23 piece of glass in my clothes.

24 Q. Okay.

25 A. I never saw it.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. All right.

2 A. But the jury, it was a bench like that and they
3 spread my clothes out on a piece of paper. And they
4 showed a piece of glass, but I never saw a piece of
5 glass. I don't know what they saw. I never saw that
6 evidence. I mean, I saw those clothes before but I never
7 saw what was in the pockets or anything of that nature,
8 you know.

9 Q. Now, when the officer testified, the BA officer
10 testified, he testified that there was, that your hair
11 glistened; is that correct?

12 A. Yes, sir.

13 Q. With shards of glass in your hair at that time,
14 which would have been almost two o'clock in the
15 afternoon?

16 A. Yes, sir.

17 Q. But he didn't collect any of those shards, did he?

18 A. No.

19 Q. And he didn't present any of those shards of glass
20 in evidence during his testimony?

21 A. That's correct.

22 Q. Now, was -- the video and the confession, was it
23 admitted into evidence?

24 A. It was.

25 Q. And was it shown to the jury?

DONNIE THIGPEN - DIRECT BY THOMAS

1 A. It was. The audio.

2 Q. The audio.

3 A. The audio.

4 Q. Okay. And do you know whether or not objection was
5 made to the introduction of that?

6 A. It was.

7 Q. And was it overruled?

8 A. It was.

9 Q. Okay. Now you filed an appeal?

10 A. Yes, sir.

11 Q. Do you remember that?

12 A. Yes, sir.

13 Q. Okay. And you were fairly active in your appeal?

14 A. Yes, sir.

15 Q. And the two issues that were raised on the appeal
16 were in regards to the breathalyzer; is that right?

17 A. Yes, sir.

18 Q. And the statements --

19 A. Yes, sir.

20 Q. -- that were given?

21 A. (Nods head.)

22 Q. And the breathalyzer argument was basically what we
23 talked about in court today?

24 A. Yes, sir.

25 Q. That the Court allowed in the video and the

DONNIE THIGPEN - DIRECT BY THOMAS

1 testimony of the BA operator but not the BA level?

2 A. That's correct.

3 Q. And also that the statement that you gave in the
4 afternoon was not freely and voluntarily given because
5 you were still intoxicated?

6 A. Yes, sir.

7 Q. All right. And what did the Court do in regards to
8 your appeal?

9 A. It was denied.

10 Q. And was it denied because it wasn't preserved for
11 appeal?

12 A. That's correct. Yes, sir.

13 Q. On both issues?

14 A. That's correct.

15 Q. Now, Donnie, you and I have spent quite a bit of
16 time in this case. I know there were other issues that
17 you wanted to present.

18 You said that there was a phone number on the
19 deceased driver's phone?

20 A. That's correct.

21 Q. And explain that or tell me what you know about
22 that.

23 A. The trooper testified -- well, I didn't, I didn't
24 know about this until, I think it was maybe the week
25 before the trial -- that there was even a phone call made

DONNIE THIGPEN - DIRECT BY THOMAS

1 either from Melvin's phone or to Melvin's phone at or
2 around the time they say this accident happened.

3 Q. What time did it happen? Were they able to
4 determine?

5 A. No, no, sir. They weren't.

6 Q. Early morning?

7 A. They said between, you know, five a.m. and
8 nine a.m. in the morning.

9 Q. What time were you arrested?

10 A. 11:30.

11 Q. 11:30? Okay.

12 A. I believe some e-mails went back and forth between
13 the prosecution and the trooper about this e-mail. I
14 didn't know about it, like I said, until, I think it was
15 the week before the trial. As a matter of fact, I think
16 it was the Friday before the trial.

17 Q. Right.

18 A. I don't know why this wasn't investigated any
19 further because that could have been the driver of this
20 vehicle. If he called, if Melvin made the call or if
21 somebody called his phone at or around the time they say
22 this accident occurred, then why not investigate this guy
23 or this female. I don't know if it was a male or
24 female. Why not investigate any further just, just to
25 rule this out.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. All right. So your -- what fits with your theory
2 of defense is that you were not the driver of this
3 vehicle?

4 A. Yes, sir.

5 Q. Now how about the chain of custody, you said the
6 defense counsel stipulated to the chain?

7 A. Yes, sir.

8 Q. And why do you feel like they should not have
9 stipulated?

10 A. I believe everybody that dealt with the evidence
11 should have testified, should have heard --

12 Q. So they could prove the chain?

13 A. Yes, sir.

14 Q. Now --

15 THE COURT: Mr. Thomas, can you explain the
16 chain of custody? For what?

17 BY MR. THOMAS:

18 Q. You're talking about the chain of custody for, what
19 issues?

20 A. All evidence.

21 Q. What evidence was introduced?

22 A. Blood.

23 Q. The BA?

24 A. The BA.

25 Q. The blood alcohol?

DONNIE THIGPEN - DIRECT BY THOMAS

1 A. The blood-alcohol level, yes. Mainly.

2 Q. All right. Because there was no shards of glass
3 that were introduced?

4 A. No.

5 Q. How about the DNA on the airbag?

6 A. It was never examined. They just know there was
7 unidentified male's DNA on the front of the airbag. And
8 there was not a test done to determine whose DNA that
9 was. They know it wasn't mine.

10 Q. Right. But your DNA was found on the bag as well;
11 is that correct?

12 A. They say. They say on the back of the airbag. It
13 was touch DNA on the back of the airbag but, I mean, it
14 was my vehicle, you know. And the entire steering wheel
15 came off the column. And it was thrown amongst the
16 vehicle. So, I mean, who's to say that my DNA wasn't
17 picked up off the floorboard of the seat or, I mean,
18 because it was my vehicle.

19 Q. Okay. Now, you and I have talked about the audio
20 of the interview. And you had asked about it being
21 excluded. Did counsel make an objection to the exclusion
22 of this audio, your attorney?

23 A. He did.

24 Q. All right. It was denied?

25 A. It was.

DONNIE THIGPEN - DIRECT BY THOMAS

1 Q. Now, you and I also talked about the possibility of
2 a phone call while you were in the interview room. Did
3 you make a phone call? Did you call an attorney?

4 A. No, I didn't. I think I was allowed a phone call
5 after the interview.

6 Q. But not during the interview?

7 A. No.

8 Q. Did you ask for one?

9 A. I -- yes, sir. I believe I did.

10 Q. And did you talk to your attorney about that, about
11 that request?

12 A. I did.

13 Q. What if anything did he advise you about that?

14 A. Nothing really.

15 Q. All right. Now you and I also talked about, you
16 said there were promises made to you in the interview
17 room?

18 A. I wouldn't say promises but, I mean, he just said,
19 you know, help us and we'll help you.

20 Q. All right. And you talked about your -- talked
21 about those issues with your defense attorney?

22 A. I did.

23 Q. Okay. Now, we talked about the DNA evidence
24 because I know that you were concerned about that. Was
25 there any -- ever any independent examination of the DNA

DONNIE THIGPEN - DIRECT BY THOMAS

1 on the airbag?

2 A. No, sir.

3 Q. Okay. Was this thing -- you had asked me about
4 there was some indication that someone was found in the
5 woods.

6 A. In one of the trooper's reports he said that there
7 was someone in the woods, somebody was found in the
8 woods.

9 Q. Was anybody found in the woods?

10 A. No, sir.

11 Q. All right.

12 A. Donnie, this is your opportunity. You and I have
13 discussed this. I know this case is extremely important
14 to you. And I'm not asking this question because I
15 believe that I have left something out.

16 But, is there anything else that you feel like
17 needs to be brought to the Court's attention at this
18 time?

19 A. There was a video of the initial contact of me at
20 my residence that I knew nothing about until the day of
21 trial. Mr. Postic --

22 MR. MITCHELL: Objection. This is outside
23 of what he indicated he was going to raise at the
24 beginning of the hearing.

25 THE COURT: At the beginning of the hearing

DONNIE THIGPEN - DIRECT BY THOMAS

1 all we talked about were appellate issues.

2 MR. MITCHELL: No. I mean, when he -- when
3 Mr. Thomas went through the allegations he was
4 raising, this was not one of them.

5 THE COURT: Okay. Overruled. Go ahead.

6 THE WITNESS: Mr. Postic, he went over
7 this, this video with the prosecution before the
8 trial began. I, I had no knowledge of this video
9 prior to this day. And I don't think I got a
10 copy of it -- I'm not sure if I even got a copy
11 of it but in this video they said that I was read
12 my Miranda rights at the house, at my house
13 before they took me into custody.

14 BY MR. THOMAS:

15 Q. Right.

16 A. And that's the reason why the video was allowed
17 into evidence. Because our argument initially was that
18 you didn't advise -- they didn't advise me of my Miranda
19 rights before the interview correctly. They advised me
20 of my Miranda but they left out the fifth prong.

21 And the original judge in the case was not going to
22 allow that testimony, the statement of mine because
23 Miranda wasn't read correctly. But in this video they
24 say Miranda was read correctly. So by allowing this
25 video in, they get this statement in.

DONNIE THIGPEN - DIRECT BY THOMAS

1 And I, I, I didn't see the video. I had no
2 knowledge of this video before the trial and I don't
3 think it should have been allowed into evidence. By
4 allowing this video into evidence they were able to back
5 door this -- my testimony, my statement into evidence.

6 Q. Who was doing the video?

7 A. It was the dash-cam video.

8 Q. All right. And that dash-cam video was when the
9 police arrived at your home?

10 A. Yes, sir.

11 Q. Okay. All right. Did you discuss this issue --
12 when did you find out about this issue?

13 A. The day of trial.

14 Q. You talked to defense counsel about it?

15 A. He said it wasn't incriminating so we were going to
16 allow it.

17 Q. Okay. Anything else?

18 A. They never did an airbag residue test on me, my
19 person, or any of my clothes. I think Alex should have
20 been present at the questioning but he wasn't.

21 Q. You're talking about the interview?

22 A. Yes, sir.

23 Q. When did you retain Mr. Postic?

24 A. While I was still in custody in Kershaw County.

25 Q. Was he retained prior to the interview or after the

DONNIE THIGPEN - DIRECT BY THOMAS

1 interview?

2 A. I didn't -- the first time I met him was after the
3 interview.

4 Q. Okay.

5 A. My family member retained him.

6 Q. Retained him?

7 A. Yes, sir.

8 Q. Okay. All right, Donnie. I know that you've been
9 very involved in this case. Is there anything else?

10 A. Trooper Coates admits to telling me I was driving
11 in this interview.

12 Q. Yes, sir.

13 A. That's -- that's in this transcript. It's on
14 record. He also says on page 120 in the transcript that
15 if I want any help I better come clean.

16 I don't know why the tape was redacted.

17 MR. MITCHELL: Objection, Your Honor. This
18 is going off allegations that weren't raised
19 before the hearing.

20 THE COURT: Okay. I'll allow him to
21 continue. Thank you. Overruled. Go ahead.

22 THE WITNESS: The interview was redacted.
23 The tape was redacted. Why, I don't know. I
24 don't know if parts were cut out that --

25 BY MR. THOMAS:

DONNIE THIGPEN - CROSS BY MITCHELL

1 Q. That was the BA tape; is that correct?

2 A. I believe.

3 Q. Yeah. Then, wasn't it redacted to take out the BA
4 level?

5 A. Yes, yes, that's correct. I believe that's it.

6 Q. All right.

7 A. That's all.

8 MR. THOMAS: Your Honor, no further
9 questions.

10 THE COURT: All right. Thank you.
11 Mr. Mitchell? Mr. Mitchell?

12 CROSS-EXAMINATION

13 BY MR. MITCHELL:

14 Q. All right. Good morning, Mr. Thigpen.

15 A. How are you doing?

16 Q. You were charged with felony DUI resulting in
17 death; is that right?

18 A. Yes, sir.

19 Q. And we're talking about the range of that is one to
20 25 years, correct?

21 A. Yes, sir.

22 Q. You were sentenced to 10 years?

23 A. Yes, sir.

24 Q. And that would have been the lower end of your plea
25 offer from the State, right?

DONNIE THIGPEN - CROSS BY MITCHELL

1 A. That's correct.

2 Q. You said, your testimony earlier was that it was
3 between 10 to 15 was the range of the plea offer,
4 correct?

5 A. Yes, sir.

6 Q. And you received 10 years on this conviction,
7 correct?

8 A. Yes, sir.

9 Q. All right. Now, the defense that you put up was
10 just that you were not the driver, right?

11 A. That's correct.

12 Q. But you didn't have any problem admitting that you
13 were drunk that night?

14 A. That's right.

15 Q. And that you had been drinking, right?

16 A. That's correct.

17 Q. And you testified to that in your own testimony,
18 correct?

19 A. Yes, sir.

20 Q. That you had multiple drinks at multiple bars?

21 A. Yes, sir.

22 Q. Okay. And there were other witnesses that you put
23 up in your defense that also corroborated that you were
24 drinking that night?

25 A. Yes, sir.

DONNIE THIGPEN - CROSS BY MITCHELL

1 Q. And that you were drunk; is that right?

2 A. Yes, sir.

3 Q. Maybe even belligerent; is that right?

4 A. They testified that I was drunk, yes.

5 Q. And you got into a fight with a man named DJ; is
6 that right?

7 A. That's correct.

8 Q. And that's what the testimony that you presented
9 reflected?

10 A. Yes, sir.

11 Q. Okay. So your defense was that you were not
12 driving the car?

13 A. That's correct.

14 Q. So you had no issue conceding that you were drunk,
15 right?

16 A. That's right.

17 Q. And then the blood test, the blood was taken. The
18 blood test came back and it was .219, something around,
19 right?

20 A. Yes, sir.

21 Q. Well over the legal limit?

22 A. Yes, sir.

23 Q. Okay. So this test came in after you were arrested
24 at your home; is that right?

25 A. Yes, sir.

DONNIE THIGPEN - CROSS BY MITCHELL

1 Q. Okay. We talked a good bit about Miranda in your
2 direct testimony. Now you take some issue with whether
3 you were advised of your rights, right? So you testified
4 the first time that you were advised of your rights was
5 before the interview at the station?

6 A. Yes, sir.

7 Q. But then you saw the video where they went through
8 the Miranda with you when you were on your porch at your
9 house, right?

10 A. I didn't see at any time that they advised me of
11 Miranda.

12 Q. Well, you just testified you saw the video where
13 you argued about four prong, five prong Miranda test,
14 right?

15 A. That was the video of the -- before the interview.

16 Q. Not talking about the dash-cam video at your
17 house.

18 A. No.

19 Q. Right? So the Miranda was on that too, was it not?

20 A. I don't know.

21 Q. Okay. But that's what the officers testified in
22 their testimony?

23 A. Yes.

24 Q. So, the officers' testimony was that you were
25 given, advised of your Miranda rights on your porch when

DONNIE THIGPEN - CROSS BY MITCHELL

1 they arrived at your house?

2 A. That was their testimony, yes.

3 Q. And you just don't remember that or is that
4 something you contest?

5 A. I contest that.

6 Q. You contest that?

7 A. Yes.

8 Q. So you don't think they were being candid with the
9 Court when they testified --

10 A. That's right.

11 Q. -- that they advised you?

12 A. I don't think they had any idea if they did or they
13 didn't.

14 Q. Okay. So you just think -- when you said okay,
15 well, we advised him of it because that's what we
16 normally do, right?

17 A. Yes, sir.

18 Q. So then they testified that you were advised again
19 in the patrol car. You don't recall that either?

20 A. No.

21 Q. Okay. And was this because you were still
22 intoxicated? Or do you think that they were, again, not
23 being candid with the Court?

24 A. I don't remember him advising me of Miranda in the
25 car.

DONNIE THIGPEN - CROSS BY MITCHELL

1 Q. Okay. But then you were advised before your
2 interview?

3 A. Before the interview but they leave part of it out.

4 Q. Okay. You say they leave part of Miranda out,
5 right, and that's something that Mr. Postic argued to the
6 Judge; is that correct?

7 A. Correct.

8 Q. So now he argued but that they only went into the
9 four prongs and that they should have added this fifth
10 prong, right?

11 A. Right.

12 Q. And then Judge Cooper said, no, that's sufficient,
13 allow it, right?

14 A. Correct.

15 Q. Okay. So you -- is that your recollection of the
16 trial?

17 A. Excuse me?

18 Q. I'll withdraw that. Excuse me.

19 There was also a lot of testimony about glass
20 shards in your hair, correct?

21 A. Yes, sir.

22 Q. And the investigators testified that they could see
23 glass shards in your hair when they were at your house,
24 correct?

25 A. Yes, sir.

DONNIE THIGPEN - CROSS BY MITCHELL

1 Q. And that's also when they saw this paint chip,
2 right?

3 A. Yes.

4 Q. Okay. Now, you take issue with that testimony as
5 well that you don't believe that they were telling the
6 truth about that?

7 A. If they were telling the truth, why didn't they
8 collect this evidence?

9 Q. Okay. Now, that's a good point now. So when
10 Mr. Postic argued that pretty vehemently in his closing,
11 didn't he, about where is this evidence? Where is this
12 glass, right?

13 A. Yes.

14 Q. He said, where is this paint chip, right?

15 A. Yes.

16 Q. He was arguing that, you know, they should have
17 admitted this if this was such a crucial part of the
18 case, right?

19 A. Yes.

20 Q. So that was brought before the jury?

21 A. Yes.

22 Q. Okay.

23 A. But the jury had already heard that the trooper saw
24 this.

25 Q. Right. But, I mean, that's what he saw. So he

DONNIE THIGPEN - CROSS BY MITCHELL

1 testified and said, "This is what I saw." And then your
2 attorney argued, "Well, where is that?" I mean, we can't
3 prove that.

4 A. Correct.

5 Q. It's just your word, right?

6 A. (Nods head.)

7 Q. Now going back to the Datamaster testing. Your
8 attorney objected to the Datamaster result coming in,
9 right?

10 A. That's correct.

11 Q. And that was argued successfully, right?

12 A. Right.

13 Q. That test result would have shown that you were
14 intoxicated, right?

15 A. Right.

16 Q. So you would have been over the legal limit,
17 right? So, what your issue here is that they should have
18 argued to keep out other evidence, right?

19 A. The video, yes.

20 Q. The video and the officer's testimony regarding
21 interactions in the Datamaster room, correct?

22 A. Yes, sir.

23 Q. Okay. Now going back to this voluntariness of your
24 statement given at 5:20. Now, you testified you --
25 earlier today you testified you did not understand what

DONNIE THIGPEN - CROSS BY MITCHELL

1 was going on?

2 A. Yes, sir.

3 Q. Okay. Now when you say you don't understand, I
4 mean, you knew you were at a police station, right, or
5 you knew you were being investigated for something,
6 right?

7 A. Yes, sir.

8 Q. So you knew -- you understood what was going on a
9 little bit. I mean, you weren't just in there, like,
10 where am I, what's going on, right?

11 A. No. I was, I mean, like I said, I didn't know who
12 was in the car, who had passed away. All they told me
13 was that somebody had passed away.

14 Q. Okay.

15 A. And I had no idea who it was.

16 Q. So they had told you someone was driving your car,
17 right?

18 A. Yes.

19 Q. And that someone was in a wreck and that your
20 friend, Mr. Wright, has passed away, right?

21 A. Yes, sir.

22 Q. So, I mean, you understood that they were
23 investigating you because it was your car, that you were
24 looking like a suspect at this point. Did you understand
25 that?

DONNIE THIGPEN - CROSS BY MITCHELL

1 A. About halfway through the interview, yes.

2 Q. Okay.

3 One second, Your Honor. I'm sorry.

4 THE COURT: Okay.

5 (Pause.)

6 BY MR. MITCHELL:

7 Q. So this is 5:20. And you haven't had a drink
8 probably since early that morning. So it had been a
9 while since you had had a drink, right?

10 A. Yes, sir.

11 Q. And the testimony from the toxicologist was that
12 the alcohol will wear off and you become more coherent;
13 is that correct?

14 A. Yes. Yes, sir.

15 Q. And that's what the officers testified to, that
16 your interactions with them improved as the day went on,
17 correct?

18 A. Yes, sir.

19 Q. Okay. So getting to these other issues.
20 Mr. Postic argued that the State should have done further
21 investigation into these phone calls through Mr. Wright's
22 phone, correct?

23 A. Correct.

24 Q. And he argued that in the closing argument; is that
25 right?

DONNIE THIGPEN - CROSS BY MITCHELL

1 A. I don't recall. I can't remember if he did or
2 didn't.

3 Q. The record will speak for itself on that.

4 You know, a lot of these issues you bring up, I
5 mean, this is stuff that Mr. Postic raised and argued to
6 the jury, you know. Like this DNA. He argued that it
7 was your car and there's a chance your DNA is going to be
8 on your car, right?

9 A. Correct.

10 Q. So, I mean, the blood on that, they argued that,
11 you know, it may not have been you because there was an
12 unidentified male's DNA on the front airbag, correct?

13 A. Correct.

14 Q. Okay. You testified earlier that you had asked for
15 an attorney during this interview, the later interview;
16 is that right?

17 A. No. I didn't ask for an attorney.

18 Q. So you never asked for an attorney?

19 A. No.

20 Q. So you didn't retain Mr. Postic until after the
21 interview?

22 A. Well, a family member had retained him while I was
23 in custody.

24 Q. Okay.

25 A. I had no knowledge of that.

DONNIE THIGPEN - REDIRECT BY THOMAS

1 Q. So you did not ask for an attorney while they were
2 interviewing you --

3 A. That's correct.

4 Q. -- in the interview room? Okay. Thank you.

5 No further questions.

6 THE COURT: All right. Thank you. Any
7 reply?

8 MR. THOMAS: Your Honor, if it please the
9 Court, just one or two more questions.

10 THE COURT: Yes, sir.

11 REDIRECT EXAMINATION

12 BY MR. THOMAS:

13 Q. Mr. Thigpen, counsel asked you about the Miranda
14 warnings and asked whether or not you were Mirandized
15 when you were arrested or if you were given Miranda
16 rights in the car at some later point?

17 A. Yes, sir.

18 Q. If they had given you those Miranda rights, would
19 you have understood them?

20 A. No.

21 Q. Because of why?

22 A. I was -- the level of my intoxication.

23 Q. And you were arrested at what time?

24 A. 11:30. 11:29, I do believe.

25 Q. And by the time that you got into the hospital at

DONNIE THIGPEN - REDIRECT BY THOMAS

1 12:40, which is almost one o'clock, your BA level was
2 .21?

3 A. Yes, sir.

4 Q. And, when you got to the breathalyzer room, almost
5 two o'clock in the afternoon, your BA level was still
6 above the legal limit?

7 A. Yes, sir.

8 Q. Okay. So you said that you don't remember them
9 giving you the Miranda rights. That's a true statement?

10 A. Yes, sir.

11 Q. And you don't remember because you were highly
12 intoxicated?

13 A. Yes, sir. And really I don't, I don't think they
14 gave the Miranda.

15 Q. Okay. You don't remember them giving them to you?

16 A. No, no.

17 Q. Okay. Now, when you gave your statement you
18 believe that statement was freely and voluntarily given?

19 A. I do not.

20 Q. Okay. And why don't you believe that it wasn't
21 freely and voluntarily given?

22 A. Because it was coerced.

23 Q. Were you under the influence?

24 A. Yes, sir.

25 Q. Did you understand the dangerousness or -- of

DONNIE THIGPEN - REDIRECT BY THOMAS

1 making that statement?

2 A. No, sir.

3 Q. Now counsel also asked you about the video, the BA
4 video that was shown and the BA's officer's testimony at
5 trial. If your defense counsel had been able to object
6 and exclude the video itself and the testimony, would the
7 information in regards to the glass shards have come in?

8 A. I don't think they would have been able to
9 introduce that evidence, no.

10 Q. Right. So there was prior testimony from the
11 arresting officer that when you were arrested that he
12 noticed a glistening in your beard?

13 A. Yes, sir.

14 Q. And that these were glass shards?

15 A. Yes, sir.

16 Q. And then they were able to reinforce that testimony
17 through the BA operator?

18 A. Yes, sir.

19 Q. And if that BA information had been excluded he
20 wouldn't have been able to do that, would he?

21 A. No.

22 MR. THOMAS: Your Honor, no further
23 questions. Oh. I'm sorry. One more.

24 THE COURT: Go ahead.

25 BY MR. THOMAS:

DONNIE THIGPEN - REDIRECT BY THOMAS

1 Q. Toxicologist. Do you remember the testimony of the
2 toxicologist?

3 A. Vaguely.

4 Q. Okay. And was it their testimony that you were
5 highly intoxicated?

6 A. It was.

7 Q. And that was consistent through this evidence that
8 was presented that you were highly intoxicated?

9 A. Yes, sir. The toxicologist, he even said that he
10 don't -- he doesn't know how anybody at that level of
11 alcohol in their system was driving a vehicle to begin
12 with.

13 Q. All right. And does the toxicologist testify or
14 give any kind of opinion as to what your BA level would
15 have been later in the afternoon?

16 A. Yes, sir. I do.

17 Q. And what --

18 A. I think he did. Yes, sir.

19 Q. And did he say that he thought later in the
20 afternoon it was --

21 A. Pretty high.

22 Q. -- pretty high?

23 A. (Nods head.)

24 Q. But you were still intoxicated?

25 A. Yes, sir.

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 MR. THOMAS: No further questions, Your
2 Honor.

3 THE COURT: All right. You may step down.
4 Thank you.

5 Any additional witnesses?

6 MR. THOMAS: I do, Your Honor. If it
7 please the Court. We call Mr. Postic to the
8 stand.

9 THE COURT: All right.

10 ALEXANDRE T. POSTIC, having been duly
11 sworn, was examined and testified as follows:

12 THE BAILIFF: Have a seat. Spell your last
13 name.

14 THE WITNESS: Sure.

15 I'm Alex Postic. My last name is
16 P-O-S-T-I-C.

17 MR. THOMAS: Your Honor, if it please the Court.

18 THE COURT: Go ahead.

19 DIRECT EXAMINATION

20 BY MR. THOMAS:

21 Q. Mr. Postic, good morning.

22 A. Good morning.

23 Q. You had an opportunity to represent Mr. Donnie
24 Thigpen?

25 A. I did.

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 Q. Okay. And in what capacity did you represent him?

2 A. I was his trial counsel.

3 Q. All right, sir. And when were you retained; do you
4 remember?

5 A. I was -- sometime in 2009. I don't remember the
6 exact date. I can try to find my engagement letter if
7 that helps you.

8 Q. Let me ask. Were you retained -- do you remember
9 or know if you were retained before or after the
10 interview?

11 A. I think it was after the interview. I was there
12 for the bond hearing.

13 Q. Okay. All right. And, how many times did you meet
14 with Donnie in regards to this matter?

15 A. Oh, I can't -- I mean, many, many times.

16 Q. Okay. And you were able to go through the
17 evidence --

18 A. Yes.

19 Q. -- that the State had?

20 A. Yes.

21 Q. What was your theory of defense?

22 A. Well, Donnie told me he wasn't driving so that was
23 our theory.

24 Q. And, in what process did you go about to be able to
25 show through your theory of defense that he was not the

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 driver of this vehicle?

2 A. Well, I mean, there's -- I mean, specifically he --
3 first of all, I mean, this sort of thing that he brought
4 up. I mean, a big one for us is there was an
5 unidentified piece of DNA on the very front of the airbag
6 that I, you know, I raised over and over again at trial.

7 That he -- you know, that there was, there was a
8 splotch on the top of his, top of his car where they said
9 that it matched his DNA and that it was blood. But he
10 had gotten into a fight earlier that night and there was
11 a cut on his eye.

12 It was a witness that we found that saw him getting
13 into the passenger seat or going to get around the
14 passenger side of his car from the bar, from one of the
15 bars that he had been to that night.

16 Those are the ones that come up to me right now in
17 time.

18 Q. Okay. Now, so there was an explanation for the
19 blood because he actually did have an injury on his hand?

20 A. His head.

21 Q. His head. Okay. And --

22 A. Although the thing about DNA is, is that that was
23 just positive for blood --

24 Q. Right.

25 A. -- with his DNA on it. It could have been a dog.

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 It could have been dog blood. It didn't matter. It was
2 just blood. DNA is different that way. It could have
3 been touch DNA on some other blood spot.

4 Q. So it was just positive for blood. It wasn't a
5 positive for a DNA match?

6 A. It was positive for a DNA match. It was his car.

7 Q. Okay. And the DNA that was found on the driver's
8 airbag, there was unidentified, an unidentified person on
9 the front of the bag?

10 A. Yes.

11 Q. Okay. But there was also DNA from Donnie as well?

12 A. There was DNA on the back of the bag.

13 Q. Uh-huh.

14 A. Yes.

15 Q. Okay. And was there any reason to consider an
16 independent evaluation of that DNA?

17 A. You know, I know -- well, I tell you what I did. I
18 ended up hiring an expert, a former SLED DNA investigator
19 to review the State's DNA file. And I, you know,
20 unfortunately we didn't have the funds to pay for that
21 expert to testify. And as far as an independent test,
22 you know, I mean, I thought, I thought it was going to be
23 very powerful in front of a jury that there was this DNA
24 on the front of the airbag that was unmatched and it
25 could have been possibly this unknown driver.

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 Q. And, prior to trial, you did make pretrial motions
2 to exclude certain evidence?

3 A. Oh, yeah.

4 Q. Okay. And what were those motions?

5 A. Well, there were several but the big one was the
6 confession. I mean, I mean, I just -- candidly, I
7 thought we had a really good case about the confession.
8 The confession was -- and Donnie and I talked about that
9 a lot, that that was the toughest part of the case was
10 his confession.

11 Q. Okay.

12 A. So that was number one. Well, Jackson V Denno for
13 the voluntariness of the confession was our big, big
14 step. And I actually -- again, I hired Catherine Carruth
15 Goode to help me in preparation of pretrial. And she and
16 I spent a good bit of time going over different issues --

17 Q. Right.

18 A. -- for that pretrial.

19 Q. Can you walk us through what your argument was in
20 regards to the confession?

21 A. Well, there was several different things. I mean,
22 Jackson V Denno is voluntariness of the confession. So
23 there are several questions that have to be asked.

24 The most, you know, that reading of Miranda is
25 important. And in this case the issue that we had was --

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1 State versus Kennedy had stated that there needs to be a
2 fifth prong to the Miranda which is whether or not that
3 you can stop questioning at any time if you want a
4 lawyer.

5 They -- it's kind of, strangely enough about a week
6 or two after the trial State V Hoyle came out. It was
7 just a Supreme Court opinion that said that that fifth
8 prong was no longer necessary. So I guess Judge Cooper
9 was prescient.

10 Q. So you had an argument that, a potential argument
11 that the complete Miranda rights were not given?

12 A. That was the big one, Tommy.

13 Q. Yeah.

14 A. And I did -- of course I also thought about what
15 you brought up was his intoxication level and how
16 important that was. You know, unfortunately it's kind of
17 hard, you know -- I do a lot of DUI work. And part of
18 the statute in 29-53 they must be read Mirandas at the
19 side of the road. Well, we're dealing with drunk drivers
20 so there's also an issue of intoxication and whether or
21 not they understand it.

22 The law though, Saxon is the law on voluntariness
23 due to intoxication. And that basically says if you're
24 unconscious that's the only way it can't be voluntary. I
25 mean, it was a tough thing to do. But I brought it up in

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 front of the jury. That was a big thing for us is that
2 he had denied it for, you know, like, 12 hours or
3 something. And then he, and then he finally confessed.

4 Q. Okay. Now, in reading the transcript it appears
5 that the State goes to kind of a great effort to show how
6 intoxicated he was.

7 A. Oh, yeah.

8 Q. Which is kind of odd in this case because their
9 efforts to show how intoxicated he was, that just comes
10 back around in regards to potential voluntariness of the
11 confession?

12 A. It does, but the Judge let it in.

13 Q. Yeah. Now, they had a toxicologist there who
14 testified; is that right?

15 A. I think so. Was that, was that --

16 Q. And he testified -- I think his testimony was in
17 regards to alcohol being eliminated from the body and
18 this process?

19 A. I'm going to believe you, Tommy. I don't have an
20 independent memory of that. I only got about halfway
21 through the transcript.

22 Q. But you wouldn't disagree with me that as part of
23 their case they were wanting to show that he was highly
24 intoxicated, almost like regular DUI case?

25 A. Yes.

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 Q. But in this case the theory of defense was a little
2 different in that it wasn't that he was not intoxicated,
3 it was that he was not there?

4 A. Yeah, exactly.

5 Q. So in a way the State's argument that he was highly
6 intoxicated worked in your favor?

7 A. Well, first of all, I wanted to show that that
8 statement was that, you know, he wasn't in his right
9 frame of mind. Because I spent a lot of time with him.
10 He's an intelligent guy. He's a very thoughtful person.
11 And when he made that confession that he wouldn't have
12 been in his right state of mind.

13 And so that's why -- so that, you know,
14 intoxication would have helped me there. But they needed
15 to prove felony DUI which means he has to be driving
16 under the influence so obviously they want to prove that
17 he was under the influence.

18 Q. Right. And, you believe that in some way the level
19 of intoxication goes to his voluntariness of the
20 statement?

21 A. It was an argument.

22 Q. Uh-huh. And, the Judge allowed the statement to
23 come in?

24 A. The Judge did, yeah.

25 Q. Okay. And there was an audio recording of that?

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 A. It was an audio of that, and there was a video of
2 the Datamaster.

3 Q. Okay. Was there a video of the confession?

4 A. There was no video.

5 Q. Just audio?

6 A. Just audio.

7 Q. Okay. And was he re-Mirandized during the
8 interrogation in the afternoon?

9 A. Yes.

10 Q. Were there any defects with that Miranda?

11 A. I think that might have been the one that left out
12 the fifth prong.

13 Q. Okay.

14 A. So. I mean, my argument was at the time, yes,
15 there was a defect.

16 Q. Okay.

17 A. But the Supreme Court has since ruled that's no
18 defect.

19 Q. All right. And, by the State -- or by the Judge
20 allowing that video to come in the jury was able to hear
21 him say that he had committed this crime?

22 A. That video did not. The video --

23 Q. I mean, not the video. I apologize. The audio.

24 A. Yes, the audio. He admitted it.

25 Q. Okay. So it was a confession?

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 A. Yeah.

2 Q. Now. Are you aware of the appeal?

3 A. Just from you and I talked once in the hallway of
4 some courthouse somewhere.

5 Q. And do you know whether that the Court ruled that
6 these, that issue was not preserved for appeal?

7 A. That's what I heard, yes.

8 Q. Okay. Let's talk about the BA.

9 A. Sure.

10 Q. The breathalyzer.

11 A. Sure.

12 Q. He was arrested and then he was taken to the
13 hospital for a blood draw?

14 A. Yes.

15 Q. And I believe the law at the time was they had
16 three hours to do the blood draw and two hours to do the
17 breath test?

18 A. That sounds right.

19 Q. Okay. So if they had arrested him at 11:20 they
20 did the blood draw at 12:40, they were within that three-
21 hour period?

22 A. Yes, they were.

23 Q. Okay. And his blood level at that time was .21?

24 A. You know, I can't -- I thought it was .23 but it
25 was high.

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 Q. It was high?

2 A. High.

3 Q. And then the breath test was done at 1:42 which put
4 it, just from my calculations, about two hours and 36
5 minutes after arrest?

6 A. That's right.

7 Q. So you made an argument, pretrial argument that the
8 BA should be suppressed?

9 A. Yes.

10 Q. What I was a little confused about is why wasn't
11 the argument made or was the argument made that the video
12 and the testimony of the BA operator would also have been
13 excluded?

14 A. Well, Tommy, that was just a -- that was a trial
15 strategy of mine. I wanted to -- the video, Donnie
16 denies it throughout the video.

17 Q. Right.

18 A. And he is ambulatory. He's pacing back and forth.
19 He does not have any visible, you know, broken bones or
20 scarring or anything. And so I wanted to show the jury,
21 I wanted the jury to see him shortly after this horrific
22 event happened.

23 I wanted the jury to be able to see him, you know,
24 in a state that would be in heavy contrast to being in a
25 car accident where a young man dies. It never even

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1 crossed my mind to try to suppress -- to try to ask that
2 that be taken out.

3 I mean, I really wanted them to see it. That was
4 our, that was our theory was that Donnie wasn't the
5 driver. And so we've got -- they had a, like, some kind
6 of crazy video, you know, reenactment of the actual
7 accident. And it's a horrifically violent accident. And
8 Donnie, you know -- and their theory is Donnie is driving
9 the car. But he is, you know, he somehow walks home and
10 then just, you know, several hours later he's pacing back
11 and forth in a Datamaster room. I just thought it was
12 important for the jury to see it. It was my tactic.

13 Q. How did that play in with the level of
14 intoxication? Were you thinking about in which manner it
15 would have been beneficial for him to either, being
16 portrayed as intoxicated as his BA level was showing?

17 A. He was still drunk. I mean, he was still under the
18 influence but, you know, they already had -- by statute
19 they can get blood from him.

20 Q. Right.

21 A. And they already have that in there and, you know,
22 it's almost three times the legal limit. So, you know,
23 of course intoxication is going to be in there.

24 And I guess, you know, I was able to suppress the
25 reading and, you know, I mean, that was just -- so I

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1 asked for a redaction of that video just that it wouldn't
2 show the actual reading.

3 Q. And that's what the redaction was for --

4 A. Yes.

5 Q. -- was the actual reading of the breathalyzer?

6 A. Yes, sir.

7 Q. Okay. How about the testimony of the BA operator?
8 Because he testifies that he sees the glass shards.

9 A. He -- you know, that came up several times, Tommy.

10 Q. Yeah.

11 A. And it came up from the initial officer who came to
12 the scene. Donnie had just taken a shower and the
13 initial officer says he saw glass. And, look, I went
14 crazy. I made a lot of noise about that.

15 Q. Right. But it came in?

16 A. Yeah. It comes in. I mean, it's testimony. It
17 was already in through the testimony of the initial
18 officers.

19 Q. Right.

20 A. And I had, you know, as you pointed out, they
21 didn't preserve it. They had cameras. They had really
22 these kind of fancy high-def cameras. And they didn't
23 take any pictures of it or the paint chip.

24 Q. And they didn't have any evidence of the blue chip
25 other than the testimony of the officer?

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 A. The testimony, yes. And that's the initial officer
2 who's at the door. And, I mean, he's just testifying to
3 what he observed. I don't know how I could keep that
4 out.

5 Q. Right. How about the BA operator, did he testify
6 in regards to the blue chip?

7 A. I don't remember because the actual language of the
8 BA was not in the transcript, and I can't remember.

9 Q. Okay.

10 A. Although I did transcribe that.

11 Q. But he does talk about the shards.

12 A. He talks about the shards.

13 Q. So he gives an opportunity to kind of corroborate
14 the testimony of the arresting officer in regards to the
15 glass shards?

16 A. Yeah.

17 Q. And the glass shards were supposedly to come from
18 where?

19 A. From the glass in the car.

20 Q. From either the windshield or the driver's side?

21 A. Something like that, yeah.

22 Q. Okay. Now, in regards to the appeal, was that
23 issue preserved for appeal?

24 A. Which issue?

25 Q. The issue of the breathalyzer, the suppression of

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 the video and the testimony of --

2 A. I never moved to suppress the video.

3 Q. Oh, you didn't move to suppress it?

4 A. Not the video.

5 Q. Okay. How about the testimony of the BA officer,
6 did you move to suppress that?

7 A. It was on video. I don't --

8 Q. Okay.

9 A. -- no.

10 Q. But didn't he actually testify in person?

11 A. Yeah.

12 Q. Okay. And did you move to suppress his testimony?

13 A. No. No, sir. Sorry.

14 Q. That's fine.

15 Your Honor, if I could beg the Court's indulgence
16 just a moment. (Pause.)

17 Now the video was shown to the jury?

18 A. Yes.

19 Q. The BA video?

20 A. Yes.

21 MR. THOMAS: Your Honor, if I could beg the
22 Court's indulgence just for a little.

23 (Pause.)

24 Q. How about the issues that Donnie had brought up,
25 one of the issues being that a phone number was found in

ALEXANDRE T POSTIC - DIRECT BY THOMAS

1 the deceased, in his cell phone?

2 A. Yes, sir. You know, I heard you talking about it.
3 And that is just funny. That's just something I don't
4 remember, although I think I brought it up at trial in
5 closing. But the record can speak for itself.

6 Q. How about the chain of custody, were there any
7 chain of custody issues in this case?

8 A. I didn't know of any. I mean, what I did and this
9 is just, again, trial strategy. And just, I didn't want
10 to bog down the jury with witnesses coming in. And I
11 knew that all those witnesses -- I did, I did have my
12 investigator check and see if all of those witnesses were
13 still employed and still available to the State if
14 necessary. And they all were. So I decided to stipulate
15 to the chain of custody.

16 Q. All right. The audio in the interview room, what
17 objections did you make to the introduction of that
18 audio?

19 A. Well, I objected to -- I mean, that was the Jackson
20 V Denno.

21 Q. Okay. How about Donnie's comments about promises
22 being made or, you know, some sort of encouragement that
23 he needed to get this off his chest, he needed to come
24 clean and help himself? Any possibility to use in that
25 regards to exclusion?

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1 A. Sure. You know, that's also part of Jackson V
2 Denno, just the voluntariness. Whether somebody is
3 coerced or promised something, threatened in any way;
4 that is part of my questions in Jackson V Denno.

5 Q. Which in this case would have been even more
6 important as a result of his level or potential level of
7 intoxication?

8 A. Yeah. Yes, sir.

9 Q. Do you know whether or not he asked for a phone to
10 call in the interview room?

11 A. I don't -- for some reason I think he might have
12 called his grandmother, I think. I can't remember.

13 Q. And, we talked about testing of, the independent
14 testing of the DNA on the airbag. And you had stated
15 that you did not have it independently tested?

16 A. I don't even know how I could. I mean, I don't
17 even -- I don't have -- I mean, what do you mean just
18 having somebody --

19 Q. To verify --

20 A. -- the test it to the National DNA --

21 Q. No. Against Donnie. To test to verify --

22 A. Oh to -- okay.

23 Q. -- the results of SLED?

24 A. No, I did not do that, no.

25 Q. But you --

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1 A. I can't even remember if we discussed doing that.

2 Q. But you did hire, you said, a DNA consultant?

3 A. Yes. Steve Lawrence.

4 Q. Okay. And what did he tell you about DNA? He just
5 looked at the --

6 A. What he did, it was a really great asset to me in
7 what he -- since we didn't have the funds and I actually
8 paid for him myself for his -- to look over it, to have
9 him testify. What we did -- what he did is he helped me
10 with cross-examination questions with their experts.
11 What I did was I used their expert as our expert by
12 cross-examining. You know, it was pretty powerful to say
13 that there was this unidentified spot that the, that the
14 blood could have been pig blood, you know. I mean, that
15 was -- that was, I thought, pretty powerful stuff. He
16 was a great asset, I thought, at trial.

17 Q. No one was ever found in the woods?

18 A. I questioned him about that. That was, according
19 to him and, you know -- an error that he made in his, in
20 his incident report. I mean, they showed up at the
21 scene. There was, like, a bike race or triathlon, I
22 think, in the area. And that's when they found the car,
23 at about nine a.m.

24 And then in the initial officer's incident report
25 he mentions seeing someone in the woods. But I asked him

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1 about it at trial.

2 Q. And there was no glass shards introduced at trial,
3 so there was no reason to --

4 A. They were introduced. That I remember clearly.
5 They were -- they -- so at one point I went to go look at
6 the evidence at the highway patrol headquarters. And
7 they opened up the bags of clothing and while they were
8 lifting up Donnie's shirt some shards fell out and they
9 preserved that and that came in and then -- Donnie
10 remembers it well. The jury was very, very moved by
11 that.

12 Q. But there was no, no DNA testing of these shards?

13 A. Oh, no DNA testing. Sorry about that.

14 Q. And the shards that were allegedly found in his
15 beard were not introduced?

16 A. Never introduced. No, sir.

17 Q. So the only shards that they had were from his
18 clothes?

19 A. That's right. Yes, sir.

20 MR. THOMAS: Your Honor, if I can beg the
21 Court's indulgence.

22 THE COURT: All right. (Pause.)

23 MR. THOMAS: Your Honor, if it please the
24 Court. We have no further questions.

25 THE COURT: We've been going for over a

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1 little over an hour and a half. And I hate to do
2 this while someone's on the stand but let's go
3 ahead and take a comfort break for everyone.
4 You'll remain under oath, Mr. Postic --

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: -- during this break and we'll
7 take a break for 10 minutes and be back on the
8 record.

9 THE WITNESS: Thank you.

10 (Break taken from 11:13 a.m., until
11 11:27 a.m., and the hearing resumed:)

12 THE COURT: All right. Mr. Postic is on
13 the stand and is ready for cross-examination.

14 CROSS-EXAMINATION

15 BY MR. MITCHELL:

16 Q. Good morning, Mr. Postic.

17 A. Good morning.

18 Q. Thank you for being here with us today.

19 A. I got a subpoena.

20 Q. Thank you for your compliance.

21 A. Yes.

22 Q. Let's see. So jumping right into it. The
23 allegations that you should have moved to suppress, the
24 video of the Datamaster testing, you testified earlier
25 that you thought that that video was helpful to your

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1 case?

2 A. Yes.

3 Q. Okay. And, I mean, that's because you want to show
4 that he's supposed to have been in this horrific accident
5 and that he is, you know, walking around talking. He may
6 have been intoxicated but that he was uninjured for the
7 most part?

8 A. That's it. That's exactly why I did it.

9 Q. Now they also take issue with the investigator's
10 testimony regarding the glass and the paint. I mean,
11 that's just stuff he observed, is it not?

12 A. That was stuff they observed at the scene, yeah.

13 Q. So this is the officer testifying to what he saw
14 when he first encountered Mr. Thigpen; is that right?

15 A. That's right.

16 Q. And you believe these, some of these glass shards
17 were admitted into evidence?

18 A. Yes.

19 Q. So the relevance of whether to keep out -- I
20 withdraw that. Excuse me.

21 I mean, part of the strategy was to show -- well,
22 he was not contesting whether he was intoxicated, right?

23 A. Right.

24 Q. So, I mean, you were still able to keep out the
25 Datamaster reading. Is that just -- you know, you

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1 challenged that because you -- what was your strategy in
2 challenging the Datamaster reading?

3 A. Well, it was, you know, it was statute. I mean,
4 that's the statute. They've got to take it within a
5 certain amount of time and they did not so it can't come
6 in.

7 I mean, it was frankly minor in comparison to the
8 confession. And they already had a high reading from the
9 blood sample anyway.

10 Q. So you're familiar with the statute that he was
11 charged under, 56-5-2950?

12 A. Yeah.

13 Q. And the remedy on exclusion of if you're outside
14 the two hours, the remedy is to exclude the testing
15 result?

16 A. Yeah, that's right.

17 Q. And that's specifically in the statute. Is that
18 your understanding of it?

19 A. Yeah, he wasn't charged under it. That's just the
20 statute --

21 Q. Excuse me.

22 A. That's okay. -- for implied consent.

23 Q. Yeah. Now, we talked a little bit about how he was
24 intoxicated while giving his statement, the later
25 statement around five o'clock or whatever it was.

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1 Do you believe you brought that up to the Judge?

2 A. I definitely brought it up to the jury, Clay. I
3 can't -- I mean, I did Jackson V Denno and discussed
4 voluntariness. I don't remember specifically if I
5 brought it up to the Judge during that, during pretrial
6 argument.

7 Q. But you did argue that he did not give a voluntary
8 statement to the jury though, right?

9 A. Oh, yeah.

10 Q. And that was part of the theme in the case; is that
11 correct?

12 A. Oh, yeah. Yeah. Absolutely.

13 Q. And you were familiar with Saxon which was a 1970s
14 case about the standards for admitting a confession while
15 being intoxicated?

16 A. Yeah.

17 Q. And it's fairly high. Can you explain that?

18 A. Well, it says -- I think there's language in there
19 that says, you know, you have, basically have to be
20 unconscious not to give a voluntary statement which, I
21 mean, as a criminal defense attorney I dispute. That's
22 the law.

23 Q. You said the most incriminating evidence against
24 Mr. Thigpen was the confession?

25 A. You know, there's a totality of issues. I, you

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1 know, I thought it was a win-able case without that
2 confession. Very much so. And so I did everything I
3 could to, first, to try to get the confession out. And
4 then secondly to discount it as much as possible in front
5 of the jury.

6 Q. Moving on to a few other issues. Mr. Wright's
7 phone. I believe you argued the investigators were not
8 doing their job because they had not investigated the
9 numbers that he had called, not thoroughly?

10 A. Right. That was, you know, a huge reasonable-
11 doubt issue. We've got a phone that they never followed
12 up on the numbers to. And I brought that up. I just
13 read the beginning of my closing just now during the
14 break. I brought that up.

15 There's unidentified DNA on the very front of the
16 airbag, you know. Big reasonable-doubt issues.

17 Q. Did you see any problems with the chain of custody?

18 A. I saw none, no.

19 Q. Or any of the evidence?

20 A. No.

21 Q. I guess the blood-alcohol level or blood alcohol
22 specifically?

23 A. Right. You know, again those were -- I mean, we
24 weren't disputing that he was under the influence. I
25 mean, our argument -- what Donnie had told me was that he

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1 wasn't driving. So he was -- I mean, especially once the
2 blood alcohol came in.

3 Q. It was kind of your strategy at this point, he's in
4 this interview room and they're kind of, you know,
5 pounding, pounding, pounding, here we go. You know, this
6 is -- they're kind of trying to put words in his mouth.
7 Is that part of what happened?

8 A. That's what happened. They were, you know, they
9 were on top of him from the get-go. It was no other
10 suspect. And, they were on top of him from the get-go
11 and they -- after hours and hours of questioning he
12 confessed.

13 Q. They were suggesting like, well, maybe you saw a
14 deer and you had to swerve out of the way. Was there
15 some testimony like that?

16 A. Yeah. I mean, they're allowed to do, you know, to
17 say things to try to elicit a confession.

18 Q. You hired a DNA expert --

19 A. I did.

20 Q. -- who did not see any problems with the State's --

21 A. There was no issues with the testing or anything
22 like that. What he just helped me with was how to cross-
23 examine, the best way to cross-examine their expert.

24 Q. Just to kind of poke holes in what his report said?

25 A. Her report.

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1 Q. Oh. Excuse me.

2 A. And it was not really poke holes but to use it to
3 show, to discount it, to minimize it as much as possible.

4 MR. MITCHELL: No further questions.

5 THE WITNESS: Thanks, Clay.

6 MR. MITCHELL: Thank you.

7 THE COURT: All right.

8 MR. THOMAS: Your Honor, If it please the
9 Court.

10 THE COURT: Yes, sir.

11 REDIRECT EXAMINATION

12 BY MR. THOMAS:

13 Q. Mr. Postic, I think from your testimony you said
14 that you moved to suppress the BA level itself. But you
15 actually did not move to suppress the video being
16 introduced?

17 A. Yeah. That's it.

18 Q. The BA officer testified; is that correct?

19 A. They both -- the video came in. The BA officer's
20 testimony came in. I did not move to suppress either one
21 of those things. It was trial strategy.

22 Q. Okay. Don't you think they go hand in hand, if you
23 can suppress the BA level, the evidence of the
24 breathalyzer should be, also be able to suppress the
25 actual video and the testimony in regards to the BA

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1 level?

2 A. You know, Tommy, that -- in my experience doing
3 trial, just DUI trials that that, I have never won that
4 motion. I have tried that in trials in municipal courts
5 and magistrate courts when I've gotten the actual reading
6 suppressed because of, you know, it -- they asked him,
7 asked the defendant to blow hard which is against the
8 rules or different or they, or I had a client who was
9 chewing tobacco and, you know, that could have messed up
10 the reading. And videos will always come in.

11 But in this case, Tommy, I really wanted that video
12 in. I wanted the jury to see what Donnie looked like.
13 And, again, they had pictures of a car that had been
14 smashed. They had a video of, you know, a violent
15 accident. And then they had a video of a young man
16 walking around, you know, as if he had just woken up from
17 a bender.

18 Q. He testified?

19 A. Who?

20 Q. Donnie testified?

21 A. Yes, yes. Yes, he did.

22 Q. All right. And that was part of your strategy was
23 to allow him to take the stand?

24 A. I had to. I mean, you know, they had this
25 confession. I needed to have the jury hear -- it was my

1 position that the jury should hear Donnie tell them that
2 he didn't do it and that he was, he confessed under
3 duress.

4 MR. THOMAS: Your Honor, I have no further
5 questions.

6 THE COURT: All right. You may step down.
7 Thank you.

8 THE WITNESS: Thank you, Judge.

9 THE COURT: Any additional witnesses from
10 the Applicant?

11 MR. THOMAS: Your Honor, if it please the
12 Court, that's the Applicant's case.

13 THE COURT: All right. Thank you.
14 Anything from the State?

15 MR. MITCHELL: Your Honor, the State has no
16 witnesses.

17 THE COURT: All right. Any closing
18 arguments that you wish?

19 MR. THOMAS: Your Honor, if it please the
20 Court. I just want to say a couple things.

21 The Court has the brief for the appeal.
22 And we would ask the Court to review that. That
23 actually sets forth these arguments in length.
24 It also cites to the transcript, the page numbers
25 and the line numbers as well. So all of that is

1 spelled out. So I won't go through all of that
2 again.

3 Your Honor, just in closing, we believe
4 that counsel was ineffective for failure to move
5 to suppress the BA video and the testimony of the
6 BA officer. I mean, from the testimony on the
7 stand there was no, there was not even a motion
8 made to suppress this. And that I think that was
9 extremely prejudicial. If the Court was going to
10 keep out the BA level and that it was taken
11 timely then the other two issues should have been
12 suppressed as well.

13 And in addition the issue, too, of the
14 voluntariness of the confession was not preserved
15 for appeal. We believe that that issue is also
16 extremely prejudicial in that it actually
17 contains a confession. And those issues were not
18 preserved, were not allowed for the Court on
19 appeal to determine the voluntariness of that
20 especially in light of the testimony.

21 And oddly enough in this case a lot of that
22 testimony comes from the State to show the level
23 of intoxication which was extreme. They used a
24 toxicologist which also tends to heighten his
25 level of intoxication even further into the

1 afternoon which clearly, I think, raises a
2 question about the voluntariness of his
3 statement.

4 THE COURT: Okay.

5 MR. THOMAS: Yes, ma'am. Thank you.

6 THE COURT: Thank you. Anything from the
7 State?

8 MR. MITCHELL: Your Honor, briefly. I
9 think as to the first issue, I think Mr. Postic
10 articulated reasonable trial strategy for letting
11 this video in to show that he could not have been
12 involved in this accident if he's walking around
13 this interview room relatively un-injured in a
14 very serious car accident. The Jeep was flipped
15 over. It hit a bridge off the side of the road.
16 The passenger died.

17 And I think the testimony at trial was he
18 had maybe some bruised ribs or something. The
19 injuries are not consistent with the crash as the
20 State portrayed it. And that was the defense
21 theory going in, that he could not have been in
22 this crash.

23 So I think that's reasonable to say that
24 that was the whole defense, that he, he was not
25 present. You know, there's no -- and the other

1 part about that is that it's just not relevant to
2 whether he was intoxicated or not because his own
3 testimony comes out. The testimony he puts up
4 shows that he was intoxicated.

5 So as far as, you know, keeping the
6 evidence out of -- the video or the officer's
7 testimony, I don't think there's any basis to
8 keep that testimony out. The statute, the DUI
9 statute calls for a remedy when these procedures
10 are violated to exclude the test result. That's
11 exactly what the statute says. Test result. You
12 know, here that's what was excluded. But, you
13 know, either way there's no prejudice at all
14 because that was part of the strategy to show,
15 you know, there was no issue whether he was
16 intoxicated. There's multiple, multiple
17 witnesses saying that.

18 As far as what the officer can testify to,
19 he can obviously testify to what he saw. I think
20 it was the credibility, not the admissibility of
21 that testimony.

22 So the second issue on the voluntariness.
23 You know, I think it's -- if you rule that this
24 would be deficient in not preserving this issue,
25 you would then have to rule that the issue was

1 successful on appeal had it been raised. You
2 just can't do that here because the standard is
3 the Saxton case.

4 And right in the proof of intoxication
5 short of rendering the accused unconscious of
6 what he is saying goes to the weight and
7 credibility to be accorded to the confession. So
8 it doesn't require that it be excluded. I think
9 if you look at it and he was absolutely
10 Mirandized multiple times, whether he agrees with
11 that or not, I, I think the statement was
12 voluntarily given. I don't think there's any
13 doubt about that. And also I believe this was
14 raised a bit at trial even though the Court of
15 Appeals disagreed in the appellate, and in the
16 brief --

17 THE COURT: I don't think that particular
18 issue was raised in the appeal with regard to
19 Miranda. I think the idea was they had switched
20 courses from at trial. It was argued that the
21 statement was not voluntarily given because of
22 the Miranda issue and on appeal it was focusing
23 on the intoxication level --

24 MR. MITCHELL: And that's exactly right.

25 THE COURT: -- is my understanding.

1 MR. MITCHELL: That's exactly right. And
2 on the other allegations I just rest. Thank you,
3 Your Honor.

4 THE COURT: Thank you.

5 MR. THOMAS: Your Honor, may I in very
6 brief reply?

7 THE COURT: Yes, please.

8 MR. THOMAS: One thing that struck me in
9 reading this transcript, and I read it a number
10 of times, is that the State treats this case like
11 a DUI. It is a DUI, but they treat it like a
12 DUI. The more intoxicated you can be the better,
13 really, which doesn't fit. It fits oddly into
14 the defense argument that he was intoxicated,
15 extremely intoxicated, which goes to the
16 voluntariness of his confession.

17 Now the State even brings in a toxicologist
18 who in the afternoon -- or testifies that in the
19 afternoon his BA level would have still had to be
20 high. So they're moving down this road of saying
21 that he was extremely intoxicated therefore he's
22 guilty of this felony DUI. And the theory of the
23 defense is actually that he wasn't present.

24 I think that if you argue from trial
25 strategy that I'm going to keep out, I'm going to

1 take out the BA level but I'm going to keep in
2 the video because I want them to see him, to see
3 how he was, clean, maybe not quite as
4 intoxicated, able to walk, or whatever, during
5 this period of time in which the BA was given and
6 allow the BA operator to testify it's
7 inconsistent with the theory of defense.

8 The theory of defense in this was that it
9 doesn't matter how intoxicated he is, he wasn't
10 present. The theory of defense goes further to
11 say he was so intoxicated that he was unable to
12 voluntarily make this so-called confession that
13 afternoon.

14 Well, I think that those arguments are
15 inconsistent with each other because you can go
16 and show, I want to show the video or I want the
17 BA operator to testify because it showed the jury
18 as to maybe he wasn't quite so intoxicated.

19 So the thing that jumps out to me is that
20 the State is showing or attempting to show
21 extreme intoxication by allowing the video in and
22 objecting to the BA level. You're actually
23 presenting two inconsistent theories of defenses.

24 THE COURT: Just remind me. We have a
25 blood test that was introduced to show .219.

1 MR. THOMAS: Which is extremely high.

2 THE COURT: And then what was the level of
3 intoxication in the breathalyzer?

4 MR. THOMAS: The breathalyzer was 1. {sic}

5 --

6 THE COURT: So it had gone down.

7 MR. THOMAS: 1.9 {sic}. Still high.

8 THE COURT: But it was heading in the other
9 direction.

10 MR. THOMAS: It was heading in the other
11 direction. That was at 1:42 which is about two
12 o'clock in the afternoon.

13 THE COURT: All right. So this is a PCR
14 based on ineffective assistance of counsel.
15 Applicant is required to prove that counsel's
16 performance was deficient. And deficiency in
17 counsel's performance is defined as someone who
18 represented him below the standard of which the
19 normal prevailing professional norms exists.

20 In addition to proving that counsel was
21 deficient, the Applicant is required to prove
22 prejudice which basically means that but for
23 counsel's deficient performance the result of the
24 trial would have been different.

25 I have reviewed the application in this

1 case. I've reviewed the amended application.
2 And I have also read the trial transcript.
3 During the break that we took I read the briefs
4 that were submitted to the Court of Appeals.
5 I've listened carefully to everyone's testimony
6 today and I am denying Mr. Thigpen's
7 application.

8 And I'll go through each of his arguments
9 in turn. And I ask that Mr. Mitchell prepare an
10 order in this case, and I ask that you prepare it
11 within 20 days, please.

12 The first issue that's raised. There are
13 two, I will say, major issues raised by the
14 Applicant. And the first is that counsel failed
15 to properly object to the introduction of the
16 video from the breathalyzer as well as the
17 breathalyzer's officer's testimony. I find that
18 this was neither deficient of Mr. Postic nor was
19 there any prejudice to Mr. Thigpen.

20 There's no authority to say that a video
21 can't come in so long as the video is relevant
22 and it's not otherwise objectionable. There was
23 a strategic reason in this case to present the
24 video which showed that Mr. Thigpen while
25 intoxicated did not appear to be injured in any

1 way, did not appear to be in a traumatic car
2 accident from the night before.

3 And while I understand Mr. Thomas's
4 argument that it may have seemed schizophrenic to
5 ask for the blood-alcohol result, the
6 breathalyzer result not to come in but allow the
7 video to come in, I think that there is a
8 strategic reason for that as well. The blood
9 test had already come in to show high
10 intoxication. The breathalyzer showed that that
11 intoxication was waning as the afternoon wore
12 on.

13 And so while the alcohol results may not
14 have been much help to him once he got that blood
15 level into evidence, it sure was a strategic and
16 seemingly helpful thing to show that Mr. Thigpen
17 was not bleeding, was not limping, did not appear
18 to have any whiplash or any sort of problem from
19 an accident. And for that reason I find that
20 there was neither deficient performance nor any
21 prejudice considering the strategy that was
22 employed by the defense counsel.

23 The second major issue is the argument that
24 counsel failed to properly object to the
25 confession of the Applicant. And I would just

1 note here that there were objections with regard
2 to the Miranda issue.

3 And the issue on PCR is the failure to
4 object specifically to the voluntariness of the
5 confession based on Mr. Thigpen's high level of
6 intoxication at the time that he gave this
7 purported confession.

8 This really goes to the weight of the
9 testimony, not the admissibility as has been
10 mentioned several times throughout this hearing.
11 There's a case of State versus Saxton that says
12 as much; that when someone's intoxicated unless
13 they're unconscious when they supposedly gave the
14 statement that is just an issue for the jury to
15 consider.

16 And here Mr. Postic actually used that to
17 his benefit. He did elicit testimony showing
18 that Mr. Thigpen was highly intoxicated when the
19 statement was given so that, in hopes that the
20 jury would not find the confession credible. As
21 we know, the jury did not go along with that
22 argument but it was a strategic -- a good
23 strategy that he employed although unsuccessful.

24 There were several other issues that were
25 raised during the hearing. One issue with regard

1 to the failure to investigate a number found on
2 the deceased's phone. This was argued during
3 closing argument. This was not deficient
4 performance, and there was no evidence presented
5 of what more counsel could have done or could
6 have discovered with regard to this number.

7 Chain of custody. Mr. Thigpen argues that
8 Mr. Postic was ineffective because he stipulated
9 to the blood-alcohol level results. This was a
10 strategic position as Mr. Postic explained. He
11 didn't want to bore the jurors. He had no reason
12 to believe that the chain of custody could not be
13 established by the State. He had investigated
14 this issue. And on top of that no one was
15 arguing that Mr. Thigpen wasn't highly
16 intoxicated, and so there would be no prejudice
17 either.

18 With regard to the argument about the DNA.
19 There seems to be an argument that Mr. Postic
20 should have had an independent test done on the
21 DNA, but the test results from the State were
22 favorable. They showed that there was some
23 unknown person's DNA in the front of the airbag.
24 This was argued by Mr. Postic. And there was
25 nothing more Mr. Postic should have done under

1 the prevailing professional norms with regard to
2 the DNA.

3 There was some testimony from Mr. Thigpen
4 about not investigating a man supposedly found in
5 the woods. But additional testimony showed that
6 this was apparently a mistake in the reporting
7 officer's incident report, that there was
8 actually nobody found in the woods. And there
9 was nothing Mr. Postic could have done with
10 regard to this potential -- or this mistake that
11 was in the incident report.

12 Any Miranda issues I think were either
13 raised by Mr. Postic at the trial, also we have
14 now a new case that if the only issue was a fifth
15 prong of Miranda that the defendant should have
16 been advised that he could stop questioning at
17 any time and speak to an attorney, that fifth
18 prong is no longer required under new case law.

19 There was some testimony that Mr. Postic
20 should have been at the interview when
21 Mr. Thigpen was with the police in police
22 custody. However, Mr. Postic was not retained on
23 this case until after the interview.

24 There was some testimony elicited about the
25 shard and the paint chip, the glass shards and

1 the paint chips. I'm not 100 percent certain of
2 what the argument was on how Mr. Postic was
3 ineffective with regard to the shards and the
4 paint chip but I will just state for the record
5 that I didn't decipher any deficiency.

6 Mr. Postic argued those issues. Said if there's
7 a paint chip, where's the paint chip.

8 And to the extent there was some argument
9 that a video should not have been introduced or
10 there should have been some objection to the
11 interview, I think the dash-cam video, where the
12 trooper in the video talked about the paint chip.
13 The trooper testified similar to the video. So
14 that information was already given to the
15 jurors. And there was no, nothing Mr. Thigpen
16 advanced to show what Mr. Postic could have done
17 to keep that video out, how that was
18 objectionable other than that it didn't -- other
19 than he did not like the fact that the trooper in
20 the video had said something about the paint
21 chip. There's, there was no reason why that
22 video wouldn't have come in.

23 I believe that I have ruled on all the
24 issues that were raised but I'll give you an
25 opportunity at this point to let me know if

1 there's something that I did not specifically
2 rule on that was raised.

3 MR. THOMAS: Your Honor, just one thing
4 further which was the issue that was raised
5 about promises or suggestions made in the
6 interview room.

7 THE COURT: All right. There was
8 testimony that there were promises -- well, not
9 necessarily promises. I think the specific
10 testimony was, from Mr. Thigpen was that the
11 police officers had told him that he needed to
12 confess, he needed to help them, and it would
13 help him if he confessed. I found that there
14 was no evidence presented what Mr. Postic could
15 have or should have done with that information.
16 It was no evidence of deficient performance or
17 how that prejudiced Mr. Thigpen. Certainly a
18 statement like that isn't something that would
19 mean that his confession was involuntary. It
20 doesn't appear that there was any coercion other
21 than asking him to confess.

22 Again, Mr. Mitchell, I'll ask that you
23 prepare the order, please.

24 MR. MITCHELL: Yes, ma'am. Thank you.

25 MR. THOMAS: Thank you, Your Honor.

1 THE COURT: Thank you all very much.

2 MR. THOMAS: Yes, ma'am.

3 END OF CASE: 11:57 A.M.

4 CERTIFICATE OF REPORTER

5 STATE OF SOUTH CAROLINA)

6 COUNTY OF AIKEN)

7 I, Cheri L. Young, Registered Professional
8 Reporter and Official Court Reporter for the State
9 of South Carolina, Second Circuit-At Large, do hereby
10 certify that the foregoing proceedings were written
11 stenographically by me using computer-aided
12 translation; further, that the foregoing is a true,
13 accurate and complete record, to the best of my skill
14 and ability, of all the proceedings had and evidence
15 introduced in the hearing of the captioned case,
16 relative to appeal, in the Court of Common Pleas for
17 Richland County, on the 25th day of August, 2015.

18 I do further certify that I am neither of kin,
19 counsel, nor interest to any party hereto.

20 I have hereunder set my hand this 20th day of
21 February, 2016.

22
23
24 
25 Cheri L. Young, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

Donnie R. Thigpen, #350243,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2014-CP-28-01207

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 30, 2014. Respondent made its Return on June 15, 2015, requesting an evidentiary hearing be convened. Tommy A. Thomas, Esquire, was retained by Applicant to represent him on this action. An evidentiary hearing was held on August 25, 2015, at the Richland County Courthouse. Applicant was present and represented by Counsel Thomas. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's counsel, Alex T. Postic, Esquire. This Court had before it the Kershaw County Clerk of Court records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Kershaw County. Applicant was indicted at the March 2012 term of the Court of General Sessions for Kershaw County for Hit and Run – Death Result (2009-GS-28-1171) and Felony DUI – Death Result (2009-GS-28-1164). Applicant

was represented by Counsel Postic. Applicant proceeded to trial on March 23, 2012. He was convicted as indicted. The Honorable G. Thomas Cooper, Jr. sentenced Applicant to concurrent terms of ten (10) years' imprisonment.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tommy A. Thomas, Esq. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Thigpen, No. 2014-UP-386 (filed November 5, 2014). The Remittitur was issued on November 21, 2013.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

I. Ineffective assistance of trial counsel in

- a. Failing to object to the introduction of evidence and testimony of the DataMaster examination, including the DataMaster video;
- b. Failing to preserve this objection for appellate review;
- c. Failing to properly object to the statement made by Applicant to law enforcement admitting his involvement in the accident;
- d. Failing to preserve this objection for appellate review;
- e. Failure to investigate the victim's phone records;
- f. Failure to challenge the chain of custody regarding the blood alcohol test results;
- g. Failure to challenge the DNA test results;
- h. Failure to investigate the note in the responding officer's report that there was a man in the woods near the scene of the crime;
- i. Failure to properly challenge the sufficiency of the Miranda¹ warnings.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

¹ 384 U.S. 436 (1966).

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, appellate records, records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a matter of general impression, this Court finds Applicant's testimony and assertions to be not credible. In contrast, this Court finds counsel's testimony to be credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below. As an initial matter, Applicant waived any challenge^{by} to appellate counsel's performance and made his intentions clear that he wished to go forward with Counsel Thomas.

Ineffective Assistance of Trial Counsel

Failure to object to the introduction of evidence and testimony of the DataMaster examination, including the DataMaster video

Applicant alleges Counsel was ineffective in failing to object to the introduction of evidence and testimony pertaining to the DataMaster examination, including the DataMaster video. Specifically, Applicant argues Counsel was ineffective in failing to argue that S.C. Code § 56-5-2950 provides for the exclusion of all evidence stemming from the testing result.

Counsel did object to the admissibility of the DataMaster test result's admission on the grounds that the sample was not taken within the time limits prescribed by statute. (Trial Tr. p. 72, lines 17 – p. 73, line 10). The trial court granted Counsel's motion to suppress the test result, but allowed the DataMaster video to be shown. (Trial Tr. p. 154-56). The trial court also allowed the administering officer to testify as to his observations of Applicant.

This Court finds this allegation without merit. Applicant has failed to meet his burden in proving Counsel was ineffective in any regard. This Court finds that Counsel made a strategic decision in allowing the video to be admitted. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance.). Counsel credibly testified he thought the video would show the jury that Applicant was in fairly good shape for a man who

had just recently been involved in a horrific car accident. This was a reasonable trial strategy. As Counsel testified, he wanted to show the jury that Applicant was intoxicated because it tended to show that Applicant's confession was not given voluntarily. This Court finds Counsel was not deficient.

Applicant has cited no authority that such evidence must be excluded if the time parameters are not complied with. South Carolina Code § 56-5-2950(J) provides:

[t]he failure to follow policies, procedures, and regulations, or the provision of this section, shall result in the exclusion from evidence of any *test results* if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy of reliability of the test results of the fairness of the procedure.

(emphasis added). The statute is clear that *only* the test result shall be excluded. Applicant has also failed to cite any authority to exclude the officer's testimony as to his personal observations of Applicant. Applicant has therefore failed to prove any resulting prejudice because he cannot show that if an objection made been made, that it would have been successful.

Applicant further argues that even if the trial court overruled an objection to the DataMaster video and the related testimony, then it would have been reversed on appeal. The appellate courts will not disturb a trial court's ruling to admit evidence, absent an abuse of discretion. See State v. Horton, 359 S.C. 555, 566, 598 S.E.2d 279, 285 (Ct. App. 2004) (holding the trial court did not abuse its discretion in admitting the defendant's urine sample to show the level of defendant's intoxication). Here, a ruling admitting the evidence would clearly not be an abuse of discretion. This allegation is denied and dismissed with prejudice.

Failing to properly object to the statement made by Applicant to law enforcement admitting his involvement in the accident

Applicant alleges Counsel was ineffective in failing to object to the admissibility of the statement Applicant gave to investigators where he admitted to driving the vehicle. Applicant argues Counsel should have argued for suppression of that statement because the totality of the circumstances shows that he was deeply intoxicated at the time it was given. Counsel did object to Applicant's statement, but on the grounds that the investigators did not properly Mirandize Applicant. (Trial Tr. p. 85-91; 133-46) See infra.

This Court finds Applicant failed to meet his burden of proof. As Counsel realized at trial, "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 113, 117 (1973). "Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." Id. It was therefore reasonable for Counsel to not object under these grounds. This Court finds that a motion to suppress Applicant's statement on the grounds that he was intoxicated would have been futile. Importantly, this statement was given around 6:00pm, and Applicant had stopped drinking early that morning around 5:30am. (Trial Tr. p. 320, lines 12-17; p. 436-50, p. 778, lines 23-24). The testimony reflects that Applicant had sobered up. (Trial Tr. p. 112-16; p. 127-31; p. 320, lines 7-13). This Court finds Applicant's statement was properly admitted. See State v. Collins, 266 S.C. 566, 673, 225 S.E.2d 189, 193 (1976) (the evidence regarding the defendant's intoxicated condition at the time he made a statement to police "presented a factual situation which the judge determined unfavorably to the defendant. We cannot say he erred."). This Court denies and dismisses this allegation.

Applicant also alleges that this issue would have been successful on appeal if the trial judge had not suppressed the statements. This Court finds otherwise. "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (internal citations omitted). A ruling that Applicant's statement was given voluntarily would not be disturbed on appeal. There is ample evidence in the record to support that finding; particularly that Applicant's level of intoxication had waned in the previous hours.

Failure to investigate the victim's phone records

Applicant further alleges that Counsel was ineffective for failing to investigate the victim's phone records. Counsel noted this and argued to the jury that law enforcement did no investigation into the victim's phone. (Trial Tr. p. 865, line 11 – p. 866, line 3). It was a reasonable strategy for Counsel to point out what he believed to be the weak points in the State's case. In any case, this allegation rests entirely on speculation because no records were produced at the hearing. See Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) ("failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result."). Applicant failed to present any evidence to this Court as to how the records could have changed the result of the trial.

Failure to challenge the chain of custody regarding the blood alcohol test results

Applicant alleges Counsel was ineffective in failing to challenge the chain of custody of the blood alcohol test results. This Court finds Counsel made a strategic decision in not prolonging the trial and challenging every step to the chain of custody. It was not Counsel's theory that Applicant had not been drinking that night, so the blood test results were not relevant

to his defense. Further, Applicant failed to show that the chain was not proper with any credible evidence. This allegation is denied and dismissed.

Failure to challenge the DNA test results

Applicant alleges Counsel was ineffective in failing to challenge the DNA test results. The State's DNA expert testified at trial that she was able to develop a partial DNA profile from blood on the driver side airbag. The expert testified that the blood did not match Applicant's and that it was from an unidentified male. (Trial Tr. p. 551, lines 10-19). The expert also determined that the DNA profile from the rear of the driver side airbag was a direct match to Applicant. *Id.* Counsel testified he retained his own DNA expert to help craft a strategy for cross-examining the State's DNA expert. Applicant has failed to produce any credible evidence that would support a challenge to the DNA results. Counsel had his consultant review the results of the State's expert and decided there was no basis to challenge the testing results. This was a very reasonable strategy. It was more appropriately to argue to the jury that it should be no surprise to find Applicant's DNA all over his own vehicle which Counsel did. However, this allegation rests on speculation. See Moorehead. It is denied and dismissed.

Failure to investigate the note in the responding officer's report that there was a man in the woods near the scene of the crime

Applicant alleges Counsel was ineffective in failing to investigate the fact that a man may have been found in the woods near the scene of the crime. Counsel testified credibly that he believed that to be a mistake in the officer's report and that the officer was questioned on this issue. Counsel explained that some of the confusion could have been due to a bicycle race or triathlon going on in the area at the time the vehicle was discovered. This Court finds Counsel's testimony credible and finds this was a mistake in the officer's report. This allegation is denied and dismissed.

Failure to properly challenge the sufficiency of the Miranda warnings

Finally, Applicant alleges Counsel was ineffective in failing to have Applicant's statement suppressed because he was not Mirandized properly. This Court finds Applicant argued this point to the trial judge. Counsel argued that the statements should be suppressed because Applicant was not advised that he could stop the questioning at any time. (Trial Tr. p. 85, line 23 – p. 91, line 8). Counsel acknowledged Applicant had been Mirandized earlier in the day at his residence when arrested but argued that the subsequent Miranda warnings were not sufficient pursuant to State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998). This Court finds that Counsel's presented a strong challenge to the statements and was not deficient in any manner. Moreover, the South Carolina Court of Appeals rejected the argument that a defendant must be informed that he had a right to terminate questions at any time. State v. Hoyle, 397 S.C. 622, 725 S.E.2d 720 (Ct. App. 2012). Applicant has failed to carry his burden of proof.

All Other Allegations

As to any and all allegations that were raised in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559,

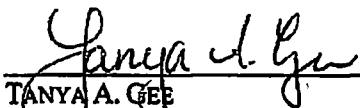
563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15th day of October, 2015.


TANYA A. GEE
Presiding Judge

Columbia, South Carolina

WITNESSES

(S) W B Kelly - S C Highway Patrol

ARREST WARRANT NUMBER

D881817

ACTION OF GRAND JURY

TRUE BILL

William Morris
Foreperson of Grand Jury

Date:

MAR 14 2012

VERDICT

guilty

Thomas Staker
Foreperson of Petit Jury

Date:

3-23-12

DOCKET NO. 2009-GS-28-1164

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

MARCH TERM 2012

K96

**THE STATE
vs.**

Donnie Roland Thigpen

AMENDED

**Indictment for
FELONY DUI - DEATH**

SC Code: 56-05-2945(A)(2)

CDR Code: 0395

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

JOYCE PATRICK ALB
CLERK OF COURT
KERSHAW COUNTY, S.C.

2012 MAR 14 PM 1:54

FILED FOR RECORD

ATTEST True, Correct & Certified
Copy of Original on File in this
Court
James Smith
Clerk of Court
Kershaw County

1140

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

AMENDED
INDICTMENT

At a Court of General Sessions, convened on MARCH 14, 2012, the
Grand Jurors of Kershaw County present upon their oath:

FELONY DRIVING UNDER THE INFLUENCE - DEATH

That Donnie Roland Thigpen did in Kershaw County on or about June 20, 2009,
drive a motor vehicle while under the influence of alcohol, drugs, or a
combination of both, and did drive said motor vehicle left of center and off of the
roadway as prohibited by Code Section 56-5-1810, and that said actions
proximately caused the death of MELVIN WRIGHT, JR., in violation of Section
56-05-2945(A)(2), S. C. Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the
statute in such case made and provided.



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Kershaw

VS.

Donnie Roland Thigpen

AKA:

Race: Sex: M Age: 27

DOB: 84 SS#:

Address:

City, State, Zip: COLUMBIA, SC 29206

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: DUI / Felony driving under the influence, death results

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2009-GS-28-1164

A/W#: D881817

Date of Offense: 6/20/2009

S.C. Code § : 56-05-2945(A)(2)

CDR Code #: 0395

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 56-05-2945(A)(2) of the S.C. Code of Laws, bearing CDR Code # 0395

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Perry, Brett

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$ 10,100.00 provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)		\$0,857.50
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ 100.00
§ 56-5-2995 (DUI Assessment)	\$12	\$ 12.00
§ 56-1-286 (DUI Breath Test)	\$25	\$ 25.00
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ 636.74
TOTAL		\$21,861.24

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

PTUP

days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal consecutive weekly/monthly pmts. of \$

\$ paid to Public Defender Fund

Other:

☐ Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition☐ Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code:

Sentence Date:

2/26
3/23/2012

WITNESSES

(S) W B Kelly - S C Highway Patrol

ARREST WARRANT NUMBER

D881818

ACTION OF GRAND JURY

TRUE BILL

William Morris

Foreperson of Grand Jury

Date:

MAR 14 2012

VERDICT

GUILTY

Thomas Stakes

Foreperson of Petit Jury

Date: 3 - 23 - 12

DOCKET NO. 2009-GS-28-1171

The State of South Carolina

County of

Kershaw

COURT OF GENERAL SESSIONS

MARCH TERM 2012

K96

THE STATE

vs.

Donnie Roland Thigpen

AMENDED

**Indictment for
LEAVE SCENE ACCIDENT - DEATH
RESULTED**

SC Code: 56-05-1210(A)(3)

CDR Code: 2463

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

FILED FOR RECORD
2012 MAR 14 PM 1:54
JOYCE F. FARMER
CLERK OF COURT
KERSHAW COUNTY, S.C.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court.
Debra S. Smith
Clerk of Court
Kershaw County

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

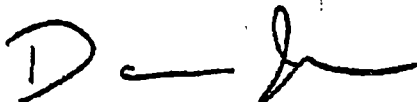
AMENDED
INDICTMENT

At a Court of General Sessions, convened on MARCH 14, 2012, the
Grand Jurors of Kershaw County present upon their oath:

LEAVING SCENE OF ACCIDENT - DEATH

That Donnie Roland Thigpen did in Kershaw County on or about June 20, 2009, while operating a motor vehicle become involved in an accident which resulted in the death of MELVIN WRIGHT, JR., and did leave the scene of the accident without first rendering aid and/or providing information, as required by Section 56-5-1230, all in violation of Section 56-05-1210(A)(3), S. C. Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

1145

COUNTY OF
STATE

Kershaw

VS.

Donnie Roland Thigpen

AKA:

Race:

Sex: M

Age:

27

DOB:

84

SS#

Address:

City, State, Zip:

COLUMBIA, SC 29206

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Traffic / Hit and run, duties of driver involved in accident with death

INDICTMENT/CASE#: 2009-GS-28-1171

A/W#: D881818

Date of Offense: 6/20/2009

S.C. Code § 56-05-1210(A)(3)

CDR Code #: 2463

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 56-05-1210(A)(3) of the S.C. Code of Laws, bearing CDR Code # 2463

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Perry, Brett

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed 10 years
and/or to pay a fine of \$ 10,100.00; provided that upon the service of 10 days/months/years and/or payment
of \$ 10,100.00; plus costs and assessments as applicable*; the balance is suspended with probation for 10months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ 10,100.00 plus 20% fee: \$ 2,020.00

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5%)		\$ <u>10,100.00</u>
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ <u>10,857.50</u>
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u>100.00</u>
§ 56-5-2995 (DUI Assessment)	\$12	\$ <u>12.00</u>
§ 56-1-286 (DUI Breath Test)	\$25	\$ <u>25.00</u>
Proviso 47.9 (Public Def/Prob)	\$500	\$ <u>500.00</u>
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ <u>150.00</u>
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$ <u>50.00</u>
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ <u>40.00</u>
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5.00</u>
§ 44-53-450(C) (Conditional Discharge)	\$350	\$ <u>350.00</u>
3% to County (if paid in installments)		\$ <u>631.73</u>
TOTAL		\$ <u>21,689.23</u>

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (06/2010)

PTUP

10 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. ☐May serve W/E beginning ☐Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 10,100.00 beginning 10/23/2012\$ 10,100.00 paid to Public Defender FundOther: ☐☐ Condition Discharge, § 44-53-450(C) requires
\$350 be paid to the Clerk prior to case disposition.☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code:

Sentence Date:

21,689.23

3/23/2012