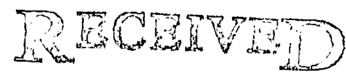
STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas



Honorable Daniel D. Hall, Circuit Court Judge

OCT 10 2016
SC Court of Appeals

Appellate Case No. 2015-001409

STATE OF SOUTH CAROLINA, ... Appellant,

vs.

CHARLES TODD BURNS, ... Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities 2

Statement of Issues on Appeal 3

Statement of Facts 3

Argument 3

CONCLUSION 7

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) 5

Prosser v. Parsons, 245 S.C. 493, 141 S.E.2d 342 (1965) 4, 6

State v. *Martin*, 275 S.C. 141, 268 S.E.2d 105 (1980) 4, 6

State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960) 4

CASES: SOUTH CAROLINA COURT OF APPEALS

Fradella v. Town of Mount Pleasant,
325 S.C. 469, 141 S.E.2d 53 (Ct.App. 1997), CERT. DEN. (1997) 6, 7

State v. *Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct.App. 2004) 6

STATUTES: SOUTH CAROLINA

S.C. Code § 17-13-30 (West) 4

S.C. Code § 56-5-2930 (West) 3

S.C. Code § 56-5-2953 (West) 5, 6

S.C. Code § 56-5-2953(B) (West) 5

S.C. Code § 56-7-15(A) (West) 4, 5

OTHER AUTHORITY

4 AM.JUR.2D *Arrest* § 31, p.721 4

STATEMENT OF ISSUES ON APPEAL

I. DID THE SHERIFF'S DEPUTY OBSERVE FACTS AND CIRCUMSTANCES SUFFICIENT TO ESTABLISH PROBABLE CAUSE TO ARREST THE RESPONDENT FOR DRIVING UNDER THE INFLUENCE FIRST?

STATEMENT OF FACTS

On July 4, 2014, Foster, a Security Officer for the gated community known as River Hills witnessed the Respondent Charles Todd Burns driving left of center in that neighborhood. River Hills Security Officer Foster initiated a traffic stop; he stated that he smelled alcohol coming from the Respondent's person and that the Respondent refused to answer questions.

Officer Foster's supervisor contacted the York County Sheriff's Office to request assistance, and Sheriff's Deputy Osborne responded. Officer Foster narrated his observations of Respondent to the Deputy.

According to Officer Foster, Deputy Osborne arrived approximately ten to fifteen minutes after the traffic stop. Deputy Osborne acknowledged that he did not witness Respondent driving on the night of the arrest. Osborne testified that when he arrived, Respondent's car was stopped at the front gate of the neighborhood, with the Respondent was sitting in the driver's seat. Deputy Osborne testified that the Respondent Burns refused to answer Deputy Osborne's questions about whether he had been drinking. He also stated that he noticed an odor of alcohol coming from the Respondent. Finally, Deputy Osborne testified that Respondent refused field sobriety testing, citing his alleged inability to perform the tests due to medical problems.

Deputy Osborne issued a Uniform Traffic Ticket charging the Respondent Burns with DUI 1st. Bums later refused the breathalyzer test. After hearing on a Pretrial Motion on February 19, 2015, the Magistrate Judge dismissed the charge. This matter was appealed by the State to the Circuit Court. By Order dated June 18, 2015, the Honorable Daniel D. Hall affirmed the decision of the Magistrate Judge.

ARGUMENT

An element of the charge of DUI is that a vehicle has been driven by the person charged. S.C. Code § 56-5-2930. Here, the evidence of the vehicle being driven is the observation of Security Office Foster, not that of the arresting officer, Deputy Osborne.

South Carolina Courts have long held that the acts underlying an arrest without a warrant "must become known to the officer to the officer, at the time of their commission, through his sensory perception, and he must infer that they constitute an offense." *Prosser* v. *Parsons*, 245 S.C. 493, ___, 141 S.E.2d 342, 346 (1965), quoting from 4 AM.JUR.2D *Arrest* § 31, p.721, and citing in support *State* v. *Williams*, 237 S.C. 252, 116 S.E.2d 858 (1960). The arresting Officer in this matter, Deputy Osborne, did not observe the Respondent driving.

The State deploys what are basically two arguments to meet this objection.

STATUTES

The State cites S.C. Code § 17-13-30 (West) which allows warrantless arrest for a "suspected freshly committed crime, whether upon view or upon prompt information." This cited Statute has a history dating to 1898. Interpreting this Statute, as well as S.C. Code §§ 23–5-40 and 23-13-60, our Supreme Court in *State* v. *Martin*, 275 S.C. 141, 268 S.E.2d 105 (1980) stated:

> We, therefore, conclude from the foregoing statutes and decisions that, while generally an officer cannot arrest, without a warrant, for a misdemeanor not committed in his presence, an officer can arrest for a misdemeanor when *the facts and circumstances observed by the officer* give him probable cause to believe that a crime has been freshly committed. [*Id.*, 275 S.C. 145-146, 268 S.E.2d 107; *emphasis added.*]

Thus, we arrive at the same problem of observation by the arresting officer as set out before.

The State also relies upon the language of S.C. Code § 56-7-15(A) (West), which provides, in relevant part:

> The uniform traffic ticket, established pursuant to the provisions of Section 56-7-10, may be used by law enforcement officers to arrest a person for an offense that has been [A] freshly committed or [B] is committed in the presence of a law enforcement officer if the punishment is within the jurisdiction of magistrates court and municipal court.
> [*Id.*; matter in brackets added for clarity.]

Obviously, the DUI charged was not "committed in the presence of" the arresting officer,

and to that extent, the requirement under clause [B] above does no more than refer us back to the existing law requiring the arresting officer's knowledge. The exception stated as clause [A] is that the offense be "freshly committed". The alternative to these requirements is, of course, obtaining a warrant, which was not done in this case.

South Carolina has set out specific requirements for the conduct of an arrest for driving under the influence. S.C. Code § 56-5-2953 (West) sets out the procedure for such an arrest, including the video recording of the field sobriety tests or determination of probable cause. It requires, *inter alia*, that the video recording at the incident site must begin not later than the activation of the officer's blue lights. *Id.*, S.C. Code § 56-5-2953(A)(1)(a)(i). In *City of Rock Hill* v. *Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007), the Supreme Court held that

> Finally, dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions.
> [*Id.*, 374 S.C. __, 646 S.E.2d 881.]

S.C. Code Subsection 56-5-2953(B) provides an exception to the requirement of Subsection (A) if the arresting officer can submit an affidavit showing inoperable equipment, good faith attempts to repair or other exigent circumstances. Such an affidavit was not supplied in this case, nor was the exception allowed under S.C. Code § 56-5-2953(B) plead or referenced.

To the extent available, the Respondent would plead this point in itself as an additional ground for sustaining the Circuit Court. The point was raised by motion at the hearing before the Magistrate Judge. [RECORD ON APPEAL, Hearing of February 19, 2015, p.36, l.7 – p.37,l.14.]

The Respondent would would also point out the Respondent was effectively placed under arrest by the Security Officer before the arrival of the Deputy who issued the Uniform Traffic Ticket for DUI 1st. There is no evidence that the Respondent was told he could leave or take any action other than wait for the Deputy officer's arrival. This point was also raised during argument. [RECORD ON APPEAL, Hearing of February 19, 2015, p.36, l.7 – p.37,l.14.]

Over and above the question of the effect of S.C. Code § 56-5-2953 as a separate ground for dismissal, there is the matter of how it that Statute comports with the language of S.C. Code § 56-7-15(A) allowing an officer to arrest for certain offenses "freshly committed".

The Respondent submits that S.C. Code § 56-5-2953, by its designation of the time in

which the video must start, limits the time in which an offense can be considered as "freshly committed." In this case, the officer's recording only started once the Deputy arrived, that is, after the element of "driving" was said to have been observed by the Security Officer who placed the Respondent under arrest. The same statute refers to "*the officer's* blue lights"; S.C. Code § 56-5-2953(A)(1)(a)(i); *emphasis added*.[1] Reading the Statutes together, there is no indication of a legislative intent to negate the requirement that the elements of an arrest "must become known to the officer to the officer, at the time of their commission, through his sensory perception [or that of his equipment], and he must infer that they constitute an offense". *Prosser* v. *Parsons, supra; matter in brackets added for clarity.*

PRECEDENT:

The State cites the holding in *Fradella* v. *Town of Mount Pleasant*, 325 S.C. 469., 141 S.E.2d 53 (Ct.App. 1997), CERT. DEN. (1997). In that case, the police discovered a wrecked car, the owner of which identified Fradella in possession of the car. A third party told them he ha*observed the car's driver, had given him a ride and noticed he smelled of alcohol[2], and had dropped him off. Fradella had called 911 to report he was involved in an accident at the location. The police went to Fradella's home, where he admitted he was the driver. The third party identified Fradella as the man he had given a ride to. The police administered field sobriety tests, which Fradella failed.

The Court of Appeals in *Fradella* concluded:

> However, neither [*State* v.] Martin [275 S.C. 141, 268 S.E.2d105 (1980)] nor subsequent cases interpreting Martin expressly mandated that the officer observe all of the facts and circumstances at the scene. We believe such a holding would construe Martin too narrowly. Therefore, we hold that as long as the facts and circumstances *observed or perceived by an officer* justify the conclusion that a crime has been freshly committed, then the Martin rule is satisfied.
>
> [*Id.*, 325 S.C. 476-477, 141 S.E.2d 57; *emphasis added*; *matter in brackets added for clarity.*]

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1 Respondent notes that the case cited by the Assistant Solicitor at hearing, *State* v. *Landis*, 362 S.C. 97, 606 S.E.2d 503 (Ct.App. 2004) is without application here: in that case, two police officer arrived together and one wrote the ticket: here we have two officers "trading off" their handling of the Respondent.

2 The third party later recanted this statement, claiming the smell came from another source. *Id.*

In this case, the only matters observed or perceived by the arresting officer for DUI were the Respondent's presence in a vehicle and the odor of alcohol. On that basis, the Respondent argues that there is a substantive difference between matters brought to attention of the arresting officer here and the facts under *Fradella, supra.*

CONCLUSION

The arresting officer did not observe facts and circumstances sufficient to establish probable cause for arrest. The decision of the Magistrate Judge and the Circuit Court should be affirmed.

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October 5, 2016

Rock Hill, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 211(b), S.C.A.C.R.

October 5, 2016

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STATE OF SOUTH CAROLINA, ... Appellant,

vs.

CHARLES TODD BURNS, ... Respondent.

CERTIFICATE OF SERVICE

I certify that, on the date below, I have served the Brief of Respondent on the following counsel of record:

Alan Wilson
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William M. Blitch, Jr.
Assistant Attorney General
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Columbia, SC 29211

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

October 5, 2016

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October 5, 2016

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: State of South Carolina, Appellant,
v. Charles Todd Burns, Respondent.

Appellate Case No. 2015-001409

Dear Ms. Kitchings:

In accordance with Rule 211, S.C.A.C.R., enclosed herewith please find the original and fifteen (15) copies of the Respondent's Brief, with Certificate of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorney for the Appellant with copies of the said Brief, as evidenced by the Certificate of Service.

Please return the extra conformed copies to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely yours,

John Martin Foster

jmf/
enclosures

cc: Client File

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