

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

**RECEIVED**

**APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas**

DEC 05 2016

**Donald B. Hocker, Circuit Court Judge**

**SC Court of Appeals**

**Case No. 2016-000745**

**The State,.....Respondent,**

**vs.**

**Maria Todd Martin.....Appellant.**

**RECORD ON APPEAL**

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1           It was before that.

2 MR. WOOLSTON:

3           No. It was before that.

4 MR. HENDERSON:

5           No, sir.

6 (Stopped typing Trooper Sinclair and began Motion 2 -  
7 1:17:30)

8 THE COURT:

9           Motion 2, you're making a Motion that there be no  
10          mention of her refusal to take field sobriety  
11          tests?

12 MR. HENDERSON:

13          That is correct, Your Honor. And also that they  
14          not be allowed to play that portion of the video.

15 THE COURT:

16          Okay.

17 MR. HENDERSON:

18          Because legislature has specifically said you  
19          don't have to tape them.

20 THE COURT:

21          Right.

22 MR. HENDERSON:

23          And unlike the chemical test where it says  
24          expressively refusal can be used against you,  
25          here, if anything, the legislature is somewhat

1           saying, hey, refusal can't be used against you  
2           because you can't be arrested. And honestly  
3           because those field sobriety tests, most of them  
4           would deal with counting, alphabet. You run into  
5           Miranda issues, you know, basically commenting  
6           their right to remain silent by getting into that.  
7           And we just ask that the government not be allowed  
8           to go into those issues in the case  
9           (indiscernible)

10 THE COURT:

11           Okay. Mr. Woolston, what's your position on that?

12 MR. WOOLSTON:

13           Okay. If I understand the Motion, they're --  
14           they're asking for the Defendant's refusal to take  
15           field sobriety is not relevant and therefore  
16           inadmissible. The State's position is why can't  
17           (indiscernible) one of these things individually  
18           (Indiscernible) request to (indiscernible)

19 THE COURT:

20           (Indiscernible) I haven't read the whole thing.

21           It's just basically a --

22 MR. WOOLSTON:

23           I mean --

24 THE COURT:

25           They're basically asking that there be no mention

1 of her refusal to take the field sobriety test and  
2 no -- no -- and delete it off the recording.

3 MR. WOOLSTON:

4 Yeah.

5 THE COURT:

6 No evidence of her -- there will be no evidence or  
7 mention of her refusal to take the field sobriety  
8 test.

9 MR. WOOLSTON:

10 Right. Judge, the State would be completely  
11 opposed to the suppression of that highly relevant  
12 evidence in the matter. There is no requirement  
13 under the U.S. Constitution or (Indiscernible) the  
14 State Statute to require that (Indiscernible)? be  
15 given prior to the administration of field  
16 sobriety. The imposition on road chart  
17 (indiscernible) road (indiscernible) stops, the  
18 Supreme Court (indiscernible) that is the  
19 Richardson case (indiscernible) I'm forgetting the  
20 name of the cite. I think the courts made  
21 (indiscernible) the Supreme Court has said that  
22 (Indiscernible) cannot be required to be given on  
23 roadside stops prior to arrest. And here --

24 THE COURT:

25 That was a --

1 MR. WOOLSTON:

2 -- the officer --

3 THE COURT:

4 That was another -- that's like Ohio versus  
5 Robertson --

6 MR. WOOLSTON:

7 Yeah, it's one of those --

8 THE COURT:

9 (Indiscernible)

10 MR. WOOLSTON:

11 One of those. I have -- I have it buried in here.  
12 I can get it out. But the bottom line is, I don't  
13 think there's anyone that's disagreeing that under  
14 Federal Law and now under State law -- the State  
15 Statute no longer requires that Miranda be given  
16 prior.

17 UNKNOWN SPEAKER:

18 (Indiscernible)

19 MR. WOOLSTON:

20 I don't want to be interrupted here. I'm giving  
21 my argument (Indiscernible) that the Miranda's --  
22 the Mirander's is no longer required to be given  
23 prior to the administration of field sobriety  
24 tests. At one time the defense enjoyed that extra  
25 benefit, but there is no requirement for it now.

1           The legislation has finally realized that -- you  
2           know, I don't know how many hundreds and probably  
3           thousands of cases had their evidence suppressed  
4           because there was this extra requirement that our  
5           legislature reduced putting into the law by  
6           motivated defense (Indiscernible) that this was a  
7           needed (Indiscernible). But it's no longer the  
8           law, thank goodness, so you don't have to afford  
9           Miranda Rights --

10       THE COURT:

11           I think Miranda's coming up in Motion 3, but we're  
12           on Motion 2 right now.

13       MR. WOOLSTON:

14           Okay. Well --

15       THE COURT:

16           I mean, let's get the Motion through. What is the  
17           relevance of --

18       MR. WOOLSTON:

19           I kind of thought it was weaved in there by them.

20       THE COURT:

21           Well --

22       MR. WOOLSTON:

23           But the bottom line is, it's highly relevant --

24       THE COURT:

25           -- I don't think they even mentioned Miranda.

1 MR. WOOLSTON:

2 Okay. I apologize. But it's highly relevant  
3 evidence that her refusal to perform field  
4 sobriety is part of the officer's investigation  
5 into the matter, and so it's highly relevant. And  
6 she may be able to explain later, to some degree,  
7 why she didn't want to participate in the field  
8 sobriety. But --

9 THE COURT:

10 Well, I don't --

11 MR. WOOLSTON:

12 But that the -- the absolute --

13 THE COURT:

14 I don't think she has -- I'm going to grant motion  
15 to because she doesn't have any burden of proof  
16 and she doesn't have a burden to produce evidence  
17 in her unwillingness to cooperate an -- you know,  
18 her unwillingness to -- to provide evidence is not  
19 -- and she -- she doesn't have the burden of  
20 producing evidence.

21 MR. WOOLSTON:

22 I never suggested that she did. But the officer  
23 is conducting an investigation for a DUI.

24 THE COURT:

25 Yeah.

1 MR. WOOLSTON:

2 And the fact that she will not provide any  
3 evidence that her sobriety is not -- is not a  
4 speech issue for purposes of -- of (Indiscernible)  
5 --

6 THE COURT:

7 I don't know if it's speech. It's more their  
8 burden that she's presumed innocent and she  
9 doesn't have the burden of proving anything, so --

10 MR. WOOLSTON:

11 But that would be --

12 THE COURT:

13 -- why is it -- why is it -- what is that? That's  
14 provocative (Indiscernible) of her unwillingness to  
15 cooperate with an investigation.

16 MR. WOOLSTON:

17 Well, her -- I mean, the Court has already said  
18 that a refusal on the DataMaster (Indiscernible) -  
19 -

20 THE COURT:

21 I mean, I can't say -- when you can't say that  
22 like in a -- if you were trying a case and  
23 somebody said the police asked them to give a  
24 statement, you couldn't mention that they failed  
25 to give a statement.

1 MR. WOOLSTON:

2 Right; that's true.

3 THE COURT:

4 I mean, that's (Indiscernible) that's

5 (Indiscernible)

6 MR. WOOLSTON:

7 But they would be in custody. I mean, I guess

8 some of your scenario there is --

9 THE COURT:

10 You can't -- you can't -- you can't mention

11 somebody's failure to make a -- to pull up to make

12 a statement; right?

13 MR. WOOLSTON:

14 I mean, are you giving me the (Indiscernible)

15 situation where a law enforcement officer has --

16 THE COURT:

17 I'm giving you Supreme Court law that is -- the US

18 Supreme Court has said you cannot mention that a

19 person has invoked their right to remain silent.

20 MR. WOOLSTON:

21 I agree; I agree.

22 THE COURT:

23 And I think this is (Indiscernible)

24 MR. WOOLSTON:

25 (Indiscernible) as to a statement. You know, I

1           guess an interrogation. Your --

2 THE COURT:

3           Yeah. You cannot mention that they have invoked  
4           their right to remain silent. And I think by  
5           analogy you can't mention that they invoked their  
6           right to refuse to --

7 MR. WOOLSTON:

8           Well --

9 THE COURT:

10          -- to perform full sobriety tests.

11 MR. WOOLSTON:

12          Well, the only dilemma, then, that such a ruling  
13          would create --

14 THE COURT:

15          I mean, the State has the burden of proving its  
16          case by -- she doesn't -- she has no burden of  
17          proof.

18 MR. WOOLSTON:

19          (Indiscernible)? Not by (Indiscernible)

20 THE COURT:

21          She doesn't have the -- (Indiscernible) you have  
22          to prove it beyond reasonable doubt. I mean  
23          beyond a reasonable doubt. But she doesn't have  
24          to prove -- she doesn't have to prove her  
25          innocence.

1 MR. WOOLSTON:

2 Okay. I get that, but --

3 THE COURT:

4 Are those tests designed to prove her innocence or  
5 to prove her guilt or they're designed to prove  
6 her guilt.

7 MR. WOOLSTON:

8 Right. What about the problem of (Indiscernible)  
9 run into if I could afford this (Indiscernible)?  
10 to -- to congeal (Indiscernible)?

11 THE COURT:

12 I'm just saying it goes back to --

13 MR. WOOLSTON:

14 What about --

15 THE COURT:

16 -- just as you can't mention if they give a  
17 statement. I mean, you clearly agree with that;  
18 right?

19 MR. WOOLSTON:

20 I do.

21 THE COURT:

22 I mean, that's --

23 MR. WOOLSTON:

24 (Indiscernible) under the --

25 THE COURT:

1           -- that's (Indiscernible) that's a Supreme Court  
2           ruling.

3 MR. HENDERSON:

4           (Indiscernible)

5 THE COURT:

6           Under that -- under that scenario. Or yeah. I  
7           think actually that one -- I think (indiscernible)  
8           persaid (indiscernible) --

9 MR. WOOLSTON:

10          Okay.

11 THE COURT:

12          But -- but you can't -- you can't mention the fact  
13          that somebody gave a state -- refused to give a  
14          statement, so --

15 MR. WOOLSTON:

16          I'm not arguing with you about that.

17 THE COURT:

18          So I --

19 MR. WOOLSTON:

20          I'm not disagreeing with you about that.

21 THE COURT:

22          So I would -- I'm analogizing that to this and --

23 MR. WOOLSTON:

24          Here's the dilemma I find myself in, but I would  
25          think the Court would --

1 THE COURT:

2 Just skip that part of the video.

3 MR. WOOLSTON:

4 Okay. Here's -- here's the -- I don't want to --  
5 I need to put this thought out, this part of my  
6 argument.

7 THE COURT:

8 Yeah.

9 MR. WOOLSTON:

10 If we find (Indiscernible) ourselves not being able  
11 to show the officer's diligence and effort to make  
12 an informed decision to arrest someone for  
13 driving under the influence by denying the jury's  
14 access to the diligence that the officer  
15 endeavored to exert so that we could make an  
16 argument (Indiscernible) to the State that the  
17 State did not rush to judgement, that they made an  
18 informed effort to try to make an informed  
19 decision about whether this person was under the  
20 influence, if you deny the State's ability to  
21 bring forward that information, then you've got --  
22 you've set the defense up to -- the defense is  
23 then set up to make what I believe to be a very  
24 unfair presentation in closing or (Indiscernible)  
25 whether it be a directed verdict, a Motion at the

1 closing of the State's case, or an argument at the  
2 close of the case, that this is all the State was  
3 willing or did. This is all the State did; this  
4 is all they did (Indiscernible) --

5 THE COURT:

6 That's right.

7 MR. WOOLSTON:

8 They just stopped a car --

9 THE COURT:

10 That's right. That's what --

11 MR. WOOLSTON:

12 They just stopped a car.

13 THE COURT:

14 That's what defense lawyers do. They say --

15 MR. WOOLSTON:

16 Everybody out here on the jury has -- has -- is  
17 very familiar with the law and field sobriety,  
18 field sobriety, field sobriety.

19 THE COURT:

20 Well, by that -- by -- according to your argument,  
21 then why would they not be able to say, well, we  
22 were diligent; we asked her to give a statement,  
23 but she wouldn't give us one. I mean, your  
24 argument -- by your argument, then you ought to be  
25 able to mention the fact that they asked her to

1 give a statement and she refused to give a  
2 statement.

3 MR. WOOLSTON:

4 We're not -- no. I'm saying that the  
5 (Indiscernible) --

6 THE COURT:

7 That's the same argument that would have been made  
8 by the -- by the State back in the 1960s --

9 MR. WOOLSTON:

10 Right.

11 THE COURT:

12 -- when the U.S. Supreme Court said you cannot  
13 mention the fact --

14 MR. WOOLSTON:

15 Yeah.

16 THE COURT:

17 -- even (Indiscernible) you asked her to give a  
18 statement.

19 MR. WOOLSTON:

20 But this is a while --

21 THE COURT:

22 You were trying to -- hold up, don't interrupt me  
23 while I'm talking.

24 MR. WOOLSTON:

25 All right.

1 THE COURT:

2 You're asking her -- and I'm sure the State --  
3 back then they probably said, well, Judge, well --  
4 well, (Indiscernible) back then. They just said  
5 justice, you know, you're making it look like we  
6 didn't even ask her to give a statement. We ought  
7 to be able to say we asked her to give a statement  
8 and she didn't give a statement, but they didn't --  
9 -- they didn't accept that argument. They said you  
10 if -- if somebody that you -- if you -- you cannot  
11 mention the fact that you asked somebody to give a  
12 statement and they refused to give a statement.

13 MR. WOOLSTON:

14 I agree.

15 THE COURT:

16 And that -- and by your -- and that tends to make  
17 it look like the State didn't even try to give --  
18 ask for a statement, to a jury; does it not? I  
19 say it does. It makes it -- it could create the  
20 inference in the mind of the jurors that the State  
21 didn't even bother to try to give a statement.  
22 Nevertheless, you can't mention the fact that she  
23 refused to give a statement. Do you follow my  
24 logic?

25 MR. WOOLSTON:

1 I do, Judge. (Indiscernible)

2 THE COURT:

3 So the same --

4 MR. WOOLSTON:

5 I do.

6 THE COURT:

7 Okay. So I don't see why that argument would  
8 apply here. I mean, he asked her to give the  
9 evidence, and she refused to give him the  
10 evidence. Now, the State has said so I -- I'm  
11 going to grant it to -- I grant Motion 2 so I  
12 don't mention of the fact that she -- so I'm going  
13 to grant Motion 2. There shouldn't be any -- any  
14 mention of the fact that she -- that she failed to  
15 participate in the field sobriety test. Because I  
16 think that's (Indiscernible) as to -- it goes back  
17 to the fact that the Defendant -- the State has to  
18 prove -- the State has the burden of proof and --

19 MR. WOOLSTON:

20 Judge, (Indiscernible)? you know, I didn't want to  
21 interrupt you, and I apologize for the --

22 THE COURT:

23 And self incrimination (Indiscernible) self  
24 incrimination. And yeah, go ahead.

25 MR. WOOLSTON:

1 I just wanted to put one last matter on the  
2 record, if I could.

3 THE COURT:

4 Okay.

5 MR. WOOLSTON:

6 In this particular setting, you have a situation  
7 out here where the community at large knows that  
8 field sobriety is a necessary part of an officer's  
9 duty to investigate. And that's -- I would be  
10 shocked if everybody on a jury in this community  
11 or across the United States doesn't expect the  
12 officer --

13 THE COURT:

14 Do they not? I'll say no, that an officer is  
15 always going to -- a diligent officer will always  
16 ask for a statement, almost. If they're  
17 investigating a burglary case, aren't they going  
18 to say you have the right to remain silent,  
19 wouldn't you -- would you like to talk to us about  
20 this. And are they aware of that? I mean, what  
21 officer wouldn't do that.

22 MR. WOOLSTON:

23 The part of my argument that I'm trying to  
24 complete here, is that my argument is essentially  
25 that by depressing that information from the jury

1           so that they don't see the diligence, what you end  
2           up having is a situation where they will hold that  
3           lack of diligence against the State because it  
4           empowers the defense to be able to say this is all  
5           he did.

6   THE COURT:

7           Well, if they said that's all he did, then they  
8           would be opening the door for you to come back to  
9           say that we did. They would be opening the door  
10          if they made that argument.

11   MR. WOOLSTON:

12          You mean in the closing? Are you saying if this  
13          ruling is upheld, that --

14   THE COURT:

15          Now, you would --

16   MR. WOOLSTON:

17          -- (Indiscernible) would be shut off?

18   THE COURT:

19          You would -- I would -- I mean, I would find --  
20          you would agree that you can't argue that they  
21          didn't even ask her to take field sobriety, to  
22          take field sobriety tests?

23   MR. WOOLSTON:

24          No. And that would be an improper argument to the  
25          jury actually --

1 THE COURT:

2 And they would be grounds for a mistrial.

3 MR. (Indiscernible):

4 Actually --

5 MR. GARRETT:

6 We know we can't say that --

7 THE COURT:

8 No.

9 -- knowing the fact that he did.

10 MR. HENDERSON (Indiscernible):

11 Yes.

12 THE COURT:

13 You know for a -- so you -- you're not going to  
14 argue that he didn't even ask her? He didn't even  
15 bother to ask her for --

16 MR. HENDERSON:

17 No, no, no.

18 MR. WOOLSTON:

19 But what they're going to do, is they're going to  
20 say this is all the State has; this is all -- this  
21 is all the State did.

22 THE COURT:

23 Right.

24 MR. WOOLSTON:

25 This is all the State did. This is all the State

1           did.

2   THE COURT:

3           No, no, no, no, no, no. They can't -- they're not  
4           going to say -- they can say this is what the  
5           State's evidence is and it's inadequate.

6   MR. WOOLSTON:

7           (Indiscernible)

8   THE COURT:

9           Well, I feel like we're breaking new ground here,  
10          because I never -- have not heard of that sort of  
11          suppression of evidence.

12   MR. WOOLSTON:

13          Well, I've never seen the Motion. I've never  
14          thought about it. But, I mean, I'm breaking new  
15          ground. I'm going to -- I guess. I'm granting --  
16          I denying Motion 1 and I'm granting Motion 2.

STATE OF SOUTH CAROLINA  
COUNTY OF GREENWOOD

EIGHTH JUDICIAL CIRCUIT  
IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA, )  
PLAINTIFF, )  
)  
)  
-VS- )  
)  
MARIA TODD MARTIN, )  
DEFENDANT. )  
\_\_\_\_\_ )

CASE NO.: 2014-CP-24-00981

TRANSCRIPT OF RECORD

SEPTEMBER 2, 2015  
GREENWOOD, SOUTH CAROLINA

BEFORE:

THE HONORABLE DONALD B. HOCKER, JUDGE

APPEARANCES:

ATTORNEY FOR PLAINTIFF:  
DEPUTY SOLICITOR MICAH BLACK

ATTORNEY FOR DEFENDANT:

BILLY GARRETT, ESQUIRE  
CARSON HENDERSON, ESQUIRE

TARA T. SCOTT, CVR  
CIRCUIT COURT REPORTER

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1 THE COURT: This is 2014-981, Eighth Circuit Solicitor's  
2 Office vs. Marie Martin. Solicitor Micah Black is present  
3 representing the State and Billy Garrett and Carson  
4 Henderson are here on behalf of Marie Martin. The Appellate  
5 is who?

6 MR. CARSON: The State, Your Honor.

7 THE COURT: Oh, okay. The State is the Appellate.  
8 Okay.

9 MR. CARSON: Your Honor, before we get started, may I  
10 hand up a document that I've handed to the Solicitor?

11 THE COURT: Sure.

12 MR. CARSON: I'm not sure that this has made its way  
13 into the Common Pleas file, but this is the relevant  
14 transcript from the jury trial on July 25 and 26, 2012. The  
15 Court has the transcript from the 2014 hearing, but that's  
16 the 2012 transcript, Your Honor. We just wanted to make it  
17 part of the file. I believe we've given that to the  
18 Solicitor before, but wanted to double check and do it  
19 again.

20 THE COURT: I've got a transcript in the file 2014, and  
21 you say this is a 2012 transcript?

22 MR. CARSON: Correct, Your Honor. This case was tried  
23 before a jury downstairs in 2012, hung jury. Three for  
24 acquittal, three for guilty. It was reconvened in May 2014  
25 and that is what is leading to the State's appeal today,

1 Your Honor.

2 THE COURT: All right. Solicitor Black, I'll be glad to  
3 hear from you.

4 MR. BLACK: Yes, sir, Your Honor. Just as a way of  
5 background, I believe in the first trial -- Mr. Henderson  
6 can correct me if I'm wrong. Mr. Woolston tried the case  
7 for the State and I believe that Judge Martin also presided  
8 over that case as well.

9 MR. HENDERSON: That is correct, Your Honor.

10 MR. BLACK: And in that case, Your Honor, Judge Martin  
11 ruled that the State basically the Defense made a motion in  
12 limine to redact any field sobriety test that were made at  
13 the scene of that test, to redact any mention of those, to  
14 redact them from the record in general, period. I think Mr.  
15 Woolston went ahead and tried the case and I think it was  
16 tried to a mistrial of three to three with a hung jury.  
17 Like Mr. Henderson stated, the State tried the case again  
18 last year, I think it was May or June.

19 MR. HENDERSON: I think May of 2014, Your Honor.

20 MR. BLACK: I think it was May that the State retried  
21 the case.

22 THE COURT: Well, it's got, "Transcript of pretrial  
23 motion July 16, 2014."

24 MR. HENDERSON: That would be the correct date.

25 MR. BLACK: So it's July, Your Honor. So the case came

1 up to be retried. I stepped in and I tried the case. Judge  
2 Martin was the presiding judge. He made the same ruling  
3 that the State could not use - we couldn't mention any part  
4 of the field sobriety test at the scene. Basically, the  
5 Defendant, she was arrested for DUI. The Trooper offered  
6 her a set of field sobriety tests at the scene and she  
7 refused to take any field sobriety test. Judge Martin, in  
8 his ruling -- the State made several rulings. Judge Martin  
9 basically ruled --

10 THE COURT: Would his ruling be contained in an order  
11 dated July 30, 2014? Would that be the appealed order?

12 MR. HENDERSON: That's correct.

13 MR. BLACK: Mr. Henderson drafted that order. It was  
14 signed by Judge Martin. Of course, the State had a chance  
15 to look over the order that was signed. I think, basically,  
16 his ruling is contained in paragraph number 7 on page 4 if  
17 I'm not mistaken. Basically, the Judge said that the  
18 statute specifically outlines - the DUI statute specifically  
19 outlines that the breath test - if an individual refused to  
20 take the breath test the statute expressly says that that  
21 can be used against the Defendant. However, the Defense's  
22 argument at trial, and the Judge kind of went along with  
23 that, is that the statute doesn't make any mention of that  
24 in the DUI statute as far as the field sobriety test is  
25 concerned.

1 I do have the statute in front of me, Your Honor. I  
2 think the statute --

3 MR. HENDERSON: Actually, Your Honor, the appropriate  
4 statutes are actually cited in Judge Martin's order.

5 MR. BLACK: And that statute, Your Honor, is 56-5-2953  
6 under section A(1). Your Honor, the State's position is  
7 that the statute does say that the field sobriety test  
8 should be admitted and should be allowed to go to the jury.  
9 Under that statute, it says, "A person who violates  
10 subsection 56-5-2930", which is basically the DUI statute,  
11 "must have his conduct at the incident site and the breath  
12 site video recorded. The video recording at the incident  
13 site", which is out on the scene, "must not begin later than  
14 the activation of the officer's blue lights, include any  
15 field sobriety test administered." It talks about Miranda  
16 after that.

17 Your Honor, the State's position is that a refusal of  
18 any field sobriety test should be administered. The statute  
19 requires that. And so the State's argument is that it  
20 should be allowed to go to the jury. I made several  
21 arguments to Judge Martin down in Magistrate's Court, Your  
22 Honor, but basically his ruling was that based on statutory  
23 construction the expression of one is the exclusion of the  
24 other. Your Honor, it's the State's position that the  
25 administration of the field sobriety test talked about in

1 56-5-2953 is clearly enumerated in the statute. In general,  
2 Your Honor, in this particular case the Defendant refused to  
3 take the field sobriety test and she refused to blow into  
4 the DataMaster. I think the officer mentioned that at the  
5 scene he smelled some alcohol and I think he mentioned that  
6 the lady had bloodshot eyes. But we think -- the State  
7 feels that not being able to talk about the refusal of the  
8 field sobriety test severely inhibited our case.

9 Basically, it sent the State into a fight with one hand  
10 tied behind our back. Not being able to talk about anything  
11 that happened at the scene as far as offering a field  
12 sobriety test to the Defendant. It kind of goes toward the  
13 res gestae, Your Honor, getting the full context of what's  
14 going on out there at the scene. That's the argument that I  
15 made to the Court down in Magistrate's Court, but the Judge  
16 ruled in the Defense's favor and excluded that. The State  
17 immediately appealed up to the Circuit Court.

18 THE COURT: So you didn't go ahead and try the case?

19 MR. BLACK: Did not. No, sir, Your Honor.

20 THE COURT: I'm just looking at 2953 for just a moment.  
21 All right, Mr. Henderson? I'll be glad to hear from you.

22 MR. HENDERSON: Yes, sir, Your Honor. When this case  
23 was tried the first time, or I guess the only time that it's  
24 been tried to a jury verdict, which was a mistrial, the  
25 State did not have this evidence. In fact, Judge Martin had

1 suppressed my client's refusal to take the field sobriety  
2 test. During that first trial the State put up evidence of  
3 bad driving, that the officer smelled alcohol, that my  
4 client admitted drinking alcohol, and that she refused to  
5 take the DataMaster test. So even without that evidence,  
6 the State went forward and actually the State convinced  
7 three people beyond all and any reasonable doubt that our  
8 client was guilty of driving under the influence even  
9 without this information being presented to the jury.

10 So when this case was called for trial a second time,  
11 Your Honor, in July of last year, obviously the Solicitor  
12 knew what our argument was going to be. The Judge knew what  
13 our argument was going to be about the field sobriety test  
14 because they had just pulled out the old file and there it  
15 was. We updated our motion and then had a lengthy argument  
16 about it, Your Honor, which I think is really incorporated  
17 into Judge Martin's order.

18 If you look at Judge Martin's order, he was of the  
19 opinion that his ruling last year did not significantly  
20 impair the State's ability to go forward with their case.  
21 His prime reasoning was, hey, you didn't have this evidence  
22 two years ago and you went forward without it and convinced  
23 three of the jurors that she was guilty beyond all and any  
24 reasonable doubt. But, of course, the State has a right to  
25 appeal it and I think that was what Judge Martin said I

1 can't stop you from appealing, I just don't think it  
2 significantly impairs your case. Your Honor, the Court's  
3 order I think *State v. Belviso*, B-e-l-v-I-s-o, is kind of a  
4 central case on what significantly impairs the State's  
5 ability to prosecute the case. So, Your Honor, first of all  
6 just from a procedural standpoint, I'm not sure that the  
7 State's ability to prosecute the case has been significantly  
8 impacted.

9 THE COURT: But is that a factor to determine whether or  
10 not evidence is admissible or not? I've never heard that  
11 argument that, "Well, I'm going to keep it out because it's  
12 really not going to hurt you by keeping it out." I've just  
13 never heard that argument. And it may be a good argument.  
14 I've just never heard it before.

15 MR. HENDERSON: What? Us asking to keep the evidence --

16 THE COURT: Well, a factor in determining whether or not  
17 evidence is admissible or not, "Well, if I keep it out it's  
18 really not going to hurt you too bad."

19 MR. HENDERSON: Well, in fact, we wanted to keep it out.

20 THE COURT: No, the argument was that the Magistrate  
21 told the State that, "It really doesn't hurt you if I rule  
22 that it's inadmissible."

23 MR. HENDERSON: From that standpoint, right, because  
24 there was plenty of other evidence that would be presented  
25 to a second trial jury that had been presented to a first

1 trial jury that the jury could believe or disbelieve in  
2 determining whether or not to convict. I just wanted to  
3 raise that to the Court's attention because I'm just not  
4 convinced that the State's case was significantly impacted.  
5 I think that's your first threshold, Your Honor. If you  
6 believe that it was significantly impacted then again, going  
7 to the second leg of the argument, we don't believe that the  
8 Magistrate erred at all in making this determination.

9 The legislature has set forth what can be used against  
10 you, i.e. A refusal to take the breath test. The  
11 legislature has also said that you can't be arrested for  
12 refusing to take field sobriety tests. Meaning, it's not an  
13 unlawful - disobeying police command. And again, that's set  
14 forth in the order as well. And also, Your Honor, the  
15 legislature has set forth a time and instances when actually  
16 an officer can make you take a field sobriety test. If you  
17 are involved in an incident involving somebody's death the  
18 legislature has actually said, yes, the arresting officer or  
19 investigating officer can make you take a field sobriety  
20 test.

21 So Judge Martin, I think, made the appropriate decision  
22 when he said that the legislature has gone ahead and said  
23 what can be used against you. And by them saying what can't  
24 be used against you, it ought to be redacted. Again, as the  
25 Judge said, no person is ever compelled or has to give any

1 evidence against themselves in any circumstance.

2 Your Honor, a case that came down here just this past  
3 month from our Supreme Court is *State vs. Cody Roy Gordon*.  
4 This Gordon case is getting a lot of mention. It was the  
5 case about the horizontal gaze nystagmus test. Justice  
6 Beaty, not really relevant to the central holding in the  
7 case, was talking about instances where a Defendant actually  
8 performs field sobriety tests. And it's on video. At  
9 certain times that can be redacted for a variety of reasons.

10 Your Honor, taking that to the next step if our Supreme  
11 Court is saying that at times when tests are taken they can  
12 be redacted surely a person's refusal to even participate in  
13 any of those tests ought to be able to be redacted. And,  
14 again, it goes back to the point the legislature hasn't said  
15 this can be used against you and we believe that all these  
16 criminal laws, penal laws, need to be strictly construed  
17 against the State and that our client is entitled to the  
18 benefit of the doubt about any ambiguity about what these  
19 statutes may or may not mean.

20 We would ask if you get to the second leg, whether or  
21 not the Magistrate erred, we're asking you to uphold the  
22 Magistrate, that you're never entitled -- that you never  
23 have to give any evidence against yourself.

24 THE COURT: Thank you very much. Solicitor, anything in  
25 response?

1           MR. BLACK: Your Honor, the State feels that the statute  
2 clearly lays out the fact that it says any field sobriety  
3 test administered, whether they take it or not, the statute  
4 says it's got to be on video. So when the individual in  
5 this particular case, the Defendant, said I'm not going to  
6 take the test, the State feels that the Defendant at that  
7 point she obviously said that she didn't want to take the  
8 test we feel that the statute requires that to be shown on  
9 video. Essentially, what the Magistrate did to the State  
10 was allow us to go into the fight with one hand tied behind  
11 our back.

12           In any of these particular types of cases, Your Honor,  
13 when a person refuses the field sobriety test and refuses to  
14 take the DataMaster, and the officer sees that the  
15 individual has bloodshot eyes, they smell of alcohol, and  
16 it's 2:00 in the morning, the Defense can argue, "My client  
17 was coming back from a Braves game that night. They spilled  
18 beer on them, and they were tired because they worked all  
19 day, drove to Atlanta, and then were coming back to  
20 Greenwood." That's the reason why they had bloodshot eyes.  
21 That could be the Defense's argument.

22           The refusal of the field sobriety test goes towards  
23 kind of the totality of the circumstances. By basically  
24 limiting us from talking about this at trial we basically  
25 went into the fight with one hand tied behind our back and

1 that was the reason for the appeal.

2 MR. HENDERSON: Your Honor, just to clarify, no tests  
3 were administered here. I would agree with the Solicitor's  
4 argument if, in fact, tests had been administered. None  
5 were ever administered. So I don't think the videotaping  
6 section of what's got to be on video is even applicable here  
7 because no tests were administered.

8 THE COURT: Let me ask you this, Mr. Henderson. Let's  
9 say that the first field sobriety test was offered and your  
10 client did that one, but then offers a second one and they  
11 refuse. Are you --

12 MR. HENDERSON: I think that should be redacted as well,  
13 Your Honor.

14 THE COURT: The one that's refused.

15 MR. HENDERSON: Because, again, you're never required to  
16 give the government evidence to potentially incriminate  
17 yourself, or for any reason for that matter. Ms. Martin  
18 exercised her right not to do anything.

19 THE COURT: Well, you have an interesting issue here. I  
20 need to take it under advisement, give it some thought, and  
21 do a little studying on it. I appreciate it very much.

22 MR. BLACK: Can I add just one thing before you close  
23 the matter?

24 THE COURT: Sure.

25 MR. BLACK: According to Mr. Henderson's and Mr.

1 Garrett's argument, if the State -- if everything was to be  
2 written out by the statute of what the State can and cannot  
3 put into a jury trial, the statute would fill the annals of  
4 the Greenwood County Courthouse. It would just be  
5 impossible. I think that when the laws were written and we  
6 elect a Judge to sit on a bench there is an element of  
7 common sense that the legislature just kind of put on the  
8 judges and put on the lawyers involved. It doesn't make any  
9 sense at all for the State to be held in this manner. Your  
10 Honor, it just doesn't make any sense. There has to be some  
11 kind of context of why an officer is arresting someone for a  
12 DUI when they refuse. We just feel that should be provided  
13 to a jury.

14 THE COURT: Should I look at the issue of legislative  
15 intent of why the statute says refusal of Breathalyzer, that  
16 comes in, but because refusal of field sobriety is not in --  
17 should one of the ways of looking at this case be -- should  
18 I try to determine what the legislative intent is here for  
19 being silent on the refusal of field sobriety tests?

20 MR. HENDERSON: I think you should, Your Honor, because  
21 I think a good part of the legislative intent is the statute  
22 that was passed in December of '12 that the arresting  
23 officer can make you do field sobriety tests in an incident  
24 involving death. It says nothing about drinking. It says  
25 nothing about drugs. If you are involved in an incident,

1 notice I didn't say accident, the statute says "incident".  
2 If you are involved in an incident involving death they can  
3 actually make you do field sobriety test.

4 THE COURT: How do you make someone do field sobriety  
5 test if you don't want to?

6 MR. BLACK: Exactly my point.

7 MR. HENDERSON: I agree. That's the next argument. I'm  
8 just letting you know what -- if we're looking at  
9 legislative intent, that's at least what the House and the  
10 Senate intended in 2012 that we're going to let officers, in  
11 certain circumstances, make you do field sobriety test.  
12 Then that can lead to a whole host of issues, I agree, but  
13 at least we're looking at intent, Your Honor. I think  
14 that's very definite intent.

15 THE COURT: What section? What statute number is that,  
16 Mr. Henderson?

17 MR. HENDERSON: Your Honor, it is in Judge Martin's  
18 order, but it is actually 56-5-2948.

19 THE COURT: Thank you.

20 MR. BLACK: Your Honor, the State feels that if you look  
21 at 56-5-2953 it clearly states that conduct at the scene --  
22 what must be recorded is any field sobriety test  
23 administered. The State feels that whether they take it or  
24 not the conduct should be shown for the jury.

25 THE COURT: Thank you, guys. I appreciate it very much.

1 I will take this under advisement.

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I, the undersigned, Tara T. Scott, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenwood County, South Carolina, on the 2nd day of September, 2015.

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

*Tara T. Scott*

---

Tara T. Scott, CVR  
Circuit Court Reporter  
Greenwood, South Carolina  
April 19, 2016



1 State of South Carolina )  
 2 County of Greenwood )  
 3 State of South Carolina, )  
 4 Plaintiff, )  
 5 vs. )  
 6 Maria Todd Martin, )  
 7 Defendant. )

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In the Court  
 Of Common Pleas  
 C/A No.: 2014-CP-24-00981

Transcript of Record

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January 14, 2016

Greenwood, South Carolina

BEFORE:

The Honorable Donald B. Hocker, Judge

APPEARANCES:

Micah Black, Assistant State Solicitor  
 Attorney for the State

Carson M. Henderson, Esquire  
 Attorney for the Defendant

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Steven E. LeBlanc, R.P.R., Circuit Court Reporter  
P.O. Box 184, Lexington, South Carolina 29071

1 Whereupon, the following proceedings were had,

2 THE COURT: All right. We are on the Marie Martin  
3 case. This is the State's motion to reconsider.  
4 Solicitor, I'll be glad to hear from you.

5 MR. BLACK: Thank you, Your Honor. Would you like  
6 me to kind of go over a background?

7 THE COURT: Yeah. Give me a little background on  
8 this and I do have some recollection of this as well but  
9 a little background would be good.

10 MR. BLACK: Your Honor, this case was originally  
11 tried July the 25th and 26th, 2012 by Tim Woosten of our  
12 office and Mr. Garrett and Mr. Henderson. There was a  
13 hung jury.

14 I tried the case -- Well, I attempted to try the  
15 case in July of 2014. The judge, Judge Martin,  
16 magistrate downstairs, ruled against me as far as the  
17 standardized field sobriety test being introduced.  
18 At that point I filed an interlocutory appeal and you  
19 heard the first appeal a couple months ago.

20 Your Honor, as far as this case is concerned, I  
21 filed a motion to reconsider. I'm going to go through  
22 several of the things in the order that I believe  
23 Mr. Henderson drafted and you ultimately signed. Do you  
24 have that order in front of you, Your Honor?

25 THE COURT: My order that Mr. Henderson drafted?

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1 MR. BLACK: Yes, sir, Your Honor.

2 THE COURT: I did. Let me find it.

3 MR. BLACK: The grounds that I set forth, I'm going  
4 to start kind of at the end, Your Honor, and kind of work  
5 my way back up to my primary argument. In section 15 and  
6 section 16 of the order it's talking about standardized  
7 field sobriety test not being relevant. I think the  
8 State disagrees with that wholeheartedly. In DUI cases  
9 where an individual refuses to perform field sobriety  
10 tests and then they ultimately refuse to perform the  
11 breath test, I think that evidence is highly relevant for  
12 a jury to be able to kind of decipher what's going on in  
13 the particular case so I think the State has an issue  
14 with that being called not relevant and so I just wanted  
15 to put that on the record.

16 THE COURT: The whole issue is there was video of  
17 the defendant refusing the field sobriety test and the  
18 suppression motion was granted. That's basically what I  
19 upheld, is that correct, in a nutshell?

20 MR. HENDERSON: That's correct, Your Honor.

21 THE COURT: All right.

22 MR. BLACK: Your Honor, just to give a background of  
23 this particular case, the defendant was traveling on 25  
24 heading towards uptown Greenwood and was pulled over for  
25 swerving left of center right about where the Dixie is

1 located here in Greenwood. The officer stopped the  
2 defendant in the case and began questioning her. At that  
3 particular point after some statements that she made that  
4 are recorded on video he offered her the field sobriety  
5 test.

6 The magistrate downstairs ruled that none of the  
7 statements that the defendant made freely and voluntarily  
8 could come in as well as the field sobriety test, the  
9 refusal of the field sobriety test. The State's position  
10 in this particular case is those statements should have  
11 definitely come in and the statements that she said, and  
12 I can quote this, I believe it's in section 13 of your  
13 order which I believe you upheld the State not be allowed  
14 to introduce, the defendant exercised her right to remain  
15 silent. I believe that's what the order states.

16 THE COURT: What page are you on?

17 MR. BLACK: I believe it's section 13 of your order,  
18 Your Honor.

19 THE COURT: Okay. All right. Page 5.

20 MR. BLACK: That's right. Mine is a little bit  
21 different, Your Honor.

22 THE COURT: Your copy is different? I hope there's  
23 not two orders floating around.

24 MR. BLACK: I was referring to my motion. I  
25 apologize.

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1 THE COURT: Okay. That's fine, too.

2 MR. BLACK: This would be section 2 of your order,  
3 Judge, on page 2.

4 THE COURT: Okay.

5 MR. BLACK: Trooper Sinclair asked the respondent to  
6 perform the field sobriety tests. The defendant stated  
7 quote, "I can't do that." She said that twice. Then he  
8 asked, "Are you willing to take the test?" And she said  
9 "no." Trooper Sinclair then asked, "You're not going to  
10 take any tests?" Again the defendant says "no."  
11 Trooper Sinclair asks, "No field sobriety test?" Again  
12 the defendant says, "No. If I was straight, I couldn't  
13 have passed."

14 Your Honor, I think that evidence is highly  
15 relevant. I think if you look at Supreme Court cases,  
16 McCartney, I think it's a 1984 U.S. Supreme Court case  
17 talks about when an individual is first pulled over for  
18 some type of traffic violation, the person is not in  
19 custody and Miranda is not invoked in that particular  
20 situation. In traffic offenses like these the officers  
21 are allowed to question individuals briefly and I think  
22 in this particular case once the officer noticed the  
23 smell of alcohol once he began kind of talking to the  
24 defendant he knew something was off and Miranda is not  
25 invoked in this particular case because she's not in

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1 custody. So all of those statements should be allowed to  
2 come in for the State. This is setting aside the field  
3 sobriety test. These are statements before she is even  
4 arrested and the magistrate downstairs ruled that these  
5 statements don't come in. I believe your order also  
6 stated that these statements cannot come in.

7 So it's the State's position before we even get to  
8 the standardized field sobriety tests that these  
9 statements made by the defendant should come in because  
10 they were freely and voluntarily made and they weren't  
11 coerced at all. She was on the road side and she was not  
12 in custody and she made these statements to the officer.

13 THE COURT: All right. So what you are suggesting  
14 is is that we really ought to ignore the basis of  
15 Mr. Henderson's argument that because the statute doesn't  
16 address that, therefore, it shouldn't come in, that's not  
17 relevant. It should come in just from a purely voluntary  
18 statement being made absent not being in custody and  
19 absent the Miranda issue and all that. Is that basically  
20 what you are saying?

21 MR. BLACK: Not exactly, Your Honor.

22 THE COURT: Okay. I probably poorly stated.

23 MR. BLACK: My argument, Your Honor, is that the  
24 statements should come in absolutely. I also agree that  
25 the standardized field sobriety test should come in. I

1 haven't quite gotten to that argument yet. Now I can  
2 give you the argument for that if you --

3 THE COURT: Let me ask it this way then. Maybe do  
4 it this way. Let's say that the trooper said, Ms.  
5 Martin, will you perform field sobriety tests? She says  
6 no and that's it. End of discussion. No further  
7 statements made. No further questions made. Would that  
8 have been allowed to come in under Mr. Henderson's  
9 theory?

10 MR. BLACK: According to the magistrate downstairs  
11 that was not allowed to come in either and I think that  
12 Mr. Henderson was trying to allow that none of the field  
13 sobriety - none - no talking about the field sobriety  
14 test, the tests themselves were all thrown out  
15 downstairs.

16 THE COURT: So you would not agree that -- I mean,  
17 that could still come in?

18 MR. BLACK: Yes, sir, Your Honor, absolutely. I  
19 think the State has every right to bring that in because  
20 it is highly relevant to a DUI case and relevant evidence  
21 is allowed to come in under the rules of evidence, South  
22 Carolina and the Federal Rules.

23 So, Your Honor, that addresses the statements that  
24 the defendant made before she even, the tests even come  
25 into question. Before the tests were dismissed. The

1 sheet that I handed up to you, Judge, that has the DUI  
2 statute 56-5-2953, I have given Mr. Henderson a copy as  
3 well, under section A, there is a 1, 2 and 3, and under  
4 section 3, I think it was overlooked by Judge Martin, and  
5 I think we also overlooked it the first time we addressed  
6 this case.

7 Section 3 states that video recording at the  
8 incident site and of the breathe test site are admissible  
9 pursuant to the South Carolina rules of evidence in  
10 criminal, administrative or civil proceedings by any part  
11 to the action.

12 So the statute clearly states that these two videos  
13 are admissible if they comply with the rules of evidence  
14 and the primary reason that the magistrate ruled against  
15 the State keeping the video out was that under the rules  
16 of statutory, the canons of statutory construction,  
17 *expressio unius est exclusio alterius* or *inclusio unius*  
18 *est exclusio alterius* which means to express or include  
19 one thing implies the exclusion of another or the  
20 alternative which was the defense's primary argument and  
21 I think if you look at section 3 there has to be some  
22 kind of evidentiary reason why this particular test is  
23 taken out and I think that's clearly enumerated in  
24 section 3 of 56-5-2953 under section A.

25 THE COURT: Okay.

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1 MR. BLACK: There has to be some type of, some rule  
2 of evidence, Your Honor.

3 THE COURT: Okay.

4 MR. BLACK: Thank you.

5 THE COURT: Thank you very much, Solicitor.  
6 Mr. Henderson.

7 MR. HENDERSON: Very briefly, Your Honor. The fact  
8 that Ms. Martin or Ms. Todd said no, I'm not going to  
9 take your test, I mean, that has nothing to do with  
10 Miranda, being arrested, being in custody. She like any  
11 other citizen can always say no, I'm not going to  
12 participate in your test. I'm not going to talk to you,  
13 this, that or the other. She always has the right to say  
14 no. She said no. She exercised -- And again, I don't  
15 think we get to the constitutional issue yet. She just  
16 said no which she has an absolute right to do. She never  
17 - there is no warnings out here about that there would be  
18 any repercussions for not taking or choosing to perform  
19 these field sobriety tests.

20 I think His Honor's order lays it out very clearly.  
21 The legislature has said that you're put on notice. If  
22 you don't blow into this machine, we're gonna punish you.  
23 We're gonna take your license. They haven't said that in  
24 the full body context. In fact, they have said that you  
25 can't be arrested for disobeying a law enforcement order

1 for not taking them and they've also given specific  
2 instances when an officer can try to actually make you  
3 take the field sobriety test mainly when someone is in a  
4 wreck or someone's been killed.

5 So yes, she's always got a right to just not  
6 cooperate, to say no thank you. And again, we are not  
7 saying that what she said wasn't freely and voluntarily  
8 given. It was. She freely and voluntarily said no. And  
9 again, the fact that she said no is not relevant to any  
10 fact at issue here. It doesn't go to help prove any  
11 issue or to disprove any issue. In fact, her saying no,  
12 if that goes before the jury, then the jury is going to  
13 be speculating about how she may have done on the field  
14 sobriety test. So even as Your Honor said it might be  
15 relevant, it still is more prejudicial than it would be  
16 probative. It just doesn't go to show anything.

17 THE COURT: Would her statement that, no, if I was  
18 straight, I couldn't pass it, wouldn't that be in some  
19 fashion a confession of being under the influence driving  
20 this motor vehicle if she said I couldn't even pass that  
21 if I was straight meaning I'm not straight?

22 MR. HENDERSON: Whatever, whatever her explanation  
23 is for saying no, we always go back to her saying no. So  
24 I think the no keeps it out regardless of what  
25 explanation she gives for the no. It could have been I

1 have got bad hips. I have got a bad back. My lawyer  
2 told me not to do these tests. Whatever her rationale  
3 would be it ties back into the ultimate no, I'm not going  
4 to participate in your field sobriety tests.

5 So there is no way to exclude the field sobriety  
6 test refusal and then come in here and let this straight  
7 language come in because the straight language would be  
8 commenting back on her not taking the field sobriety  
9 test. The two are intertwined. There is no way to  
10 unring the bell and separate them, Your Honor. At least  
11 on this particular set of facts they are not.

12 And as it relates to the Solicitor's argument about  
13 the videotaping statute, I agree. The videotapes are  
14 subject to the rules of evidence. Like any other  
15 document that comes into this courtroom, they are subject  
16 to the rules of evidence. And here it wasn't relevant  
17 that she said no and she can always exercise just her  
18 plain fundamental right of saying no. Stuff is excluded  
19 from DUI videotapes all the time. Talking about the  
20 person's prior DUI would be redacted. The person has got  
21 an arrest record would be redacted. There's all sorts of  
22 issues on these videotapes that get redacted all the  
23 time. I think every DUI we try something is redacted.

24 Yes, in theory overall the videos are admissible  
25 under the rules of evidence but they're also subject to

1 the rules of evidence and any constitutional claims that  
2 might be out here or quasi constitutional claims that I'm  
3 not going to participate in your test. The legislature  
4 just hasn't made any exceptions for defendants who say no  
5 to field sobriety tests. They have made exceptions for  
6 defendants who say no to breath tests. That's going to  
7 come into evidence against you in trial. Actually the  
8 U.S. Supreme Court said that's okay. I think our implied  
9 consent laws are somewhat modeled after what the U.S.  
10 Supreme Court says is admissible. So, Your Honor, I  
11 think it's a well thought out order and I would ask that  
12 the Court uphold it in its entirety.

13 THE COURT: Thank very much. Solicitor.

14 MR. BLACK: Yes, sir, Your Honor. Just a brief  
15 response. What the State is asking the Court to do is to  
16 remand the case back down to the magistrate court. In  
17 this particular case the magistrate did not make any  
18 findings on the rules of evidence. The magistrate  
19 basically relied on this canon of statutory construction  
20 to make his findings. There was no finding on the rules  
21 of evidence and under section 3 there has to be a finding  
22 under the rules of evidence for a portion of the video,  
23 the entire video to be thrown out or to be disregarded  
24 downstairs and not shown to the jury.

25 What the State is asking for is the Court to remand

Steven E. LeBlanc, R.P.R., Circuit Court Reporter  
P.O. Box 184, Lexington, South Carolina 29071

1 the case back down to the magistrate court and if the  
2 judge down there would like to make a ruling based on the  
3 rules of evidence, then the State would be more than  
4 willing to entertain and argue those arguments. But in  
5 this particular case there were no rules of evidence that  
6 were cited that the magistrate ultimately that he relied  
7 on. It was the old statutory language, how you derive  
8 statutes and how you interpret them so the State is just  
9 asking the court to follow the statute under section 3.

10 THE COURT: All right. Thank very much.

11 MR. HENDERSON: I think that's the first time the  
12 State has raised that argument, Your Honor. I'm not sure  
13 if this would be the appropriate time on a motion to  
14 reconsider to raise that particular argument because if  
15 you look at their initial notice of intent to appeal and  
16 His Honor's order, that issue has never been raised by  
17 the State until we are here at the State's motion to  
18 alter or omit.

19 THE COURT: Thank you very much. I will take this  
20 under advisement and I appreciate y'all's hard work on  
21 this one, too. This hearing is concluded.

22 WHEREUPON THE HEARING WAS CONCLUDED.  
23  
24  
25

## 1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON )

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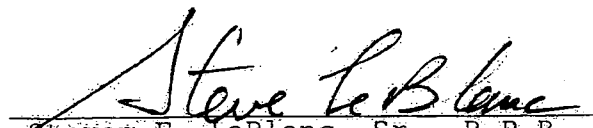
25

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R.,  
and Official Circuit Court Reporter for the Eleventh Judicial  
Circuit in and for the State of South Carolina, do hereby  
certify that I reported the proceedings in the before  
captioned case in the Court of Common Pleas in and for the  
State of South Carolina on the 14th day of January, 2016.

I FURTHER CERTIFY that the forgoing 14 pages  
constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel  
to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at  
Lexington County, this 5th day of May, 2016.

  
Steven E. LeBlanc, Sr., R.P.R.  
Eleventh Circuit Court Reporter  
State of South Carolina.

Steven E. LeBlanc, R.P.R., Circuit Court Reporter  
P.O. Box 184, Lexington, South Carolina 29071

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENWOOD )  
 )  
 STATE OF SOUTH CAROLINA )  
 )  
 v. )  
 )  
 MARIA TODD MARTIN, )  
 )  
 Defendant. )

IN THE MAGISTRATE'S COURT  
 EIGHTH JUDICIAL CIRCUIT  
 2014-CP-24 00981

**ORDER**

Ticket #E857866 (DUI 1<sup>st</sup>)

FILED CARROLL PLEAS  
 8TH JUDICIAL CIRCUIT  
 GREENWOOD, S.C.  
 2014 JUL 30 PM 4:35

**TRIAL JUDGE:** HON. W. RUTLEDGE MARTIN  
**COURT REPORTER:** TAPE RECORDED  
**STATE'S ATTORNEY:** MICAH BLACK  
**DEFENDANT'S ATTORNEYS:** BILLY J. GARRETT JR. and  
 CARSON M. HENDERSON  
**DATE OF TRIAL:** WEDNESDAY, JULY 16, 2014

This matter came before the Court for a scheduled jury trial on Wednesday, July 16, 2014, at 10:00 a.m. The Defendant was present and was represented by Billy J. Garrett Jr. and Carson M. Henderson. The State was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office.

Prior to the swearing of the jury, the Defendant renewed her motion for the Court to suppress and redact all evidence relating to the Defendant's refusal to perform field sobriety tests as requested by State Trooper Jordan N. Sinclair. By way of background, this Judge presided over a jury trial in this matter on July 25-26, 2012. After lengthy deliberations which including the reading of an Allen charge, the jury deadlocked three (3) – three (3), and the Court declared a mistrial. In the jury trial, the Court suppressed and redacted all evidence relating to the Defendant's refusal to perform field sobriety tests. In making its decision, the Court relied on the following documents: (1) Trooper Sinclair's incident site video recording of the Defendant's arrest on June 3, 2011, and (2) the

Defendant's written Motion to Suppress dated July 23, 2012.

After the Defendant renewed her motion on Wednesday, July 16, 2014, the Court reviewed the following documents: (1) a rough transcript of the motion hearing on July 25, 2012, (2) the Defendant's written Motion to Suppress dated July 16, 2014, and (3) the State's brief entitled "Admissibility of Field Sobriety Test." The Court also heard arguments from all attorneys. Furthermore, the Defendant represented to the Court that she will provide a "cleaned up" transcript from the motion hearing on July 25, 2012, as soon as the transcript is available.

Based upon the above-referenced documents and arguments of counsel, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. Trooper Sinclair's incident site video recording clearly demonstrates that the Defendant refused to perform field sobriety tests. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Defendant to perform field sobriety tests. The Defendant says, "I can't do that" twice. Trooper Sinclair then asks, "Are you willing to take the tests?" The Defendant says, "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass it."

2. On June 3, 2011, Code Section 56-5-2953(A)(1)(b) provided as follows: "A refusal to take a field sobriety test does not constitute disobeying a police command."

3. On June 3, 2011, Code Section 56-5-2950(A) provided in relevant part: "A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been

committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.”

4. On June 3, 2011, Code Section 56-5-2950(B) provided in relevant part: “No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court.”

5. After the Defendant’s jury trial in 2012 but prior to the July 16, 2014, motion hearing, the Legislature enacted Code Section 56-5-2948, which became effective on December 18, 2012, and which provides as follows: “When a person is suspected of causing a motor vehicle incident resulting in the death of another person by the investigating law enforcement officer on the scene of the incident, the driver must submit to field sobriety tests if he is physically able to do so.”

6. Upon reading the above-referenced statutes, the Legislature has clearly intended to allow the State to introduce evidence in a DUI trial of a defendant’s refusal to submit to a breath test. However, the Legislature has not expressly provided that a person arrested for DUI and who refused to perform field sobriety tests may or will have this refusal used against him by the State at trial. In fact, to the contrary, the Legislature has specifically provided that a DUI suspect who refuses to perform field sobriety tests cannot be arrested for failing to obey a police command; and the Legislature has furthermore expressly provided for when and under what circumstances the driver of a vehicle has to submit to field sobriety tests.

7. In reaching its decision to suppress the Defendant's refusal to perform field sobriety tests, this Court relies upon the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," which means "to express or include one thing implies the exclusion of another, or of the alternative." If the Legislature intended for a defendant's refusal to perform field sobriety tests to be used against the defendant during a standard DUI trial, the Legislature would have passed such a law.

8. Furthermore, when a statute is penal in nature, which the statutes governing DUI clearly are, such statutes must be construed strictly against the State and in favor of the defendant.

9. Furthermore, no defendant is ever required to voluntarily provide verbal or physical evidence to a police officer in order to help the police officer make a better case against the defendant. This fundamental right applies whether or not the defendant is under arrest and/or in custody, whether or not a police officer is required to read Miranda warnings to the defendant, and whether or not a police officer has actually read Miranda warnings to the defendant. No defendant ever has to voluntarily make the situation worse for himself, because no defendant has the burden to prove or disprove any matter. In this matter, the Defendant expressly exercised her right to remain silent prior to being arrested and prior to receiving Miranda warnings from Trooper Sinclair.

10. The Court believes that the walk and turn and one leg stand field sobriety tests may be testimonial in nature, because the person performing these tests is required to count out loud. However, this exact issue is not before the Court in this matter, because the Defendant refused to perform field sobriety tests.

11. The Court also incorporates into its ruling all other grounds discussed by the Court

during the motion hearing on July 25, 2012, and the motion hearing on July 16, 2014.

12. The State argued that Code Section 56-5-2953(A)(1)(a)(ii), which provides that the incident site video recording must "include any field sobriety tests administered," should be interpreted to mean that if a police officer asks a defendant to perform field sobriety tests on video and the defendant refuses on video, then the defendant's refusal on the video recording should be admissible as evidence to the jury as a free and voluntary oral statement based on the theory that the Defendant was not in custody at that time for purposes of Miranda. Berkemer v. McCarty, 104 S.Ct. 3138 (1984)(roadside questioning of a motorist detained pursuant to a traffic stop does not constitute "custodial interrogation" for purposes of Miranda). The Court disagrees with this argument. This portion of Code Section 56-5-2953 only applies when field sobriety tests are "administered." In the case at hand, the Defendant was offered field sobriety tests, but Trooper Sinclair never administered field sobriety tests to the Defendant.

13. The State informed the Court that it intends to appeal the Court's ruling because the State believes that the Court's ruling "significantly impairs" the State's ability to proceed with the prosecution of the DUI charge against the Defendant. See State v. Belviso, 600 S.E.2d 68 (S.C. Ct. App. 2004). Therefore, the Court hereby stays this proceeding until the appeal is heard by the Common Pleas. This Court has no authority to stop the State from appealing.

14. This Court does not believe that the State's ability to prosecute the Defendant for DUI without evidence of the Defendant's refusal to perform field sobriety tests will significantly impair the State's case. The State has previously prosecuted the Defendant without the benefit of this evidence and convinced three (3) jurors of the Defendant's guilt beyond any and all reasonable doubt

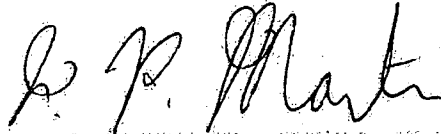
using admissible evidence, including but not limited to the Defendant's refusal to provide a breath sample.

**IT IS THEREFORE ORDERED** that all evidence of the Defendant's refusal to perform field sobriety tests is hereby suppressed and shall be redacted from the incident site video recording, and the State shall not be allowed to introduce any evidence to the jury about, or comment to the jury on, the Defendant's refusal to perform field sobriety tests.

**IT IS FURTHER ORDERED** that the Defendant's jury trial is hereby stayed pending resolution of the State's appeal by the Court of Common Pleas.

**IT IS FURTHER ORDERED** that the Defendant's jury trial shall resume once the State's appeal is decided with finality and the matter is remanded to this Court.

**IT IS SO ORDERED.**



---

HON. W. RUTLEDGE MARTIN  
Presiding Magistrate's Court Judge  
Greenwood County

Greenwood, South Carolina

July 30, 2014

STATE OF SOUTH CAROLINA )

COUNTY OF GREENWOOD )

David M. Stumbo, Solicitor, Eighth Judicial Circuit )  
on behalf of South Carolina Highway Patrol )

Plaintiff(s) )

vs. )

Marie Martin )

Defendant(s) )

(Please Print)  
Submitted By: Micah Black, Assistant Solicitor  
Address: PO Box 516, Greenwood, SC 29648

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 24- 00981

FILED COMMON PLEAS  
8TH JUDICIAL CIRCUIT  
GREENWOOD, S.C.

SC Bar #: 101119  
Telephone #: 864-942-8806  
Fax #: 864-942-8830

Other:  
E-mail: mblack@greenwoodsc.gov

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.  NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |   |  |   |  |  |  |
|---|--|---|--|--|--|
| <p><b>Contracts</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Constructions (100)</li> <li><input type="checkbox"/> Debt Collection (110)</li> <li><input type="checkbox"/> Employment (120)</li> <li><input type="checkbox"/> General (130)</li> <li><input type="checkbox"/> Breach of Contract (140)</li> <li><input type="checkbox"/> Other (199)</li> </ul>  | <p><b>Torts - Professional Malpractice</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Dental Malpractice (200)</li> <li><input type="checkbox"/> Legal Malpractice (210)</li> <li><input type="checkbox"/> Medical Malpractice (220)</li> <li>Previous Notice of Intent Case #<br/>20____-CP-_____</li> <li><input type="checkbox"/> Notice/ File Med Mal (230)</li> <li><input type="checkbox"/> Other (299)</li> </ul>  | <p><b>Torts - Personal Injury</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Assault/Slander/Label (300)</li> <li><input type="checkbox"/> Conversion (310)</li> <li><input type="checkbox"/> Motor Vehicle Accident (320)</li> <li><input type="checkbox"/> Premises Liability (330)</li> <li><input type="checkbox"/> Products Liability (340)</li> <li><input type="checkbox"/> Personal Injury (350)</li> <li><input type="checkbox"/> Wrongful Death (360)</li> <li><input type="checkbox"/> Other (399)</li> </ul> | <p><b>Real Property</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Claim &amp; Delivery (400)</li> <li><input type="checkbox"/> Condemnation (410)</li> <li><input type="checkbox"/> Foreclosure (420)</li> <li><input type="checkbox"/> Mechanic's Lien (430)</li> <li><input type="checkbox"/> Partition (440)</li> <li><input type="checkbox"/> Possession (450)</li> <li><input type="checkbox"/> Building Code Violation (460)</li> <li><input type="checkbox"/> Other (499)</li> </ul>  |  |  |
| <p><b>Inmate Petitions</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> PCR (500)</li> <li><input type="checkbox"/> Mandamus (520)</li> <li><input type="checkbox"/> Habeas Corpus (530)</li> <li><input type="checkbox"/> Other (599)</li> </ul>  | <p><b>Judgments/Settlements</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Death Settlement (700)</li> <li><input type="checkbox"/> Foreign Judgment (710)</li> <li><input type="checkbox"/> Magistrate's Judgment (720)</li> <li><input type="checkbox"/> Minor Settlement (730)</li> <li><input type="checkbox"/> Transcript Judgment (740)</li> <li><input type="checkbox"/> Lis Pendens (750)</li> <li><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)</li> <li><input type="checkbox"/> Other (799)</li> </ul> | <p><b>Administrative Law/Relief</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Reinstatement Driver's License (800)</li> <li><input type="checkbox"/> Judicial Review (810)</li> <li><input type="checkbox"/> Relief (820)</li> <li><input type="checkbox"/> Permanent Injunction (830)</li> <li><input type="checkbox"/> Forfeiture-Petition (840)</li> <li><input type="checkbox"/> Forfeiture-Consent Order (850)</li> <li><input type="checkbox"/> Other (899)</li> </ul>  | <p><b>Appeals</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Arbitration (900)</li> <li><input type="checkbox"/> Magistrate-Civil (910)</li> <li><input checked="" type="checkbox"/> Magistrate-Criminal (920)</li> <li><input type="checkbox"/> Municipal (930)</li> <li><input type="checkbox"/> Probate Court (940)</li> <li><input type="checkbox"/> SCDOT (950)</li> <li><input type="checkbox"/> Worker's Comp (960)</li> <li><input type="checkbox"/> Zoning Board (970)</li> <li><input type="checkbox"/> Public Service Commission (990)</li> <li><input type="checkbox"/> Employment Security Comm (991)</li> <li><input type="checkbox"/> Other (999)</li> </ul> |  |  |
| <p><b>Special/Complex /Other</b></p> <table border="0"> <tr> <td style="vertical-align: top;"> <ul style="list-style-type: none"> <li><input type="checkbox"/> Environmental (600)</li> <li><input type="checkbox"/> Automobile Arb. (610)</li> <li><input type="checkbox"/> Medical (620)</li> <li><input type="checkbox"/> Other (699)</li> </ul> </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> <li><input type="checkbox"/> Pharmaceuticals (630)</li> <li><input type="checkbox"/> Unfair Trade Practices (640)</li> <li><input type="checkbox"/> Out-of State Depositions (650)</li> <li><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)</li> <li><input type="checkbox"/> Sexual Predator (510)</li> </ul> </td> </tr> </table> |  |   |  | <ul style="list-style-type: none"> <li><input type="checkbox"/> Environmental (600)</li> <li><input type="checkbox"/> Automobile Arb. (610)</li> <li><input type="checkbox"/> Medical (620)</li> <li><input type="checkbox"/> Other (699)</li> </ul> | <ul style="list-style-type: none"> <li><input type="checkbox"/> Pharmaceuticals (630)</li> <li><input type="checkbox"/> Unfair Trade Practices (640)</li> <li><input type="checkbox"/> Out-of State Depositions (650)</li> <li><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)</li> <li><input type="checkbox"/> Sexual Predator (510)</li> </ul> |
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Submitting Party Signature:

*Micah Black*

Date: 7/30/14 - 2014

**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT

COUNTY OF GREENWOOD )

The State )  
(Appellant) )

NOTICE OF APPEAL

v. )

2014-CP-24 00981

Maria Martin, )  
(Respondant) )


Ticket#(s)  
E857866

FILED COMMON PLEAS  
8TH JUDICIAL CIRCUIT  
GREENWOOD, S.C.  
2014 JUL 30 PM 4:35

YOU WILL PLEASE TAKE NOTICE that the Appellant named above appeals from the July 16<sup>th</sup> ruling by the Honorable W. Rutledge Martin, Magistrate of the County of Greenwood, that were reduced to a signed written Order on July 30, 2014 that pertains to a ruling made during the pretrial phase of Respondent's case charging her with the offense of Driving under the Influence. Appellant respectfully submits the following ground for its appeal:

That the Court erred by granting the Defendant's Motion to Suppress made prior to the swearing of the jury, in that the Court ruled in its suppression ruling that all matters pertaining to the Trooper's offer of field sobriety testing to the Defendant as well as the Defendant's oral statements made voluntarily in response to that offer were in violation of her Constitutional right to remain silent and because the South Carolina Legislature has not expressly provided that a refusal to perform field sobriety testing can be used against a defendant in court in a Driving Under the Influence case.

WHEREFORE, the Appellant prays that the Circuit Court consider the matter raised herein and issue its order reversing the trial courts suppression of the test.

  
\_\_\_\_\_  
Micah Black  
Assistant Solicitor

This 30<sup>th</sup> Day of July, 2014  
Greenwood, South Carolina

COPY

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT

COUNTY OF GREENWOOD )

The State )  
(Appellant) )

**CERTIFICATE OF SERVICE**  
Ticket# 857866

v. )

Maria Martin, )  
(Respondant) )

The Undersigned of the Solicitor's Office, does hereby certify that on the 31<sup>th</sup> day of July 2014, he served the documents indicated below by hand delivering at the addresses referenced below:

1. Notice of Appeal
2. Certificate of Service
3. Copy of Judges Order

**SERVED:**

The Honorable W. Rutledge Martin  
Magistrate Judge of Greenwood County  
528 Edgefield St.  
Greenwood SC 29646

Ms. Maria Martin  
506 Marshall Rd  
Greenwood SC 29646

Billy Garrett and Carson Henderson  
Attorneys for Respondant  
109 Oak Street  
Greenwood SC 29646

*CMA*  
*07/31/14*  
*9:30 AM*

Served by

*Courtney Smith*  
Courtney Smith  
Investigator Eighth Judicial Circuit  
PO Box 516 Greenwood SC 29646

July 31<sup>th</sup> 2014

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENWOOD )

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT

The State )  
(Appellant) )

NOTICE OF APPEAL

v. )

2014-CP-24 00981

Maria Martin, )  
(Respondant) )

Ticket#(s)  
E857866

FILED COMMON PLEAS  
8TH JUDICIAL CIRCUIT  
GREENWOOD, S.C.  
2014 JUL 30 PM 4:35

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WHEREFORE, the Appellant prays that the Circuit Court consider the matter raised herein and issue its order reversing the trial courts suppression of the test.

*Micah Black*

Micah Black  
Assistant Solicitor

This 30<sup>th</sup> Day of July, 2014  
Greenwood, South Carolina

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA )

COUNTY OF GREENWOOD )

David M. Stumbo, Solicitor, Eighth Judicial Circuit )

on behalf of South Carolina Highway Patrol )

Plaintiff(s) )

vs. )

Marie Martin )

Defendant(s) )

(Please Print)

Submitted By: Micah Black, Assistant Solicitor

Address: PO Box 516, Greenwood, SC 29648

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 24- 00981

FILED COMMON PLEAS  
8TH JUDICIAL CIRCUIT  
GREENWOOD, S.C.

SC Bar #: 101119

Telephone #: 864-942-8806

Fax #: 864-942-8830

Other:

E-mail: mblack@greenwoodsc.gov

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-CP-..., Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Label (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Other (799)
Administrative Law/Relief: Reinstate Driver's License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Commission (990), Employment Security Comm (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature:

Micah Black

Date: 7/30/14 - 2014



Defendant's written Motion to Suppress dated July 23, 2012.

After the Defendant renewed her motion on Wednesday, July 16, 2014, the Court reviewed the following documents: (1) a rough transcript of the motion hearing on July 25, 2012, (2) the Defendant's written Motion to Suppress dated July 16, 2014, and (3) the State's brief entitled "Admissibility of Field Sobriety Test." The Court also heard arguments from all attorneys. Furthermore, the Defendant represented to the Court that she will provide a "cleaned up" transcript from the motion hearing on July 25, 2012, as soon as the transcript is available.

Based upon the above-referenced documents and arguments of counsel, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. Trooper Sinclair's incident site video recording clearly demonstrates that the Defendant refused to perform field sobriety tests. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Defendant to perform field sobriety tests. The Defendant says, "I can't do that" twice. Trooper Sinclair then asks, "Are you willing to take the tests?" The Defendant says, "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass it."

2. On June 3, 2011, Code Section 56-5-2953(A)(1)(b) provided as follows: "A refusal to take a field sobriety test does not constitute disobeying a police command."

3. On June 3, 2011, Code Section 56-5-2950(A) provided in relevant part: "A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been

committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.”

4. On June 3, 2011, Code Section 56-5-2950(B) provided in relevant part: “No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court.”

5. After the Defendant’s jury trial in 2012 but prior to the July 16, 2014, motion hearing, the Legislature enacted Code Section 56-5-2948, which became effective on December 18, 2012, and which provides as follows: “When a person is suspected of causing a motor vehicle incident resulting in the death of another person by the investigating law enforcement officer on the scene of the incident, the driver must submit to field sobriety tests if he is physically able to do so.”

6. Upon reading the above-referenced statutes, the Legislature has clearly intended to allow the State to introduce evidence in a DUI trial of a defendant’s refusal to submit to a breath test. However, the Legislature has not expressly provided that a person arrested for DUI and who refused to perform field sobriety tests may or will have this refusal used against him by the State at trial. In fact, to the contrary, the Legislature has specifically provided that a DUI suspect who refuses to perform field sobriety tests cannot be arrested for failing to obey a police command; and the Legislature has furthermore expressly provided for when and under what circumstances the driver of a vehicle has to submit to field sobriety tests.

7. In reaching its decision to suppress the Defendant's refusal to perform field sobriety tests, this Court relies upon the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," which means "to express or include one thing implies the exclusion of another, or of the alternative." If the Legislature intended for a defendant's refusal to perform field sobriety tests to be used against the defendant during a standard DUI trial, the Legislature would have passed such a law.

8. Furthermore, when a statute is penal in nature, which the statutes governing DUI clearly are, such statutes must be construed strictly against the State and in favor of the defendant.

9. Furthermore, no defendant is ever required to voluntarily provide verbal or physical evidence to a police officer in order to help the police officer make a better case against the defendant. This fundamental right applies whether or not the defendant is under arrest and/or in custody, whether or not a police officer is required to read Miranda warnings to the defendant, and whether or not a police officer has actually read Miranda warnings to the defendant. No defendant ever has to voluntarily make the situation worse for himself, because no defendant has the burden to prove or disprove any matter. In this matter, the Defendant expressly exercised her right to remain silent prior to being arrested and prior to receiving Miranda warnings from Trooper Sinclair.

10. The Court believes that the walk and turn and one leg stand field sobriety tests may be testimonial in nature, because the person performing these tests is required to count out loud. However, this exact issue is not before the Court in this matter, because the Defendant refused to perform field sobriety tests.

11. The Court also incorporates into its ruling all other grounds discussed by the Court

during the motion hearing on July 25, 2012, and the motion hearing on July 16, 2014.

12. The State argued that Code Section 56-5-2953(A)(1)(a)(ii), which provides that the incident site video recording must "include any field sobriety tests administered," should be interpreted to mean that if a police officer asks a defendant to perform field sobriety tests on video and the defendant refuses on video, then the defendant's refusal on the video recording should be admissible as evidence to the jury as a free and voluntary oral statement based on the theory that the Defendant was not in custody at that time for purposes of Miranda. Berkemer v. McCarty, 104 S.Ct. 3138 (1984)(roadside questioning of a motorist detained pursuant to a traffic stop does not constitute "custodial interrogation" for purposes of Miranda). The Court disagrees with this argument. This portion of Code Section 56-5-2953 only applies when field sobriety tests are "administered." In the case at hand, the Defendant was offered field sobriety tests, but Trooper Sinclair never administered field sobriety tests to the Defendant.

13. The State informed the Court that it intends to appeal the Court's ruling because the State believes that the Court's ruling "significantly impairs" the State's ability to proceed with the prosecution of the DUI charge against the Defendant. See State v. Belviso, 600 S.E.2d 68 (S.C. Ct. App. 2004). Therefore, the Court hereby stays this proceeding until the appeal is heard by the Common Pleas. This Court has no authority to stop the State from appealing.

14. This Court does not believe that the State's ability to prosecute the Defendant for DUI without evidence of the Defendant's refusal to perform field sobriety tests will significantly impair the State's case. The State has previously prosecuted the Defendant without the benefit of this evidence and convinced three (3) jurors of the Defendant's guilt beyond any and all reasonable doubt

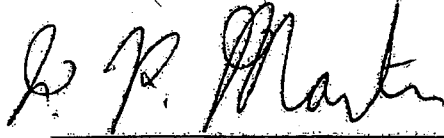
using admissible evidence, including but not limited to the Defendant's refusal to provide a breath sample.

**IT IS THEREFORE ORDERED** that all evidence of the Defendant's refusal to perform field sobriety tests is hereby suppressed and shall be redacted from the incident site video recording, and the State shall not be allowed to introduce any evidence to the jury about, or comment to the jury on, the Defendant's refusal to perform field sobriety tests.

**IT IS FURTHER ORDERED** that the Defendant's jury trial is hereby stayed pending resolution of the State's appeal by the Court of Common Pleas.

**IT IS FURTHER ORDERED** that the Defendant's jury trial shall resume once the State's appeal is decided with finality and the matter is remanded to this Court.

**IT IS SO ORDERED.**



---

**HON. W. RUTLEDGE MARTIN**  
Presiding Magistrate's Court Judge  
Greenwood County

Greenwood, South Carolina

July 30, 2014

COPY

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENWOOD )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Appellant, )  
 )  
v. )  
 )  
MARIA TODD MARTIN, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT

**CERTIFICATE OF DELIVERY**

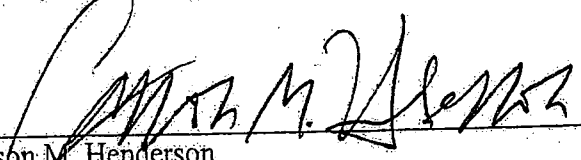
C/A No. 2014-CP-24-00981

The undersigned does hereby certify that on the 29<sup>th</sup> day of October, 2015, he served the Order dated October 23, 2015, by mailing by first class United States mail from Greenwood, South Carolina, and/or by hand delivering the same to the person(s) listed below at the address(es) listed below:

Micah Black, Esquire  
Eighth Circuit Solicitor's Office  
P.O. Box 516  
Greenwood, S.C. 29648-0516  
**(HAND DELIVERED VIA CLERK'S BOX)**

- 1. Order dated October 23, 2015
- 2. Certificate of Delivery

**THE HENDERSON LAW FIRM, P.C.**  
Attorney for the Respondent

By:   
Carson M. Henderson  
109-B Oak Avenue  
Greenwood, S.C. 29646  
Phone: (864) (864) 229-8000  
Fax: (864) 229-8001

Greenwood, South Carolina

October 29, 2015

FILED COMMON PLEAS  
8TH JUDICIAL CIRCUIT  
GREENWOOD, S.C.  
2015 OCT 29 PM 12:40

STATE OF SOUTH CAROLINA  
COUNTY OF Greenwood  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-24-981

COPY

State of South Carolina  
PLAINTIFF(S)

Maria Todd Martin  
DEFENDANT(S)

Submitted by: The Court

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate, or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
Additional information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2167  
Judge Code

10/26/15  
Date

For Clerk of Court Office Use Only



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENWOOD )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 MARIA TODD MARTIN, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 EIGHTH JUDICIAL CIRCUIT

FILED  
 8th JUDICIAL CIRCUIT  
 GREENWOOD, SC  
 2015 OCT 28 PM 2:00

**ORDER**

C/A No. 2014-CP-24-00981

**PRESIDING JUDGE:**  
**COURT REPORTER:**  
**APPELLANT'S ATTORNEY:**  
**RESPONDENT'S ATTORNEYS:**

**HON. DONALD B. HOCKER**  
**TARA T. SCOTT**  
**MICAH BLACK**  
**BILLY J. GARRETT JR. and**  
**CARSON M. HENDERSON**  
**WEDNESDAY, SEPTEMBER 2, 2015**

**DATE OF HEARING:**

This matter came before the Court for an appeal hearing from Magistrate's Court on Wednesday, September 2, 2015, at 9:00 a.m. The Appellant was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office. The Respondent was represented by Billy J. Garrett Jr. and Carson M. Henderson.

**Procedural History**

The Respondent was arrested for DUI on June 3, 2011, by Trooper Jordan N. Sinclair. She was issued Ticket No. E857866.

A jury trial was held in this matter on July 25-26, 2012. Magistrate Walter Rutledge Martin presided. Pursuant to the Respondent's motion after the jury was sworn, Judge Martin suppressed, redacted, and excluded all evidence and testimony relating to the Respondent's decision not to perform field sobriety tests. The State did not file an interlocutory appeal. After



lengthy deliberations which included the reading of an Allen charge, the jury deadlocked three (3) – three (3), and Judge Martin declared a mistrial.

A second jury trial was scheduled for July 16, 2014, before Judge Martin. Prior to the swearing of the jury, the Respondent renewed her motion for the Court to suppress, redact, and exclude all evidence and testimony relating to the Respondent's decision not to perform field sobriety tests as requested by Trooper Sinclair. Judge Martin granted the Respondent's motion.

Judge Martin signed an Order dated July 30, 2014, confirming his in-court ruling. The State timely filed an appeal to this Court on July 30, 2014.

Based upon a review of the clerk's file and arguments of counsel, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. The State had the right to file the interlocutory appeal on July 30, 2014, to challenge Judge Martin's pre-trial ruling. Therefore, this Court has jurisdiction to determine the merits of the State's appeal.

2. Trooper Sinclair's incident site video clearly demonstrates that the Respondent chose not to perform field sobriety tests. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Respondent to perform field sobriety tests. The Defendant says, "I can't do that" twice. Trooper Sinclair then asks, "Are you willing to take the tests?" The Defendant says, "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass it."

3. On the Respondent's arrest date of June 3, 2011, Code Section 56-5-2953(A)(1)(b) provided as follows: "A refusal to take a field sobriety test does not constitute

disobeying a police command.”

4. On June 3, 2011, Code Section 56-5-2950(A) provided in relevant part: “A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.”

5. On June 3, 2011, Code Section 56-5-2950(B) provided in relevant part: “No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court.”

6. After the Defendant’s jury trial in 2012 but prior to the July 16, 2014, scheduled jury trial, the Legislature enacted Code Section 56-5-2948, which became effective on December 18, 2012, and which provides as follows: “When a person is suspected of causing a motor vehicle incident resulting in the death of another person by the investigating law enforcement officer on the scene of the incident, the driver must submit to field sobriety tests if he is physically able to do so.”

7. Upon reading the above-referenced statutes, the Legislature has clearly intended to allow the State to introduce evidence in a DUI trial of a defendant’s refusal to submit to a breath,

blood, or urine test. However, the Legislature has not expressly provided that a person arrested for DUI and who refused to perform field sobriety tests may have or will have this refusal used against him by the State at trial. In fact, to the contrary, the Legislature has specifically provided that a DUI suspect who refuses to perform field sobriety tests cannot be arrested for failing to obey a police command; and the Legislature has furthermore expressly provided for when and under what circumstances the driver of a vehicle can be made to submit to field sobriety tests if physically able to do so.

8. In State v. Gordon, Op. No. 27554 (S.C. August 5, 2015), our Supreme Court noted that in certain circumstances it's appropriate for the trial court in a DUI case to redact field sobriety tests from the incident site video and exclude testimony about the tests. If it's permissible to redact field sobriety tests when such tests have been taken by a suspect, then this Court finds it's appropriate to redact a suspect's refusal to perform field sobriety tests.

9. In reaching his decision to suppress and redact the Respondent's refusal to perform field sobriety tests, Judge Martin relied upon the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*," which means "to express or include one thing implies the exclusion of another, or of the alternative." If the Legislature intended for a defendant's refusal to perform field sobriety tests to be used against the defendant during a standard DUI trial, the Legislature could have and would have passed such a law.

10. The intent of Code Section 56-5-2953 is to preserve evidence which speaks to a suspect's impairment or non-impairment. However, when a suspect on video invokes his right



not to give evidence against himself, this right is so fundamental that the suspect's invocation cannot be used against him absent a specific statutory and/or constitutional allowance, such as a suspect's refusal to submit to a breath, blood, or urine test. The Legislature has weighed the need for public safety versus a suspect's refusal to submit to a breath, blood, or urine test, and the need for public safety has prevailed. If the Legislature has weighed the need for public safety versus a suspect's refusal to perform field sobriety tests, so far the suspect has prevailed.

11. When a statute is penal in nature, which the statutes governing DUI clearly are, such statutes must be construed strictly against the State and in favor of the defendant.

12. No suspect is ever required to voluntarily provide verbal or physical evidence to a police officer in order to help the police officer make a better case against the suspect. This fundamental right applies whether or not the suspect is under investigation and/or under arrest and/or in custody, whether or not a police officer is required to read Miranda warnings to the suspect, and whether or not a police officer has actually read Miranda warnings to the suspect. No suspect ever has to voluntarily make the situation worse for himself, because no suspect has the burden of proving or disproving any matter.

13. In this matter, the Respondent expressly exercised her right to remain silent prior to being arrested and prior to receiving Miranda warnings from Trooper Sinclair.

14. The Respondent was offered voluntary, pre-arrest field sobriety tests, which she chose not to perform. Prior to being offered the field sobriety tests, the Respondent was never informed by Trooper Sinclair that her choice not to perform the tests could or would be used against her at trial. In contrast, the Respondent was informed verbally and in writing that her

refusal to submit to a breath test could be used against her at trial.

15. The Respondent's choice not to perform field sobriety tests was not relevant to the issue of whether the Respondent was driving a motor vehicle while impaired. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. SCRE 401. The Respondent's choice doesn't make it more probable or less probable that she was driving impaired. The lack of field sobriety tests proves or disproves no fact in controversy.

16. Our appellate courts have determined that the performance of field sobriety tests is direct evidence of impairment or the lack of impairment. When a suspect chooses not to perform these tests, and if this evidence is heard by the trial jury, this would lead to speculation by the jury about whether the suspect was impaired. Speculative evidence is not relevant evidence. If the Respondent's choice was relevant evidence, the admission of this evidence would be more prejudicial than probative. See SCRE 403. The State would be seeking to introduce this evidence to show that the Respondent must be guilty of DUI because she chose not to perform the field sobriety tests, or that only an impaired person would choose not to perform these tests. This is speculation. A suspect may choose not to perform these tests for reasons that have nothing to do with impairment.

17. The State argued that Code Section 56-5-2953(A)(1)(a)(ii), which provides that the incident site video must "include any field sobriety tests administered," should be interpreted to mean that if a police officer asks a suspect to perform field sobriety tests on video and the

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suspect refuses on video, then the suspect's refusal on video should be admissible as evidence to the jury as a free and voluntary oral statement based on the theory that the suspect was not in custody at that time for purposes of Miranda. See Berkemer v. McCarty, 104 S.Ct. 3138 (1984) (roadside questioning of a motorist detained pursuant to a traffic stop does not constitute "custodial interrogation" for purposes of Miranda). This Court disagrees with the State's argument. This portion of Code Section 56-5-2953 only applies when field sobriety tests are "administered." In the case at hand, the Respondent was asked to perform field sobriety tests, but Trooper Sinclair never administered field sobriety tests to the Respondent. The Respondent has never alleged a violation of the video requirements contained in Code Section 56-5-2953. Therefore, the State's argument regarding the "include any field sobriety tests administered" language is a burden that the State must meet, which the State has failed to do.

18. The State also argued that the Respondent's choice not to perform field sobriety tests should be admissible at trial as part of the res gestae of the crime charged. The State argued that this evidence would give the trial jury context as to why the Respondent was arrested for DUI. The Court disagrees with this argument. The Respondent had no obligation to perform field sobriety tests and therefore had the choice not to perform the field sobriety tests.

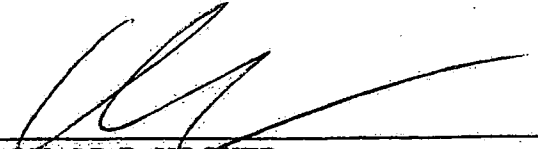
**IT IS THEREFORE ORDERED** that Judge Martin's Order dated July 30, 2014, is affirmed, and all evidence of the Respondent's decision not to perform field sobriety tests is hereby suppressed and shall be redacted from the incident site video at trial, and the State shall not be allowed to introduce any evidence or testimony to the jury about, or comment to the jury on, the Respondent's decision not to perform field sobriety tests.

**IT IS FURTHER ORDERED** that the Respondent's jury trial shall resume once the

#7  
DSD

State's appeal is decided with finality and the matter is remanded to the Magistrate's Court.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
HON. DONALD B. HOCKER  
Presiding Circuit Court Judge

Laurens, South Carolina

10/23, 2015



Page 8 of 8

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENWOOD )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
Appellant, )  
 )  
v. )  
 )  
MARIA TODD MARTIN, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT

**MOTION TO RECONSIDER**

C/A No. 2014-CP-24-00981

FILED IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT  
GREENWOOD COUNTY, SOUTH CAROLINA  
2015 NOV - 5 PM 1:07

This matter came before the Court for an appeal hearing from Magistrate's Court on Wednesday, September 2, 2015, at 9:00 a.m. The Appellant was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office. The Respondent was represented by Billy J. Garrett Jr. and Carson M. Henderson.

After the hearing, Circuit Court Judge Hocker affirmed the decision of the lower court. Mr. Henderson drafted an Order, which the Judge signed on October 23, 2015 and submitted to the Clerk of Courts office and filed on October 28, 2015.

PLEASE BE ADVISED that the State (Appellant), through its attorney will move for the Honorable Judge Donald Hocker to reconsider the ruling set forth in his Order, dated October 23, 2015, affirming the Magistrate's ruling to suppress the statements made by the Defendant prior to being offered the Standardized Field Sobriety Tests (SFST's) and to suppress the SFST's offered by the trooper. Appellant respectfully submits the following grounds for its appeal:

1. That the Court erred in suppressing the statements by the Defendant after being offered the SFST's because she was not in custody at the time of the stop and spoke freely and voluntarily to the officer about her inability to perform the SFSTs.

2. Section 56-5-2953 (A) (1) (a) (ii) requires "The video recording at the incident site must: include ANY field sobriety tests administered."
3. Section 56-5-2953 (A) (3) states "The video recordings of the incident site and breath test site are admissible pursuant to the South Carolina Rules of Evidence in a Criminal, Administrative, or Civil Proceeding by any party to the action."
4. The laws of statutory construction are clear: "The starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102 (1980). Section 56-5-2953 cannot be any more clear when it states that the video recording must include any field sobriety tests and that the incident site and breath test site videos are admissible as evidence pursuant to the SC Rules of Evidence in Criminal Cases.
5. Under section 10 and section 12 of the Courts Order, it states that Defendants has a Fundamental Right not to give evidence against themselves. This is clearly not the law as interpreted by the United States Supreme Court and the South Carolina Supreme Court. "A Defendant can be ordered to give handwriting exemplars because they are non-testimonial in nature and do not involve his Fifth Amendment right against self-incrimination. *State v Frasier*, 341 S.C. 546, 534 S.E. 2d 711 (Ct. App. 2000).
6. Section 13 of the Court's Order states, "The Defendant exercised her right to remain silent." This is a misstatement of the facts in this case as the Defendant audibly responded to the officer's questions concerning the SFSTs, thus not exercising her right to remain silent. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Respondent to perform the SFSTs. The Respondent says, "I can't do that" twice. Trooper

Sinclair then asks, "Are you willing take the tests?" The Defendant says "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass." Defendant is then placed under arrest for DUI and given her Miranda warnings.

7. Section 15 and 16 of the Courts Order states, a refusal to perform SFSTs is not relevant and would cause the jury to speculate as to the whether the Defendant was impaired. It further states that speculative evidence is not relevant evidence. The State contends that a refusal of the SFST's is highly relevant evidence in a DUI prosecution, and it should be available for the jury to consider. Furthermore, it is circumstantial evidence that the jury should consider in the course of their deliberation.
8. Such other grounds as may be set forth by Appellant at the date of the Hearing.

WHEREFORE, the Appellant prays that the Circuit Court to reconsider the matter raised herein and issue its order reversing the trial courts suppression of the Defendant's Statement and the Test.

This 5<sup>th</sup> Day of November, 2015

Greenwood, South Carolina



Micah Black

Assistant Solicitor

Eighth Circuit Solicitors Office  
Attorney for the Appellant

By: Micah Black  
Micah Black  
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Greenwood SC 29648  
(864) 942-8801

STATE OF SOUTH CAROLINA )  
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COUNTY OF GREENWOOD )  
 )  
STATE OF SOUTH CAROLINA, )  
 )  
APPELLANT, )  
 )  
vs. )  
 )  
MARIA TODD MARTIN, )  
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RESPONDENT. )  
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**THE COURT OF COMMON PLEAS**

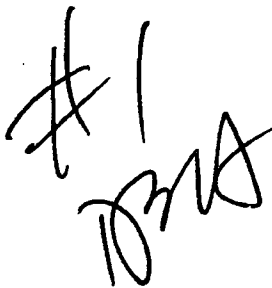
**No. 2014-CP-24-00981**

**ORDER**

THIS MATTER IS BEFORE THE COURT on Appellant's Motion for Reconsideration of the Court's October 23, 2015 Order Denying Appellant's requested relief. The Appellant raises seven (7) issues in support of its Motion. This is a DUI case that originated in Magistrate's Court. The Court incorporates by reference its Order of October 23, 2015 as to the procedural history of this case outlined therein as well as the subject conversation (Parag. 2, Page 2) between the trooper and Defendant at the incident site as it relates to the Field Sobriety Tests.

After a careful and thorough review of this entire case, this Court determines that it was in error in affirming Judge Martin and his Order of July 30, 2014.

This whole case boils down to whether or not the video portion at the incident site as it relates to the Defendant's refusal to perform the field sobriety tests should be shown to the jury at trial. In other words, whether suppression of the Defendant's statements should be granted.



This Court makes the above determination on the following grounds:

1. It is undisputed that Miranda warnings were not given prior to the colloquy between the Trooper and Defendant concerning the Defendant performing the Field Sobriety Tests. It does not appear that this is really at issue between the parties. This Court determines, however, that Miranda warnings were not required in this situation pursuant to State vs. Kerr, 330 S.C. 132 (1998); State vs. Peele, 298 S.C. 63 (1989); Berkemer vs. McCarty, 468 U.S. 420 (1984).
2. Defendant argues that this issue requires a Rule 403 prejudice vs. probative value analysis. However, the prejudice to the Defendant has to be unfair prejudice. While the Defendant's statements can be considered incriminating and ultimately prejudicial, they are not unfair. The probative value of her statements as to the issue of intoxication far exceeds any unfair prejudice to the Defendant.
3. The Defendant freely and voluntarily gave the statements in response to the troopers' questions about the field sobriety tests.
4. The Court's Order stating that a person is not required to provide evidence against himself is true but misplaced in this case. While a person has the constitutional protection of not being required to incriminate himself, if he voluntarily makes statements when Miranda warnings are not required, then he has to live with his decision and in this case, the Defendant has to live with her decision. She could have kept her responses to a simple "no" throughout the colloquy but elected to comment on her abilities and sobriety.
5. The Court in its prior Order placed too much emphasis on the fact that since the Legislature has not enacted legislation allowing for a Defendant's refusal to perform

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DADA

the field sobriety tests to be used against the Defendant at trial then the implication exists that the Legislature intended for the refusal not to be used. While this canon of statutory construction may be a valid one in some situations, it should not apply here.

6. The Defendant argues that her refusal would require the jury to speculate on the issue of the Defendant's impairment. While this may arguably be true if the Defendant's responses remained a "no", it certainly does not require speculation when the Defendant voluntarily said "No , if I was straight, I couldn't pass it".

**IT IS HEREBY ORDERED:**

1. The Appellant's Motion for Reconsideration is granted;
2. The Court's Order, dated October 23, 2015, is vacated except as to the above procedural history and the colloquy between the trooper and Defendant as outlined in Paragraph 2;
3. The Order of Judge Martin, dated July 30, 2014, is respectfully reversed;
4. This case is remanded to the Greenwood Magistrate's office for disposition of this case. If the case goes to trial, then the State will have the right to show the video of the Defendant's refusing to undertake the field sobriety tests to the jury.

**IT IS SO ORDERED.**

  
Donald B. Hocker  
Circuit Court Judge

March 30, 2016  
Laurens, South Carolina

# 3

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**  
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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2016-000745

The State.....Respondent,

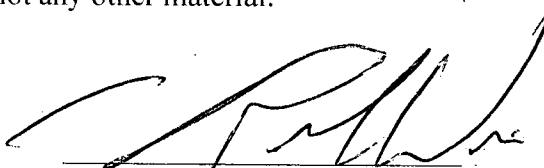
vs.

Maria Todd Martin.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the partes and not any other material.

Nov. 14<sup>th</sup>, 2016



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