THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case №2016-000745

The State, ... Respondent,

vs.

Maria Todd Martin ..... Appellant.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Question I: Did the lower Court err in finding that the State had the right to appeal a pre-trial ruling suppressing the video of the Defendant refusing to take the field sobriety test when the case of the State was not substantially impaired by the suppression of the evidence?

Question II: Did the lower court err in finding that the magistrate judge abused his discretion in excluding the refusal of Maria Martin to take the field sobriety tests?

STATEMENT OF THE CASE

Rutledge Martin, magistrate for Greenwood County issued a written order dated July 30, 2014 suppressing the refusal of Maria Martin to take a field sobriety test in a driving under the influence trial. The State filed a notice of appeal on July 30, 2014. A hearing was held in this appeal before the Honorable Donald B. Hocker on September 2, 2015. By Order dated October 23, 2015, Judge Hocker affirmed the ruling of Magistrate Martin. The State filed a Motion for Re-consideration on November 5, 2015. A hearing was held on this Motion on January 14, 2016. By Order of March 30, 2016, Judge Hocker reversed his prior ruling. Ms. Martin filed her Notice of Appeal on April 7, 2016.

FACTS

State Trooper Jordan N. Sinclair stopped Maria Martin on June 3, 2011 in the City of Greenwood. At the stop, Ms. Martin refused to take any field sobriety tests. She twice stated a simple "no" when asked to take the test. The third time she stated "No. If I was straight, I couldn't pass it." Order dated July 30, 2014 at 2. At the first trial July 25-26, 2012, Magistrate Rutledge Martin excluded the evidence of the refusal of Ms. Martin to take the test. This trial ended with a hung jury with three voting guilty and three not guilty. Order dated July 30, 2014, at 1.

The State called the case for trial on July 16, 2014 at which time the attorney for Ms. Martin again renewed his motion to exclude the refusal to take the field sobriety tests. The State announced in advance that they would appeal an adverse ruling as it believed the exclusion of the field sobriety test refusal significantly impaired its ability to try the case. Order dated July 30, 2014 at 5. Magistrate Martin issued a written Order dated July 30, 2014 suppressing the refusal

to take the field sobriety tests.

The State filed its appeal. After two hearings, Judge Donald B. Hocker then reversed the ruling of Magistrate Martin.

Question I

Did the lower Court err in finding that the State had the right to appeal a pre-trial ruling suppressing the video of the Defendant refusing to take the field sobriety test when the case of the State was not substantially impaired by the suppression of the evidence?

South Carolina Code § 14-3-330, as interpreted in *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985), is the only means for an appeal by the State in the State of South Carolina. *McKnight* provides "A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14–3–330(2)(a) (1976)." The statute provides for an appeal "(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." In this case the ruling by the magistrate judge did not affect a substantial right that had the effect of dismissing the action. The record in this case establishes this fact. When the case was originally called for trial on July 25-26, 2012, the magistrate in his ruling excluded the field sobriety test. The State elected to proceed to trial resulting in the 3-3 hung jury. Rec. On App. At 78-79. As the South Carolina Supreme Court has said "Under section 14–3–330(2)(a), an interlocutory order is immediately appealable if the order affects "a substantial right"and "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." *State v. Samuel*, 411 S.C. 602, 604, 769 S.E.2d 662, 663 (2015).

The State has not argued below how the suppression of the field sobriety test "in effect determines the action" as required by the statute and case precedent. The State below simply

argued that they had to fight the case "with one hand tied behind our back." Rec. on App. at 27, ll 9-10. Counsel for Ms. Martin argued that the magistrate had found his ruling did not significantly impair the ability of the State to try the case Rec. on App. at 28, ll 18-20. The magistrate had the opportunity to see the case tried without the evidence and was, therefore, in the best position to make such a determination. In his rulings dated March 30, 2016 (Rec. on App. at 90, and October 23, 2015 (Rec. on App. At 78) the Common Pleas judge did not make a finding that or explain how the ruling of the magistrate "determines the action and prevents a judgment." In the first order the Common Pleas judge simply stated "The State had the right to file the interlocutory appeal on July 30, 2014 to challenge Judge Martin's ruling." Rec. on App. At 79.

As to whether the ruling can be appealed, this case should be controlled by *State v. Samuel*, 411 S.C. 602, 769 S.E.2d 662 (2015). In *Samuel*, the lower court suppressed one of several statements the defendant had given. The South Carolina Supreme Court properly held that the statement "did not significantly impair the prosecution's ability to try Petitioner's case." *Id.* at 602, 605, 769 S.E.2d at 663. In the present case the arresting officer still is able to tell the jury his impression of the condition of Ms. Martin. The State was able to introduce her refusal to take the breath test. The evidence excluded did not involve her condition being shown on the road side video. All that were excluded was three verbal statements. The exclusion of these statements did not and could not substantially impair the ability of the State to go forward.

Question II

Did the lower court err in finding that the magistrate judge abused his discretion in excluding the refusal of Maria Martin to take the filed sobriety tests?

Twice when asked to exclude the field sobriety test, the magistrate in this matter considered the arguments of counsel and ruled that the refusal of the person arrested for driving under the influence should be excluded. He ruled "[N]o 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." Rec. on App. at 57. The appellate courts review the exclusion of evidence under an abuse of discretion standard. *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 115 (Ct. App. 2008) ("A court's ruling on the admissibility of evidence will not be reversed by this Court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant.").

In South Carolina a person is not required to participate in a field sobriety test. The legislature very specifically provided "A refusal to take a field sobriety test does not constitute disobeying a police officer." S.C. Code § 56-5-2953(A)(1)(b). The legislature further recognizes they can pass a law requiring a person to take a field sobriety test. *See,* S.C. Code § 56-5-2948 (providing that field sobriety tests are required when a death is caused by the motor vehicle incident.)

The State argued below that as the legislature required that the field sobriety tests be videotaped, they were mandating that the refusal to take the test be video taped and therefore it is admissible. Rec. on App. at 32, ll 1-9. What the State fails to consider is that the

requirement that the traffic stop be video taped does not mean the legislature intended for everything on the video to be admissible. For example, suppose a person refuses to take a field sobriety test and says "Last time I was arrested for DUI, I did not do well on those test therefore I am not taking them." The defendant would have refused to take the field sobriety test, but clearly the statement would not be admissible. The requirement of video taping the scene does not make it automatically admissible. The legislature never even suggested that the rules of evidence should be abandoned in applying the statute.

The legislature also knows how to make a refusal to take a test admissible. In S.C. Code § 56-5-2950(B) the legislature specifically provided that the refusal to take a breath test can be used against the defendant. No such provision appears in the video taping of the traffic stop. This Court cannot read into the law a requirement that is not there.

Here is the dilemma. A person has an absolute right to refuse a field sobriety test. The legislature has recognized this fact. A person may refuse a field sobriety test for a variety of reasons, only one of which is to cover up his obvious intoxication. A person may have consumed some alcohol but does not have the physical dexterity to perform well on the tests and does not want to appear materially and appreciably impaired when they are not. A person may not know how well they will perform on the test and simply does not want to give the State any aid in prosecuting the case. A person may decide based upon their age they do not want to perform a field sobriety test. If a person has an absolute right to refuse the test for a valid reason or any reason, why does the State receive a benefit from a person invoking a right that everyone agrees he has? This is truly the proverbial dilemma of "being between a rock and a hard place." The person either tries the test and performs poorly for even a reason not related

Later the Oregon Court explained it this way:

> For example, in response to a police officer's request to perform field sobriety tests, if defendant were to say, "I am exercising my right to remain silent under Article I, section 12, of the Oregon Constitution,"that response would be treated as a refusal to perform the tests, and the refusal would be admissible as substantive evidence of guilt under ORS 813.135 and ORS 813.136. It is fundamental that the assertion of the right against self-incrimination cannot be considered as evidence of guilt.
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> *State v. Fish*, 321 Or. 48, 61, 893 P.2d 1023, 1030 (1995)[2]

Many other states have ruled that a refusal is admissible. *People v. Berg*, 92 N.Y.2d 701, 685 N.Y.S.2d 906, 708 N.E.2d 979, 982 (1999); *Farmer v. Commonwealth*, 12 Va.App. 337, 404 S.E.2d 371, 373 (1991); *City of Seattle v. Stalsbroten,* 138 Wash.2d 227, 978 P.2d 1059, 1065 (1999); *State v. Mallick*, 210 Wis.2d 427, 565 N.W.2d 245, 248 (1997); *State v. Mellett*, 642 N.W.2d 779, 786 (Minn. Ct. App. 2002). The reasoning varies and the applicable statutes vary as some states require that a driver submit to a field sobriety test. Each case must be read closely accounting for the different factors.

In South Carolina the legislature, unlike many other states, has specifically recognized that a driver does not have to take a field sobriety test. As noted previously, the legislature specifically held that a refusal to take a field sobriety test cannot be used as a charge for the failure to obey a law enforcement officer. Not every state has such a provision.

Many states make an analogy between admitting evidence of a refusal to take a breath test and the refusal to take a field sobriety test. Such an analogy is false. As has been noted by one court "Experts in the areas of drunk driving apprehension, prosecution, and defense all

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[2] The Oregon statute was later amended to require that a driver submit to a field sobriety test.

appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures." *State v. Homan,* 89 Ohio St. 3d 421, 425, 732 N.E.2d 952, 956 (2000). Thus, a field sobriety test may be subject to some subjectivity. As noted previously, failure to perform well on a field sobriety test may be subject to other factors such as age and dexterity. A breath test is used to determine only one fact - the blood alcohol level in a subject. When the test is done correctly, there is no subjective opinion about the result. The reading is entirely objective.

Some states also hold that a field sobriety test is not testimonial and does not violate a driver's right against self incrimination. That issue is not before this court as no test was taken in this case. The refusal to take a test, however, is in fact testimonial. To establish the fact that a refusal is testimonial one need to look no further than a typical closing argument in such a case - "only a drunk would refuse a field sobriety test." The state argues that a driver has admitted they are drunk when they refused the test. If non-testimonial, how then can the state argue he refused because he knew he was too drunk to pass the tests? The State is arguing that the driver has testified by simply saying "no." The refusal is, therefore, testimonial.

In South Carolina the driver has the right either implicitly, because the legislature has provided no punishment for a refusal to take a field sobriety test, or explicitly because the legislature has provided that such action cannot be used as a basis for a failure to obey a lawful command. Either way, the right to refuse exists in South Carolina. Either way, a driver cannot be punished for invoking a right he has. To do so is to "keep the promise to the ear and break it to the hope." *State v. Prescott*, 125 S.C. 22, ___, 117 S.E. 637, 638 (1923).

CONCLUSION

For the foregoing reasons, the decision of the lower court should be reversed and the ruling of the magistrate's court affirmed.

November 30, 2016

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

December 1, 2016

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