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.

REPLY BRIEF OF APPELLANT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
SC Bar #006188

Attorney for Appellant

INDEX

Page:

Table of Authorities

Cases:

Statutes:

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?

The State cites *State v. Sterling,* 377 S.C. 475, 661 S.E.2d 99 (2008); *State v. Jansen,* 305 S.C. 320, 408 S.E.2d 235 (1991); *State v. Henry,* 313 S.C. 106, 432 S.E.2d 489 (Ct. App. 1993) and *State v. Landon*, 370 S.C. 103, 634 S.E.2d 660 (2006) for the proposition that this issue is appealable. The *Sterling* decision actually addresses the issue of whether the State can appeal a pre-trial ruling. The Court said "The witnesses to which the trial court's order pertained personally interacted with Respondent during the relevant time period and will be able to provide a first-hand account of what Respondent knew and his actions. Thus, their testimonies are critical to prove the charges against Respondent, and the suppression of their testimonies would significantly impair the State's case." *Id.* at 478 (S.C. 2008 661 S.E.2d at t101,). Few people could honestly debate that without those four witnesses the ability of the state to get past a directed verdict motion is seriously impaired.

While *Henry* also discusses the issue, they discuss it in terms of whether the ruling significantly impairs the ability of the State to prosecute the case. The Court in *Henry* took the language from *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209, (1985). In *McKnight* the ruling did not just significantly impair the prosecution, it ended the prosecution as the drugs being suppressed were the only evidence against the defendant. *See*, *State v. McKnight*,, 291 S.C. 110, 112, 352 S.E.2d 471, 472 (1987). The language in the statute is significantly different from that used in *Henry* and *McKnight*.. The State could virtually always argue a pre-trial

motion suppressing any evidence "significantly impairs" its ability to prosecute the case. This Court should interpret the statute as written. The ruling of the magistrate judge below did not "in effect determines the action" as required by the code. S. C. Code § 14-3-330.

As for the other two cases, former Chief Justice of the South Carolina Court of Appeals said it best when he stated "More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561, (S.C. App.,1984) rev'd 286 S.C. 85, 332 S.E.2d 100 (1985). As the Court in the two decisions did not discuss the issue, one can only assume they were not spoken to on the issue. While arguably in neither case would the suppressed evidence have determined the case, as the Court did not discuss the issues, they are not support for the position argued by the State.

While the appellate courts in South Carolina have discussed the issue of when the State may appeal a pre-trial ruling, whether a ruling "in effect determines the action" is, like beauty, often in the eye of the beholder. As noted in the opening brief, the State originally did not believe the ruling of the magistrate determined the action. The case at the first trial easily survived the directed verdict motion. The State had ample evidence to present the case to the jury. They had the refusal to take a breath test. They had the video of Ms. Martin at the scene. They had the video of her in the datamaster room. They had the testimony of the arresting officer. The evidence suppressed was only seconds of the video tape made at the roadside which otherwise showed her conduct. The magistrate judge's ruling suppressed only one brief statement by her. The State has not shown where the ruling in effect determined the action.

The magistrate judge that heard the case specifically ruled that the evidence excluded did

not impair the ability of the State to try the case. Rec. on App. at 58 (Order Judge Martin). The State has not shown that he abused his discretion in making such a ruling. He had the advantage of watching the trial, hearing the evidence and judging the credibility of the witnesses. His finding should be respected. As South Carolina Supreme Court said in *Sterling* "The Court is bound by the trial court's preliminary factual findings in determining the admissibility of certain evidence in criminal cases unless the findings are clearly erroneous or unless the trial court abused its discretion." *Id.* at 478, 661 S.E.2d at 100. As the State has not shown an abuse of discretion, this Court should hold the ruling of the magistrate judge cannot be appealed.

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?

In discussing this issue the State takes the position that the statute involving the datamaster simply acknowledges that refusal to take a datamaster test simply acknowledges that the refusal is already admissible. If the refusal to take the test is admissible even without the statute providing for such refusal, then there would have been no need for the legislature to specifically inform the driver that the evidence can be used against him. The legislature put the provision in the code because they knew it would not otherwise be admissible. They elected to make it a part of the implied consent law. Nothing in the code suggests that the legislature believed the refusal was admissible without their specifically providing for it in the statute.

The State further contends that the refusal to take a field sobriety test is not testimonial. The State properly cites *Schmerber v. California,* 385 U.S. 757 (1966) and *Doe v. United States.* 487 U.S. 201 (1988). But the State seems to confuse the refusal to take the test with the actual

taking of the test. For the purposes of this appeal, this Court may assume that the actual field sobriety test is not testimonial. But the State erroneously contends that since the test itself is not testimonial, then the refusal to take the test is not testimonial. The Supreme Court in Washington described the distinction between testimonial and non-testimonial. They stated "It has been consistently held that compulsion which makes an accused the source of real or physical evidence does not violate the privilege. It is only violated when the accused is compelled to make a testimonial communication that is incriminating." *State v. Franco*, 96 Wash.2d 816, 827, 639 P.2d 1320, 1326 (1982). Here Ms. Martin made such a testimonial communication.

A distinction also needs to be made between a refusal to take a breath test and the refusal to take a field sobriety test. The law applicable to each is very different. The breath test is part of the implied consent law. Under that law a driver, by driving upon the public highways of South Carolina, has impliedly consented to have his breath tested if he is arrested for a traffic violation committed while driving under the influence. Part of the implied consent law to which he has consented is also that the jury will be informed of his refusal to take a breath test if he refuses to take the breath test. By driving upon the highway, he has consented to the admission of such evidence. *See.* S. C. Code § 56-5-2950 ("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.")

No such provision applies to the field sobriety test. In fact, as noted in the opening brief,

the legislature has specifically provided that no penalty is attached to the refusal to take the field sobriety test. The refusal to take a field sobriety is simply not the equivalent of the refusal to take a breath test. As noted by the magistrate judge, a citizen should not required to give evidence against themselves. Rec. on App. at 57 (Judge Martin Order).

In this case the rights afforded to a defendant under *Miranda v. Arizona*, 384U.S. 436 (1966) are simply not relevant. Ms. Martin has the right to refuse to perform the test without being told she had a right to refuse to perform the test. Surely the state would not contend that a defendant's invoking his right to remain silent would be admissible if the arresting officer did not read the defendant his *Miranda* rights. She invoked a right she had under the constitution and invoking that right cannot be used against her. *Cf. Doyle v. Ohio*, 426 U.S. 610 (1976). Unless this Court were to hold a citizen does not have the right to refuse a field sobriety test, the ruling of the magistrate court should be upheld.

The State has further argued that a statement refusing to take a field sobriety test is not testimonial. If it is not testimonial, then Ms. Martin's refusal should not be used by the State as an admission of guilt. But this is precisely the reason the State wants to admit the refusal, so they can argue she admitted her guilt when she refused. As the Florida Supreme Court has said "His refusal thus is relevant to show consciousness of guilt." *State v. Taylor*, 648 So.2d 701, 704 (Fla. 1995). A statement showing consciousness of guilt is testimonial.

The statement of Ms. Martin that she could not pass the test even if she were sober should also be held inadmissible. The magistrate judge excluded the statement because he found that the statement was made only after Ms. Martin clearly and unequivocally had twice told the officer she was not going to take the field sobriety tests. His persistence in continuing to ask her

CONCLUSION

For the foregoing reasons and for the reasons set forth in the opening brief, this Court should reverse the decision of the Circuit Court Judge and remand the matter back to the magistrate's court and affirm the decision of the magistrate's court.

November 29, 2016

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
SC Bar # 006188

Attorney for Appellant

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 05 2016
SC 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.

CERTIFICATE OF COUNSEL

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

November 30th, 2016

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorney for Appellants