STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Greenwood County
Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2016-000424

THOMAS A. WILLIAMS,

Appellant,

vs.

THE STATE,

Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court judge correctly affirmed the magistrate judge's decision to admit evidence of Appellant's refusal to submit to a breath test following his arrest for the statutory offense of driving under the influence because, based on the plain language of South Carolina's implied consent statute, Appellant was considered to have impliedly consented to such a test after he was arrested "for an offense arising out of acts alleged to have been committed while [he] was driving a motor vehicle while under the influence" by virtue of his driving under the influence arrest. Moreover, even if Appellant somehow did not impliedly consent to a breath test under the circumstances of his case, evidence of Appellant's refusal to submit a breath test after his arrest was nonetheless properly admitted during his trial because he had no right to refuse to submit to such a test when the trooper offered one to him incident to his arrest. However, even if evidence of Appellant's refusal to submit to a breath test was somehow inadmissible during trial, any error in the admission of that evidence was entirely harmless in light of the cumulative nature of that evidence to other properly-admitted evidence coupled with the fact the other evidence presented during trial overwhelmingly established Appellant's guilt for driving under the influence.

STATEMENT OF THE CASE

On March 30, 2013, Appellant Thomas A. Williams was arrested for driving under the influence after he was stopped at a roadside checkpoint and failed to successfully complete a series of field sobriety tests. As a consequence of his arrest, Appellant was issued a uniform traffic ticket for a violation of S.C. Code Ann. § 56-5-2930. Subsequently, on August 26, 2014, a jury trial was commenced in the Greenwood County Magistrate Court before the Honorable Christopher R. Johnson, magistrate judge. At the conclusion of trial, the jury convicted Appellant as charged. Appellant then appealed his conviction to the Greenwood County Court of Common Pleas, and an appellate hearing was conducted on September 2, 2015, before the Honorable Donald B. Hocker, circuit court judge. Following the appellate hearing, the circuit court judge issued an order affirming Appellant's conviction. Appellant then filed a motion seeking for that order to be altered or amended, and the circuit court judge conducted a hearing on the motion on January 14, 2016. Subsequently, the circuit court judge denied Appellant's motion through another order. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

Just after midnight on March 30, 2013, a vehicle being driven by Appellant Thomas A. Williams was stopped at a roadside checkpoint set up by troopers with the South Carolina Highway Patrol on North Main Street in Greenwood, South Carolina.[1] (Trial Tr. p. 10; Nov. Order, p. 1; Uniform Traffic Ticket; Recording of Incident). During the course of the stop, Appellant admitted he drank approximately five beers that night, and a trooper at the checkpoint informed Appellant he could smell the odor of alcohol emanating from Appellant's person. (Recording of Incident). The trooper then asked Appellant to participate in some field sobriety tests, and Appellant agreed to do so. (Recording of Incident). At that point, the trooper conducted a horizontal gaze nystagmus test, and Appellant repeatedly failed to comply with the trooper's instructions as the test was being administered. (Recording of Incident). Thereafter, the trooper proceeded to conduct a walk-and-turn test, and, as the trooper was explaining that test to Appellant, Appellant again repeatedly failed to follow the trooper's instructions while struggling to maintain his balance. (Recording of Incident). Appellant then attempted to perform the walk-and-turn test, but he veered wildly to the side while trying to walk in a straight line and nearly stumbled to the ground.[2] (Recording of Incident). In response, the trooper placed Appellant under arrest and charged him with driving under the influence. (Uniform Traffic Ticket; Recording of Incident).

Following Appellant's arrest, the trooper informed Appellant of his rights and questioned him about his activities prior to the stop. (Recording of Incident). During their ensuing conversation, Appellant again confirmed to the trooper he had been drinking beer that night and

[1] During Appellant's trial, the area where the checkpoint was set up was identified as a "high-producing" area for incidents of drunk driving. (Trial Tr. p. 6).

[2] As evidenced by the recording of the incident, Appellant also slurred his speech throughout his interactions with the trooper during the course of the stop. (Recording of Incident).

also stated he had been taking "all kinds of blood medicine." (Recording of Incident). The trooper then placed Appellant into his patrol vehicle and began transporting him to a law enforcement center. (Recording of Incident). On the way, Appellant spontaneously informed the trooper he was "not going to blow," and the trooper responded they were still going to have to go through the process of attempting to conduct a breath test. (Recording of Incident). Thereafter, at the law enforcement center, the trooper attempted to have Appellant submit to a breath test, but, consistent with his earlier unprompted proclamation, Appellant refused to submit to the test. (Recording of Incident).

Subsequently, Appellant elected to proceed forward to trial on the driving under the influence charge, and, during the course of trial, defense counsel raised a number of objections, including one to the admission of evidence related to Appellant's refusal to submit to a breath test following his arrest. (Trial Tr. pp. 13-14; p. 24; p. 29). In support of that objection, defense counsel contended Appellant was not arrested for an offense arising out of acts alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs as specified in South Carolina's implied consent statute. (Trial Tr. p. 29). As a result, defense counsel contended the provisions of the implied consent statute were inapplicable to Appellant's case, Appellant could not lawfully be offered a breath test, and Appellant's refusal to submit to one could not be used against him during trial. (Trial Tr. p. 29). However, the magistrate judge rejected defense counsel's argument and found Appellant could be offered the breath test based on his arrest for driving under the influence. (Trial Tr. p. 30; Sept. Tr. p. 3). Thereafter, as the trial proceeded forward, the solicitor introduced evidence of Appellant's refusal to submit to a breath test, and the jury ultimately convicted Appellant as charged. (Nov. Order, pp. 1-4; Uniform Traffic Ticket).

Following trial, Appellant appealed his conviction to the Greenwood County Court of Common Pleas, and defense counsel raised a number of issues on appeal, including one related to his objection to the admission of the evidence of Appellant's refusal to submit to a breath test. (Sept. Tr. p. 3; pp. 13-14; p. 17). Specifically, defense counsel argued the plain language of the implied consent statute established an individual in South Carolina must be arrested for "something beyond" driving under the influence in order to fall under the mandates of that statute. (Sept. Tr. pp. 17-18; Jan. Tr. pp. 4-5). Because Appellant supposedly was not arrested for an offense arising out of acts alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs as specified in the implied consent statute, defense counsel maintained the trooper could not have legally asked Appellant to submit to a breath test and evidence of Appellant's refusal to submit to a breath test should not have been admitted during trial. (Sept. Tr. pp. 17-18). However, after taking the matter under advisement, the circuit court judge disagreed with defense counsel's contentions and found the evidence related to Appellant's failure to submit to a breath test was properly admitted during trial "because any person arrested for driving under the influence has consented to a breath test" in South Carolina. (Sept. Tr. p. 20; Jan. Tr. p. 14; Nov. Order, pp. 3-4; Feb. Order, pp. 1-2).

ARGUMENT

The circuit court judge correctly affirmed the magistrate judge's decision to admit evidence of Appellant's refusal to submit to a breath test following his arrest for the statutory offense of driving under the influence because, based on the plain language of South Carolina's implied consent statute, Appellant was considered to have impliedly consented to such a test after he was arrested "for an offense arising out of acts alleged to have been committed while [he] was driving a motor vehicle while under the influence" by virtue of his driving under the influence arrest. Moreover, even if Appellant somehow did not impliedly consent to a breath test under the circumstances of his case, evidence of Appellant's refusal to submit a breath test after his arrest was nonetheless properly admitted during his trial because he had no right to refuse to submit to such a test when the trooper offered one to him incident to his arrest. However, even if evidence of Appellant's refusal to submit to a breath test was somehow inadmissible during trial, any error in the admission of that evidence was entirely harmless in light of the cumulative nature of that evidence to other properly-admitted evidence coupled with the fact the other evidence presented during trial overwhelmingly established Appellant's guilt for driving under the influence.

Appellant contends the circuit court judge erroneously affirmed the magistrate judge's decision to admit evidence of his refusal to submit to a breath test when he was offered one pursuant to the implied consent statute. In support of that contention, Appellant maintains he could not have validly been offered a breath test because the implied consent statute was not applicable to his case in light of the fact his arrest for driving under the influence allegedly did not constitute an arrest for "an offense arising out of acts alleged to have been committed while [he] was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs." To the contrary, Appellant's arrest for driving under the influence did constitute an arrest for which Appellant was considered to have impliedly consented to a breath test pursuant to the plain and unambiguous language of the implied consent statute. As a result, evidence of Appellant's revocation of that implied consent and refusal to submit to a breath test was properly admitted during trial, and the circuit court judge properly affirmed the magistrate judge's decision to admit that evidence. Furthermore, regardless of the applicability of the implied consent statute to Appellant's case, evidence of Appellant's refusal to submit to a breath

test was also properly admitted during trial in light of the fact Appellant had no right to refuse that test when it was offered to him incident to his arrest for driving under the influence. However, even assuming evidence of Appellant's refusal to submit to a breath test was somehow improperly admitted during his trial, any error was entirely harmless in light of the fact the challenged evidence was merely cumulative to other evidence establishing Appellant spontaneously stated he would not take a breath test if offered one coupled with the fact the other evidence presented during trial, which included a recording of Appellant displaying numerous signs of intoxication after his vehicle was stopped, overwhelmingly established Appellant's guilt for driving under the influence. Accordingly, there is no valid basis upon which to reverse Appellant's conviction on appeal. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

In criminal appeals from magistrate court, the circuit court judge does not conduct a de novo review and is limited to reviewing for preserved errors raised by appropriate objections. City of Landrum v. Sarratt, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002); see S.C. Code Ann. § 18-3-70 ("The appeal must be heard by the Court of Common Pleas upon the grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court. And the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial, as to the court may seem meet and conformable to law."). An appellate court reviewing a criminal appeal from the circuit court may review for errors of law only and is bound by the magistrate judge's fact findings unless clearly erroneous. State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); see City of Aiken v. Koontz, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (Ct. App. 2006) ("In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court

unless clearly erroneous."). "Accordingly, [the appellate] court's scope of review is limited to correcting the circuit court's order for errors of law." State v. Johnson, 396 S.C. 424, 428, 721 S.E.2d 786, 788 (Ct. App. 2012); see Rogers v. State, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct. App. 2004) ("Brandon clearly misconstrues our standard of review, for in criminal appeals we sit to review errors of law only.").

ANALYSIS

A. Propriety of the Circuit Court Judge's Order Affirming the Magistrate Judge's Decision to Permit the Introduction During Trial of Evidence of Appellant's Refusal to Submit to a Breath Test

Drunk driving is a significant perpetual problem throughout the United States, including in the South Carolina, and "continues to exact a terrible toll on our society." Missouri v. McNeely, __ U.S. __, 133 S. Ct. 1552, 1565 (2013); see South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented[.]"). In order to aid in the enforcement of laws prohibiting drunk driving, South Carolina – just like every other state in the country – has enacted a statute "that require[s] motorists, as a condition of operating a motor vehicle within [our state], to consent to [breath] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." McNeely, 133 S. Ct. at 1566. Specifically, pursuant to the provisions of South Carolina's implied consent statute, a person is impliedly considered to have given consent for chemical testing of the person's breath, blood, and urine in order to determine if alcohol, drugs, or a combination of those things are present "if [the person is] 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." S.C. Code Ann.

§ 56-5-2950(A) (emphasis added). Notably, that statute is "driven by public policy considerations[,]" including the government's "strong interest in maintaining safe highways and roads." South Carolina Dep't of Motor Vehicles v. Nelson, 364 S.C. 514, 522, 613 S.E.2d 544, 548 (Ct. App. 2005); see also Birchfield v. North Dakota, __ U.S. __, 136 S. Ct. 2160, 2184 (2016) ("[T]he need for BAC testing is great.").

In the case sub judice, Appellant was stopped at a roadside checkpoint and arrested for driving under the influence after he exhibited numerous obvious signs of intoxication during the course of the stop. Significantly, because Appellant was arrested for the statutory offense of driving under the influence after he drove his motor vehicle in South Carolina while under the influence, he was logically and naturally arrested for an offense "arising out of acts alleged to have been committed while [he] was driving a motor vehicle while under the influence[.]"[3] Compare S.C. Code Ann. § 56-5-2930(A) ("It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired[.]"); with S.C. Code Ann. § 56-5-2950(A) ("A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, 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

[3] Notably, like the statutory offense of driving under the influence, the statutory offenses of driving with an unlawful alcohol concentration and felony driving under the influence are South Carolina offenses arising out of acts alleged to have been committed while someone was driving a motor vehicle while under the influence of alcohol, drugs, or both. See S.C. Code Ann. § 56-5-2933(A) ("It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more."); S.C. Code Ann. § 56-5-2945(A) ("A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to another person, is guilty of the offense of felony driving under the influence[.]"); see also S.C. Code Ann. § 56-5-2950(G)(3) ("[I]f the alcohol concentration was at [the] time [of a chemical test] eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.").

while under the influence of alcohol, drugs, or a combination of alcohol and drugs."). As a result, he was considered to have impliedly consented to a breath test, and his refusal to submit to a breath test when offered one pursuant to the implied consent statute was admissible as evidence against him during trial. See State v. Jansen, 305 S.C. 320, 322, 408 S.E.2d 235, 237 (1991) ("[I]t is well established in this State that **one who is arrested for DUI** impliedly consents to a breathalyzer test, and that the revocation of that consent is constitutionally admissible as prosecutorial evidence at the trial pursuant to that arrest." (emphasis added)).

In arguing to the contrary on appeal, Appellant maintains the plain language of the implied consent statute establishing a person impliedly consents to chemical testing when that person is 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" rendered the implied consent statute inapplicable to his case despite the fact he was arrested for the statutory offense of driving under the influence. In support of that particular argument, Appellant maintains the use of the phrase "acts alleged to have been committed while . . . driving a motor vehicle while under the influence" demonstrates a clear intent on the part of the legislature to limit the applicability of requirements of the implied consent statute only to situations where an individual was arrested for some violation **other than** driving under the influence. Because he was solely arrested for driving under the influence, Appellant asserts he could not have been offered a breath test pursuant to the implied consent statute and his refusal to take such a test could not properly be used against him during trial.

Importantly though, when given its plain and ordinary meaning and viewed in the proper context in which it was used by the legislature, the phrase "driving a motor vehicle while under the influence" as used in the implied consent statute does not refer to – and was not intended to

refer to – the **statutory offense** of driving under the influence and, instead, refers to the acts of driving a motor vehicle and being under the influence, which themselves are acts related to only two of the required elements of the statutory offense of driving under the influence. See S.C. Code Ann. § 56-5-2930(A) (making it unlawful for a person to: (1) drive a motor vehicle; (2) within South Carolina; (3) while under the influence to the extent the person's faculties to drive are materially and appreciably impaired); see also State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Ct. App. 2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. . . . Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. In interpreting a statute, the language of the statute must be construed in a sense which harmonizes with its subject matter and accords with its general purpose." (citations omitted)). Because the acts of driving a motor vehicle and being under the influence are merely elements of the statutory offense of driving under the influence, Appellant's act of being in South Carolina while doing those two other acts established his guilt for the required elements of the statutory offense of driving under the influence and, when he was arrested for that statutory offense, he was considered to have impliedly consented to a breath test pursuant to the plain language of the implied consent statute just as was intended by the legislature in enacting that particular provision. See State v. Knuckles, 354 S.C. 626, 629, 583 S.E.2d 51, 52 (2003) (recognizing the required elements of the offense of driving under the influence are: (1) driving a motor vehicle; (2) within South Carolina; (3) while under the influence of alcohol or drugs), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Smith, 328 S.C. 622,

625, 493 S.E.2d 506, 508 (Ct. App. 1997) ("To establish the *corpus delicti* of the offense of DUI, the State must present evidence establishing (1) the driving of a vehicle; (2) within this State; (3) while under the influence of intoxicating liquors or drugs."); see also S.C. Code Ann. § 56-5-2950(A) ("A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine **for the purpose of determining the presence of alcohol, 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." (emphasis added)); cf. State v. Squires, 311 S.C. 11, 14, 426 S.E.2d 738, 739-740 (1992) ("Our primary function in interpreting a statute is to ascertain the intent of the Legislature. In doing so, we must give consideration to the object which the Legislature sought to attain and the evil which it endeavored to remedy. In our view, the Legislature did not intend to limit the definition of 'chemical tests' to include only those methods that employ chemical reactions to determine the presence of alcohol in the breath. Such a restrictive reading of 'chemical tests' would undermine the important public purpose underlying section 56-5-2950 of facilitating the compilation of reliable evidence in drunk driving prosecutions." (citations omitted)).

In light of the fact Appellant impliedly consented to a breath test under the plain language of the implied consent statute, evidence of his subsequent refusal to submit to such a test was properly admitted as evidence of his guilt during trial, and both the magistrate judge and circuit court judge correctly rejected Appellant's attempt to have that evidence suppressed based on an erroneous and absurd interpretation of the language of the implied consent statute. See State v. Mills, 360 S.C. 621, 624, 602 S.E.2d 750, 752 (2004) ("Although a penal statute must be strictly construed against the State, when the terms of the statute are clear and unambiguous, [the court]

is constrained to give them their literal meaning."); Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); Landis, 362 S.C. at 102, 606 S.E.2d at 505 ("The legislature's intent should be ascertained primarily from the plain language of the statute. . . . This Court must apply clear and unambiguous terms of a statute according to their literal meaning." (citations omitted)); see also State v. Johnson, 396 S.C. 182, 189, 720 S.E.2d 516, 520 (Ct. App. 2011) ("[C]ourts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention."). Accordingly, as no legal error was committed in Appellant's case either during trial or on appeal to the circuit court, there is no proper basis upon which to disturb Appellant's conviction on appeal. See Landis, 362 S.C. at 101, 606 S.E.2d at 505 ("In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous."). Appellant's conviction should be affirmed.

B. Admissibility of the Evidence of Appellant's Refusal to Submit to a Breath Test Even Assuming the Trooper Could Not Lawfully Offer Him One Pursuant to South Carolina's Implied Consent Statute

In the course of a criminal investigation, a law enforcement officer generally can conduct a warrantless search when the officer receives consent to do so. See State v. Adams, 377 S.C. 334, 339, 659 S.E.2d 272, 275 (Ct. App. 2008) (holding warrantless searches and seizures are constitutionally permissible when conducted under the authority of voluntary consent); see also State v. Laux, 344 S.C. 374, 377, 544 S.E.2d 276, 277 (2001) (recognizing consent may be valid if the person granting consent reasonably appeared to have the apparent authority to grant the consent). However, even if a law enforcement officer does **not** have consent for a search or a search warrant, an officer nonetheless can conduct a valid search under a variety of different

circumstances, including after lawfully arresting a person. See State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (instructing South Carolina courts have recognized several exceptions to the warrant requirement, including the search incident to lawful arrest exception). Thus, when a person is lawfully arrested for driving under the influence, a law enforcement officer can properly and legally administer a breath test to that person **even without** that person's consent. See Birchfield, 136 S. Ct. at 2185 ("[A] breath test, but not a blood test, may be administered incident to a lawful arrest for drunk driving.").

In the case at bar, Appellant was unquestionably arrested for the offense of driving under the influence. As a consequence of that arrest, the trooper who arrested Appellant could lawfully conduct a search incident to Appellant's arrest and was permitted to administer a breath test to Appellant even without Appellant's express or implied consent. See id. at 2185 (instructing a breath test may be administered incident to an arrest for driving under the influence); see also United States v. Robinson, 414 U.S. 218, 224 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."). For that reason, the trooper properly and validly offered a breath test to Appellant's following his driving under the influence arrest, and Appellant had **no right** to refuse to submit to that test even if the provisions of the implied consent statute did not apply to his case. See Birchfield, 136 S. Ct. at 2186 (holding an individual arrested for drunk driving "had no right to refuse" a warrantless breath test offered to him). Accordingly, even if the trooper had somehow been precluded from offering Appellant a breath test pursuant to the implied consent statute, the trooper's offer of a test to Appellant was nonetheless entirely valid based solely on Appellant's arrest, and Appellant's refusal to submit to that test could properly be admitted as evidence of his guilt during his trial. See State v. Smith, 230 S.C. 164, 173, 94 S.E.2d 886, 890 (1956) (holding

Smith's rights were not violated during his trial for the offense of driving under the influence by the admission of evidence related to "his failure to submit to a chemical test designed to measure the alcoholic content of his blood"). Therefore, the magistrate judge committed no error in admitting the evidence of Appellant's refusal to submit to a breath test during trial, and the circuit court judge correctly affirmed that ruling on appeal. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); see also Law v. South Carolina Dep't of Corr., 368 S.C. 424, 440, n. 3, 629 S.E.2d 642, 651 (2006) ("This Court may affirm the trial court based on any ground found in the record."); see generally Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) ("[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." (citation omitted)). Appellant's conviction should be affirmed.

C. Harmlessness of Any Conceivable Error in the Admission of the Evidence of Appellant's Refusal to Submit to a Breath Test

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006); see State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). An error is harmless beyond a reasonable doubt if it does not contribute

to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Importantly, "[w]hen guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see United States v. Hastings, 461 U.S. 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]").

In Appellant's case, even assuming the circuit judge somehow erred by affirming the magistrate judge's decision to admit the evidence of Appellant's refusal to submit to a breath test after he was offered one pursuant to the implied consent statute, any error related to the admission of that evidence was entirely harmless for several different reasons. Initially, any error was harmless because the challenged evidence related to Appellant's refusal to submit to a breath test was entirely cumulative to the evidence of Appellant's unprompted statement he was "not going to blow," which Appellant spontaneously made **before** he was offered a breath test pursuant to the implied consent statute. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."); State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("[T]he admission of improper evidence is deemed harmless if

it is merely cumulative to other evidence."); see also State v. Gilchrist, 342 S.C. 369, 372-373, n. 3, 536 S.E.2d 868, 869-870 (2000) (finding Gilchrist's incriminating statement was admissible as an admission by a party-opponent); State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011) ("[A]s a general rule, any guilty act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt."). Moreover, any error was entirely harmless in light of the other evidence presented during trial that overwhelmingly established Appellant's guilt for driving under the influence, which included a recording of the incident depicting Appellant readily admitting he had consumed five beers before he was stopped, slurring his speech, struggling to maintain his balance while simply standing, failing to follow basic instructions on multiple occasions, and nearly falling to the ground as he tried to walk in a straight line. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) (finding an error to be harmless beyond a reasonable doubt in light of the overwhelming evidence of the appellant's guilt); cf. State v. Degnan, 305 S.C. 369, 372, 409 S.E.2d 346, 348 (1991) ("Degnan asserted that denial of an independent blood test mandated suppression of her refusal to take the breathalyzer. The record reflects, however, that she admitted drinking five or six beers, was unable to complete the alphabet, was dazed, had trouble walking and had to lean on the car. In light of the overwhelming evidence of her intoxication, Degnan has shown no prejudice in admission of her refusal to submit to the breathalyzer."); State v. Wilson, 296 S.C. 73, 76, 370 S.E.2d 715, 716 (1988) (finding any error in the admission of blood test results was harmless because those test results were cumulative to other evidence of Wilson's intoxication, which included properly-admitted breathalyzer test results and testimony regarding Wilson's admission to drinking a half pint of Vodka). In light of the cumulative nature of the challenged evidence to other properly-admitted evidence of Appellant's unwillingness to submit to a breath test coupled

with the existence of the other overwhelming evidence of guilt presented during trial, any error that possibly could have been committed in connection to the admission of the evidence of Appellant's refusal to submit to the breath test offered to him was entirely harmless and could have had no impact on the outcome of Appellant's case. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); see also State v. Tench, 353 S.C. 531, 537, 579 S.E.2d 314, 317 (2003) ("Given the abundant evidence of Tench's guilt, we find any error in admission of the seized items clearly harmless beyond a reasonable doubt."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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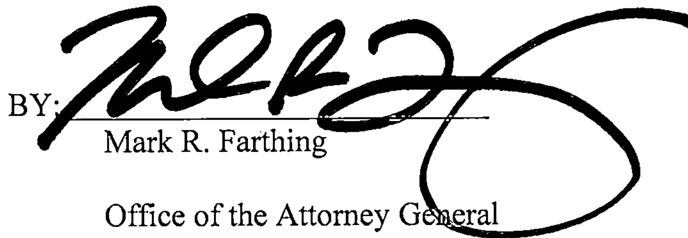

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January 20, 2017

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SC Court of Appeals

January 20, 2017

C. Rauch Wise, Esquire
305 Main Street
Greenwood, SC 29646

RE: Thomas A. Williams v. State – Appellate Case No. 2016-000424

Dear Mr. Wise:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: ~~Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Services