

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge
Barbara Jo Wofford-Kanwat, Magistrate Court Judge

Appellate Case No. 2015-002576
Circuit Case No. 2015-CP-40-03354

Gerald J. Nagy, Appellant
v.
The State Of South Carolina, Respondent

APPELLANTS RESPONSE TO
RESPONDENTS FINAL BRIEF

Gerald J. Nagy
Mail Stop 149
911 Old Barnwell Road
West Columbia, South Carolina 29170
1-803-808-3438
Pro Se

RECEIVED
SEP 01 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge
Barbara Jo Wofford-Kanwat, Magistrate Court Judge

Appellate Case No. 2015-002576
Circuit Case No. 2015-CP-40-03354

Gerald J. Nagy, Appellant
v.
The State Of South Carolina, Respondent

APPELLANTS RESPONSE TO
RESPONDENTS FINAL BRIEF

Gerald J. Nagy
Mail Stop 149
911 Old Barnwell Road
West Columbia, South Carolina 29170
1-803-808-3438
Pro Se

Come now the Appellant, Gerald J. Nagy, Pro Se, and hereby presents the following:

In Respondents Final Brief there are numerous claims that Appellant summarizes as questions below:

1. Is State Trooper Oxandaboure (Prosecution, now Respondent) allowed to represent The State and prosecute the case in Magistrates Court?
2. Did the Honorable Judge Barbara Jo Wofford-Kanwat (Magistrate Court Judge A.) violate South Carolina law; B.) fail to comply with the various court rules; and C.) did she in fact show bias against Appellant by eliciting testimony from Respondent at trial?
3. Did Trooper Oxandaboure comply "sufficiently" with discovery in order for Defendant (now Appellant) to prepare for trial?
4. Were the Magistrate and Circuit Court judges rulings correct that there was full compliance with Rule 5, Brady, and Agurs?
5. Would the outcome of the trial be different if Respondent had provided all available materials requested under discovery?
6. Did Appellant received a fair trial?

Appellant addresses these questions in order:

1. Is State Trooper Oxandaboure (Prosecution, now Respondent) allowed to represent The State and prosecute the case in Magistrates Court?

Apparently yes, but with some caveats. (Note that Appellant did not raise this issue on Appeal but rather Respondent, in his Brief.) Appellant cannot locate any statute under South Carolina Code specifically allows for a State Trooper / non-lawyer to represent The State and

prosecute a criminal case, but the earliest reference Appellant can locate does allow for this process. Under *State v. Messervy*, 248 S.C. 110, 187 S.E.2d 524 (1972), it states in part: "**...The patrolman's conduct (same as an attorney) is subject to the scrutiny of the magistrate at all times, and if the patrolman's conduct of the case is not proper it is the duty of the magistrate to make appropriate rulings...**". However, Appellant could not find any statutes, case law, and the like, that permits any party, be it an attorney, a non-lawyer prosecutor, or a pro se defendant, to haphazardly ignore statutes, court rules, and United States Supreme Court rulings simply because it's convenient for them to do so.

2. Did the Honorable Judge Barbara Jo Wofford-Kanwat (Magistrate Court Judge) A.) violate South Carolina law; B.) fail to comply with the various court rules; and C.) did she in fact show bias against Appellant by eliciting testimony from Respondent at trial?

A.) Appellant agrees that the Magistrate did not violate any laws. (Note that Appellant did not raise the issue of violation of law on Appeal but rather Respondent, in his Brief.)

B.) Appellant does not agree she fully complied with the various court rules as Respondent contends. In Rule 2 - SCRMC it states in part: "**...These rules shall govern all civil suits in the magistrates court...**", the key word being "civil". The original case was criminal, not civil. As such, Respondent claim that Rule 13, SCRMC, that states in part: "**... South Carolina Rules of Evidence shall apply but shall be relaxed in the interest of justice...**" would not be relevant. Rather, Rule 101, SCRE states in part: "**... Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina...**" which is relevant to the initial trial.

C.) While Appellant is unsure if the Summary Court Judges Bench Book technically falls under "court rules", it does provide guidelines to a magistrates conduct during trial. Summary Court Bench Book - Criminal Section, H. (1), Paragraph 6, states in part "**...the fact that the proceedings lack many of the formalities required in the higher courts does not mean that various fundamental safeguards can be ignored in the magistrates' courts.**" Summary Court Bench Book - Criminal Section, H. (10), Paragraph 13 states: "**During the trial, the judge should refrain from questioning the witnesses, unless the witness' response is ambiguous, in which case the judge may ask questions until the ambiguity is eliminated.**" As noted in both Appellants Final Brief and Respondents Final Brief, Appellant objected (R.p.69) to the Magistrate eliciting testimony from Trooper Oxandaboure (acting as both prosecutor and witness) for information that was not in evidence. There was no statement, ambiguous or otherwise, that needed clarification. The Magistrate essentially ignored Appellants objection.

3. Did Trooper Oxandaboure comply "sufficiently" with discovery in order for Defendant (now Appellant) to prepare for trial?

No. Prior to trial, Appellant served Respondent with a MOTION FOR DISCLOSURE OF EVIDENCE. Items Five, Seven and Eight of that motion asked for very specific information. (R.pp.5-6) In response to those three requests, Respondent produced exactly one item; his SMD (Speed Measuring Device) certification, and completely ignored everything else. In response to all other items in Appellants motion, Respondent supplied only one other item; what was purported to be a video of the alleged violation, but in fact was a video that began when Appellant was on an exit ramp and Trooper Oxandaboure turned on his blue light (well after the alleged violation) and ended after Respondent issued the citation.

4. Were the Magistrate and Circuit Court judges rulings correct that there was full compliance with Rule 5, Brady, and Agurs?

Under Rule 5, SCCrimP, Section a, Subsection 1, Paragraphs A, B, C, and D, there is reoccurring wording: "**...the existence of which is known...** (emphasis added)". In *Brady v. Maryland*, 373 U.S. 83 (1963) it states in part: "**...Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution...**". This concept was further clarified under *US v. Agurs*, 427 U.S. 97 (1976) which states in part: "**... In Brady the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable....** (emphasis added)." If Respondent did not have, or did not want to provide, any or all of the materials requested, he should have stated that in his response to discovery. If Respondent did not have the requested material, he should have stated such. However, if Respondent knew where such material was located, and based on trial testimony Trooper Oxandaboure did know the location of requested material, most emphatically he should have stated such. If Respondent felt requests would not lead to discoverable material, he should have stated such. Appellant requested very specific materials that he believed were relevant and material to the preparation of the defense of

the case. Instead of dealing with each item requested, Respondent simply ignored them.

As stated in Appellants Brief, during the course of the motion hearing prior to trial, Appellant was often not allowed to fully present arguments nor fully answer questions proffered by the Judge, and was repeatedly cut off mid-argument by the Judge who would often then change the topic under discussion. The Judge and Respondent discussed things such as body cameras (R.p.57) and breathalyzer printouts (R.p.61), which had nothing to do with this motion. Also during the motion hearing, Appellant requested "**...that anything that's not been provided by Trooper Oxandaboure be excluded from evidence at trial...**" (R.p.65). The Magistrate agreed and then contrary to her own order, allowed such items to be introduced at trial.

Addressing just one point of many possible, in the trial Respondent offered testimony as to the make and model number of the RADAR unit along with knowledge of the location of "**...paperwork, the manuals and stuff...**" "**That's CJA. The manuals for that are at our headquarters or at our shop. I'm sorry.**" (R.pp.67-68). These items were requested under discovery but were not produced under discovery, and should have been excluded from evidence in chief at trial (especially in light of the Magistrate having just ruled they would not be allowed into evidence). None of this information was made available to Appellant prior to trial, and the first time Appellant was made aware of said material was in the course of the criminal trial. Appellant is at a loss to understand how this aligns with Rule 5, Brady, and Agurs, but all this was upheld as complying on initial appeal to Circuit Court.

5. Would the outcome of the trial be different if Respondent had provided all available materials requested under discovery?

Appellant believes without question that, yes, the outcome would have been different.

One purpose of discovery is to allow a defendant an opportunity to impeach alleged facts and testimony at trial, and to that end is providing just one example of many possible.

It is common knowledge (news releases, articles in The State newspaper, etc.), and has been witnessed firsthand by Appellant, that many traffic enforcement agencies "hunt" in what they refer to as wolfpacks. This is where one officer is clocking vehicles on RADAR while others pursue and issues citations. Appellant requested a witness list prior to trial (R.p.5) intending to depose any and all prospective witnesses, which would require the service of a subpoena. Therefore, Appellant also requested the mailing address of all intended witnesses. None was disclosed thus making issuance of a deposition subpoena impossible.

Had Appellant been able to depose Trooper Oxandaboure prior to trial, Appellant would have learned that Respondent first observed Appellant as Respondent was entering I-26 from the on-ramp at Lake Murray Boulevard. (R.p.66). Respondent goes on to testify about how he paced Appellant using the vehicle, verified this more than once (R.p.66), then Respondent reduced his speed in order to get a RADAR "lock" (R.p.68). This looks "good" in print, but the reality is far different.

Appellant had been using the same dry cleaning establishment (R.p.69) since July, 2008, and had been making the same trip, on average, two to three times a month. At that particular section of I-26, some drivers begin to increase their speed as the posted limit increases to 70 mile per hour about a half mile further down. Also, there can be some traffic congestion encountered as I-26 goes from three lanes to two where the speed limit increases, and many other drivers slow down to well below the posted speed limit due to traffic from the numerous off-ramps and on-ramps in that area. Because of those factors, just as he passes under the Lake Murray Boulevard overpass, Appellant usually begins to move from the left lane, to the middle, to the right lane,

reducing his speed in anticipation of exiting.

Based on Respondents testimony, Appellant was traveling at 80 miles per hour (R.p.66), or 7040 feet per second, or, more importantly, one mile in 45 seconds. Post trial, Appellant measured the distances from the beginning of the Lake Murray Boulevard / I-26 on-ramp to the beginning of the off-ramp Appellant used to exit I-26. The total distance is $4/10^{\text{th}}$ of a mile, or at 80 miles per hour, a total time of 18 seconds assuming a constant speed. Based on Respondents testimony, within that time frame Trooper Oxandaboure would have had to accelerate to 80, verify that speed at least twice, reduce his speed, clock Appellant on RADAR, and lock that information into the RADAR unit.

There are at least two major issues with this scenario. First, most RADAR units have a minimum required measurement distance, usually at least .25 miles in a straight line, required to insure it has a "good" reading. Subtracting .25 miles from the total $4/10^{\text{th}}$ total, this would have left Respondent a total of seven seconds to accomplish everything to which he testified. Appellant does believe this is a physical improbability. Second, during that time frame Appellant would have been reducing his speed as he approached the exit ramp speed, thus negating any potential RADAR lock. The unit would not have been able to acquire a constant speed measurement.

Additionally, the Lake Murray Boulevard / I-26 on-ramp has a long sweeping curve. When using non-stationary Doppler effect devices like RADAR against a moving "target", if either the Doppler effect device or the "target" is in a constantly changing angle of attack, such as a curve, the readings are always erroneous.

Appellant has designed and built custom electronics for military defense contractors that confirm, traceable to a NIST standard, the accuracy of equipment that defense contractors use to

certify the accuracy of their military weapons testing systems. Appellant has more than a passing knowledge of speed measuring devices. As stated repeatedly, Appellant has not, and does not, doubt the accuracy of RADAR units when properly maintained and used according to the manufacturers recommendations. That Trooper Oxandaboure has had theoretical, and probably hands-on, training with Speed Measuring Devices has not come under question by Appellant. However, just because Trooper Oxandaboure may know how to operate RADAR in general, does not mean, nor should it be a requirement to be assumed, by Appellant and/or the courts, that Trooper Oxandaboure was in fact operating the unit properly.

Further, the FCC requires, in most cases, that RADAR units (transmitters) be certified traceable to a NIST standard at least every two years. Many RADAR units manufacturers require re-certification every year. In order to ensure proper operation, RADAR manufacturers may require daily calibration, along with an additional verification immediately after using the obtained results for a traffic citation. These daily calibrations and post-incident verifications, when required for proper operation, are to be preserved in a log. Hence, the necessity for Respondent to produce the requested information. This is just one of many issues Appellant has with these proceedings.

6. Did Appellant received a fair trial?

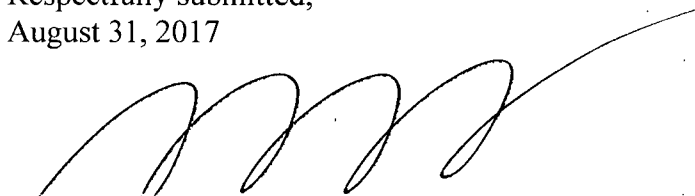
No. Much of Trooper Oxandaboures testimony and actions throughout this entire affair have been disingenuous at best, thus the reason Appellant was granted an Ishmell Order after the first trial. Considering the items presented above, Appellant thinks a more likely potential scenario is that as Trooper Oxandaboure was still traveling along the curved on-ramp when he observed Appellant moving at a different rate of speed in relation to another vehicle. Possibly

activating the "instant on" capability many RADAR units now implement, the unit may, again may, have flashed up a reading of 80, and Respondent commenced the traffic stop about 3/4th of a mile later. From that point on, Respondent did everything he could to obstruct Appellant from gathering any facts that might have led to Appellants acquittal. The Magistrate did not want to "waste" the courts time with a defendant who believes he in innocent, thus she rendered numerous decisions that ran afoul to Rule 5, Brady, and Agurs, to include allowing testimony at trial that was contrary to her own evidentiary exclusion ruling, by overruling her own decision.

Appellant did not bother to cross examine Respondent for three reasons. First, he has a heart condition and after waiting in court for over four hours for his case to be called, along with the stress of the trial, Appellant was simply exhausted. Second, Appellant believed that the proceedings up to that point would never be upheld on appeal. Third, Appellant believed that at that point, there was nothing he could say or do that would have altered the outcome.

In *Lutwak v. United States*, 344 U.S. 604 (1953), the United States Supreme Court stated in part "**The Constitution requires only that a defendant receive a fair trial, not a perfect one.**" Appellant is not seeking a perfect trail, just a fair one; or the reversal of the outcome of an unfair one.

Respectfully submitted,
August 31, 2017



Gerald J. Nagy
Appellant, Pro Se