

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 STATE OF SOUTH CAROLINA)
 Plaintiff,)
 vs.)
)
 HANNAH KELLY)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 9TH JUDICIAL CIRCUIT
 CASE NO.: 2017-CP-10-725

**MOTION AND ORDER INFORMATION
 FORM AND COVER SHEET**

RECEIVED
 OCT 11 2017
 SC Court of Appeals

Plaintiff's Attorney: Edward L. Phipps, Bar No. 010331 Address: 155 King Street, 2nd Floor, Charleston, SC 29401 Phone: 843-216-9797 Fax 843-300-4949 E-mail: edward@phippsfirm.com Other: _____	Defendant's Attorney: Tod Williams, Bar No. _____ Address: O.T. Wallace Building, 101 Meeting Street, Charleston, SC 29401 Phone: 843-958-1900 Fax 843-958-1905 E-mail: williamst@scsolicitor9.org Other: _____
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____
 Estimated Time Needed: _____ Court Reporter Needed: YES/ NO

SECTION II: Motion/Order Type

Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff / Defendant Date submitted _____

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)

Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRCF)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.
 Other: _____

JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF CHARLESTON)
) CASE NO. 2017-CP-10-725
 STATE OF SOUTH CAROLINA,)
 Respondent,)
 vs.)
)
 HANNAH KELLY,)
 Appellant.)

RECEIVED

OCT 11 2017 ORDER
 SC Court of Appeals

FILED
 2017 SEP 21 AM 9:38
 JULIE J. HARRIS
 CLERK OF COURT

Jen

THIS MATTER came before the Court on August 31, 2017 for a hearing upon Appellant's Motion to Appeal a conviction in Charleston County North Area III Magistrate in front of the Honorable Joanna Summey-Fuller on February 1, 2017. Appellant was represented by Edward L. Phipps. The Respondent was represented by Tod Williams. The Court having reviewed this matter and the record as a whole, the submittals of counsel, and upon hearing arguments of counsel and being fully informed, it is Ordered that this case be remanded for a new trial on the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1. Appellant was arrested and charged with driving under the influence (DUI), but Respondent chose to prosecute her with driving with an unlawful alcohol concentration ("DUAC") instead and tried her in Magistrate's Court before the Honorable Joanna Summey-Fuller on February 1, 2017.
2. During opening arguments, Respondent improperly went into extensive discussion and analysis about DUI to the Jury in violation of S.C. Code Ann. § 56-5-2933(I).

3. Appellant objected to the Respondent's improper statements in regards to DUI, the Magistrate sustained the objection but did not grant a mistrial or provide a curative instruction to the jury to disregard the improper statements.
4. Appellant was found guilty of DUAC.
5. Appellant filed Notice of Appeal on February 13, 2017.
6. Magistrate Summey-Fuller filed the Magistrates Return on March 17, 2017.
7. The criminal appeal from Magistrate's Court was heard by this Court of Common Pleas on August 31, 2017.

CONCLUSIONS OF LAW

I.

- gan
- A. S.C. Code Ann. § 56-5-2933(I) provides that it is unlawful in our State for a person to be prosecuted for both a driving with an unlawful alcohol concentration (DUAC) and driving while under the influence of alcohol or drugs (DUI) for the same incident. Based on the record herein, I find that Respondent's extensive discussion and analysis of DUI during opening argument while Appellant is charged with DUAC is improper and a violation of 56-5-2933(I).
 - B. This claim was reviewed to determine whether the conduct complained of so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. v. Blackwood, 149 Fed.Appx. 163 (4th Cir. 2005). To prevail under this standard, one must show that "the State's remarks or conduct were improper and, second ... that such remarks or conduct prejudicially affected his substantial rights" so as to deprive him of a fair trial. Id. Based on the evidence submitted before this court, and the arguments of counsel, I find and conclude that

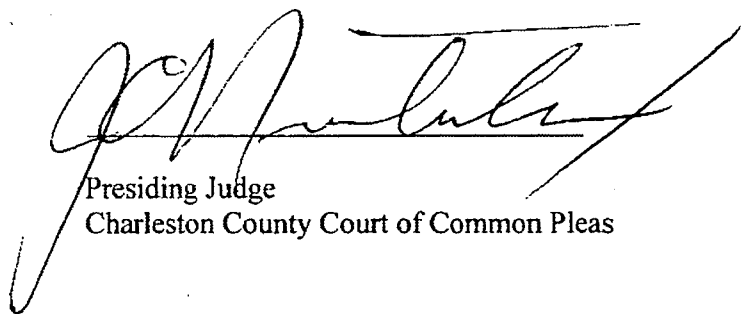
Respondent's remarks during opening argument were improper. I find that such remarks and conduct, coupled with the absence of curative instructions to the jury, prejudicially affected Appellant's substantial rights so as to deprive her of a fair trial.

II. Prior to admitting breath test results, Appellant objected and now appealed the results of the breathalyzer test based on violation of State v. Parker, 271 S.C. 160, 162 (1978). Based on the evidence submitted before this court, and the arguments of counsel, I find and conclude that the Magistrate did not err in allowing into evidence the results of the breathalyzer test.

IT IS THEREFORE ORDERED AS FOLLOWS:

It is therefore **ORDERED** that Appellant's Motion on Appeal is **GRANTED** in part and **DENIED** in part, and this case shall be remanded to North Area III Magistrate for a new trial consistent with this order and will be scheduled at a time determined by the Magistrate court.

It is further **ORDERED** that the verdict, judgment, and any administrative (DMV) suspensions entered against the Appellant in the Magistrate Court is set aside and vacated.



Presiding Judge
Charleston County Court of Common Pleas

Date: _____

9/14/17
Charleston, South Carolina

State of South Carolina

Charleston County
101 Meeting Street, Suite 400
Charleston, SC 29401
Phone (843) 958-1900
Fax (843) 958-1905



Berkeley County
300-B California Avenue
Moncks Corner, SC 29461
Phone (843) 723-3800 ext. 4529
Fax (843) 719-4588

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

October 9, 2017

Joyce C. Rueger
Post Office Box 1472
Johns Island, South Carolina 29457-1472

RECEIVED
OCT 11 2017
SC Court of Appeals

Re: The State of South Carolina, Appellant, v. Hannah Kelly, Respondent, 2017-CP-10-0725

Dear Ms. Rueger:

On August 31, 2017, the above-referenced matter was heard by the Honorable J. C. Nicholson, Jr., Circuit Court Judge, in the Charleston County Court of Common Pleas. My records indicate that you served as court reporter at that time.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record.

I agree to pay the per-page charge for this transcript as provided by Rule 607, SCACR.

With kindest regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read "T. D. Williams IV".

T. D. Williams IV, Assistant Solicitor
Attorney for Appellant

cc: Edward L. Phipps, Esquire
Attorney for Respondent

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals