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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2016-000745

The State,.....Respondent,

vs.

Maria Todd Martin.....Appellant.

RECORD ON APPEAL

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

David M. Stumbo
Solicitor, Eighth Judicial Circuit

ATTORNEYS FOR RESPONDENT

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

ATTORNEY FOR APPELLANT

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It was before that.

MR. WOOLSTON:

No. It was before that.

MR. HENDERSON:

No, sir.

(Stopped typing Trooper Sinclair and began Motion 2 - 1:17:30)

THE COURT:

Motion 2, you're making a Motion that there be no mention of her refusal to take field sobriety tests?

MR. HENDERSON:

That is correct, Your Honor. And also that they not be allowed to play that portion of the video.

THE COURT:

Okay.

MR. HENDERSON:

Because legislature has specifically said you don't have to tape them.

THE COURT:

Right.

MR. HENDERSON:

And unlike the chemical test where it says expressively refusal can be used against you, here, if anything, the legislature is somewhat

saying, hey, refusal can't be used against you because you can't be arrested. And honestly because those field sobriety tests, most of them would deal with counting, alphabet. You run into Miranda issues, you know, basically commenting their right to remain silent by getting into that. And we just ask that the government not be allowed to go into those issues in the case (indiscernible)

THE COURT:

Okay. Mr. Woolston, what's your position on that?

MR. WOOLSTON:

Okay. If I understand the Motion, they're -- they're asking for the Defendant's refusal to take field sobriety is not relevant and therefore inadmissible. The State's position is why can't (indiscernible) one of these things individually (Indiscernible) request to (indiscernible)

THE COURT:

(Indiscernible) I haven't read the whole thing. It's just basically a --

MR. WOOLSTON:

I mean --

THE COURT:

They're basically asking that there be no mention

of her refusal to take the field sobriety test and no -- no -- and delete it off the recording.

MR. WOOLSTON:

Yeah.

THE COURT:

No evidence of her -- there will be no evidence or mention of her refusal to take the field sobriety test.

MR. WOOLSTON:

Right. Judge, the State would be completely opposed to the suppression of that highly relevant evidence in the matter. There is no requirement under the U.S. Constitution or (Indiscernible) the State Statute to require that (Indiscernible)? be given prior to the administration of field sobriety. The imposition on road chart (indiscernible) road (indiscernible) stops, the Supreme Court (indiscernible) that is the Richardson case (indiscernible) I'm forgetting the name of the cite. I think the courts made (indiscernible) the Supreme Court has said that (Indiscernible) cannot be required to be given on roadside stops prior to arrest. And here --

THE COURT:

That was a --

MR. WOOLSTON:

-- the officer --

THE COURT:

That was another -- that's like Ohio versus Robertson --

MR. WOOLSTON:

Yeah, it's one of those --

THE COURT:

(Indiscernible)

MR. WOOLSTON:

One of those. I have -- I have it buried in here. I can get it out. But the bottom line is, I don't think there's anyone that's disagreeing that under Federal Law and now under State law -- the State Statute no longer requires that Miranda be given prior.

UNKNOWN SPEAKER:

(Indiscernible)

MR. WOOLSTON:

I don't want to be interrupted here. I'm giving my argument(Indiscernible) that the Miranda's -- the Mirander's is no longer required to be given prior to the administration of field sobriety tests. At one time the defense enjoyed that extra benefit, but there is no requirement for it now.

The legislation has finally realized that -- you know, I don't know how many hundreds and probably thousands of cases had their evidence suppressed because there was this extra requirement that our legislature reduced putting into the law by motivated defense (Indiscernible) that this was a needed(Indiscernible). But it's no longer the law, thank goodness, so you don't have to afford Miranda Rights --

THE COURT:

I think Miranda's coming up in Motion 3, but we're on Motion 2 right now.

MR. WOOLSTON:

Okay. Well --

THE COURT:

I mean, let's get the Motion through. What is the relevance of --

MR. WOOLSTON:

I kind of thought it was weaved in there by them.

THE COURT:

Well --

MR. WOOLSTON:

But the bottom line is, it's highly relevant --

THE COURT:

-- I don't think they even mentioned Miranda.

MR. WOOLSTON:

Okay. I apologize. But it's highly relevant evidence that her refusal to perform field sobriety is part of the officer's investigation into the matter, and so it's highly relevant. And she may be able to explain later, to some degree, why she didn't want to participate in the field sobriety. But --

THE COURT:

Well, I don't --

MR. WOOLSTON:

But that the -- the absolute --

THE COURT:

I don't think she has -- I'm going to grant motion to because she doesn't have any burden of proof and she doesn't have a burden to produce evidence in her unwillingness to cooperate an -- you know, her unwillingness to -- to provide evidence is not -- and she -- she doesn't have the burden of producing evidence.

MR. WOOLSTON:

I never suggested that she did. But the officer is conducting an investigation for a DUI.

THE COURT:

Yeah.

MR. WOOLSTON:
And the fact that she will not provide any evidence that her sobriety is not -- is not a speech issue for purposes of -- of (Indiscernible) --
THE COURT:
I don't know if it's speech. It's more their burden that she's presumed innocent and she doesn't have the burden of proving anything, so --
MR. WOOLSTON:
But that would be --
THE COURT:
-- why is it -- why is it -- what is that? That's provative (Indiscernible) of her unwillingness to cooperate with an investigation.
MR. WOOLSTON:
Well, her -- I mean, the Court has already said that a refusal on the DataMaster (Indiscernible) --
THE COURT:
I mean, I can't say -- when you can't say that like in a -- if you were trying a case and somebody said the police asked them to give a statement, you couldn't mention that they failed to give a statement.

MR. WOOLSTON:
Right; that's true.
THE COURT:
I mean, that's (Indiscernible) that's (Indiscernible)
MR. WOOLSTON:
But they would be in custody. I mean, I guess some of your scenario there is --
THE COURT:
You can't -- you can't -- you can't mention somebody's failure to make a -- to pull up to make a statement; right?
MR. WOOLSTON:
I mean, are you giving me the (Indiscernible) situation where a law enforcement officer has --
THE COURT:
I'm giving you Supreme Court law that is -- the US Supreme Court has said you cannot mention that a person has invoked their right to remain silent.
MR. WOOLSTON:
I agree; I agree.
THE COURT:
And I think this is (Indiscernible)
MR. WOOLSTON:
(Indiscernible) as to a statement. You know, I

guess an interrogation. Your --

THE COURT:

Yeah. You cannot mention that they have invoked their right to remain silent. And I think by analogy you can't mention that they invoked their right to refuse to --

MR. WOOLSTON:

Well --

THE COURT:

-- to perform full sobriety tests.

MR. WOOLSTON:

Well, the only dilemma, then, that such a ruling would create --

THE COURT:

I mean, the State has the burden of proving its case by -- she doesn't -- she has no burden of proof.

MR. WOOLSTON:

(Indiscernible)? Not by (Indiscernible)

THE COURT:

She doesn't have the -- (Indiscernible) you have to prove it beyond reasonable doubt. I mean beyond a reasonable doubt. But she doesn't have to prove -- she doesn't have to prove her innocense.

MR. WOOLSTON:

Okay. I get that, but --

THE COURT:

Are those tests designed to prove her innocense or to prove her guilt or they're designed to prove her guilt.

MR. WOOLSTON:

Right. What about the problem of (Indiscernible) run into if I could afford this (Indiscernible)? to -- to congeal(Indiscernible)?

THE COURT:

I'm just saying it goes back to --

MR. WOOLSTON:

What about --

THE COURT:

-- just as you can't mention if they give a statement. I mean, you clearly agree with that; right?

MR. WOOLSTON:

I do.

THE COURT:

I mean, that's --

MR. WOOLSTON:

(Indiscernible) under the --

THE COURT:

-- that's (Indiscernible) that's a Supreme Court ruling.

MR. HENDERSON:

(Indiscernible)

THE COURT:

Under that -- under that scenario. Or yeah. I think actually that one -- I think (indiscernible) persaid (indiscernible) --

MR. WOOLSTON:

Okay.

THE COURT:

But -- but you can't -- you can't mention the fact that somebody gave a state -- refused to give a statement, so --

MR. WOOLSTON:

I'm not arguing with you about that.

THE COURT:

So I --

MR. WOOLSTON:

I'm not disagreeing with you about that.

THE COURT:

So I would -- I'm analagizing that to this and --

MR. WOOLSTON:

Here's the dilemma I find myself in, but I would think the Court would --

THE COURT:

Just skip that part of the video.

MR. WOOLSTON:

Okay. Here's -- here's the -- I don't want to -- I need to put this thought out, this part of my argument.

THE COURT:

Yeah.

MR. WOOLSTON:

If we find(Indiscernible) ourselves not being able to show the officer's diligence and effort to make an informed decision to arrest someone for driving under the influence by denying the jury's access to the diligence that the officer endeavored to exert so that we could make an argument (Indiscernible) to the State that the State did not rush to judgement, that they made an informed effort to try to make an informed decision about whether this person was under the influence, if you deny the State's ability to bring forward that information, then you've got -- you've set the defense up to -- the defense is then set up to make what I believe to be a very unfair presentation in closing or (Indiscernible) whether it be a directed verdict, a Motion at the

closing of the State's case, or an argument at the close of the case, that this is all the State was willing or did. This is all the State did; this is all they did (Indiscernible) --

THE COURT:

That's right.

MR. WOOLSTON:

They just stopped a car --

THE COURT:

That's right. That's what --

MR. WOOLSTON:

They just stopped a car.

THE COURT:

That's what defense lawyers do. They say --

MR. WOOLSTON:

Everybody out here on the jury has -- has -- is very familiar with the law and field sobriety, field sobriety, field sobriety.

THE COURT:

Well, by that -- by -- according to your argument, then why would they not be able to say, well, we were diligent; we asked her to give a statement, but she wouldn't give us one. I mean, your argument -- by your argument, then you ought to be able to mention the fact that they asked her to

give a statement and she refused to give a statement.

MR. WOOLSTON:

We're not -- no. I'm saying that the (Indiscernible) --

THE COURT:

That's the same argument that would have been made by the -- by the State back in the 1960s --

MR. WOOLSTON:

Right.

THE COURT:

-- when the U.S. Supreme Court said you cannot mention the fact --

MR. WOOLSTON:

Yeah.

THE COURT:

-- even(Indiscernible) you asked her to give a statement.

MR. WOOLSTON:

But this is a while --

THE COURT:

You were trying to -- hold up, don't interrupt me while I'm talking.

MR. WOOLSTON:

All right.

THE COURT:

You're asking her -- and I'm sure the State -- back then they probably said, well, Judge, well -- well, (Indiscernible) back then. They just said justice, you know, you're making it look like we didn't even ask her to give a statement. We ought to be able to say we asked her to give a statement and she didn't give a statement, but they didn't -- they didn't accept that argument. They said you if -- if somebody that you -- if you -- you cannot mention the fact that you asked somebody to give a statement and they refused to give a statement.

MR. WOOLSTON:

I agree.

THE COURT:

And that -- and by your -- and that tends to make it look like the State didn't even try to give -- ask for a statement, to a jury; does it not? I say it does. It makes it -- it could create the inference in the mind of the jurors that the State didn't even bother to try to give a statement. Nevertheless, you can't mention the fact that she refused to give a statement. Do you follow my logic?

MR. WOOLSTON:

I do, Judge. (Indiscernible)

THE COURT:

So the same --

MR. WOOLSTON:

I do.

THE COURT:

Okay. So I don't see why that argument would apply here. I mean, he asked her to give the evidence, and she refused to give him the evidence. Now, the State has said so I -- I'm going to grant it to -- I grant Motion 2 so I don't mention of the fact that she -- so I'm going to grant Motion 2. There shouldn't be any -- any mention of the fact that she -- that she failed to participate in the field sobriety test. Because I think that's (Indiscernible) as to -- it goes back to the fact that the Defendant -- the State has to prove -- the State has the burden of proof and --

MR. WOOLSTON:

Judge, (Indiscernible)? you know, I didn't want to interrupt you, and I apologize for the --

THE COURT:

And self incrimination (Indiscernible) self incrimination. And yeah, go ahead.

MR. WOOLSTON:

I just wanted to put one last matter on the record, if I could.

THE COURT:

Okay.

MR. WOOLSTON:

In this particular setting, you have a situation out here where the community at large knows that field sobriety is a necessary part of an officer's duty to investigate. And that's -- I would be shocked if everybody on a jury in this community or across the United States doesn't expect the officer --

THE COURT:

Do they not? I'll say no, that an officer is always going to -- a diligent officer will always ask for a statement, almost. If they're investigating a burglary case, aren't they going to say you have the right to remain silent, wouldn't you -- would you like to talk to us about this. And are they aware of that? I mean, what officer wouldn't do that.

MR. WOOLSTON:

The part of my argument that I'm trying to complete here, is that my argument is essentially that by depressing that information from the jury

so that they don't see the diligence, what you end up having is a situation where they will hold that lack of diligence against the State because it empowers the defense to be able to say this is all he did.

THE COURT:

Well, if they said that's all he did, then they would be opening the door for you to come back to say that we did. They would be opening the door if they made that argument.

MR. WOOLSTON:

You mean in the closing? Are you saying if this ruling is upheld, that --

THE COURT:

Now, you would --

MR. WOOLSTON:

-- (Indiscernible) would be shut off?

THE COURT:

You would -- I would -- I mean, I would find -- you would agree that you can't argue that they didn't even ask her to take field sobriety, to take field sobriety tests?

MR. WOOLSTON:

No. And that would be an improper argument to the jury actually --

THE COURT:

And they would be grounds for a mistrial.

MR. (Indiscernible):

Actually --

MR. GARRETT:

We know we can't say that --

THE COURT:

No.

-- knowing the fact that he did.

MR. HENDERSON(Indiscernible):

Yes.

THE COURT:

You know for a -- so you -- you're not going to argue that he didn't even ask her? He didn't even bother to ask her for --

MR. HENDERSON:

No, no, no.

MR. WOOLSTON:

But what they're going to do, is they're going to say this is all the State has; this is all -- this is all the State did.

THE COURT:

Right.

MR. WOOLSTON:

This is all the State did. This is all the State

did.

THE COURT:

No, no, no, no, no, no. They can't -- they're not going to say -- they can say this is what the State's evidence is and it's inadequate.

MR. WOOLSTON:

(Indiscernible)

THE COURT:

Well, I feel like we're breaking new ground here, because I never -- have not heard of that sort of suppression of evidence.

MR. WOOLSTON:

Well, I've never seen the Motion. I've never thought about it. But, I mean, I'm breaking new ground. I'm going to -- I guess. I'm granting -- I denying Motion 1 and I'm granting Motion 2.

STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

EIGHTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA,
PLAINTIFF,

-VS-

MARIA TODD MARTIN,
DEFENDANT.

CASE NO.: 2014-CP-24-00981

TRANSCRIPT OF RECORD

SEPTEMBER 2, 2015
GREENWOOD, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DONALD B. HOCKER, JUDGE

A P P E A R A N C E S:

ATTORNEY FOR PLAINTIFF:
DEPUTY SOLICITOR MICAH BLACK

ATTORNEY FOR DEFENDANT:

BILLY GARRETT, ESQUIRE
CARSON HENDERSON, ESQUIRE

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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THE COURT: This is 2014-981, Eighth Circuit Solicitor's Office vs. Marie Martin. Solicitor Micah Black is present representing the State and Billy Garrett and Carson Henderson are here on behalf of Marie Martin. The Appellate is who?

MR. CARSON: The State, Your Honor.

THE COURT: Oh, okay. The State is the Appellate. Okay.

MR. CARSON: Your Honor, before we get started, may I hand up a document that I've handed to the Solicitor?

THE COURT: Sure.

MR. CARSON: I'm not sure that this has made its way into the Common Pleas file, but this is the relevant transcript from the jury trial on July 25 and 26, 2012. The Court has the transcript from the 2014 hearing, but that's the 2012 transcript, Your Honor. We just wanted to make it part of the file. I believe we've given that to the Solicitor before, but wanted to double check and do it again.

THE COURT: I've got a transcript in the file 2014, and you say this is a 2012 transcript?

MR. CARSON: Correct, Your Honor. This case was tried before a jury downstairs in 2012, hung jury. Three for acquittal, three for guilty. It was reconvened in May 2014 and that is what is leading to the State's appeal today,

Your Honor.

THE COURT: All right. Solicitor Black, I'll be glad to hear from you.

MR. BLACK: Yes, sir, Your Honor. Just as a way of background, I believe in the first trial -- Mr. Henderson can correct me if I'm wrong. Mr. Woolston tried the case for the State and I believe that Judge Martin also presided over that case as well.

MR. HENDERSON: That is correct, Your Honor.

MR. BLACK: And in that case, Your Honor, Judge Martin ruled that the State basically the Defense made a motion in limine to redact any field sobriety test that were made at the scene of that test, to redact any mention of those, to redact them from the record in general, period. I think Mr. Woolston went ahead and tried the case and I think it was tried to a mistrial of three to three with a hung jury. Like Mr. Henderson stated, the State tried the case again last year, I think it was May or June.

MR. HENDERSON: I think May of 2014, Your Honor.

MR. BLACK: I think it was May that the State retried the case.

THE COURT: Well, it's got, "Transcript of pretrial motion July 16, 2014."

MR. HENDERSON: That would be the correct date.

MR. BLACK: So it's July, Your Honor. So the case came

up to be retried. I stepped in and I tried the case. Judge Martin was the presiding judge. He made the same ruling that the State could not use - we couldn't mention any part of the field sobriety test at the scene. Basically, the Defendant, she was arrested for DUI. The Trooper offered her a set of field sobriety tests at the scene and she refused to take any field sobriety test. Judge Martin, in his ruling -- the State made several rulings. Judge Martin basically ruled --

THE COURT: Would his ruling be contained in an order dated July 30, 2014? Would that be the appealed order?

MR. HENDERSON: That's correct.

MR. BLACK: Mr. Henderson drafted that order. It was signed by Judge Martin. Of course, the State had a chance to look over the order that was signed. I think, basically, his ruling is contained in paragraph number 7 on page 4 if I'm not mistaken. Basically, the Judge said that the statute specifically outlines - the DUI statute specifically outlines that the breath test - if an individual refused to take the breath test the statute expressly says that that can be used against the Defendant. However, the Defense's argument at trial, and the Judge kind of went along with that, is that the statute doesn't make any mention of that in the DUI statute as far as the field sobriety test is concerned.

I do have the statute in front of me, Your Honor. I think the statute --

MR. HENDERSON: Actually, Your Honor, the appropriate statutes are actually cited in Judge Martin's order.

MR. BLACK: And that statute, Your Honor, is 56-5-2953 under section A(1). Your Honor, the State's position is that the statute does say that the field sobriety test should be admitted and should be allowed to go to the jury. Under that statute, it says, "A person who violates subsection 56-5-2930", which is basically the DUI statute, "must have his conduct at the incident site and the breath site video recorded. The video recording at the incident site", which is out on the scene, "must not begin later than the activation of the officer's blue lights, include any field sobriety test administered." It talks about Miranda after that.

Your Honor, the State's position is that a refusal of any field sobriety test should be administered. The statute requires that. And so the State's argument is that it should be allowed to go to the jury. I made several arguments to Judge Martin down in Magistrate's Court, Your Honor, but basically his ruling was that based on statutory construction the expression of one is the exclusion of the other. Your Honor, it's the State's position that the administration of the field sobriety test talked about in

56-5-2953 is clearly enumerated in the statute. In general, Your Honor, in this particular case the Defendant refused to take the field sobriety test and she refused to blow into the DataMaster. I think the officer mentioned that at the scene he smelled some alcohol and I think he mentioned that the lady had bloodshot eyes. But we think -- the State feels that not being able to talk about the refusal of the field sobriety test severely inhibited our case.

Basically, it sent the State into a fight with one hand tied behind our back. Not being able to talk about anything that happened at the scene as far as offering a field sobriety test to the Defendant. It kind of goes toward the res gestae, Your Honor, getting the full context of what's going on out there at the scene. That's the argument that I made to the Court down in Magistrate's Court, but the Judge ruled in the Defense's favor and excluded that. The State immediately appealed up to the Circuit Court.

THE COURT: So you didn't go ahead and try the case?

MR. BLACK: Did not. No, sir, Your Honor.

THE COURT: I'm just looking at 2953 for just a moment. All right, Mr. Henderson? I'll be glad to hear from you.

MR. HENDERSON: Yes, sir, Your Honor. When this case was tried the first time, or I guess the only time that it's been tried to a jury verdict, which was a mistrial, the State did not have this evidence. In fact, Judge Martin had

suppressed my client's refusal to take the field sobriety test. During that first trial the State put up evidence of bad driving, that the officer smelled alcohol, that my client admitted drinking alcohol, and that she refused to take the DataMaster test. So even without that evidence, the State went forward and actually the State convinced three people beyond all and any reasonable doubt that our client was guilty of driving under the influence even without this information being presented to the jury.

So when this case was called for trial a second time, Your Honor, in July of last year, obviously the Solicitor knew what our argument was going to be. The Judge knew what our argument was going to be about the field sobriety test because they had just pulled out the old file and there it was. We updated our motion and then had a lengthy argument about it, Your Honor, which I think is really incorporated into Judge Martin's order.

If you look at Judge Martin's order, he was of the opinion that his ruling last year did not significantly impair the State's ability to go forward with their case. His prime reasoning was, hey, you didn't have this evidence two years ago and you went forward without it and convinced three of the jurors that she was guilty beyond all and any reasonable doubt. But, of course, the State has a right to appeal it and I think that was what Judge Martin said I

can't stop you from appealing, I just don't think it significantly impairs your case. Your Honor, the Court's order I think *State v. Belviso*, B-e-l-v-I-s-o, is kind of a central case on what significantly impairs the State's ability to prosecute the case. So, Your Honor, first of all just from a procedural standpoint, I'm not sure that the State's ability to prosecute the case has been significantly impacted.

THE COURT: But is that a factor to determine whether or not evidence is admissible or not? I've never heard that argument that, "Well, I'm going to keep it out because it's really not going to hurt you by keeping it out." I've just never heard that argument. And it may be a good argument. I've just never heard it before.

MR. HENDERSON: What? Us asking to keep the evidence --

THE COURT: Well, a factor in determining whether or not evidence is admissible or not, "Well, if I keep it out it's really not going to hurt you too bad."

MR. HENDERSON: Well, in fact, we wanted to keep it out.

THE COURT: No, the argument was that the Magistrate told the State that, "It really doesn't hurt you if I rule that it's inadmissible."

MR. HENDERSON: From that standpoint, right, because there was plenty of other evidence that would be presented to a second trial jury that had been presented to a first

trial jury that the jury could believe or disbelieve in determining whether or not to convict. I just wanted to raise that to the Court's attention because I'm just not convinced that the State's case was significantly impacted. I think that's your first threshold, Your Honor. If you believe that it was significantly impacted then again, going to the second leg of the argument, we don't believe that the Magistrate erred at all in making this determination.

The legislature has set forth what can be used against you, i.e. A refusal to take the breath test. The legislature has also said that you can't be arrested for refusing to take field sobriety tests. Meaning, it's not an unlawful - disobeying police command. And again, that's set forth in the order as well. And also, Your Honor, the legislature has set forth a time and instances when actually an officer can make you take a field sobriety test. If you are involved in an incident involving somebody's death the legislature has actually said, yes, the arresting officer or investigating officer can make you take a field sobriety test.

So Judge Martin, I think, made the appropriate decision when he said that the legislature has gone ahead and said what can be used against you. And by them saying what can't be used against you, it ought to be redacted. Again, as the Judge said, no person is ever compelled or has to give any

evidence against themselves in any circumstance.

Your Honor, a case that came down here just this past month from our Supreme Court is *State vs. Cody Roy Gordon*. This Gordon case is getting a lot of mention. It was the case about the horizontal gaze nystagmus test. Justice Beaty, not really relevant to the central holding in the case, was talking about instances where a Defendant actually performs field sobriety tests. And it's on video. At certain times that can be redacted for a variety of reasons.

Your Honor, taking that to the next step if our Supreme Court is saying that at times when tests are taken they can be redacted surely a person's refusal to even participate in any of those tests ought to be able to be redacted. And, again, it goes back to the point the legislature hasn't said this can be used against you and we believe that all these criminal laws, penal laws, need to be strictly construed against the State and that our client is entitled to the benefit of the doubt about any ambiguity about what these statutes may or may not mean.

We would ask if you get to the second leg, whether or not the Magistrate erred, we're asking you to uphold the Magistrate, that you're never entitled -- that you never have to give any evidence against yourself.

THE COURT: Thank you very much. Solicitor, anything in response?

MR. BLACK: Your Honor, the State feels that the statute clearly lays out the fact that it says any field sobriety test administered, whether they take it or not, the statute says it's got to be on video. So when the individual in this particular case, the Defendant, said I'm not going to take the test, the State feels that the Defendant at that point she obviously said that she didn't want to take the test we feel that the statute requires that to be shown on video. Essentially, what the Magistrate did to the State was allow us to go into the fight with one hand tied behind our back.

In any of these particular types of cases, Your Honor, when a person refuses the field sobriety test and refuses to take the DataMaster, and the officer sees that the individual has bloodshot eyes, they smell of alcohol, and it's 2:00 in the morning, the Defense can argue, "My client was coming back from a Braves game that night. They spilled beer on them, and they were tired because they worked all day, drove to Atlanta, and then were coming back to Greenwood." That's the reason why they had bloodshot eyes. That could be the Defense's argument.

The refusal of the field sobriety test goes towards kind of the totality of the circumstances. By basically limiting us from talking about this at trial we basically went into the fight with one hand tied behind our back and

that was the reason for the appeal.

MR. HENDERSON: Your Honor, just to clarify, no tests were administered here. I would agree with the Solicitor's argument if, in fact, tests had been administered. None were ever administered. So I don't think the videotaping section of what's got to be on video is even applicable here because no tests were administered.

THE COURT: Let me ask you this, Mr. Henderson. Let's say that the first field sobriety test was offered and your client did that one, but then offers a second one and they refuse. Are you --

MR. HENDERSON: I think that should be redacted as well, Your Honor.

THE COURT: The one that's refused.

MR. HENDERSON: Because, again, you're never required to give the government evidence to potentially incriminate yourself, or for any reason for that matter. Ms. Martin exercised her right not to do anything.

THE COURT: Well, you have an interesting issue here. I need to take it under advisement, give it some thought, and do a little studying on it. I appreciate it very much.

MR. BLACK: Can I add just one thing before you close the matter?

THE COURT: Sure.

MR. BLACK: According to Mr. Henderson's and Mr.

Garrett's argument, if the State -- if everything was to be written out by the statute of what the State can and cannot put into a jury trial, the statute would fill the annals of the Greenwood County Courthouse. It would just be impossible. I think that when the laws were written and we elect a Judge to sit on a bench there is an element of common sense that the legislature just kind of put on the judges and put on the lawyers involved. It doesn't make any sense at all for the State to be held in this manner. Your Honor, it just doesn't make any sense. There has to be some kind of context of why an officer is arresting someone for a DUI when they refuse. We just feel that should be provided to a jury.

THE COURT: Should I look at the issue of legislative intent of why the statute says refusal of Breathalyzer, that comes in, but because refusal of field sobriety is not in -- should one of the ways of looking at this case be -- should I try to determine what the legislative intent is here for being silent on the refusal of field sobriety tests?

MR. HENDERSON: I think you should, Your Honor, because I think a good part of the legislative intent is the statute that was passed in December of '12 that the arresting officer can make you do field sobriety tests in an incident involving death. It says nothing about drinking. It says nothing about drugs. If you are involved in an incident,

notice I didn't say accident, the statute says "incident". If you are involved in an incident involving death they can actually make you do field sobriety test.

THE COURT: How do you make someone do field sobriety test if you don't want to?

MR. BLACK: Exactly my point.

MR. HENDERSON: I agree. That's the next argument. I'm just letting you know what -- if we're looking at legislative intent, that's at least what the House and the Senate intended in 2012 that we're going to let officers, in certain circumstances, make you do field sobriety test. Then that can lead to a whole host of issues, I agree, but at least we're looking at intent, Your Honor. I think that's very definite intent.

THE COURT: What section? What statute number is that, Mr. Henderson?

MR. HENDERSON: Your Honor, it is in Judge Martin's order, but it is actually 56-5-2948.

THE COURT: Thank you.

MR. BLACK: Your Honor, the State feels that if you look at 56-5-2953 it clearly states that conduct at the scene -- what must be recorded is any field sobriety test administered. The State feels that whether they take it or not the conduct should be shown for the jury.

THE COURT: Thank you, guys. I appreciate it very much.

I will take this under advisement.

- - - END OF TRANSCRIPT OF RECORD - - -

Certificate of Reporter

I, the undersigned, Tara T. Scott, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenwood County, South Carolina, on the 2nd day of September, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Tara T. Scott

Tara T. Scott, CVR
Circuit Court Reporter
Greenwood, South Carolina
April 19, 2016

Invoice

Tara T. Scott, CVR
Official Court Reporter for the Judicial Department of the State of S.C.
Eighth Judicial Circuit

April 19, 2016
Invoice No.: 160419

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State v Maria Todd Martin

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State of South Carolina)) County of Greenwood)	In the Court Of Common Pleas C/A No.: 2014-CP-24-00981
State of South Carolina,)) Plaintiff,) vs.)) Maria Todd Martin,)) Defendant.)	Transcript of Record

January 14, 2016

Greenwood, South Carolina

BEFORE:

The Honorable Donald B. Hocker, Judge

APPEARANCES:

Micah Black, Assistant State Solicitor
Attorney for the State

Carson M. Henderson, Esquire
Attorney for the Defendant

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

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EXHIBITS

NO. DESCRIPTION	PAGE
NONE	

Whereupon, the following proceedings were had,

THE COURT: All right. We are on the Marie Martin case. This is the State's motion to reconsider. Solicitor, I'll be glad to hear from you.

MR. BLACK: Thank you, Your Honor. Would you like me to kind of go over a background?

THE COURT: Yeah. Give me a little background on this and I do have some recollection of this as well but a little background would be good.

MR. BLACK: Your Honor, this case was originally tried July the 25th and 26th, 2012 by Tim Woosten of our office and Mr. Garrett and Mr. Henderson. There was a hung jury.

I tried the case -- Well, I attempted to try the case in July of 2014. The judge, Judge Martin, magistrate downstairs, ruled against me as far as the standardized field sobriety test being introduced. At that point I filed an interlocutory appeal and you heard the first appeal a couple months ago.

Your Honor, as far as this case is concerned, I filed a motion to reconsider. I'm going to go through several of the things in the order that I believe Mr. Henderson drafted and you ultimately signed. Do you have that order in front of you, Your Honor?

THE COURT: My order that Mr. Henderson drafted?

MR. BLACK: Yes, sir, Your Honor.

THE COURT: I did. Let me find it.

MR. BLACK: The grounds that I set forth, I'm going to start kind of at the end, Your Honor, and kind of work my way back up to my primary argument. In section 15 and section 16 of the order it's talking about standardized field sobriety test not being relevant. I think the State disagrees with that wholeheartedly. In DUI cases where an individual refuses to perform field sobriety tests and then they ultimately refuse to perform the breath test, I think that evidence is highly relevant for a jury to be able to kind of decipher what's going on in the particular case so I think the State has an issue with that being called not relevant and so I just wanted to put that on the record.

THE COURT: The whole issue is there was video of the defendant refusing the field sobriety test and the suppression motion was granted. That's basically what I upheld, is that correct, in a nutshell?

MR. HENDERSON: That's correct, Your Honor.

THE COURT: All right.

MR. BLACK: Your Honor, just to give a background of this particular case, the defendant was traveling on 25 heading towards uptown Greenwood and was pulled over for swerving left of center right about where the Dixie is

located here in Greenwood. The officer stopped the defendant in the case and began questioning her. At that particular point after some statements that she made that are recorded on video he offered her the field sobriety test.

The magistrate downstairs ruled that none of the statements that the defendant made freely and voluntarily could come in as well as the field sobriety test, the refusal of the field sobriety test. The State's position in this particular case is those statements should have definitely come in and the statements that she said, and I can quote this, I believe it's in section 13 of your order which I believe you upheld the State not be allowed to introduce, the defendant exercised her right to remain silent. I believe that's what the order states.

THE COURT: What page are you on?

MR. BLACK: I believe it's section 13 of your order, Your Honor.

THE COURT: Okay. All right. Page 5.

MR. BLACK: That's right. Mine is a little bit different, Your Honor.

THE COURT: Your copy is different? I hope there's not two orders floating around.

MR. BLACK: I was referring to my motion. I apologize.

THE COURT: Okay. That's fine, too.

MR. BLACK: This would be section 2 of your order, Judge, on page 2.

THE COURT: Okay.

MR. BLACK: Trooper Sinclair asked the respondent to perform the field sobriety tests. The defendant stated quote, "I can't do that." She said that twice. Then he asked, "Are you willing to take the test?" And she said "no." Trooper Sinclair then asked, "You're not going to take any tests?" Again the defendant says "no." Trooper Sinclair asks, "No field sobriety test?" Again the defendant says, "No. If I was straight, I couldn't have passed."

Your Honor, I think that evidence is highly relevant. I think if you look at Supreme Court cases, McCartney, I think it's a 1984 U.S. Supreme Court case talks about when an individual is first pulled over for some type of traffic violation, the person is not in custody and Miranda is not invoked in that particular situation. In traffic offenses like these the officers are allowed to question individuals briefly and I think in this particular case once the officer noticed the smell of alcohol once he began kind of talking to the defendant he knew something was off and Miranda is not invoked in this particular case because she's not in

custody. So all of those statements should be allowed to come in for the State. This is setting aside the field sobriety test. These are statements before she is even arrested and the magistrate downstairs ruled that these statements don't come in. I believe your order also stated that these statements cannot come in.

So it's the State's position before we even get to the standardized field sobriety tests that these statements made by the defendant should come in because they were freely and voluntarily made and they weren't coerced at all. She was on the road side and she was not in custody and she made these statements to the officer.

THE COURT: All right. So what you are suggesting is is that we really ought to ignore the basis of Mr. Henderson's argument that because the statute doesn't address that, therefore, it shouldn't come in, that's not relevant. It should come in just from a purely voluntary statement being made absent not being in custody and absent the Miranda issue and all that. Is that basically what you are saying?

MR. BLACK: Not exactly, Your Honor.

THE COURT: Okay. I probably poorly stated.

MR. BLACK: My argument, Your Honor, is that the statements should come in absolutely. I also agree that the standardized field sobriety test should come in. I

haven't quite gotten to that argument yet. Now I can give you the argument for that if you --

THE COURT: Let me ask it this way then. Maybe do it this way. Let's say that the trooper said, Ms. Martin, will you perform field sobriety tests? She says no and that's it. End of discussion. No further statements made. No further questions made. Would that have been allowed to come in under Mr. Henderson's theory?

MR. BLACK: According to the magistrate downstairs that was not allowed to come in either and I think that Mr. Henderson was trying to allow that none of the field sobriety - none - no talking about the field sobriety test, the tests themselves were all thrown out downstairs.

THE COURT: So you would not agree that -- I mean, that could still come in?

MR. BLACK: Yes, sir, Your Honor, absolutely. I think the State has every right to bring that in because it is highly relevant to a DUI case and relevant evidence is allowed to come in under the rules of evidence, South Carolina and the Federal Rules.

So, Your Honor, that addresses the statements that the defendant made before she even, the tests even come into question. Before the tests were dismissed. The

sheet that I handed up to you, Judge, that has the DUI statute 56-5-2953, I have given Mr. Henderson a copy as well, under section A, there is a 1, 2 and 3, and under section 3, I think it was overlooked by Judge Martin, and I think we also overlooked it the first time we addressed this case.

Section 3 states that video recording at the incident site and of the breathe test site are admissible pursuant to the South Carolina rules of evidence in criminal, administrative or civil proceedings by any part to the action.

So the statute clearly states that these two videos are admissible if they comply with the rules of evidence and the primary reason that the magistrate ruled against the State keeping the video out was that under the rules of statutory, the canons of statutory construction, expressio unius est exclusio alterius or inclusio unius est exclusio alterius which means to express or include one thing implies the exclusion of another or the alternative which was the defense's primary argument and I think if you look at section 3 there has to be some kind of evidentiary reason why this particular test is taken out and I think that's clearly enumerated in section 3 of 56-5-2953 under section A.

THE COURT: Okay.

MR. BLACK: There has to be some type of, some rule of evidence, Your Honor.

THE COURT: Okay.

MR. BLACK: Thank you.

THE COURT: Thank you very much, Solicitor. Mr. Henderson.

MR. HENDERSON: Very briefly, Your Honor. The fact that Ms. Martin or Ms. Todd said no, I'm not going to take your test, I mean, that has nothing to do with Miranda, being arrested, being in custody. She like any other citizen can always say no, I'm not going to participate in your test. I'm not going to talk to you, this, that or the other. She always has the right to say no. She said no. She exercised -- And again, I don't think we get to the constitutional issue yet. She just said no which she has an absolute right to do. She never - there is no warnings out here about that there would be any repercussions for not taking or choosing to perform these field sobriety tests.

I think His Honor's order lays it out very clearly. The legislature has said that you're put on notice. If you don't blow into this machine, we're gonna punish you. We're gonna take your license. They haven't said that in the full body context. If fact, they have said that you can't be arrested for disobeying a law enforcement order

for not taking them and they've also given specific instances when an officer can try to actually make you take the field sobriety test mainly when someone is in a wreck or someone's been killed.

So yes, she's always got a right to just not cooperate, to say no thank you. And again, we are not saying that what she said wasn't freely and voluntarily given. It was. She freely and voluntarily said no. And again, the fact that she said no is not relevant to any fact at issue here. It doesn't go to help prove any issue or to disprove any issue. In fact, her saying no, if that goes before the jury, then the jury is going to be speculating about how she may have done on the field sobriety test. So even as Your Honor said it might be relevant, it still is more prejudicial than it would be probative. It just doesn't go to show anything.

THE COURT: Would her statement that, no, if I was straight, I couldn't pass it, wouldn't that be in some fashion a confession of being under the influence driving this motor vehicle if she said I couldn't even pass that if I was straight meaning I'm not straight?

MR. HENDERSON: Whatever, whatever her explanation is for saying no, we always go back to her saying no. So I think the no keeps it out regardless of what explanation she gives for the no. It could have been I

have got bad hips. I have got a bad back. My lawyer told me not to do these tests. Whatever her rationale would be it ties back into the ultimate no, I'm not going to participate in your field sobriety tests.

So there is no way to exclude the field sobriety test refusal and then come in here and let this straight language come in because the straight language would be commenting back on her not taking the field sobriety test. The two are intertwined. There is no way to unring the bell and separate them, Your Honor. At least on this particular set of facts they are not.

And as it relates to the Solicitor's argument about the videotaping statute, I agree. The videotapes are subject to the rules of evidence. Like any other document that comes into this courtroom, they are subject to the rules of evidence. And here it wasn't relevant that she said no and she can always exercise just her plain fundamental right of saying no. Stuff is excluded from DUI videotapes all the time. Talking about the person's prior DUI would be redacted. The person has got an arrest record would be redacted. There's all sorts of issues on these videotapes that get redacted all the time. I think every DUI we try something is redacted.

Yes, in theory overall the videos are admissible under the rules of evidence but they're also subject to

the rules of evidence and any constitutional claims that might be out here or quasi constitutional claims that I'm not going to participate in your test. The legislature just hasn't made any exceptions for defendants who say no to field sobriety tests. They have made exceptions for defendants who say no to breath tests. That's going to come into evidence against you in trial. Actually the U.S. Supreme Court said that's okay. I think our implied consent laws are somewhat modeled after what the U.S. Supreme Court says is admissible. So, Your Honor, I think it's a well thought out order and I would ask that the Court uphold it in its entirety.

THE COURT: Thank very much. Solicitor.

MR. BLACK: Yes, sir, Your Honor. Just a brief response. What the State is asking the Court to do is to remand the case back down to the magistrate court. In this particular case the magistrate did not make any findings on the rules of evidence. The magistrate basically relied on this canon of statutory construction to make his findings. There was no finding on the rules of evidence and under section 3 there has to be a finding under the rules of evidence for a portion of the video, the entire video to be thrown out or to be disregarded downstairs and not shown to the jury.

What the State is asking for is the Court to remand

the case back down to the magistrate court and if the judge down there would like to make a ruling based on the rules of evidence, then the State would be more than willing to entertain and argue those arguments. But in this particular case there were no rules of evidence that were cited that the magistrate ultimately that he relied on. It was the old statutory language, how you derive statutes and how you interpret them so the State is just asking the court to follow the statute under section 3.

THE COURT: All right. Thank very much.

MR. HENDERSON: I think that's the first time the State has raised that argument, Your Honor. I'm not sure if this would be the appropriate time on a motion to reconsider to raise that particular argument because if you look at their initial notice of intent to appeal and His Honor's order, that issue has never been raised by the State until we are here at the State's motion to alter or omit.

THE COURT: Thank you very much. I will take this under advisement and I appreciate y'alls hard work on this one, too. This hearing is concluded.

WHEREUPON THE HEARING WAS CONCLUDED.

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 14th day of January, 2016.

I FURTHER CERTIFY that the forgoing 14 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 5th day of May, 2016.

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE'S COURT
	)	
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
		2014-CP-24 00981
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	**ORDER**
	)	
MARIA TODD MARTIN,	)	Ticket #E857866 (DUI 1st)
	)	
Defendant.	)	
	)	

TRIAL JUDGE: **HON. W. RUTLEDGE MARTIN**
COURT REPORTER: **TAPE RECORDED**
STATE'S ATTORNEY: **MICAH BLACK**
DEFENDANT'S ATTORNEYS: **BILLY J. GARRETT JR. and CARSON M. HENDERSON**
DATE OF TRIAL: **WEDNESDAY, JULY 16, 2014**

This matter came before the Court for a scheduled jury trial on Wednesday, July 16, 2014, at 10:00 a.m. The Defendant was present and was represented by Billy J. Garrett Jr. and Carson M. Henderson. The State was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office.

Prior to the swearing of the jury, the Defendant renewed her motion for the Court to suppress and redact all evidence relating to the Defendant's refusal to perform field sobriety tests as requested by State Trooper Jordan N. Sinclair. By way of background, this Judge presided over a jury trial in this matter on July 25-26, 2012. After lengthy deliberations which including the reading of an Allen charge, the jury deadlocked three (3) – three (3), and the Court declared a mistrial. In the jury trial, the Court suppressed and redacted all evidence relating to the Defendant's refusal to perform field sobriety tests. In making its decision, the Court relied on the following documents: (1) Trooper Sinclair's incident site video recording of the Defendant's arrest on June 3, 2011, and (2) the

Defendant's written Motion to Suppress dated July 23, 2012.

After the Defendant renewed her motion on Wednesday, July 16, 2014, the Court reviewed the following documents: (1) a rough transcript of the motion hearing on July 25, 2012, (2) the Defendant's written Motion to Suppress dated July 16, 2014, and (3) the State's brief entitled "Admissibility of Field Sobriety Test." The Court also heard arguments from all attorneys. Furthermore, the Defendant represented to the Court that she will provide a "cleaned up" transcript from the motion hearing on July 25, 2012, as soon as the transcript is available.

Based upon the above-referenced documents and arguments of counsel, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. Trooper Sinclair's incident site video recording clearly demonstrates that the Defendant refused to perform field sobriety tests. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Defendant to perform field sobriety tests. The Defendant says, "I can't do that" twice. Trooper Sinclair then asks, "Are you willing to take the tests?" The Defendant says, "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass it."

2. On June 3, 2011, Code Section 56-5-2953(A)(1)(b) provided as follows: "A refusal to take a field sobriety test does not constitute disobeying a police command."

3. On June 3, 2011, Code Section 56-5-2950(A) provided in relevant part: "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."

4. On June 3, 2011, Code Section 56-5-2950(B) provided in relevant part: "No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court."

5. After the Defendant's jury trial in 2012 but prior to the July 16, 2014, motion hearing, the Legislature enacted Code Section 56-5-2948, which became effective on December 18, 2012, and which provides as follows: "When a person is suspected of causing a motor vehicle incident resulting in the death of another person by the investigating law enforcement officer on the scene of the incident, the driver must submit to field sobriety tests if he is physically able to do so."

6. Upon reading the above-referenced statutes, the Legislature has clearly intended to allow the State to introduce evidence in a DUI trial of a defendant's refusal to submit to a breath test. However, the Legislature has not expressly provided that a person arrested for DUI and who refused to perform field sobriety tests may or will have this refusal used against him by the State at trial. In fact, to the contrary, the Legislature has specifically provided that a DUI suspect who refuses to perform field sobriety tests cannot be arrested for failing to obey a police command; and the Legislature has furthermore expressly provided for when and under what circumstances the driver of a vehicle has to submit to field sobriety tests.

7. In reaching its decision to suppress the Defendant's refusal to perform field sobriety tests, this Court relies upon the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius,*" which means "to express or include one thing implies the exclusion of another, or of the alternative." If the Legislature intended for a defendant's refusal to perform field sobriety tests to be used against the defendant during a standard DUI trial, the Legislature would have passed such a law.

8. Furthermore, when a statute is penal in nature, which the statutes governing DUI clearly are, such statutes must be construed strictly against the State and in favor of the defendant.

9. Furthermore, no 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. This fundamental right applies whether or not the defendant is under arrest and/or in custody, whether or not a police officer is required to read Miranda warnings to the defendant, and whether or not a police officer has actually read Miranda warnings to the defendant. No defendant ever has to voluntarily make the situation worse for himself, because no defendant has the burden to prove or disprove any matter. In this matter, the Defendant expressly exercised her right to remain silent prior to being arrested and prior to receiving Miranda warnings from Trooper Sinclair.

10. The Court believes that the walk and turn and one leg stand field sobriety tests may be testimonial in nature, because the person performing these tests is required to count out loud. However, this exact issue is not before the Court in this matter, because the Defendant refused to perform field sobriety tests.

11. The Court also incorporates into its ruling all other grounds discussed by the Court

during the motion hearing on July 25, 2012, and the motion hearing on July 16, 2014.

12. The State argued that Code Section 56-5-2953(A)(1)(a)(ii), which provides that the incident site video recording must "include any field sobriety tests administered," should be interpreted to mean that if a police officer asks a defendant to perform field sobriety tests on video and the defendant refuses on video, then the defendant's refusal on the video recording should be admissible as evidence to the jury as a free and voluntary oral statement based on the theory that the Defendant was not in custody at that time for purposes of Miranda. Berkemer v. McCarty, 104 S.Ct. 3138 (1984)(roadside questioning of a motorist detained pursuant to a traffic stop does not constitute "custodial interrogation" for purposes of Miranda). The Court disagrees with this argument. This portion of Code Section 56-5-2953 only applies when field sobriety tests are "administered." In the case at hand, the Defendant was offered field sobriety tests, but Trooper Sinclair never administered field sobriety tests to the Defendant.

13. The State informed the Court that it intends to appeal the Court's ruling because the State believes that the Court's ruling "significantly impairs" the State's ability to proceed with the prosecution of the DUI charge against the Defendant. See State v. Belviso, 600 S.E.2d 68 (S.C. Ct. App. 2004). Therefore, the Court hereby stays this proceeding until the appeal is heard by the Common Pleas. This Court has no authority to stop the State from appealing.

14. This Court does not believe that the State's ability to prosecute the Defendant for DUI without evidence of the Defendant's refusal to perform field sobriety tests will significantly impair the State's case. The State has previously prosecuted the Defendant without the benefit of this evidence and convinced three (3) jurors of the Defendant's guilt beyond any and all reasonable doubt

using admissible evidence, including but not limited to the Defendant's refusal to provide a breath sample.

IT IS THEREFORE ORDERED that all evidence of the Defendant's refusal to perform field sobriety tests is hereby suppressed and shall be redacted from the incident site video recording, and the State shall not be allowed to introduce any evidence to the jury about, or comment to the jury on, the Defendant's refusal to perform field sobriety tests.

IT IS FURTHER ORDERED that the Defendant's jury trial is hereby stayed pending resolution of the State's appeal by the Court of Common Pleas.

IT IS FURTHER ORDERED that the Defendant's jury trial shall resume once the State's appeal is decided with finality and the matter is remanded to this Court.

IT IS SO ORDERED.

HON. W. RUTLEDGE MARTIN
Presiding Magistrate's Court Judge
Greenwood County

Greenwood, South Carolina
July 30, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
David M. Stumbo, Solicitor, Eighth Judicial Circuit)
on behalf of South Carolina Highway Patrol
Plaintiff(s))
)
vs.)
)
Marie Martin)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 24- 00981

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

(Please Print)
Submitted By: Micah Black, Assistant Solicitor
Address: PO Box 516, Greenwood,SC 29648

SC Bar #: 101119
Telephone #: 864-942-8806
Fax #: 864-942-8830
Other:
E-mail: mblack@greenwoodsc.gov

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- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☒ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: Micah Black **Date:** 7/30/14 - 2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
The State (Appellant)	)	NOTICE OF APPEAL
v.	)	2014-CP-24 00981
Maria Martin, (Respondant)	)	Ticket#(s) E857866

YOU WILL PLEASE TAKE NOTICE that the Appellant named above appeals from the July 16th ruling by the Honorable W. Rutledge Martin, Magistrate of the County of Greenwood, that were reduced to a signed written Order on July 30, 2014 that pertains to a ruling made during the pretrial phase of Respondent's case charging her with the offense of Driving under the Influence. Appellant respectfully submits the following ground for its appeal:

> That the Court erred by granting the Defendant's Motion to Suppress made prior to the swearing of the jury, in that the Court ruled in its suppression ruling that all matters pertaining to the Trooper's offer of field sobriety testing to the Defendant as well as the Defendant's oral statements made voluntarily in response to that offer were in violation of her Constitutional right to remain silent and because the South Carolina Legislature has not expressly provided that a refusal to perform field sobriety testing can be used against a defendant in court in a Driving Under the Influence case.

WHEREFORE, the Appellant prays that the Circuit Court consider the matter raised herein and issue its order reversing the trial courts suppression of the test.

Micah Black
Assistant Solicitor

This 30th Day of July, 2014
Greenwood, South Carolina

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
The State (Appellant)	)	**CERTIFICATE OF SERVICE** Ticket# 857866
v.	)	
Maria Martin, (Respondant)	)	

The Undersigned of the Solicitor's Office, does herby certify that on the 31th day of July 2014, he served the documents indicated below by hand delivering at the addresses referenced below:

1. Notice of Appeal[
2. Certificate of Service
3. Copy of Judges Order

SERVED:

The Honorable W. Rutledge Martin
Magistrate Judge of Greenwood County
528 Edgefield St.
Greenwood SC 29646

Ms. Maria Martin
506 Marshall Rd
Greenwood SC 29646

Billy Garrett and Carson Henderson
Attorneys for Respondant
109 Oak Street
Greenwood SC 29646

7/31/14 9:30 Am

Served by 7.31.14 9:30Am

Courtney Smith
Investigator Eighth Judicial Circuit
PO Box 516 Greenwood SC 29646

July 31th 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
The State (Appellant)	)	NOTICE OF APPEAL
v.	)	2014-CP-24 00981
Maria Martin, (Respondant)	)	Ticket#(s) E857866

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WHEREFORE, the Appellant prays that the Circuit Court consider the matter raised herein and issue its order reversing the trial courts suppression of the test.

Micah Black
Assistant Solicitor

This 30th Day of July, 2014
Greenwood, South Carolina

FOR MANDATED ADR COUNTIES ONLY

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    d. Post Conviction relief matters;

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)
)
David M. Stumbo, Solicitor, Eighth Judicial Circuit)
on behalf of South Carolina Highway Patrol
Plaintiff(s))
)
vs.)
)
Marie Martin)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 24- 00981

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

(Please Print)
Submitted By: Micah Black, Assistant Solicitor
Address: PO Box 516, Greenwood,SC 29648

SC Bar #: 101119
Telephone #: 864-942-8806
Fax #: 864-942-8830
Other:
E-mail: mblack@greenwoodsc.gov

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION *(Check all that apply)*

If Action is Judgment/Settlement do not complete

☐ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
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- ☐ Sexual Predator (510)

Submitting Party Signature: Micah Black Date: 7/30/14 - 2014

SCCA / 234 (01/2011)

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE'S COURT
	)	
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	2014-CP-24 00981
	)	
v.	)	**ORDER**
	)	
MARIA TODD MARTIN,	)	Ticket #E857866 (DUI 1st)
	)	
Defendant.	)	

TRIAL JUDGE: **HON. W. RUTLEDGE MARTIN**
COURT REPORTER: **TAPE RECORDED**
STATE'S ATTORNEY: **MICAH BLACK**
DEFENDANT'S ATTORNEYS: **BILLY J. GARRETT JR. and CARSON M. HENDERSON**
DATE OF TRIAL: **WEDNESDAY, JULY 16, 2014**

This matter came before the Court for a scheduled jury trial on Wednesday, July 16, 2014, at 10:00 a.m. The Defendant was present and was represented by Billy J. Garrett Jr. and Carson M. Henderson. The State was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office.

Prior to the swearing of the jury, the Defendant renewed her motion for the Court to suppress and redact all evidence relating to the Defendant's refusal to perform field sobriety tests as requested by State Trooper Jordan N. Sinclair. By way of background, this Judge presided over a jury trial in this matter on July 25-26, 2012. After lengthy deliberations which including the reading of an Allen charge, the jury deadlocked three (3) – three (3), and the Court declared a mistrial. In the jury trial, the Court suppressed and redacted all evidence relating to the Defendant's refusal to perform field sobriety tests. In making its decision, the Court relied on the following documents: (1) Trooper Sinclair's incident site video recording of the Defendant's arrest on June 3, 2011, and (2) the

Defendant's written Motion to Suppress dated July 23, 2012.

After the Defendant renewed her motion on Wednesday, July 16, 2014, the Court reviewed the following documents: (1) a rough transcript of the motion hearing on July 25, 2012, (2) the Defendant's written Motion to Suppress dated July 16, 2014, and (3) the State's brief entitled "Admissibility of Field Sobriety Test." The Court also heard arguments from all attorneys. Furthermore, the Defendant represented to the Court that she will provide a "cleaned up" transcript from the motion hearing on July 25, 2012, as soon as the transcript is available.

Based upon the above-referenced documents and arguments of counsel, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. Trooper Sinclair's incident site video recording clearly demonstrates that the Defendant refused to perform field sobriety tests. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Defendant to perform field sobriety tests. The Defendant says, "I can't do that" twice. Trooper Sinclair then asks, "Are you willing to take the tests?" The Defendant says, "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass it."

2. On June 3, 2011, Code Section 56-5-2953(A)(1)(b) provided as follows: "A refusal to take a field sobriety test does not constitute disobeying a police command."

3. On June 3, 2011, Code Section 56-5-2950(A) provided in relevant part: "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."

4. On June 3, 2011, Code Section 56-5-2950(B) provided in relevant part: "No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court."

5. After the Defendant's jury trial in 2012 but prior to the July 16, 2014, motion hearing, the Legislature enacted Code Section 56-5-2948, which became effective on December 18, 2012, and which provides as follows: "When a person is suspected of causing a motor vehicle incident resulting in the death of another person by the investigating law enforcement officer on the scene of the incident, the driver must submit to field sobriety tests if he is physically able to do so."

6. Upon reading the above-referenced statutes, the Legislature has clearly intended to allow the State to introduce evidence in a DUI trial of a defendant's refusal to submit to a breath test. However, the Legislature has not expressly provided that a person arrested for DUI and who refused to perform field sobriety tests may or will have this refusal used against him by the State at trial. In fact, to the contrary, the Legislature has specifically provided that a DUI suspect who refuses to perform field sobriety tests cannot be arrested for failing to obey a police command; and the Legislature has furthermore expressly provided for when and under what circumstances the driver of a vehicle has to submit to field sobriety tests.

7. In reaching its decision to suppress the Defendant's refusal to perform field sobriety tests, this Court relies upon the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius,*" which means "to express or include one thing implies the exclusion of another, or of the alternative." If the Legislature intended for a defendant's refusal to perform field sobriety tests to be used against the defendant during a standard DUI trial, the Legislature would have passed such a law.

8. Furthermore, when a statute is penal in nature, which the statutes governing DUI clearly are, such statutes must be construed strictly against the State and in favor of the defendant.

9. Furthermore, no 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. This fundamental right applies whether or not the defendant is under arrest and/or in custody, whether or not a police officer is required to read Miranda warnings to the defendant, and whether or not a police officer has actually read Miranda warnings to the defendant. No defendant ever has to voluntarily make the situation worse for himself, because no defendant has the burden to prove or disprove any matter. In this matter, the Defendant expressly exercised her right to remain silent prior to being arrested and prior to receiving Miranda warnings from Trooper Sinclair.

10. The Court believes that the walk and turn and one leg stand field sobriety tests may be testimonial in nature, because the person performing these tests is required to count out loud. However, this exact issue is not before the Court in this matter, because the Defendant refused to perform field sobriety tests.

11. The Court also incorporates into its ruling all other grounds discussed by the Court

during the motion hearing on July 25, 2012, and the motion hearing on July 16, 2014.

12. The State argued that Code Section 56-5-2953(A)(1)(a)(ii), which provides that the incident site video recording must "include any field sobriety tests administered," should be interpreted to mean that if a police officer asks a defendant to perform field sobriety tests on video and the defendant refuses on video, then the defendant's refusal on the video recording should be admissible as evidence to the jury as a free and voluntary oral statement based on the theory that the Defendant was not in custody at that time for purposes of Miranda. Berkemer v. McCarty, 104 S.Ct. 3138 (1984)(roadside questioning of a motorist detained pursuant to a traffic stop does not constitute "custodial interrogation" for purposes of Miranda). The Court disagrees with this argument. This portion of Code Section 56-5-2953 only applies when field sobriety tests are "administered." In the case at hand, the Defendant was offered field sobriety tests, but Trooper Sinclair never administered field sobriety tests to the Defendant.

13. The State informed the Court that it intends to appeal the Court's ruling because the State believes that the Court's ruling "significantly impairs" the State's ability to proceed with the prosecution of the DUI charge against the Defendant. See State v. Belviso, 600 S.E.2d 68 (S.C. Ct. App. 2004). Therefore, the Court hereby stays this proceeding until the appeal is heard by the Common Pleas. This Court has no authority to stop the State from appealing.

14. This Court does not believe that the State's ability to prosecute the Defendant for DUI without evidence of the Defendant's refusal to perform field sobriety tests will significantly impair the State's case. The State has previously prosecuted the Defendant without the benefit of this evidence and convinced three (3) jurors of the Defendant's guilt beyond any and all reasonable doubt

using admissible evidence, including but not limited to the Defendant's refusal to provide a breath sample.

IT IS THEREFORE ORDERED that all evidence of the Defendant's refusal to perform field sobriety tests is hereby suppressed and shall be redacted from the incident site video recording, and the State shall not be allowed to introduce any evidence to the jury about, or comment to the jury on, the Defendant's refusal to perform field sobriety tests.

IT IS FURTHER ORDERED that the Defendant's jury trial is hereby stayed pending resolution of the State's appeal by the Court of Common Pleas.

IT IS FURTHER ORDERED that the Defendant's jury trial shall resume once the State's appeal is decided with finality and the matter is remanded to this Court.

IT IS SO ORDERED.

HON. W. RUTLEDGE MARTIN
Presiding Magistrate's Court Judge
Greenwood County

Greenwood, South Carolina
July 30, 2014

COPY

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENWOOD)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,)	
)	
Appellant,)	
)	
v.)	**CERTIFICATE OF DELIVERY**
)	
MARIA TODD MARTIN,)	C/A No. 2014-CP-24-00981
)	
Respondent.)	
)	

The undersigned does hereby certify that on the 29th day of October, 2015, he served the Order dated October 23, 2015, by mailing by first class United States mail from Greenwood, South Carolina, and/or by hand delivering the same to the person(s) listed below at the address(es) listed below:

Micah Black, Esquire
Eighth Circuit Solicitor's Office
P.O. Box 516
Greenwood, S.C. 29648-0516
(HAND DELIVERED VIA CLERK'S BOX)

1. Order dated October 23, 2015

2. Certificate of Delivery

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2015 OCT 29 PM 12:40

THE HENDERSON LAW FIRM, P.C.
Attorney for the Respondent

By: _____
Carson M. Henderson
109-B Oak Avenue
Greenwood, S.C. 29646
Phone: (864) (864) 229-8000
Fax: (864) 229-8001

Greenwood, South Carolina

October 29, 2015

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenwood
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-24-981

COPY

State of South Carolina
PLAINTIFF(S)

Maria Todd Martin
DEFENDANT(S)

Submitted by: The Court	Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED 2015 OCT 30 P 2:
8th JUDICIAL CIRCUIT
GREENWOOD SC

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☒ does not end the case.
Additional information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2167
Judge Code

10/26/15
Date

For Clerk of Court Office Use Only

SCRCP Form 4C (03/2013)

This judgment was entered on the 28 day of Oct, 20 15 and a copy mailed first class or placed in the appropriate attorney's box on this 28 day of Oct, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	
	)	
Appellant,	)	
	)	
v.	)	**ORDER**
	)	
MARIA TODD MARTIN,	)	C/A No. 2014-CP-24-00981
	)	
Respondent.	)	
	)	

PRESIDING JUDGE: **HON. DONALD B. HOCKER**
COURT REPORTER: **TARA T. SCOTT**
APPELLANT'S ATTORNEY: **MICAH BLACK**
RESPONDENT'S ATTORNEYS: **BILLY J. GARRETT JR. and CARSON M. HENDERSON**

DATE OF HEARING: **WEDNESDAY, SEPTEMBER 2, 2015**

This matter came before the Court for an appeal hearing from Magistrate's Court on Wednesday, September 2, 2015, at 9:00 a.m. The Appellant was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office. The Respondent was represented by Billy J. Garrett Jr. and Carson M. Henderson.

Procedural History

The Respondent was arrested for DUI on June 3, 2011, by Trooper Jordan N. Sinclair. She was issued Ticket No. E857866.

A jury trial was held in this matter on July 25-26, 2012. Magistrate Walter Rutledge Martin presided. Pursuant to the Respondent's motion after the jury was sworn, Judge Martin suppressed, redacted, and excluded all evidence and testimony relating to the Respondent's decision not to perform field sobriety tests. The State did not file an interlocutory appeal. After

lengthy deliberations which included the reading of an Allen charge, the jury deadlocked three (3) – three (3), and Judge Martin declared a mistrial.

A second jury trial was scheduled for July 16, 2014, before Judge Martin. Prior to the swearing of the jury, the Respondent renewed her motion for the Court to suppress, redact, and exclude all evidence and testimony relating to the Respondent's decision not to perform field sobriety tests as requested by Trooper Sinclair. Judge Martin granted the Respondent's motion.

Judge Martin signed an Order dated July 30, 2014, confirming his in-court ruling. The State timely filed an appeal to this Court on July 30, 2014.

Based upon a review of the clerk's file and arguments of counsel, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. The State had the right to file the interlocutory appeal on July 30, 2014, to challenge Judge Martin's pre-trial ruling. Therefore, this Court has jurisdiction to determine the merits of the State's appeal.

2. Trooper Sinclair's incident site video clearly demonstrates that the Respondent chose not to perform field sobriety tests. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Respondent to perform field sobriety tests. The Defendant says, "I can't do that" twice. Trooper Sinclair then asks, "Are you willing to take the tests?" The Defendant says, "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass it."

3. On the Respondent's arrest date of June 3, 2011, Code Section 56-5-2953(A)(1)(b) provided as follows: "A refusal to take a field sobriety test does not constitute

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disobeying a police command."

4. On June 3, 2011, Code Section 56-5-2950(A) provided in relevant part: "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."

5. On June 3, 2011, Code Section 56-5-2950(B) provided in relevant part: "No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that: (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court."

6. After the Defendant's jury trial in 2012 but prior to the July 16, 2014, scheduled jury trial, the Legislature enacted Code Section 56-5-2948, which became effective on December 18, 2012, and which provides as follows: "When a person is suspected of causing a motor vehicle incident resulting in the death of another person by the investigating law enforcement officer on the scene of the incident, the driver must submit to field sobriety tests if he is physically able to do so."

7. Upon reading the above-referenced statutes, the Legislature has clearly intended to allow the State to introduce evidence in a DUI trial of a defendant's refusal to submit to a breath,

blood, or urine test. However, the Legislature has not expressly provided that a person arrested for DUI and who refused to perform field sobriety tests may have or will have this refusal used against him by the State at trial. In fact, to the contrary, the Legislature has specifically provided that a DUI suspect who refuses to perform field sobriety tests cannot be arrested for failing to obey a police command; and the Legislature has furthermore expressly provided for when and under what circumstances the driver of a vehicle can be made to submit to field sobriety tests if physically able to do so.

8. In State v. Gordon, Op. No. 27554 (S.C. August 5, 2015), our Supreme Court noted that in certain circumstances it's appropriate for the trial court in a DUI case to redact field sobriety tests from the incident site video and exclude testimony about the tests. If it's permissible to redact field sobriety tests when such tests have been taken by a suspect, then this Court finds it's appropriate to redact a suspect's refusal to perform field sobriety tests.

9. In reaching his decision to suppress and redact the Respondent's refusal to perform field sobriety tests, Judge Martin relied upon the canon of statutory construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius,*" which means "to express or include one thing implies the exclusion of another, or of the alternative." If the Legislature intended for a defendant's refusal to perform field sobriety tests to be used against the defendant during a standard DUI trial, the Legislature could have and would have passed such a law.

10. The intent of Code Section 56-5-2953 is to preserve evidence which speaks to a suspect's impairment or non-impairment. However, when a suspect on video invokes his right

not to give evidence against himself, this right is so fundamental that the suspect's invocation cannot be used against him absent a specific statutory and/or constitutional allowance, such as a suspect's refusal to submit to a breath, blood, or urine test. The Legislature has weighed the need for public safety versus a suspect's refusal to submit to a breath, blood, or urine test, and the need for public safety has prevailed. If the Legislature has weighed the need for public safety versus a suspect's refusal to perform field sobriety tests, so far the suspect has prevailed.

11. When a statute is penal in nature, which the statutes governing DUI clearly are, such statutes must be construed strictly against the State and in favor of the defendant.

12. No suspect 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 suspect. This fundamental right applies whether or not the suspect is under investigation and/or under arrest and/or in custody, whether or not a police officer is required to read Miranda warnings to the suspect, and whether or not a police officer has actually read Miranda warnings to the suspect. No suspect ever has to voluntarily make the situation worse for himself, because no suspect has the burden of proving or disproving any matter.

13. In this matter, the Respondent expressly exercised her right to remain silent prior to being arrested and prior to receiving Miranda warnings from Trooper Sinclair.

14. The Respondent was offered voluntary, pre-arrest field sobriety tests, which she chose not to perform. Prior to being offered the field sobriety tests, the Respondent was never informed by Trooper Sinclair that her choice not to perform the tests could or would be used against her at trial. In contrast, the Respondent was informed verbally and in writing that her

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refusal to submit to a breath test could be used against her at trial.

15. The Respondent's choice not to perform field sobriety tests was not relevant to the issue of whether the Respondent was driving a motor vehicle while impaired. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. SCRE 401. The Respondent's choice doesn't make it more probable or less probable that she was driving impaired. The lack of field sobriety tests proves or disproves no fact in controversy.

16. Our appellate courts have determined that the performance of field sobriety tests is direct evidence of impairment or the lack of impairment. When a suspect chooses not to perform these tests, and if this evidence is heard by the trial jury, this would lead to speculation by the jury about whether the suspect was impaired. Speculative evidence is not relevant evidence. If the Respondent's choice was relevant evidence, the admission of this evidence would be more prejudicial than probative. See SCRE 403. The State would be seeking to introduce this evidence to show that the Respondent must be guilty of DUI because she chose not to perform the field sobriety tests, or that only an impaired person would choice not to perform these tests. This is speculation. A suspect may choose not to perform these tests for reasons that have nothing to do with impairment.

17. The State argued that Code Section 56-5-2953(A)(1)(a)(ii), which provides that the incident site video must "include any field sobriety tests administered," should be interpreted to mean that if a police officer asks a suspect to perform field sobriety tests on video and the

suspect refuses on video, then the suspect's refusal on video should be admissible as evidence to the jury as a free and voluntary oral statement based on the theory that the suspect was not in custody at that time for purposes of Miranda. See Berkemer v. McCarty, 104 S.Ct. 3138 (1984) (roadside questioning of a motorist detained pursuant to a traffic stop does not constitute "custodial interrogation" for purposes of Miranda). This Court disagrees with the State's argument. This portion of Code Section 56-5-2953 only applies when field sobriety tests are "administered." In the case at hand, the Respondent was asked to perform field sobriety tests, but Trooper Sinclair never administered field sobriety tests to the Respondent. The Respondent has never alleged a violation of the video requirements contained in Code Section 56-5-2953. Therefore, the State's argument regarding the "include any field sobriety tests administered" language is a burden that the State must meet, which the State has failed to do.

18. The State also argued that the Respondent's choice not to perform field sobriety tests should be admissible at trial as part of the res gestae of the crime charged. The State argued that this evidence would give the trial jury context as to why the Respondent was arrested for DUI. The Court disagrees with this argument. The Respondent had no obligation to perform field sobriety tests and therefore had the choice not to perform the field sobriety tests.

IT IS THEREFORE ORDERED that Judge Martin's Order dated July 30, 2014, is affirmed, and all evidence of the Respondent's decision not to perform field sobriety tests is hereby suppressed and shall be redacted from the incident site video at trial, and the State shall not be allowed to introduce any evidence or testimony to the jury about, or comment to the jury on, the Respondent's decision not to perform field sobriety tests.

IT IS FURTHER ORDERED that the Respondent's jury trial shall resume once the

State's appeal is decided with finality and the matter is remanded to the Magistrate's Court.

IT IS SO ORDERED.

HON. DONALD B. HOCKER
Presiding Circuit Court Judge

Laurens, South Carolina

10/23, 2015

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA,	)	
	)	
Appellant,	)	
	)	
v.	)	**MOTION TO RECONSIDER**
	)	
MARIA TODD MARTIN,	)	C/A No. 2014-CP-24-00981
	)	
Respondent.	)	
	)	

This matter came before the Court for an appeal hearing from Magistrate's Court on Wednesday, September 2, 2015, at 9:00 a.m. The Appellant was represented by Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office. The Respondent was represented by Billy J. Garrett Jr. and Carson M. Henderson.

After the hearing, Circuit Court Judge Hocker affirmed the decision of the lower court. Mr. Henderson drafted an Order, which the Judge signed on October 23, 2015 and submitted to the Clerk of Courts office and filed on October 28, 2015.

PLEASE BE ADVISED that the State (Appellant), through its attorney will move for the Honorable Judge Donald Hocker to reconsider the ruling set forth in his Order, dated October 23, 2015, affirming the Magistrate's ruling to suppress the statements made by the Defendant prior to being offered the Standardized Field Sobriety Tests (SFST's) and to suppress the SFST's offered by the trooper. Appellant respectfully submits the following grounds for its appeal:

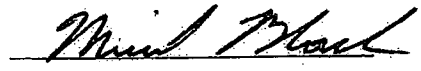
1. That the Court erred in suppressing the statements by the Defendant after being offered the SFST's because she was not in custody at the time of the stop and spoke freely and voluntarily to the officer about her inability to perform the SFSTs.

2. Section 56-5-2953 (A) (1) (a) (ii) requires "The video recording at the incident site must: include ANY field sobriety tests administered."
3. Section 56-5-2953 (A) (3) states "The video recordings of the incident site and breath test site are admissible pursuant to the South Carolina Rules of Evidence in a Criminal, Administrative, or Civil Proceeding by any party to the action."
4. The laws of statutory construction are clear: "The starting point for interpreting a statute is the language of the statue itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*,447 U.S. 102 (1980). Section 56-5-2953 cannot be any more clear when it states that the video recording must include any field sobriety tests and that the incident site and breath test site videos are admissible as evidence pursuant to the SC Rules of Evidence in Criminal Cases.
5. Under section 10 and section 12 of the Courts Order, it states that Defendants has a Fundamental Right not to give evidence against themselves. This is clearly not the law as interpreted by the United States Supreme Court and the South Carolina Supreme Court. "A Defendant can be ordered to give handwriting exemplars because they are non-testimonial in nature and do not involve his Fifth Amendment right against self-incrimination. *State v Frasier*, 341 S.C. 546, 534 S.E. 2d 711 (Ct. App. 2000).
6. Section 13 of the Court's Order states, "The Defendant exercised her right to remain silent." This is a misstatement of the facts in this case as the Defendant audibly responded to the officer's questions concerning the SFSTs, thus not exercising her right to remain silent. Beginning at approximately 1:12:22 on the video, Trooper Sinclair asks the Respondent to perform the SFSTs. The Respondent says, "I can't do that" twice. Trooper

Sinclair then asks, "Are you willing take the tests?" The Defendant says "No." Trooper Sinclair then asks, "You're not gonna take any tests?" The Defendant says, "No." Trooper Sinclair then asks, "No field sobriety tests?" The Defendant says, "No. If I was straight, I couldn't pass." Defendant is then placed under arrest for DUI and given her Miranda warnings.

7. Section 15 and 16 of the Courts Order states, a refusal to perform SFSTs is not relevant and would cause the jury to speculate as to the whether the Defendant was impaired. It further states that speculative evidence is not relevant evidence. The State contends that a refusal of the SFST's is highly relevant evidence in a DUI prosecution, and it should be available for the jury to consider. Furthermore, it is circumstantial evidence that the jury should consider in the course of their deliberation.
8. Such other grounds as may be set forth by Appellant at the date of the Hearing.

WHEREFORE, the Appellant prays that the Circuit Court to reconsider the matter raised herin and issue its order reversing the trial courts suppression of the Defendant's Statement and the Test.



This 5th Day of November, 2015

Greenwood, South Carolina

Micah Black

Assistant Solicitor

Eighth Circuit Solicitors Office
Attorney for the Appellant

By: Micah Black
Micah Black
PO Box 516
Greenwood SC 29648
(864) 942-8801

STATE OF SOUTH CAROLINA	)	**THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GREENWOOD	)	**No. 2014-CP-24-00981**
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
APPELLANT,	)	
	)	
VS.	)	
	)	**ORDER**
MARIA TODD MARTIN,	)	
	)	
RESPONDENT.	)	
	)	
	)	

THIS MATTER IS BEFORE THE COURT on Appellant's Motion for Reconsideration of the Court's October 23, 2015 Order Denying Appellant's requested relief. The Appellant raises seven (7) issues in support of its Motion. This is a DUI case that originated in Magistrate's Court. The Court incorporates by reference its Order of October 23, 2015 as to the procedural history of this case outlined therein as well as the subject conversation (Parag. 2, Page 2) between the trooper and Defendant at the incident site as it relates to the Field Sobriety Tests.

After a careful and thorough review of this entire case, this Court determines that it was in error in affirming Judge Martin and his Order of July 30, 2014.

This whole case boils down to whether or not the video portion at the incident site as it relates to the Defendant's refusal to perform the field sobriety tests should be shown to the jury at trial. In other words, whether suppression of the Defendant's statements should be granted.

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This Court makes the above determination on the following grounds:

1. It is undisputed that Miranda warnings were not given prior to the colloquy between the Trooper and Defendant concerning the Defendant performing the Field Sobriety Tests. It does not appear that this is really at issue between the parties. This Court determines, however, that Miranda warnings were not required in this situation pursuant to State vs. Kerr, 330 S.C. 132 (1998); State vs. Peele, 298 S.C. 63 (1989); Berkemer vs. McCarty, 468 U.S. 420 (1984).
2. Defendant argues that this issue requires a Rule 403 prejudice vs. probative value analysis. However, the prejudice to the Defendant has to be unfair prejudice. While the Defendant's statements can be considered incriminating and ultimately prejudicial, they are not unfair. The probative value of her statements as to the issue of intoxication far exceeds any unfair prejudice to the Defendant.
3. The Defendant freely and voluntarily gave the statements in response to the troopers' questions about the field sobriety tests.
4. The Court's Order stating that a person is not required to provide evidence against himself is true but misplaced in this case. While a person has the constitutional protection of not being required to incriminate himself, if he voluntarily makes statements when Miranda warnings are not required, then he has to live with his decision and in this case, the Defendant has to live with her decision. She could have kept her responses to a simple "no" throughout the colloquy but elected to comment on her abilities and sobriety.
5. The Court in its prior Order placed too much emphasis on the fact that since the Legislature has not enacted legislation allowing for a Defendant's refusal to perform

the field sobriety tests to be used against the Defendant at trial then the implication exists that the Legislature intended for the refusal not to be used. While this canon of statutory construction may be a valid one in some situations, it should not apply here.

6. The Defendant argues that her refusal would require the jury to speculate on the issue of the Defendant's impairment. While this may arguably be true if the Defendant's responses remained a "no", it certainly does not require speculation when the Defendant voluntarily said "No , if I was straight, I couldn't pass it".

IT IS HEREBY ORDERED:

1. The Appellant's Motion for Reconsideration is granted;
2. The Court's Order, dated October 23, 2015, is vacated except as to the above procedural history and the colloquy between the trooper and Defendant as outlined in Paragraph 2;
3. The Order of Judge Martin, dated July 30, 2014, is respectfully reversed;
4. This case is remanded to the Greenwood Magistrate's office for disposition of this case. If the case goes to trial, then the State will have the right to show the video of the Defendant's refusing to undertake the field sobriety tests to the jury.

IT IS SO ORDERED.

Donald B. Hocker
Circuit Court Judge

March 30, 2016
Laurens, South Carolina

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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 No. 2016-000745

The State.....Respondent,

vs.

Maria Todd Martin.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the partes and not any other material.

Nov. 14th, 2016

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(8640 229-5010
S.C. Bar No. 00188

Attorney for Appellant