State of South Carolina
In the Court of Appeals

Appeal from Charleston County

Larry B. Hyman, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

DANIEL HAMRICK,

APPELLANT

APPELLATE CASE NO. 2015-002164

BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

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II. The trial court erred in refusing to suppress the results of Appellant's blood draw where the blood draw did not take place within three hours of Appellant's arrest as required under S.C. Code Ann. § 56-5-2950(A) which is applicable to felony DUI resulting in great bodily injury pursuant to S.C. Code Ann. § 56-5-2946.

III. The trial court committed an abuse of discretion by allowing Officer Andrew Harris to testify about an experiment that he conducted in an attempt to prove that Appellant's car could have struck construction worker Ahmed Garland while he was standing in the construction lane and then exited the construction lane without contacting any adjacent cones or the nearby paving machine, where Harris was never qualified as an expert in accident reconstruction by the trial court and his testimony was inadmissible lay witness testimony on crucial issue of proximate cause.

IV. The trial court committed an abuse of discretion by not allowing into evidence video footage of an experiment conducted by Appellant's expert accident reconstructionist demonstrating that the injured construction worker was standing in the active lane of traffic when he was struck by Appellant's vehicle; where the expert was properly qualified based on his training and experience and the methodology used when conducting the experiment was reliable.

STATEMENT OF THE CASE

Indictment and Trial

On February 13, 2012, Appellant was indicted by the Charleston County Grand Jury for felony driving under the influence (DUI) with great bodily injury. App. 949 - 950. On October 21-25, 2013, Appellant proceeded to trial before the Honorable Deadra Jefferson and a jury. Appellant was represented J. Scott Bischoff and Donald L. McCune. Assistant Solicitors Culver Kidd and Benjamin Chad Simpson represented the State.

Pre-trial, Appellant moved suppress the non-consensual, warrantless blood drawn taken three hours and thirty-five minutes after the car accident. Citing *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), the defense argued that the police did not attempt to obtain a search warrant prior to administering the blood draw and that the car accident did not constitute exigent circumstances excusing the failure to seek a search warrant. App. 82, l. 2 - 85, l. 11.

The defense also argued that the blood draw exceeded the three hour time limit under S.C. Code Ann. § 56-5-2950(A). App. 124, ll. 17-20. The trial court ruled that *McNeely* was inapplicable in the context of a felony DUI and that police did not need a warrant before compelling a person suspected of felony DUI to submit to a non-consensual blood draw. App. 149, l. 14 - 162, l. 19. The court also concluded that the car accident constituted exigent circumstances excusing the failure to secure a search warrant and that, as a practical matter, securing a warrant in the early morning hours would have been too onerous. *Id.*

At the conclusion of the trial on October 25, 2013, the jury found Appellant guilty. App. 887, ll. 7-24. The trial court sentenced Appellant to fifteen years imprisonment. App. 950. An untimely notice of appeal was filed on Appellant's behalf on November 7, 2013.

PCR Application and Belated Appeal Pursuant to White v. State[1]

On August 26, 2014, Appellant filed an application for post-conviction relief (PCR) alleging that he was being unlawfully held in custody based on errors made by the trial court. App. 926 - 932. James K. Falk represented Appellant. Assistant Attorney General J. Rutledge Johnson represented the State.

Prior to the scheduled evidentiary hearing, PCR counsel amended Appellant's application to include allegations that defense counsel was ineffective for failing to file a timely notice of appeal. App. 937 - 945. PCR counsel and the State then agreed to a consent "Order of Dismissal and Grant of Appeal Pursuant to *White v. State*." *Id.*

On September 16, 2015, Judge Hyman signed the consent order dismissing Petitioner's PCR application with prejudice and granting Appellant a belated direct appeal. *Id.*

[1] 263 S.C. 110, 208 S.E.2d 35 (1974)

ARGUMENTS

I.

The trial court erred in refusing to suppress the results of Appellant's blood draw where the police ordered his blood drawn after a car accident, without a warrant, since the belief of a police officer that alcohol may be in the suspect's blood stream does not create a *per se* exception to the Fourth Amendment's search warrant requirement allowing a non-consensual blood draw, in violation of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

Relevant Facts

At around 3:20 a.m. on November 14, 2011, Appellant's Jeep Commander SUV struck road construction worker Ahmed Garland while driving through a construction zone on U.S. 21 in Mt. Pleasant. App. 226, l. 7 - 231, l. 13. Garland was struck while walking towards a nearby paving machine with his back to oncoming traffic. *Id.* Neither the paver nor the surrounding road cones were struck by Appellant's car. App. 455, l. 1 - 457, l. 18; Defendant's Exhibits No.: 12-24. Garland suffered serious, permanent bodily injuries. App. 382, ll. 9-24.

Appellant pulled to the side of the road and remained at the accident scene. Within five minutes of the accident, Officer Daniel Berkert and other law enforcement officers arrived at the scene. App. 352, l. 16 - 355, l. 24. Beckert administered first aid to Garland until EMS arrived a short time later. Beckert and other officers began interviewing Appellant around 3:34 a.m.

Appellant, a restaurant manager, admitted to having one beer that night. App. 357, ll. 3-19. Appellant refused to do any field sobriety tests. App. 358, l. 4 - 364, l. 9. Witnesses at the accident scene, noticed the smell of alcohol on Appellant's breath. App. 286, ll. 7-22. Police informed Appellant that he was not free to leave and instructed him to remain on the hood of a patrol car. App. 358, l. 4 - 364, l. 9. Video footage of the accident scene showed that dozens of officers responded. *See* State's Exhibit No.: 35 (on file for this Court's viewing).

At 4:08 a.m., almost fifty minutes after the accident, Officer Andrew Harris of the Mt. Pleasant police department arrived on the scene. App. 411, l. 15 - 424, l. 17. He was informed by Beckert and other officers that Appellant had refused to perform field sobriety tests, had refused a breathyzler test, and smelled of alcohol. App. 445, l. 25 - 447, l. 6. Despite substantial evidence indicating that Appellant was intoxicated, Harris inexplicably delayed the decision to seek chemical testing.

Harris interrogated Appellant and then instructed him to perform several sobriety tests. App. 411, l. 15 - 424, l. 17. Despite refusing to do so earlier, Appellant submitted. Harris would recall at trial that the results of the tests indicated that Appellant was intoxicated. *Id.* At 4:40 a.m., Harris formally placed Appellant under arrest and had him transported to the Mt. Pleasant police station for a breathalyzer test. App. 423, l. 15 - 424, l. 17.

When Appellant arrived at the police station, the breathalyzer repeatedly malfunctioned during test runs. App. 513, ll. 3-18. After it was restarted, Appellant refused to take a breathalyzer test. *Id.* Appellant was taken to the East Cooper Hospital where at 6:55 a.m. -over three and a half hours after his accident- he underwent a law enforcement ordered blood draw. App. 41, l. 23 - 42, l. 2. Appellant did not consent to the blood draw and police did not seek a search warrant. Retrograde analysis concluded Appellant had an approximate BAC of .15 to .07. *Id.*

Pre-trial Motion to Suppress Warrantless Blood Draw

Appellant moved to suppress the results of Appellant's non-consensual, warrantless blood draw. App. 82, l. 2 - 101, l. 2; App. 148, l. 15 - 163, l. 16. The defense argued that the results of the blood draw should be suppressed because in the then-recently decided case of *McNeely v. Missouri*, 133 S.Ct. 1552 (2013), the U.S. Supreme Court held that the, "natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth

Amendment's search warrant requirement for nonconsensual blood testing in all drunk-driving cases, and instead, exigency in this context must be determined case by case based on the totality of the circumstances." 133 S.Ct. 1552 (2013).

Thus, unless the State could demonstrate that an exigent circumstance excused law enforcement's failure to seek a search warrant prior to the blood draw, the results of Appellant's draw should be suppressed as the fruit of an unlawful search. App. 83, l. 10 - 85, l. 11. The defense argued that police could have easily applied for a search warrant once Appellant refused to perform field sobriety tests and the witnesses claimed to smelled alcohol on his breath. Had the police done so, a timely warrant could have been issued.

The State countered that *McNeely* was distinguishable from Appellant's case as *McNeely* dealt with a "regular DUI case" whereas Appellant's case was a felony DUI with an accident, which also provided exigent circumstances. App. 85, l. 13 - 90, l. 16. The State also noted that the Missouri statute gave police much broader discretion to order a blood draw and contained no time limit on when the tests could be conducted. App. 85, l. 13 - 88, l. 6.

By comparison, the mandatory blood draw statute in South Carolina only applied when the police believe someone has committed a felony DUI. *Id.*; *see* S.C. Code Ann. §56-5-2946. *Id.* The State argued that subjecting Appellant to a non-consensual, warrantless blood draw at the discretion of police officers was constitutional because of the time it took police to investigate the accident scene and transport Appellant to the hospital. App. 102, ll. 5-16.

The trial court refused to suppress the blood draw test results on the grounds that the blood draw was not an unreasonable warrantless search in violation of Appellant's Fourth Amendment rights. As an initial matter, the trial court believed that *McNeely* was simply inapplicable to Appellant's case as the Missouri statute was broader than § 56-5-2946 and Appellant's case was a

felony DUI. App. 123, l. 7 - 126, l. 20; App. 149, l. 14 - 151, l. 22. The court observed that comparing Appellant's case to *McNeely* was "almost apples and oranges in my estimation." App. 162, ll. 14-19.

In addition, the court concluded that the accident combined with the three hour time limit imposed by § 56-5-2950(A) qualified as exigent circumstances justifying the police foregoing a search warrant. "So it took what was a reasonable amount of time for them to sort out exactly what was going on at the scene, whether someone -- in terms of detaining both the Defendant and also speaking to the other witnesses." App. 158, ll. 2-13.

The court further determined that "it is not reasonable to believe that magistrate -- that you could have procured a warrant from a magistrate at 3:00 or 4:00 in the morning with sufficient time to come within the three hour window. It is just unreasonable." App. 158, ll. 14-25.

Discussion

In *Missouri v. McNeely*, the Supreme Court held that the natural metabolization of alcohol in the blood stream **did not present a *per se* exigency** that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. "[C]onsistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances." *Missouri v. McNeely*, 133 S.Ct. 1552, 1556 (2013). The Court then concluded that in drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn, the Fourth Amendment mandates that they get a warrant. *Id.* at 1561.

Here, the non-consensual, warrantless blood draw was an unreasonable seizure of Appellant's blood mandating its suppression under *McNeely*. The statute, S.C. Code Ann. § 56-5-2946, that allowed the non-consensual draw of appellant's blood without a warrant, and without an

exigency, was unreasonable and violated the Fourth Amendment. That the Missouri statute at issue in *McNeely* allowed police to seek a non-consensual blood draw from a driver under any circumstances while S.C. Code Ann. § 56-5-2946 only applies to drivers suspected of felony DUI is immaterial for Fourth Amendment purposes, a person's right to be free from unreasonable searches and seizures does not vary based on the crime he is suspected of committing by the arresting officer.

The logic of the State's argument is such that if Officer Harris did **not** think that Appellant violated any traffic laws, and only arrested him for DUI, he would have to seek search warrant. However, because he believed Appellant violated a traffic law or duty which was the proximate cause of great bodily injury to another, a warrant is unnecessary. This argument is plainly at odds with the Fourth Amendment. Particularly as the Supreme Court has consistently held that blood draws constitute a highly invasive search. *Schmerber v. California*, 384 U.S. 757, (1966).

Further, the accident here did not present exigent circumstances justifying a departure from the Fourth Amendment's warrant requirement. While the accident occurred at approximately 3:25 a.m., law enforcement officers were at the scene within five minutes. EMS arrived a short time later and took responsibility for Garland's medical treatment. Construction workers immediately informed police that Appellant smelled of alcohol.

Appellant refused to perform field sobriety tests. By the time Officer Harris formally arrested Appellant at 4:40 a.m., law enforcement had sufficient time to seek a search warrant prior to the blood draw. *State v. Manning*, 400 S.C. 257, 734 S.E.2d 314 (2012)(probable cause to arrest without a warrant exists when the circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe a crime has been committed by the person to be arrested).

The delays in processing Appellant's arrest and in administering the blood draw were almost entirely the result of inaction or missteps by law enforcement, such as the failure of the breathalyzer or the reluctance of police officers to begin a timely investigation into the accident despite the three hour time limit for conducting a blood draw. *See Kentucky v. King*, 563 U.S. 452 (2011) (warrantless entry to prevent the destruction of evidence not permissible where police conduct creates the exigency).

As *McNeely* and our Supreme Court's decisions makes clear, advancements in communication technology have reduced the bureaucratic burden on police officers seeking a warrant and police are expected to utilize - and courts should evaluate - such time saving techniques. *See State v. Sullivan*, 267 S.C. 610, 615, 230 S.E.2d 621, 623 (1976) ("propriety of an affiant attesting to information supplied him by a fellow officer has been judicially endorsed").

Any one of the dozens of officers present at the accident could have telephoned another officer and relayed the warrant information to that officer, who could then present it to a Magistrate. Mt. Pleasant and Charleston are part of a major metropolitan area; there was no reason to conclude - and the State made no showing - that a search warrant could not have been readily obtained.

Accordingly, Appellant should be granted a new trial.

II.

The trial court erred in refusing to suppress the results of Appellant's blood draw where the blood draw did not take place within three hours of Appellant's arrest as required under S.C. Code Ann. § 56-5-2950(A) which is applicable to felony DUI resulting in great bodily injury pursuant to S.C. Code Ann. § 56-5-2946.

Relevant Facts

Appellant's vehicle struck Garland at around 3:23 a.m. As detailed above, law enforcement reached the accident scene by 3:25 a.m. and began administering aid to Garland. App. 352, l. 16 - 355, l. 24. By 3:34 a.m., law enforcement had spoken with multiple construction workers who claimed to smell alcohol on Appellant. *Id.* At least one officer, Sargent Winstead, also smelled alcohol on Appellant. At 3:34 a.m., Officer Beckert began interviewing Appellant, who admitted to having one beer that night. App. 357, ll. 3-19. As seen at 3:40 a.m., Beckert asked Appellant to perform field sobriety tests. Appellant refused. App. 358, l. 4 - 364, l. 9.

After refusing to perform field sobriety tests, Beckert informed Appellant that he was not free to leave and ordered him to remain by the front of Beckert's police car. App. 358, l. 4 - 364, l. 9. Officer Harris arrived at the accident scene at 4:08 a.m., almost forty-five minutes after the first officer. App. 411, l. 15 - 424, l. 17. Harris ordered Appellant to perform field sobriety tests. According to Harris, the tests indicated that Appellant was likely intoxicated. At 4:40 a.m., Harris formally arrested Appellant. Appellant was taken to the Mt. Pleasant police station to take a breathalyzer. App. 423, l. 15 - 424, l. 17.

The breathalyzer machine malfunctioned. After the machine was restarted, Appellant refused to submit a breath sample. App. 358, l. 4 - 364, l. 9. Pursuant to S.C. Code Ann. § 56-5-2946, Appellant was taken to the East Cooper Hospital; where at 6:55 a.m., some three hours and thirty minutes after the accident, Appellant underwent a warrantless, non-consensual blood draw administered at the behest of law enforcement.

Pre-Trial Suppression Motion

After the court denied Appellant's Fourth Amendment argument, the defense moved to suppress the results of Appellant's blood draw as the blood draw did not occur within three hours of Appellant's arrest as mandated by S.C. Code Ann. § 56-5-2950(A). App. 123, l. 13 - 126, l. 22. The defense contended that Appellant was under arrest by 3:40 a.m., when he refused to perform field sobriety tests and Beckert informed him he was not free to leave. *Id.*

The defense contended that once probable cause developed and Beckert informed him Appellant that he was not free to leave, it was unreasonable in light of the three hour statutory time limit for police to claim they kept Appellant in investigative detention for an additional hour. *Id.* Appellant argued that whether a person, who has been seized and physically restrained by law enforcement is under arrest is based on an objective standard "of whether or not a reasonable person would feel like they are free to leave" or would understand that their freedom was restrained in a way typically associated with formal arrest. App. 133, ll. 2-8.

By contrast, State claimed that whether a person is under arrest depends on the subjective intent of the officer involved and the defendant. App. 128, l. 24 - 132, l. 12. Thus, Appellant was only under arrest for purposes of the three hour testing time limit once he was handcuffed and *Mirandized* by Harris at 4:40 a.m. *Id.* The fact that police had probable cause to arrest Appellant for an hour and twenty minutes prior to formally arresting Appellant was immaterial. *Id.* The defense countered that the cases relied upon by the State, were distinguishable from Appellant's case, as the defendants in those cases were not seized or physically restrained by law enforcement at the time of their alleged arrests. App. 132, l. 13-22.

The court agreed with the State and ruled that Appellant was not under arrest for the purposes of the three hour time limit until Officer Harris formally placed Appellant in handcuffs and

administered *Miranda* warnings at 4:40 am. "We are dealing with the deadline imposed by statute that clearly articulates the time frame doesn't run until he's placed under arrest. Which in this instance is not until the police say, 'You are under arrest, they put handcuffs on him and they *Mirandize* him.'" App. 123, ll. 19-25.

The court determined that, while police could have arrested Appellant at 3:40 a.m., keeping Appellant under investigative detention for an hour and twenty minutes after the accident was not the equivalent of an arrest. App. 124, l. 2 - 125, l. 25. "[U]nder these circumstances they are certainly not going to let him go home and then come back and question him later. . . . Could they have placed him under arrest then? They could have, but they didn't." *Id.* Accordingly, the trial court denied Appellant's motion and ruled the blood draw results were admissible. App. 138, ll. 15-19.

Discussion

The trial court erred in ruling that Appellant's blood draw was administered within three hours of his arrest. Appellant was under arrest for the purposes of the three hour testing time limit in S.C. Code Ann. § 56-5-2950(A) at 3:40 a.m. By this time, law enforcement had seized Appellant in a manner typically associated with a formal arrest by instructing him that he was not free to leave after he declined to perform field sobriety tests and had established probable cause to arrest Appellant. Thus, Appellant's blood draw was untimely and the results of the blood draw should have been suppressed.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. An arrest represents the highest form of seizure of the person under Fourth Amendment jurisprudence. *California v. Hodari D.,* 499 U.S. 621, 624 n. 3 (1991).

An arrest is defined as "[a] seizure or forcible restraint. The taking or keeping of a person in custody by legal authority." *Black's Law Dictionary*, 45 (8th ed. 2006); *see also* 5 Am. Jur. 2D Arrest § 4 (2007) ("Police detention constitutes an 'arrest' if a reasonable person in the suspect's position would understand the situation to be a restraint on freedom of the kind that the law typically associates with a formal arrest."); 6A C.J.S. Arrest § 1 (2004) ("An arrest is the taking, seizing, or detaining the person of another by any act which indicates an intention to take him or her into custody and subject the person arrested to the actual control and will of the person making the arrest.").

Whether the restraint or detainment rises to the level of an arrest turns on the length of the detention, the degree of restraint, and the level of police control over the defendant and the circumstances surrounding his detention. *Berkemer v. McCarty*, 468 U.S. 420 (1984) (warning against adopting a subjective test for determining when a suspect in custody and interpreting custodial detention as the equivalent of a formal arrest). This is an objective, totality of the circumstances test. *State v. Easler*, 327 S.C. 121, 127-128, 489 S.E.2d 617, 621 (1997) (defendant not in custody at time of interrogation, police had not been to accident scene and were unaware of victim's injuries). Where law enforcement has seized a defendant and restrained his freedom, the subjective intent of the police officers is immaterial to whether a defendant is under arrest.

The trial court erred by applying the subjective-intentions test advanced in *State v. Williams*, 237 S.C. 252, 116 S.E.2d 858 (1960), and reiterated in *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010). The subjective-intentions test seeks to determine ***when an arrest had been consummated despite the arresting officer having never seized or otherwise physically restrained the defendant***. (*emphasis added*). In both cases, the defendant fled upon seeing the officers and were charged with resisting arrest. *Williams v. State*, 237 S.C. at 257, 116 S.E.2d at 860-861.

In *Brannon*, the Supreme Court held that "[w]here a police officer does not manually touch the suspect, an arrest requires intent on the part of the officer to arrest the suspect, and intent on the part of the suspect to submit to the arrest, under the belief that the submission was necessary." 388 S.C. at 504, 697 S.E.2d at 597. The subjective intentions test is applicable only where police never restrained the defendant.

Here, an objective analysis of the totality of the circumstances surrounding Appellant's seizure, establish that Appellant was under arrest at 3:40 a.m. when Officer Beckert told him that he was not allowed to leave the accident scene. By 3:40 a.m. police had probable cause to believe, based on a totality of the circumstances, that Appellant had committed a felony DUI as: (1) the accident occurred at 3:23 a.m. on a Monday morning; (2) construction workers at the scene, whom Harris obviously chose to believe, claimed Appellant's vehicle was speeding and swerved into the constriction zone; (3) Garland had sustained serious injuries; (4) construction workers and some law enforcement officers reported smelling alcohol on Appellant; (5) Appellant admitted to drinking at least one beer; and (6) Appellant refused to perform any field sobriety tests.

A reasonable person in Appellant's position would "understand the situation to be a restraint on freedom of the kind that the law typically associates with a formal arrest." *Freeman v. Gore*, 483 F.3d 404 (5th Cir. 2007). The fact that Beckert was reluctant to formally arrest Appellant until his supervisor, Officer Harris, was present is immaterial to an objective determination of whether Appellant's detention was the functional equivalent of an arrest. *Bradley v. State*, 316 S.C. 255, 449 S.E.2d 492 (1994) (the relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody).

Finally, applying the subjective-intentions test used by the trial court would lead to an absurd result where the police, as they did here, simply delay formally arresting a defendant so as to

circumvent the three hour time limit on taking blood and other fluid samples for testing under S.C. Code Ann. § 56-5-2950(A). *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (courts must reject a statutory interpretation that would lead to a result "so plainly absurd that it could have been intended by the Legislature"). The statutory time limits are in place to insure the accuracy of test results. Relying on the subjective intent of the arresting officer would lead to an absurd situation where a blood draw conducted within three hours of formal arrest could have, in fact, been administered many hours or even days after the accident.

The trial court erred in applying a subjective-intentions test to determine when Appellant was under arrest. The court should have utilized an objective, totality of the circumstances test to determine whether Appellant's prolonged detention after probable cause was established constituted was, in fact, an arrest for the purposes of calculating the testing time limits in S.C. Code Ann. § 56-5-2950(A).

Accordingly, Appellant is entitled to a new trial.

III.

The trial court committed an abuse of discretion by allowing Officer Andrew Harris to testify about an experiment that he conducted in an attempt to prove that Appellant's car could have struck construction worker Ahmed Garland while he was standing in the construction lane and then exited the construction lane without contacting any adjacent cones or the nearby paving machine, where Harris was never qualified as an expert in accident reconstruction by the trial court and his testimony was inadmissible lay witness testimony on crucial issue of proximate cause.

Relevant Facts

At trial, Officer Harris testified that after he arrested Appellant following the field sobriety tests he interviewed several of the construction workers to determine a possible point of impact for the collision. App. 424, l. 3 - 425, l. 20. Harris also measured the distances between the paver and the two nearest adjoining cones (one in front of the paver and one behind the paver based on the direction of travel). App. 426, l. 5 - 428, l. 9; *See* State's Exhibit No.: 37[2].

The front cone was forty three feet from the paver and the back cone was forty one feet from the paver. *Id.* He concluded, based on interviews with eye-witnesses, that Garland was struck while he was 26.3 feet in front of the paver and 16.9 feet behind the forward cone. App. 684, ll. 11-20; *See* Defense Exhibits Nos. 12-24.[3]

On cross-examination, Harris stated that neither the paver nor either of the two nearest cones were struck by Appellant's vehicle. App. 441, ll. 7-18. When pressed by the defense, Harris reluctantly admitted that he was the lead investigator at the crime scene and that he had relied on incomplete, decade old training he received shortly after becoming a police officer in accident reconstruction to conclude that Appellant's vehicle had entered the construction lane, as opposed to Garland stepping into the lane of traffic. App. 448, l. 3 - 456, l. 23.

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[2] On file with the Court.
[3] On file with the Court.

In an effort to rehabilitate Harris, the State attempted to belatedly qualify him as an expert in accident reconstruction. App. 497, l. 18 - 503, l. 9. As he started to explain the training that he received in accident reconstruction, Harris began to comment on the facts of Appellant's case. This drew an objection from the defense as Harris had not been qualified as an expert. App. 498, l. 3 - 499, l. 13. The State countered by moving to qualify Harris, despite *voire dire* revealing that Harris had never before been qualified by a judge as an expert in accident reconstruction. *Id.* Defense continued to object that Harris was not qualified.

The trial court never qualified Harris as an expert witness. The court simply declined to make any determination one way or the other. App. 499, ll. 7-14. Harris continued to testify about his training and the accident scene. App. 501, l. 1 - 502, l. 14. The State then asked Harris, "[a]t 43 feet that we measured earlier, do you know if it's possible to swerve in and swerve out a few feet into that distance?" App. 502, ll. 18-20. Appellant again objected on the grounds that Harris had not been qualified as an expert witness and, thus, could not give opinion testimony.

Without taking argument from the State or taking the opportunity to rule on whether Harris was qualified to give expert testimony, the trial court overruled the objection noting that Harris, "investigated the accident. He has training and experience. ***He does not have to be qualified as an expert to render a lay opinion based on his rational perception.***" App. 502, l. 25 - 503, l. 5 (*emphasis added*).

Harris, who had still not been qualified as an expert, then testified about an experiment that he conducted with his police car:

> So I went out to a spot in Mount Pleasant that's by the airport that no one travels and I set up cones, took my tape measure like we had and measured 43 feet and put the cones out there. And I just did it. There were no cars coming, and I was, you know, plus I'll be honest, 100 percent I did it with impartiality. I didn't drive up there and jerk it in and jerk it out. I did it as if it would be a drift.

> I did it at different speeds. I wanted to know so I did it at 30, 35, 40 [miles per hour]...
>
> I would hit it and swerve back out. Sometimes I would hit the second cone, which was -- would have simulated the paver. So at certain times I would have hit that and -- I would have hit the paver, but in this case it didn't happen.

App. 503, l. 24 - 504, l. 23. Harris never explained how many times his experiment was unsuccessful. He also never explained why he did not include the rear cone, located 41 feet behind the paver in his simulation.

Harris stated that, while he was unsuccessful on many of his attempts, he was able to - at least once - at forty miles per hour strike the "Garland cone" without also hitting the forward cone or the paver cone. App. 505, ll. 1-3. Not surpisingly, there was no video or written report produced documenting the results of Harris' *ad hoc* experiment.

Discussion

The trial court erred by refusing to rule on whether Officer Harris had the necessary training and experience to qualify as an expert accident reconstructionst prior to Harris testifying about an experiment he conducted purporting to recreate the accident. App. 499, ll. 7-14; App. 501, l. 1 - 502, l. 14. In fact, Harris lacked the requisite knowledge, skill, experience, training, or education to be qualified as an expert in accident reconstruction and his testimony regarding the experiment that he conducted should have been ruled inadmissible as improper lay witness opinion testimony.

Prior to testifying before the jury, all expert testimony must satisfy Rule 702, SCRE, criteria. *State v. White*, 382, S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Specifically, the Rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE.

The trial court exercises a gatekeeping function to insure the proposed expert testimony meets a reliability threshold for the jury's consideration. *State v. White*, 382, S.C. at 270, 676 S.E.2d at 686. The refusal by a trial court to determine a proposed expert's qualifications prior to that expert testifying constitutes "patent error." *State v. Anderson*, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015).

Accordingly, trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. *State v. White*, 382, S.C. at 270, 676 S.E.2d at 686. The reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. *State v. Jones,* 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001)

A. ***The court erred in refusing to rule on whether Harris was qualified as an accident reconstructionist prior to allowing his to offer opinion testimony. Harris lacked the necessary skills, training, experience, and expertise required to be qualified as an accident reconstructionist.***

Here, the trial court committed "patent error" by refusing to determine whether Harris qualified as an expert in accident reconstruction. App. 502, l. 25 - 503, l. 5; *State v. Anderson*, 413 S.C. at 218, 541 S.E.2d at 818. Accident reconstruction is a well-established field of scientific expertise. *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 256, 634 S.E.2d 62, 70 (Ct. App. 2006) ("A plethora of South Carolina cases allow testimony by experts in accident reconstruction").

Inexplicably, when defense counsel brought to the court's attention that she had not qualified Harris as an expert, the trial refused make any of the required foundational inquiries regarding the admissibility of expert testimony. App. 502, l. 25 - 503, l. 5. Had the court done so, it

would have been apparent that Harris lacked the necessary experience, training, skill, and education to be qualified as an expert in accident reconstruction.

He had never been qualified as an accident reconstructionist by any court, his initial training on accident reconstruction had occurred a decade prior to Appellant's trial, he had not maintained any certifications or undergone any continuing education in the field, and he did not regularly reconstruct accidents in the course of his duties. App. 448, l. 3 - 456, l. 23; *see also McDill v. Mark's Auto Sales, Inc.*, 367 S.C. 486, 489, 626 S.E.2d 52, 54 (Ct. App. 2006) (highway patrol trooper not qualified to be an expert in accident reconstruction; trooper was not a member of the highway patrol's accident reconstruction team, he did not use any reconstructive techniques to determine the speeds of the drivers and relied on what witnesses told him).

In addition, the methodology Harris used was totally unreliable and the results completely undocumented, rendering them incapable of repetition. *State v. White,* 382, S.C. at 270, 676 S.E.2d at 686. While Harris claimed that he struck the "Garland cone" without hitting either the paver or the front cone, his experiment omitted the rear cone located forty feet behind the paver that was also untouched by Appellant's car,. App. 503, l. 15 - 505, l. 3. Likewise, Harris did not account for the barrel style cones that were deployed along the side of the travel lane opposite the construction lane. R.* (State's Exhibit No. 37).

Not only was Harris never qualified as an expert, had he been subject to a Rule 702, SCRE, analysis, his qualifications would have been found grossly inadequate and his methodology insufficiently reliable. *State v. White,* 382, S.C. at 270, 676 S.E.2d at 686; *State v. Jones,* 343 S.C. at 572, 541 S.E.2d at 818.

B. ***Harris' testimony exceeded the scope of lay witness opinion testimony.***

The court's contention that Harris was merely providing "a lay opinion based on his rational perception" misapprehended the "perception of the witness" requirement of Rule 701, SCRE, governing the admissibility of law witness testimony. App. 503, ll. 1-5. Rule 701, SCRE, provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) ***are rationally based on the perception of the witness***, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) ***do not require special knowledge, skill, experience or training.***

(*emphasis added*); *see also State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (opinion or inference of lay witness is admissible if it is (a) rationally based on perception of witness; (b) helpful to determination of fact in issue; and (c) does not require special knowledge).

Harris did not witness the accident. Therefore, he lacked the first-hand knowledge of the accident required before a lay witness can give opinion testimony. *Anderson*, 413 S.C. at 220 n. 6, 776 S.E.2d at 80 n. 6 (lay witnesses are permitted to offer opinion testimony when such testimony is rationally related to their "examinations and their personal observations of the incident").

Harris' experiment purportedly showing that it was possible for Garland to be struck while standing in the construction lane ***was not an opinion based on his personal observation of the accident***, but rather an opinion based on facts he gathered from witnesses. *In re. Thomas S.*, 402 S.C. 373, 380, 741 S.E.2d 27, 29 (2013) (social worker, a lay witness, was improperly permitted to offer expert opinion testimony where she had no first-hand knowledge of individual's conduct and was not qualified to testify about individual's likelihood to reoffend based her interpretation of the treating doctor's notes).

While Harris may have been qualified to record the distances between the cones and the paver, and to collect other information from the crime scene, he lacked the required special

knowledge, skill, experience, or training to reliably recreate the accident based on his measurements. *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (officer qualified as expert in crime scene processing and fingerprinting was qualified to testify to measurements taken at murder scene, to recovery of shell casings, and to identification of blood stains, but was ***not*** qualified to testify as expert with respect to crime scene reconstruction); *see also Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (volunteer fire chief's testimony that fire at issue was unintentional did not consist of permissible perceptions from a lay witness, ***even though chief extinguished fire***; statements were opinions that required special knowledge, skill, experience, or training to be properly made)(*emphasis added*).

Allowing Harris to opine that it was possible for Appellant's car to strike Garland without hitting either the paver or surrounding construction cones cannot be deemed harmless as the central issue at trial was whether Appellant, who was concededly under the influence of alcohol, "engaged in an act forbidden by law or neglected a duty imposed by law" that proximately caused Garland's injuries. S.C. Code Ann. § 56-5-2946; *State v. Grampus*, 288 S.C. 395, 343 S.E.2d 26 (1986) *abrogated on other grounds by State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997).

The trial court's refusal to determine Harris' qualification as an accident reconstructionist mandates that Appellant receive a new trial as does the erroneous admission of Harris' improper lay opinion testimony.

IV.

The trial court erred by not allowing into evidence video footage of an experiment conducted by Appellant's expert accident reconstructionist demonstrating that the injured construction worker was standing in the active lane of traffic when he was struck by Appellant's vehicle; where the expert was properly qualified based on his training and experience and the methodology used when conducting the experiment was reliable.

Relevant Facts

Appellant retained Woodrow Poplin, a respected mechanical and civil engineer specializing in the evaluation of traffic accidents. App. 655, l. 16 - 658, l. 20. He was qualified, without objection, as an expert witness in accident reconstruction. *Id.* Poplin drafted a report based on his investigation into Appellant's accident which was entered into evidence at trial. App. 659, l. 2 - 665, l. 22; Defendant's Exhibits Nos.: 12 - 24.

Safety Deficiencies at the Construction Site

Poplin's report concluded that, on the night of the incident, the construction zone was improperly set up in a number of critically unsafe ways. *Id.* In reaching this conclusion, Poplin relied on SCDOT regulations and the report and measurements of Officer Harris. *Id.*; App. 668, l. 2 - 679, l. 23. For example, the spacing between cones that separated the active traffic lane from the closed construction lane was three to four times SCDOT's mandated distance. *Id.*; *see also* App. 696, l. 12 - 698, l. 15.

Given the thirty-five mile per hour speed limits, cones around the paver should have been placed at twenty-five foot intervals. App. 668, l. 13 - 673, l. 19. In actuality, the cones - which were also smaller than the barrel cones SCDOT mandates, were forty three feet apart. App. 691, ll. 1-15. This was especially dangerous as the work zone extended into the active traffic lane. App. 668, l. 13 - 673, l. 19.

In addition, the buffer zone separating the construction lane from the traffic lane was only eighteen to twenty inches wide, thus more cones should have been deployed. App. 676, l. 6- 677, l. 16. Most troublingly, the paver was wider than the construction lane and stuck out into the lane of traffic. App. 679, ll. 12-23.

This meant that construction worker steeping off the paver, as Garland had moments before he was hit, would be standing in the traffic lane. Poplin ruefully noted that this situation was not covered in the SCDOT guidelines because "they just assume that you don't do stuff like that. . . I mean, having the paver stick out into the travel zone is just awful." *Id.*

Accident Reconstruction

Based on the measurements collected by law enforcement and their reports, Poplin concluded that Appellant's car, traveling at forty miles per hour could, deviate from the traffic lane a total distance of .89 feet (10.68 inches) in the forty three foot space between the two traffic cones without hitting either of the cones. App. 685, l. 23 - 691, l. 24. At thirty five miles per hour, the deviation increased to 1.15 feet (13.8 inches) and Appellant would have had .83 seconds to turn into the construction zone and out of it. At forty miles per hour, Appellant would have had .73 seconds. App. 692, ll. 3 - 698, l. 15.

Using Harris' alleged point of impact, 26.3 feet from the paver and 16.9 feet from the front cone, Garland had to have been standing in one of two places. *Id.* The position inside the construction zone was too far into the zone to have been struck by Appellant's vehicle without the vehicle contacting the paver or the cones. The second location was substantially inside the traffic lane. *Id.* Poplin stated that, in his opinion, the collision between Apellant's car and Garland occurred in the travel lane. *Id.*

Video Taped Demonstrative Experiment Disproving the State's Version of the Accident

In response to eve-of-trial notice from the State of Officer Harris' purported experiment, Poplin attempted to recreate the accident as Harris alleged it happened in his police report. App. 699, l. 9 - 703, l. 5. Unlike Harris, Poplin videotaped his experiment. Poplin also utilized GPS to insure that his speed matched Appellant's reported speed. *Id.* Poplin placed two cones forty-three feet apart and placed another cone representing the point of impact. App. 704, l. 10 - 705, l. 14.

He also established the traffic lane with a line of cones "to reduce the approach path to a lane width" and better approximate the road conditions. At the lower speed of thirty-five miles per hour, which allowed for a greater deviation from the traffic lane, Poplin was unable to recreate the collision as Harris claimed it occurred without striking either the paver or the front cone. App. 705, ll. 9-20.

Admissibility of Video Taped Demonstrative Experiment

Prior to Poplin's testimony, the State objected to the video arguing that the defense had failed to provide notice required under Rule 5, SCRCrimP. App. 638, l. 15 - 640, l. 21. The defense clarified that Poplin's experiment was conducted in response to Officer Harris' testimony regarding his purported recreation of the accident. *Id.* The video would show that it was impossible for the accident to have occurred the way Harris claimed. *Id.*

The court interjected that the defense had opened the door to testimony about the experiment during its cross-examination of Harris. App. 641, l. 14 - 642, l. 12. 650, l. 21. Curiously, the court now denied that she admitted Harris' testimony on the basis that it was his personal observations. *Id.* Instead the court declared, for the first time, that she had found Harris' testimony admissible "based on the fact that it was in response to a line of questioning that you all presented to him in your cross-examination." *Id.*

The defense again clarified that the video was demonstrative evidence intended to show that the accident could not have occurred as Harris and the State claimed it did. App. 642, ll. 6-12. The defense had always planned for Poplin to testify, based on his investigation, that actual point of impact almost certainly in the travel lane, not in the construction lane. App. 645, ll. 8-12.

The trial court declined to rule without hearing Poplin's testimony, but was skeptical of the video's admissibly. Ultimately, the court concluded that the video was a re-creation, as opposed to a demonstration:

> [I]it's almost like you've got a therapist saying, this is my opinion, and general based on certain formulas or certain applicable principles, this is generally how something would have happened. That it is permissible. They can't say, based on my review of this person's record, this is what they did. . . .
>
> So, it is almost that same line of logic, which is, your expert can opine as to how, based on how certain scientific principles, how this could or could not have happened, and in his expert opinion this is how it most probably happened. But I think once you start getting into re-creations, that becomes problematic and I need to research that a little bit.

App. 647, l. 22 - 648, l. 19. In response, the defense reiterated that the video was a demonstration and would not be presented to the jury as a re-creation. App. 649, ll. 3-10. The court disagreed, "it is a re-creation. You want the jury to believe that this is how it happened that night . . . Otherwise you wouldn't be seeking to put it in." *Id.*

After the defense proffered Poplin's testimony regarding the video, the trial court granted the State's motion and refused to admit the video of Poplin's demonstration into evidence. In doing so, the court was also concerned that it would be unfair to the State to allow Poplin's video into evidence when Harris had not videotaped his experiment. App. 711, l. 4 - 713, l. 17.

The court further noted that she had allowed Harris to testify about his experiment because she wanted to allow "the State to rehabilitate their witness, and he really testified within the lay scope of his being an officer and the extent of his investigation of this case." *Id.*

Court further expressed concern that Poplin's experiment "wasn't from any sort of scientific sampling." *Id.* Moreover, she believed that the subjective, human factor of the driver meant that the video would be misleading and the different models of cars prevented a person from recreating the accident. *Id.*

Discussion

The trial court committed an abuse of discretion by refusing to admit into evidence the video footage of Poplin's experiment. App. 711, l. 4 - 713, l. 17. The experiment was relevant, reliable demonstrative evidence that would have assisted the jury in assessing whether Appellant's conduct was the proximate cause of Garland's injuries. *Clark v. Cantrell*, 339 S.C. 369, 382-383, 529 S.E.2d 528, 535 (2000) (computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is authentic, relevant, a fair and accurate representation of the evidence).

Contrary to the court's belief, the experiment did not purport to show how the accident occurred, ***only that the accident could not have occurred in the manner argued by the State***. App. 705, ll. 9-20; *Weaks v. S.C. State Hwy. Dep't,* 250 S.C. 535, 542, 159 S.E.2d 234, 237 (1968). The trial court was failed to differentiate Poplin's testimony on how the accident likely occurred from Poplin's experiment that demonstrated only that the accident did not happen the way the State claimed it did. *Id.*; *Cf.* App. 692, ll. 3 - 698, l. 15.

A trial court's admission or rejection of evidence is generally reviewed for an abuse of discretion. *State v. McDonald,* 343 S.C. 319, 540 S.E.2d 464 (2000). An abuse of discretion occurs

when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres,* 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

Demonstrative evidence is admissible when the proponent shows that the evidence is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE. *Clark v. Cantrell*, 339 S.C. at 382-383, 529 S.E.2d at 535.

An out-of-court experiment is admissible if it is "made under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy." *State v. Frazier,* 357 S.C. 161, 166, 592 S.E.2d 621, 623 (2004) (quoting *Weaks v. S.C. State Hwy. Dep't,* 250 S.C. 535, 542, 159 S.E.2d 234, 237 (1968)). It is not required that the conditions be identical with those existing at the time of the controversy; it is sufficient if there is a substantial similarity. *Id.*

Poplin went to significant lengths to insure that his experiment was conducted under conditions substantially similar to those at the time of the accident. Through the use of a GPS, Poplin insured that he was traveling at speeds which mirrored Appellant's reported speed. Relying on police reports, the foundation of the State's version of events, Poplin reconstructed the accident scene and Garland's possible locations. *Cf: Jamison v. Ford Motor*, 373 S.C. 248, 644 S.E.2d 755 (2007) (probative value of video crash tests of a newer model of motorist's car was substantially outweighed by danger of unfair prejudice, confusion of the issues, and misleading the jury in wrongful-death action alleging that manufacturer negligently designed and implemented occupant protection system; ***when the newer model car, unlike motorist's model, had air bags***).

The fact that Poplin conducted his experiment during the day, that the simulated lane of travel was not an identical width to the actual lane of travel, and there may have been slight differences between the car used by Poplin and Appellant's car; goes to the weight and the credibility of the experiment, not its admissibility. The law "requires only a substantial similarity, not a precise recreation." *Weaks*, 250 S.C. at 542, 159 S.E.2d at 237 (1968). Likewise, that Harris neglected to video tape or otherwise document his experiment was immaterial to the admissibility of Poplin's video. *State v. Kahan*, 268 S.C. 240, 233 S.E.2d 293 (1977) (no error for court to permit expert witness to testify regarding out of court experiments based on previous testimony of a prior witness).

Video footage of Poplin's experiment was admissible as demonstrative evidence used to help explain to the jury and allow them to visualize the impossibility of the State's version of the accident. *State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999) (evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable).

Poplin's video satisfied all of the foundational requirements for admissibility. As detailed above, whether Appellant's actions were the proximate cause of Garland's injuries was the central issue at trial. *Clark v. Cantrell*, 339 S.C. at 382-383, 529 S.E.2d at 535. The video was highly relevant and corroborated Poplin's conclusions regarding the State's version of the accident. *Id.* at 384, 529 S.E.2d at 536 (animation inadmissible as it contradicted expert witness' testimony). The State had ample opportunity to cross-examine Poplin on his methodology, potential bias, and the differences in conditions between the experiment and the accident.

The court's improper exclusion of this critical defense evidence was reversible error.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Charleston County Court of General Sessions for a new trial.

Respectfully submitted,

Susan B. Hackett for
John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Larry B. Hyman, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

DANIEL HAMRICK,

APPELLANT

APPELLATE CASE NO. 2015-002164

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of May, 2016.

Susan B. Hackett for
John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of May, 2016.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.