State of South Carolina
In the Court of Appeals

Appeal from Charleston County
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No.: 2015-002164

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

DANIEL HAMRICK,

APPELLANT.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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STATEMENT OF THE CASE

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 to suppress evidence from a nonconsensual 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 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. The court also distinguished between investigative detention and arrest and found that the blood draw had occurred within three hours after the arrest satisfying S.C. Code Ann. § 56-5-2950(A). App. 123, l. 13 - 126, l. 22.

At the conclusion of the trial on October 25, 2013, the jury found Appellant guilty. App.

887, 11. 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.

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 an "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.

ARGUMENTS

I. Trial court did not abuse its discretion by admitting the results of Appellant's blood draw where the police ordered the draw without a warrant, believing alcohol was in felony DUI suspect's blood stream.

Relevant Facts

At around 3:20 a.m. on November 14, 2011, Appellant's Jeep struck construction worker Ahmed Garland while driving through a construction zone on U.S. 21 in Mt. Pleasant. App. 226, l. 7 - 231, l. 13. Appellant struck Garland as he walked towards a nearby paving machine in the construction zone. Id. Garland suffered serious, permanent bodily injuries. App. 382, ll. 9-24.

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 and other officers began interviewing Appellant around 3:34 a.m. Appellant admitted to having consumed alcohol that night, App. 357, ll. 3-19, and refused 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.

At 4:08 a.m., Officer Andrew Harris of the Mt. Pleasant police department arrived on the scene and interrogated Appellant regarding the substantial evidence indicating that he was intoxicated and then instructed him to perform several sobriety tests. App. 41 1, l. 15 - 424, l. 17. At this point, Appellant consented and 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. Appellant subsequently refused to take a breathalyzer test. Id. Appellant was taken to the East Cooper Hospital where at 6:55 a.m. and 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.

Appellant moved to suppress the results of Appellant's blood draw. App. 82, 1. 2 - 101, 1. 2; App. 148, 1. 15 - 163, 1. 16. The defense argued for the suppressed of the blood evidence because McNeely v. Missouri,133 S.Ct. 1552 (2013) held that the "natural metabolization of alcohol in the bloodstream did not present a per se exigency that justified it in all circumstances, but must be determined case by case based on the totality of the circumstances." 133 S.Ct. 1552 (2013). Defense also argued police could have applied for a search warrant once Appellant refused to perform field sobriety tests and the witnesses claimed to smelled alcohol on his breath.

The State argued that subjecting Appellant to a non-consensual, warrantless blood draw was constitutional because of the time it took police to investigate the accident scene and transport Appellant to the hospital. App. 102, 11. 5-16. The State also countered that McNeely was distinguishable because the South Carolina mandatory blood draw statute applied only to felony DUI. App. 85, 1. 13 - 88, 1. 6; see S.C. Code Ann. §56-5-2946.

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 the Fourth Amendment. 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, and that the police took a reasonable amount of time to sort out exactly what was going on at the scene, detain the Defendant and speak to witnesses. App. 158, 11. 2-13. Finally, the court determined that "it is not reasonable to believe ... 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, 1. 14-25.

Discussion

Fourth Amendment Jurisprudence: Warrantless Blood Draw

The Fourth Amendment prohibits unreasonable search and seizure without a warrant. U.S. Const. amend. IV. "[T]he Fourth Amendment's proper function is to constrain... intrusions which are not justified in the circumstances, or which are made in an improper manner." Schmerber v. California, 384 U.S. 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The ultimate measure of the constitutionality of a governmental search is reasonableness. Maryland v. King, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013). The Court has recognized that some searches conducted without a warrant are justified if reasonable in scope and manner of execution. Id. Rather than employing a *per se* rule of unreasonableness, the Court balances privacy-related and law enforcement-related concerns when determining if a warrantless intrusion is reasonable. Id. This balancing test requires a court to weigh the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy. Id. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009).

One well-recognized exception to the Fourth Amendment's search warrant requirement applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. Missouri v. McNeely, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, Michigan v. Fisher, 558 U.S. 45, 47–48, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009) (per curiam), engage in "hot pursuit" of a fleeing suspect,

United States v. Santana, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), or enter a burning building to put out a fire and investigate its cause, Michigan v. Tyler, 436 U.S. 499, 509–510, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). One such exigent circumstance is law enforcement officers conducting a search without a warrant to prevent the imminent destruction of evidence. See Cupp v. Murphy, 412 U.S. 291, 296, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); Ker v. California, 374 U.S. 23, 40–41, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (plurality opinion). See also State v. Cribb "Police may seize highly evanescent evidence without warrant before effecting arrest when there is probable cause to make arrest at time of search." State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). A finely tuned "totality of the circumstances" approach is applied when determining Fourth Amendment reasonableness, in the context of a warrantless search where a law enforcement officer faced an alleged exigency, because the police action at issue lacks the traditional justification that a warrant provides, and absent that established justification, the fact-specific nature of the reasonableness inquiry demands that the court evaluate each case of alleged exigency based on its own facts and circumstances. Missouri v. McNeely, 133 S. Ct. at 1559. The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Birchfield v. N. Dakota, 136 S. Ct. 2160 (2016). Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Id.

While metabolization of alcohol in the blood stream does not constitute a *per se* exigency justifying nonconsensual blood draw in all cases, it can still justify nonconsensual blood draws in some cases. Id. "No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned

that evidence is being destroyed." Id at 1560. In Missouri v. McNeely, the Supreme Court held "that exigency in the context of natural metabolization of alcohol by the blood stream must be determined case by case based on the totality of the circumstances." Id. at 1556.

In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Id at 1561. Factors present in an ordinary traffic stop of a suspected drunk driver, such as ...the availability of a magistrate judge, may affect whether the police can obtain a search warrant in an expeditious way and therefore may establish an exigency that permits a warrantless blood draw. Id. (See also People v. Youn, 229 Cal. App. 4th 571, 176 Cal. Rptr. 3d 652 (2014), review denied (Nov. 19, 2014) (Police officer's warrantless search in asking a hospital nurse to draw blood from suspect to determine whether the suspect was under the influence of a drug stimulant at the time of an automobile collision was within not a Fourth Amendment violation). The metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a search warrant is required, for a blood draw from a motorist suspected of driving while intoxicated (DWI). Id. (See also State v. Hollingsworth, 77 N.C.App. 36, 334 S.E.2d 463 (1985), "blood-alcohol test performed on blood seized without warrant from defendant while he was unconscious in hospital emergency room did not violate defendant's Fourth Amendment rights.")

Requiring Appellant submit to blood testing does not constitute an unreasonable search and seizure. The officers had probable cause to suspect intoxication on the grounds of witness's accounts and field sobriety tests. The entire incident occurred between the hours of 3:20AM and 6:20AM, making the availability of a magistrate to issue a blood draw warrant especially

unlikely. The investigating officer attempted to employ the more common Breathalyzer test, but it proved unavailable due to technical malfunction. The decision to draw blood to test for intoxication was a reasonable search justified by the specific complications of this case and is precisely the kind of individual case that McNeely recognized as possibly presenting a per se exigency validating a warrantless blood draw.

South Carolina Jurisprudence: Warrantless Blood Draws and Implied Consent

In South Carolina, the elements to determine whether probable cause exists to permit bodily intrusion for the acquisition of evidence are: (1) probable cause to believe the suspect has committed the crime; (2) a clear indication that relevant material evidence will be found; and (3) the method used to secure the evidence is safe and reliable. In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992). Court's may also consider of the seriousness of the crime and the importance of the evidence to the investigation. Id. Under Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), the warrantless seizure of appellant's blood did not violate his fourth amendment rights if there was probable cause to arrest at the time of the accident. State v. Williams, 297 S.C. 290, 292, 376 S.E.2d 773, 774 (1989).

Furthermore, pursuant to § 56–5–2950, a person driving a motor vehicle in South Carolina is deemed to have consented to a chemical test of his breath, blood, or urine if arrested for an offense arising out of acts alleged to have been committed while under the influence of alcohol, drugs, or a combination of the two. § 56–5–2950(a). State v. Long, 363 S.C. 360, 362, 610 S.E.2d 809, 811 (2005). Section 56–5–2946 contains further provisions for persons believed to have committed Felony DUI. "Notwithstanding any other provision of law, a person must submit" to chemical tests to determine alcohol concentration when he is suspected of Felony DUI. The second paragraph of § 56–5–2946 provides, "The tests must be administered at the

direction of a law enforcement officer ... A person who is tested or gives samples must be notified of his right to independent tests." These two paragraphs essentially alter the procedural prerequisites which must be met before an officer may order a blood test for a Felony DUI suspect. Under § 56–5–2946, the officer need no longer offer a breath test as the first option, nor must he obtain a medical opinion that such a test is not feasible before ordering a test or sample. See Long, 363 S.C. at 363. (See State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001), where warrantless seizure of defendant's blood for purposes of blood alcohol test did not violate his Fourth Amendment rights because there was probable cause for arrest at scene of accident given odor of alcohol and defendant's belligerent attitude indicating that he was intoxicated at time that wreck occurred.)

Trial court was correct in distinguishing South Carolina's implied consent statute from the broader statute at issue in McNeely. The carefully tailored balancing test employed by the state of South Carolina, coupled with our clear implied consent provisions, remove the kind of Fourth Amendment concerns at issue in McNeely. Appellant was a felony DUI suspect and due to the unavailability of less intrusive means of testing, a nonconsensual blood draw to determine intoxication was a justified search.

Finally, great deference should be given to the trial court's admissibility decision on review. In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). If there is any evidence in the record to support the trial judge's findings, the appellate court should affirm. Wilson, 345 S.C. at 6. Here, the trial court found the blood draw evidence admissible based on clear factual evidence in the record showing probable cause and exigent circumstances. Its decision should be upheld.

II. Trial court did not abuse its discretion by admitted the results of Appellant's blood draw where the blood draw took place within three hours of Appellant's arrest as required under S.C. Code Ann. § 56-5-2950(A).

Relevant Facts

Appellant's vehicle struck Garland at 3:23 a.m. As detailed above, police 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 was interviewing witnesses, and multiple construction workers claimed to smell alcohol on Appellant. Id. At 3:34 a.m., Officer Beckert began interviewing Appellant, who admitted to having consumed alcohol. App. 357, 11. 3-19. At 3:40 a.m., Beckert asked Appellant to perform field sobriety tests, and 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. 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, but only two hours and fifteen minutes after the arrest, Appellant's blood was draw to be tested for alcohol.

The defense moved to suppress the results of Appellant's blood draw claiming 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. By contrast, State claimed that 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. That the police had probable cause to arrest Appellant for an hour and twenty minutes prior to formally arresting Appellant was immaterial to determining the actual time of arrest. Id.

The court ruled that Appellant was not under arrest, for the purposes of the S.C. Code Ann. § 56-5-2950(A) 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, 11. 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, 1. 2-125, 1. 25. Accordingly, the trial court ruled the blood draw results were admissible. App. 138, 11. 15- 19.

Discussion

Only a formal arrest starts the clock on the three hour period during which an officer who suspects felony DUI may require an involuntary blood draw under S.C. Code Ann. § 56-5-2950(A). Investigative detention, though a Fourth Amendment seizure, does not rise to the level of a formal arrest, and the blood draw was thus within the statutorily prescribed period.

Investigative detention is a form of seizure. Although the concepts of arrest and seizure are related in the sense that 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, 111 S.Ct.

1547, 1551 n. 3, 113 L.Ed.2d 690 (1991), the concepts are distinguishable because, under Terry v. Ohio and its progeny, an individual can be seized under the Fourth Amendment without being arrested under state law. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010). The concepts of arrest and seizure are distinguishable because each concept requires a distinct analysis. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010). An individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave. Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988). By contrast, when determining whether a suspect has been arrested, the ultimate inquiry is whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

In South Carolina, whether an arrest has occurred is determined by the intent of the police officer and the suspect. State v. Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860–61 (1960). In order to "'constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained."[1] Williams, 237 S.C. 252, 257, 116 S.E.2d 858, 860 (1960) (quoting Jenkins v. United States, 161 F.2d 99, 101 (10th Cir.1947)). The intent of officers to arrest must be evaluated under a subjective standard rather than the objective standard governing probable cause. Id. Williams provided further guidance: "It is sufficient if the person arrested understands that he is in the power of the one arresting and submits in consequence." Id. at 257, 116 S.E.2d at 860–61

[1] State v. Brannon subsequently clarified this standard finding: "In Williams, this Court noted ..."the intentions of the parties to the transaction are very important..." We find the phrase "the intentions of the parties to the transaction," refers to the subjective intentions of the law enforcement officer and the suspect. State v. Brannon, 388 S.C. 498, 504-05, 697 S.E.2d 593, 597 (2010).

(quoting 4 Am. Jur. Arrest § 2 (1936)). Williams set forth two specific elements to determine when an arrest has been consummated. 237 S.C. at 257, 116 S.E.2d at 860–61. Where the police officer does not manually touch the suspect, an arrest requires (1) intent on the part of the officer to arrest the suspect, and (2) intent on the part of the suspect to submit to the arrest, under the belief that submission was necessary. Id.

Appellant repeatedly refers to the "totality of the circumstances" when discussing whether a seizure occurred. In doing so, Appellant appears to attempt to apply the "Mendenhall test", formulated by Justice Stewart's opinion in United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), and adopted by the Court in later cases, see Michigan v. Chesternut, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988); INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984): "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S., at 554, 100 S.Ct., at 1877. See also Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326–1327, 75 L.Ed.2d 229 (1983) (emphasis added). In seeking to rely upon that test here, Appellant omits a significant distinction. It says that a person has been seized "only if," not that he has been seized "whenever"; it states a necessary, but not a sufficient, condition for seizure—or, more precisely, for seizure effected through a "show of authority." California v. Hodari D., 499 U.S. 621, 627-28, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690 (1991). Appellant's application of the totality of the circumstances test alone, even if accepted, is inadequate to demonstrate seizure.

Investigative detention is distinct from an arrest such that a defendant is not under full custodial arrest, even when restrained in handcuffs, if officers are trying to confirm suspicions.

See United States v. Lesane: Defendant's seizure did not ripen into full custodial arrest until after he attempted to flee officers' custody; even though initial seizure included five–minute period during which defendant was handcuffed, such period was not longer than necessary for officers to confirm or dispel their suspicion that defendant may have been involved in drug–trafficking, and defendant made no claim that seizure was unreasonably delayed. 498 F. App'x 363, 2012 WL 5519992, (4th Cir. 2012). See also United States v. Elston: Police officers' actions of drawing weapons, ordering defendant out of his car, and handcuffing defendant did not transform investigative detention of defendant into an arrest requiring probable cause; although reasonable person would not have believed he was free to leave, defendant's detention lasted no longer than was necessary to verify the officers' suspicions that he had a handgun, and the officers located defendant's weapon almost immediately after detaining him. 479 F.3d 314 (4th Cir. 2007). For purposes of determining constitutional protections, a person is an "arrestee" when an officer decides to detain. Stewart v. Beaufort County, 481 F. Supp. 2d 483 (D.S.C. 2007).

Investigative detention may be a show of authority by an officer, but that does not amount to an arrest. See California v. Hodari D: Even if police officer's pursuit of defendant on suspicion of narcotics transaction was a "show of authority", defendant was not arrested until officer physically tackled him since defendant did not comply with that show of authority. 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). A police officer's show of authority alone does not constitute an arrest absent any physical contact with defendant or evidence that defendant yielded to any show of authority. Id.

Finally, an uncomplied with show of police authority is not a common law "arrest." Id. Refusal to comply with police orders is evidence that an arrest has not yet occurred. See United States v. Castillo-Cuevas: Defendant who refused to comply with police orders was not in

custody until officers confirmed he was in the United States illegally, he was informed of his Miranda rights, and he was formally placed under arrest. 105 F. App'x 511, 2004 WL 1729823, (4th Cir. 2004).

Appellant argues that the period of time he was detained while the police investigated the scene, interviewed witnesses, performed field sobriety tests, and interrogated Appellant himself is the "functional equivalent" of an arrest. The preceding law refutes this notion, requiring consideration of the officer's subjective intent during this period. The facts presented above suggest that the officer's intent during this period was investigative.

Additionally, while investigative detention rises to the level of a seizure under the Fourth Amendment, it does not rise to the level of formal arrest required by S.C. Code Ann. § 56-5-2950(A). Had the investigating officers concluded their careful investigation, decided that there was not probable cause to charge Appellant with felony DUI and allowed him to leave the scene, it could not be contended that the period of investigative detention amounted to an arrest. The police decision to arrest Appellant after the period of investigation does not alter the fact that the preceding investigative period was not an arrest.

Furthermore, Appellant's repeated refusal to comply with the officer's instructions and requests to perform field sobriety tests is evidence that he was not under arrest during the period of investigative detention, and likely provides some explanation for the hour and fifteen minutes between the officer's arrival at the scene and Appellant's arrest. The police requests that Appellant perform field sobriety tests are shows of police investigative authority, and Appellant's initial refusal to comply suggest that Appellant was not yet under arrest. The trial judge correctly found that the arrest occurred when the Appellant was handcuffed and Mirandized, and the blood draw within three hours of the arrest as required by § 56-5-2950(A).

III. Trial court did not abuse its discretion by allowing Officer Andrew Harris to testify about experiments he conducted where Harris was responding to issues raised by the defense on cross.

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, 1. 3 - 425, 1. 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, 1. 5 - 428, 1. 9; See State's Exhibit No.: 37.

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, 11. 11 20; See Defense Exhibits Nos. 12-24.

On cross-examination, Harris stated that neither the paver nor either of the two nearest cones were struck by Appellant's vehicle. App. 441, 11. 7-18. Harris was the lead investigator at the crime scene and relied on police accident reconstruction training to conclude that Appellant's vehicle had entered the construction lane, as opposed to Garland stepping into the lane of traffic. App. 448, 1. 3 - 456, 1. 23.

The State attempted to qualify Harris as an expert in accident reconstruction. App. 497, 1. 1 8 - 503, 1. 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, 1. 3-499, 1. 13. The State countered by moving to qualify Harris. Id.

The trial court declined to make any determination one way or the other. App. 499, 11. 7-14. Harris continued to testify about his training and the accident scene. App. 501, 1. 1 - 502, 1. 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, 11. 18-20. Appellant again objected on the grounds that Harris had not been qualified as an expert witness.

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, 1. 25 - 503, 1. 5.

Harris then testified about the experiment that he conducted with his police car when he recreated the accident; he set up cones at exact distances to mark where Garland, the construction cones and paver had been the night of the accident, and then attempted to drive his car along the path Appellant had driven to see if it was possible to hit "Garland" without hitting the other cones. App. 503, 1. 24 - 504, 1. 23. 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, 11. 1-3.

Discussion

Great deference should be given to the trial court's admissibility decision on review. In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citation omitted); see also State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing

of probable prejudice." (citation omitted)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). If there is any evidence in the record to substantiate a trial court's findings, the appellate court should affirm. Wilson, 345 S.C. at 6.

Trial court's initial refusal to rule on whether Harris was an expert witness was clarified. Later in the trial, the court noted that the defense had opened the door to testimony about the Harris's experiment during its cross-examination of him. App. 641, 1. 14-642, 1. 12. 650, 1. 21. The court declared that it 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. Trial court did not abuse its discretion or rule based on an error of law, and that determination should be upheld.

Nevertheless, some discussion of Harris's qualification as either an expert or lay witness is necessary. His testimony could be admitted as either lay or expert opinion evidence, but for different purposes in each case.

A. Admissibility of Officer's Testimony as Expert Opinion Evidence

The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion, State v. Chavis, 771 S.E.2d 336 (S.C. 2015), reh'g denied (May 6, 2015), and will not be reversed absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (S.C. 2008). There is no abuse of discretion in admitting expert testimony as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and

assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. White (S.C.App. 2007) 372 S.C. 364, 642 S.E.2d 607. The rule governing the admission of expert testimony does not contain a set of mandatory qualifications that a witness must meet in order to be qualified as an expert; instead, the rule recognizes that there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence. Fields v. J. Haynes Waters Builders, Inc., (S.C. 2008) 376 S.C. 545, 658 S.E.2d 80. In determining a witness's qualification as an expert, the trial court should consider the purported expert witness's level of skill or knowledge, and whether the offered testimony will assist the trier of fact. Id. In its role as gatekeeper, a trial court must assess the threshold foundational requirements of qualification, reliability, and usefulness to the trier of fact. Risher v. South Carolina Dept. of Health and Environmental Control, (S.C. 2011) 393 S.C. 198, 712 S.E.2d 428.

Once a witness is qualified as an expert, continued objections to the amount or quality of the expert's knowledge, skill, experience, training, or education go to weight of the expert's testimony, not its admissibility. State v. Martin (S.C.App. 2011) 391 S.C. 508, 706 S.E.2d 40. South Carolina often admits expert testimony from trained law enforcement officers. See State v. Jamison, (S.C.App. 2007) 372 S.C. 649, 643 S.E.2d 700; (Expert testimony of law enforcement officer about dollar value of cocaine and crack cocaine was admissible at trial for trafficking cocaine and trafficking crack cocaine); State v. Anderson (S.C.App. 2014) 407 S.C. 278, 754 S.E.2d 905; (Crime scene investigator was qualified as an expert in fingerprint analysis; his practical experience and training demonstrated that he had the requisite knowledge to testify as

an expert on the subject of fingerprint analysis and comparison, and was better qualified than the jury to form an opinion on these topics).

Officer Harris could have been qualified as an expert by the trial court with no abuse of discretion. His police training in accident reconstruction, paired with his years of experience responding to accidents and having to piece together what had occurred, suggest that he could provide testimony that would assist the trier of fact – one of the threshold issues for qualification as an expert. These factors provide ample grounds for qualification as an expert on accident reconstruction, and support the admissibility of Officer Harris's testimony, even if the court felt it unnecessary to rule on whether he should be classified as an expert witness.

B. Admissibility of Officer's Testimony as Lay Opinion Evidence

A lay witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975). Rule 602, SCRE. Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge. Rule 701, SCRE; State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996). State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury. Id. The terms "fact" and "opinion" denote merely a difference of degree of concreteness of description. McCormick on Evidence, § 12 (3rd Ed.1984). Some statements are not mere opinions but are impressions drawn from collected, observed facts. Lafon v. Commonwealth, 17 Va.App. 411, 438 S.E.2d 279 (1993). A natural inference based on stated facts is not opinion evidence. State v. Revere, 572 So.2d 117 (La.App.1990). Where the distinction between fact and

opinion is blurred, it is often best to leave the matter to the discretion of the trial judge. See e.g. 31 A Am.Jur.2d Expert and Opinion Evidence § 9." Williams, 321 S.C. at 464-465.

Officer Harris responded to the scene, made the measurements in the report, and had first-hand experience with the accident scene. His opinions were rationally based on his observations, such that though he did not actually see the crash, his testimony would be of great value to the jury in understanding what occurred that night. The experiment with the cones could be admitted as lay testimony without an abuse of discretion on the part of the trial judge because lay opinion evidence can be impressions drawn from collected, observed facts. While Officer Harris's opinion testimony would necessarily carry less weight than an expert's factual testimony, that is a question concerning weight and credibility of testimony and not a question of admissibility. Weighing questions are left to the jury and should not influence admissibility decisions for lay opinion testimony.

Officer Harris's testimony could also be admitted as lay witness with no abuse of discretion on the part of the trial court because it was necessary to rehabilitate him on redirect following the defense's aggressive cross. The trial court explained that it had allowed Officer Harris to testify about his experiment because it 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." App. 71 1, 1. 4 - 713, 1. 17. The Court's decision that Harris's test met the threshold requirements for admissibility renders the credibility determination firmly in the realm of the jury.

The trial court did not abuse it's discretion in refusing to rule on Officer Harris's classification as an expert or lay witness. Though his testimony and experiment could be admissible for different purposes as either expert or lay testimony, which purpose is ultimately

irrelevant as it was introduced as rehabilitation evidence after a hard attack by the defense. The defense opened the door to the testimony by their line of questioning, and the trial court was correct in overruling their objection.

IV. Trial court did not abuse its discretion by excluding video evidence of the experiment conducted by Appellant's accident reconstruction expert where the video evidence was recreation evidence rather than demonstrative evidence.

Relevant Facts

Appellant retained Woodrow Poplin, an engineer specializing in traffic accident evaluation. App. 655, 1. 16 - 658, 1. 20. He was qualified, as an expert witness, in accident reconstruction. Id. Poplin investigated Appellant's accident and drafted a report which was entered into evidence at trial. App. 659, 1. 2 - 665, 1. 22; Defendant's Exhibits Nos.: 12-24.

Based on the measurements collected by law enforcement and their reports, Poplin concluded that Garland had to have been standing in one of two places – inside or outside the construction zone. 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. Poplin stated that, he believed Appellant's collision with Garland occurred in the travel lane. Id.

Poplin also created a video of his attempt to recreate the accident as Harris alleged it happened in his police report. App. 699, 1. 9 - 703, 1. 5. Poplin placed two cones forty-three feet apart and placed another cone representing the point of impact. App. 704, 1. 10 - 705, 1. 14. Poplin claimed he could not recreate the collision without striking either the paver or the front cone. App. 705, 11. 9-20.

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, 1. 15-640, 1. 21. The

defense replied 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, 11. 6-12.

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.

Discussion

Great deference should be given to the trial court's admissibility decision on review. In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citation omitted); see also State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." (citation omitted)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). If there is any evidence in the record to substantiate a trial court's findings, the appellate court should affirm. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Trial courts may exclude evidence from experts without any abuse of discretion. See State v. Cope (S.C.App. 2009) 385 S.C. 274, 684 S.E.2d 177, affirmed 405 S.C. 317, 748 S.E.2d 194; Trial court exclusion of testimony from expert regarding specific details of two cases involving false confessions was not an abuse of discretion; State v. Myers (S.C. 2004) 359 S.C. 40, 596 S.E.2d 488, rehearing denied, certiorari denied 125

S.Ct. 485, 543 U.S. 980, 160 L.Ed.2d 359, Trial court exclusion of testimony from expert in social psychology regarding specific case studies of false confessions was not an abuse of discretion.

The introduction of evidence during trial is a matter addressed to the sound discretion of the trial judge, and his decisions will not be disturbed absent an abuse of discretion. Holmes v. Black River Electric Coop., Inc., 274 S.C. 252, 262 S.E.2d 875 (1980); see cases collected in West's South Carolina Digest, Appeal and Error, Key No. 970(2). Admissibility of an expert witness's opinion is a matter resting largely within trial judge's discretion. Hawkins v. Greenwood Development Corp., (S.C.App. 1997) 328 S.C. 585, 493 S.E.2d 875, rehearing denied, certiorari denied.

The trial court did not abuse its discretion in excluding portions of the Appellant's expert witness's testimony. In response to the trial court's finding that the video evidence was a re-creation, the defense reiterated that the video was a demonstration and would not be presented to the jury as a re-creation. App. 649, 11. 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. 71 1, 1. 4 - 713, 1. 17.

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.

The court did not abuse it's discretion in determining that the video evidence was a re-creation rather than a demonstration. The trial court's ruling on the admissibility of video evidence should be upheld.

CONCLUSION

For the foregoing reasons, Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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September 7, 2016

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IN THE SUPREME COURT

Appeal from Charleston County
Larry B. Hyman, Jr., Circuit Court Judge

App. Case No.: 2015-002164

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DANIEL HAMRICK,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

I, Brianna Arnone, certify that I have served the Final Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to the counsel for the Appellant as follows:

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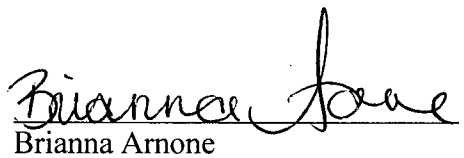
I further certify that all parties required by Rule to be served have been served.
This 7th day of September, 2016.



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