STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CHRISTINA REECE,

APPELLANT

APPELLATE CASE NO. 2013-000656

Appeal from Pickens County

Letitia H. Verdin, Circuit Court Judge

RECEIVED
JAN 24 2018
SC Court of Appeals

Opinion No. 2018-UP-022

PETITION FOR REHEARING

Appellant seeks rehearing pursuant to Rule 221 (a), SCACR, because this Court may have overlooked the fact that the Fourth Amendment warrantless blood draw without consent issue was fairly presented to the trial judge and should not, in fairness, be deemed procedurally defaulted. Missouri v. McNeely, 133 S.Ct. 1552 (2013) was pending in the Supreme Court following oral argument when the suppression hearing on appellant's blood sample was held in this case.

Defense counsel frankly told the judge of his concern that she was "rushing" to make a ruling on the suppression issue where the Supreme Court's dispositive in Missouri v. McNeely was imminent. R. 55, l. 13 – 57, l. 25. The judge stated that she was ruling "*under the law that is*

today," and she refused to suppress the blood sample based upon the Fourth Amendment argument. R. 58, ll. 1-18. (emphasis added).

When the judge refused to defer her ruling pending the decision in Missouri v. McNeely, 133 S.Ct. 1552 (2013), and filed a written order dated February 26, 2013 denying the motion to suppress, defense counsel filed a notice of intent to appeal. The notice of intent to appeal was served on March 12, 2013, and filed in the Supreme Court on March 13, 2013. While that appeal was deemed interlocutory it nonetheless showed defense counsel understood the Fourth Amendment warrantless blood draw was the critical issue in this case, and not the state law probable cause standard for the warrantless blood draw. Respectfully, the trial court understood this fact also.

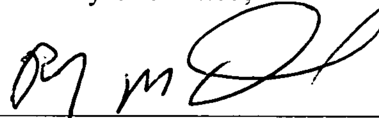
Just as the client is entitled to a fair, and not a perfect trial, the trial court is entitled to a fair presentation of the Fourth Amendment issue – not a perfect one. The trial court understood the Fourth Amendment issue – especially given that defense counsel also argued our current DUI statute with the warrantless blood draw discretionary provision was **unconstitutional.**

Respectfully, it is difficult to imagine what more defense counsel could have done to preserve this Schmerber v. California, 384 U.S. 757 (1966), and McNeely issue for appellate review. Yet, he did more. As seen above, defense counsel added the additional Fourth Amendment argument that the DUI statute allowing a police officer, as here, to order a blood sample taken without a warrant because he believed probable cause existed that the crime of felony DUI had been committed **was unconstitutional**. "[T]hat statute attempts to shift the burden of finding probable cause [for the blood draw] to the **discretion of the officer** as it quotes **[instead of] to a neutral and detached magistrate.** I think because of that, uh, vesting in the officer under the statute of that [authority] that that ultimately renders the statute unconstitutional. We would ask Your Honor to

rule upon that at some time." The judge denied the motion, and added that matter had already been discussed. R. 70, l. 12 – 71, l. 2. (emphasis added).

Appellant understands that the Fourth Amendment warrantless nonconsensual blood draw issue is of significant Constitutional significance. This Court now has a fair record with this Schmerber and McNeely issue preserved. The litigants – Appellant and the State of South Carolina – are most respectfully entitled to a holding on the merits of the Fourth Amendment warrantless nonconsensual blood draw issue on this record.[1] Appellant respectfully requests rehearing.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 24th day of January, 2018.

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[1] Further, when the state went to introduce the laboratory report based on the blood sample through SLED forensic toxicologist Quintus Young, defense counsel added the additional objection that the lab report would be cumulative to Young's testimony. R. 216, l. 19 – 217, l. 12.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Christina Reece at, 117 Tinsel Ct., Easley, SC 29640, this 24th day of January, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 24th day of January, 2018.

____________________(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.