

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of General Sessions

The Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2018-UP-022 (S.C. Ct. App. filed January 10, 2018)

Appellate Case No. 2013-000656

THE STATE, .....RESPONDENT

v.

CHRISTINA REECE, .....APPELLANT.

**RETURN TO PETITION FOR REHEARING**

On January 10, 2018, this Court issued an unpublished opinion that affirmed Appellant’s convictions for felony driving under the influence resulting in great bodily injury. State v. Reece, Op. No. 2018-UP-022 (S.C Ct. App. filed January 10, 2018). On January 24, 2018, Appellant submitted a Petition for Rehearing and by letter dated January 25, 2017, this Court requested that the State submit a return within ten days of the date of the letter. This return in opposition to the petition for rehearing now follows. The procedural history, the statement of facts, and the substantive arguments recited in the Final Brief of Respondent are hereby incorporated by reference.

The State respectfully asks this Court to deny the petition for rehearing pursuant to Rule 221(a), SCACR, because it did not overlook or misapprehend any points that would warrant further consideration of this matter. Indeed, in regard to each of Appellant's issues on appeal, the Court employed a straightforward application of existing precedent to the facts and circumstances of Appellant's case in finding no reversible error. Rehearing should be denied.

Appellant only petitions for rehearing regarding the first issue raised on appeal. Appellant contends this Court inappropriately found that the issue concerning the warrantless blood draw was not preserved for appellate review. To the contrary, this Court correctly found Appellant failed to raise the argument that the drawing of her blood violated the Fourth Amendment.

On appeal, Appellant does not argue, as he did in the pretrial hearing, that officers lacked probable cause under the felony DUI blood draw statute, S.C. Code § 56-5-2946. (See Suppr. Hrg. p. 54-58). He also does not argue, as he did just before trial commenced, that the statute itself is unconstitutional because it gives discretion to officers to determine probable cause. (See Trial Transcript p. 10). Instead, on appeal, Appellant makes the new and distinct argument that her Fourth Amendment rights were violated because "the police ordered her blood drawn after a car accident, without a warrant, since the belief of a police officer that alcohol may be present 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)." (See Brief of Appellant, p. 4).

Appellant's McNeely argument, raised for the first time on appeal, is not preserved for appellate review. First, no Fourth Amendment issue was properly raised to the trial judge below. The pretrial hearing was requested by the State to allow the trial judge to make a finding regarding probable cause for the blood draw pursuant to the felony DUI statute. The pretrial

hearing was focused on that issue. Appellant's mere mention at the end of the pretrial hearing that a similar case was pending in the United States Supreme Court – without making any specific Fourth Amendment arguments – was wholly insufficient to preserve the issue. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.” (citations omitted)); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.”); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (an appellant is limited to the arguments he makes at trial); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an issue not properly preserved for appeal where one ground was raised below and another ground was raised on appeal); State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) (even constitutional claims must be raised at trial to be preserved for review).

Second, the trial judge never ruled on any Fourth Amendment issues in her oral pronouncement or in her written order, and Appellant did not subsequently request that the judge made a specific Fourth Amendment ruling in addition to her ruling regarding probable cause under the statute. See State v. Watts, 321 S.C. 158, 167, 467 S.E.2d 272, 278 (Ct. App. 1996) (to be preserved for appellate review, an issue must be both presented to **and passed upon** by the trial judge; if an issue is raised but not ruled upon, it is not preserved (emphasis added)); State v. Hudgins, 319 S.C. 233, 236, 460 S.E.2d 388, 390 (1995) (although appellant objected, the trial judge did not rule on the objection and appellant did not object further or request curative

instructions; therefore, this issue was not preserved for review), *overruled on other grounds by State v. Collins*, 329 S.C. 23, 495 S.E.2d 202 (1998); *Harkins v. Greenville County*, 340 S.C. 606, 620, 533 S.E.2d 886, 893 (2000) (“In order to be preserved for review, the lower court must rule upon the issue.”); *see also Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (pointing out that “error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court”); *State v. Gee*, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) (“Only matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction rather than being a reviewing court. Since the trial judge was not requested to rule upon the foregoing question, and made no ruling thereabout, it is not properly before this Court for consideration.” (citations omitted)).

Third and finally, Appellant failed to make a contemporaneous objection to the blood test results when they were offered into evidence at trial.<sup>1</sup> *See, e.g., State v. Griffin*, 339 S.C. 74, 77, 528 S.E.2d 668, 669 (2000) (“[A]n in limine ruling is not final and does not preserve the issue for appeal.”); *State v. Smith*, 337 S.C. 27, 33, 522 S.E.2d 598, 600 (1999) (“A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial.”); *State v. Mitchell*, 330 S.C. 189, 498 S.E.2d 642, 644 n. 3 (1998) (unless a contemporaneous objection is made at the time the evidence is offered at trial and a final ruling made, the issue is not preserved for review).

For all of these reasons, the McNeely issue raised on appeal is not preserved for appellate review. *See State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (“If a party fails to properly object, the party is procedurally barred from raising the issue on appeal.”); *see also*

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<sup>1</sup> Appellant failed to make a contemporaneous objection at trial despite the fact that defense counsel previously stated his intention to object at the appropriate time and despite the fact that the trial judge assured him he would be given the opportunity to object and preserve his issue. (Trial Transcript p. 10, lines 2-11).

I'On. L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)

(“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments.”). This Court correctly found the issue was not preserved for appellate review. Rehearing should be denied.

### Conclusion

WHEREFORE, based on the foregoing arguments and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant’s petition for rehearing.

Respectfully submitted,

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Attorney General

V. HENRY GUNTER, JR.  
Assistant Attorney General

W. WALTER WILKINS, III  
Solicitor, Thirteenth Judicial Circuit

BY:



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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
February 2, 2018

STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
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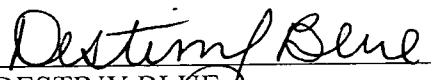
CHRISTINA REECE, ..... Appellant.

**PROOF OF SERVICE**

I, Destiny Blue, certify that I have served the Return to Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Robert M. Pachak, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 2<sup>nd</sup> day of February, 2018.

  
DESTINY BLUE  
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ALAN WILSON  
ATTORNEY GENERAL

February 2, 2018

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SC Court of Appeals

The Honorable Jenny A Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

Re: The State v. Christina Reece  
Appellate Case No: 2013-000656

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Return to Petition for Rehearing along with proof of service in the above-referenced case.

Sincerely,

V. Henry Gunter  
Assistant Attorney General  
S.C. Bar No: 102259

VHR/db  
Enclosures

cc: Robert M. Pachak, Esquire  
Victim Advocacy Division