STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY EDWARD MCCALL,

APPELLANT

APPELLATE CASE NO. 2015-001097

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statues

STATEMENT OF ISSUES ON APPEAL

1.

Whether S.C. Code Ann. § 56-5-2946, South Carolina's implied consent statute, is unconstitutional under the Fourth Amendment because it operates as a *per se* exception to the warrant requirement in violation of Missouri v. McNeely, 569 U.S. 141 (2013)?

2.

Whether the trial judge erred by denying Appellant's motion to suppress the evidence obtained from the warrantless collection of his blood and urine where law enforcement was required to obtain a warrant before directing hospital personnel to collect a blood and urine sample from Appellant since there were no exigent circumstances to justify the warrantless search, and since Appellant did not consent, and if he did consent, his consent was not freely and voluntarily given?

3.

Whether the trial judge abused his discretion by denying Appellant's motion for a continuance where "good cause" existed since the judge granted Appellant's motion to relieve counsel midtrial, even though it was timely filed six weeks before the start of trial, but refused to permit Appellant adequate time to retain other counsel, and where Appellant was prejudiced because he was ultimately forced to proceed *pro se* with stand by counsel who was unfamiliar with his case and the prior proceedings?

4.

Whether Appellant's Sixth Amendment right to counsel was violated when the trial judge granted Appellant's motion to relieve counsel without conducting a proper hearing pursuant to

Faretta v. California, 422 U.S. 806 (1975) or advising Appellant of the dangers and disadvantages of self-representation?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on February 19, 2013 for felony DUI resulting in great bodily injury. R. *. His case was called to trial on May 12, 2015 before the Honorable Robin B. Stilwell, and a jury. Tr. 1. Assistant Solicitors Sara Lee Drawdy and Stan Overby represented the state, and Randy Chambers represented Appellant. Tr. 1. On the morning of the second day of trial, Judge Stilwell granted Appellant's motion to relieve counsel, but denied his motion for a continuance. Tr. 174, ll. 6-10. Consequently, Appellant proceeded *pro se*. Jake Erwin was appointed as standby counsel. Tr. 175, ll. 10-12. On May 14, 2015, the jury found Appellant guilty as indicted. Tr. 382, l. 24 – 383, l. 6. He was sentenced to fifteen years imprisonment. Tr. 388, ll. 19-23.

On May 20, 2015, Appellant timely filed a notice of appeal. The Office of Appellate Defense undertook representation of Appellant and requested the trial transcript. Over a year later, the Office of Appellate Defense received an incomplete transcript. At a minimum, the transcript was missing the complete testimony of six witnesses and the partial testimony of two witnesses.

On September 29, 2016, Appellant filed a motion with this Court seeking to remand his case to the trial court to reconstruct the record. By order filed November 4, 2016, this Court granted Appellant's motion and remanded the case.

On March 14, 2017, a hearing was held in Greenville County before Judge Stilwell to reconstruct the record. Tr. 1. Assistant Solicitors Sara Lee Drawdy, Stan Overby, and Judy Munson represented the state, and Appellate Defender John Strom represented Appellant. Tr. 1. At the beginning of the hearing, Appellant moved to have the assistant solicitors who represented the state at trial recused because they were witnesses for purposes of the reconstruction hearing.

Tr. 5, ll. 2-21. However, Judge Stilwell denied the motion. Tr. 5, l. 22 – 7, l. 1. At the conclusion of the hearing, Judge Stilwell orally ruled the record of Appellant's trial had been sufficiently reconstructed to allow for meaningful appellate review. Tr. 98, l. 24 – 101, l. 10.

By letter dated August 25, 2017, Appellate Defender John Strom notified this Court that Appellant wished to waive his right to challenge Judge Stilwell's oral ruling that the record of his trial had been sufficiently reconstructed to allow for meaningful appellate review. Enclosed within this letter was an affidavit signed by Appellant McCall confirming his desire not to appeal Judge Stilwell's ruling.

By letter dated September 6, 2017, in response to Appellant's August 25, 2017 letter and accompanying affidavit, this Court directed Appellant to file a motion. On October 11, 2017, undersigned counsel was assigned to represent Appellant after Appellate Defender John Strom left the Office of Appellate Defense. On October 18, 2017, Appellant filed a motion to accept his decision not to appeal the ruling reconstructing the record. By order filed November 16, 2017, this Court granted Appellant's motion.

This appeal from Appellant's conviction and sentence follows.

STATEMENT OF THE FACTS

Facts Presented at Trial

On March 4, 2012, at approximately 5:50 p.m., a traffic collision occurred between Appellant and Robert Suddeth near the intersection of S.C. 291 and Worley Road in Greenville, South Carolina. Prior to the collision, Appellant was traveling northbound on S.C. 291 and Mr. Suddeth was traveling southbound. Appellant, who was driving a Ford Explorer, traveled left of the centerline, crossed the median, and struck Mr. Suddeth's Chevrolet pickup truck head on. Tr. 146, l. 22 – 147, l. 15. Both men were entrapped in their respective vehicles and had to be removed by the fire department and emergency personnel. Tr. 199, l. 4 – 200, l. 13; Tr. 204, ll. 10-18; Tr. 210, l. 8 – 211, l. 1.

Appellant was transported to Greenville Memorial Hospital at 6:29 p.m. by ambulance. Tr. 191, l. 20 – 192, l. 12. Before he was transported, Sergeant Wes Hiatt of the South Carolina Highway Patrol spoke to Appellant in the back of the ambulance. Appellant denied he had been drinking and told Hiatt that his brakes failed. Hiatt claimed that during his discussion with Appellant, he noticed Appellant's eyes were "glassy and his pupils were dilated." Tr. 212, l. 7 – 214, l. 5. However, Hiatt did not smell any alcohol on Appellant's person. After speaking with Appellant, Sergeant Hiatt told Trooper David McAlhaney, the primary investigator, that, while he did not think Appellant had been drinking, he suspected Appellant was "on some kind of drug." Tr. 214, ll. 6-9. His opinion was based not only on his observation of Appellant in the back of the ambulance, but also based on the nature of the car accident in which Appellant crossed the centerline. Tr. 216, l. 16 – 217, l. 18.

As the primary investigator, Trooper McAlhaney spent close to two hours at the location of the collision. He interviewed two witnesses who confirmed what McAlhaney suspected

occurred based on his observation of the accident scene and the location of the vehicles. The witnesses maintained Appellant's Ford Explorer crossed the median dividing the northbound and southbound lanes of traffic and struck Mr. Suddeth's Chevrolet pickup truck head on "for no reason that they could see." Tr. 221, l. 7 – 222, l. 5.

In addition to Sergeant Hiatt and Trooper McAlhaney, there were approximately *eight* other troopers with the highway patrol at the scene to assist in the investigation. Tr. 210, ll. 5-7. The Major Accident Investigation Team (MAIT) of the Highway Patrol also responded.

After McAlhaney completed his investigation at the accident location, he travelled to the hospital where he interviewed Appellant. Appellant was lying on a stretcher in the hallway of the critical care unit. Tr. 222, ll. 6-24. Appellant told McAlhaney that there were no calibers on the wheels of his vehicle which hold the brake pads in place. Consequently, Appellant maintained his vehicle did not have any operable brakes at the time of the collision. Tr. 223, ll. 1-6. He denied drinking any alcohol, but allegedly admitted to taking prescription medication. Tr. 223, ll. 9-22. McAlhaney claimed Appellant appeared "sleepy" and believed "something wasn't right" because of Appellant's reaction when he was asked a question. Appellant allegedly would "open his eyes real wide" before answering each of McAlhaney's questions. Tr. 223, ll. 13-18.

Based on Trooper McAlhaney's investigation at the accident location and his observations of Appellant, he decided to arrest Appellant for felony DUI resulting in great bodily injury. Tr. 224, ll. 14-25. Appellant was arrested at 8:13 p.m. Tr. 228, ll. 18-20. McAlhaney claimed that after he notified Appellant of his arrest, he advised him of the implied consent statute and told Appellant that, pursuant to the statute, he "must submit to either one or a combination of chemical tests for the purpose of determining the presence of alcohol, drugs or a

combination of alcohol and drugs." McAlhaney claimed he read the complete advisement form as required by the implied consent statute, gave Appellant a copy, and asked him to sign "acknowledging receipt." Tr. 225, l. 1 – 227, l. 2. According to McAlhaney, Appellant signed the form and agreed to give a blood and urine sample. Tr. 226, l. 22 – 227, l. 18. McAlhaney then found a nurse to collect the samples. Appellant's urine sample was collected at 8:45 p.m. and his blood sample was collected at 9:05 p.m. Tr. 229, l. 14 – 230, l. 22.

Appellant's blood sample was later analyzed by a forensic toxicologist at the South Carolina Law Enforcement Division (SLED). It tested positive for methamphetamine and benzodiazepines, including Lorazepam and Klonopin. Tr. 288, ll. 11-12; Tr. 293, ll. 6-15. These results were confirmed after an analysis of Appellant's urine sample. Tr. 294, ll. 2-21.

After a three day trial, the jury ultimately found Appellant guilty of felony DUI resulting in great bodily injury. Tr. 382, l. 24 – 383, l. 6.

Motion to Relieve Counsel and Motion for a Continuance

Appellant filed a *pro se* motion to relieve counsel on March 27, 2015, approximately six weeks before trial. R. *. For whatever reason, a hearing on Appellant's motion was never heard and a ruling was never made. On the morning of the second day of trial, Appellant renewed his motion to relieve counsel. Randy Chambers, Appellant's then counsel, informed the trial judge:

> He [Appellant] summoned me back this morning saying that he needed to talk to me and has told me that he feels I am not doing an adequate job. He doesn't want me to represent him anymore. I'll let him state what his reasons [are] more but he made statements that led me to believe that my continuance as an attorney basically would put me in jeopardy as far as allegations he planned to make against me. So *I think he has created a conflict between us.*
>
> He clearly does not want me to continue as his lawyer and it's my understanding that he wants the Court to grant him a continuance and allow him to hire an attorney . . .

Tr. 167, ll. 6-22 (emphasis added).

Appellant informed the judge that he "filed a motion to relieve Mr. Chambers back in March." Tr. 167, l. 24 – 168, l. 1. Appellant then orally renewed his motion to relieve counsel arguing that he and Chambers had a conflict that could not be resolved. Appellant emphasized that the trial started without a hearing ever being held on his motion to relieve counsel and he never got "to be heard in relation to it." He strongly asserted that he "was supposed to be heard on the motion first" before the trial began. Tr. 168, l. 3 – 170, l. 23. Chambers then joined in Appellant's motion stating that he did not believe he could "effectively represent him anymore." Tr. 170, l. 24 – 171, l. 5.

Appellant again stated that he wished for Chambers to be relieved and moved for a continuance so that he could retain other counsel. The trial judge denied the motion for a continuance asserting Appellant "waited until we have impaneled a jury" and "begun the presentation of evidence." Tr. 171, l. 17 – 173, l. 25.

When asked by the trial judge, Appellant asserted that he was not willing to assume the risks of proceeding *pro se*. Tr. 172, l. 23 – 173, l. 6. As far as the possible appointment of stand by counsel, Appellant stated, "I'm going to leave that up to you, Judge." Tr. 173, l. 7 – 174, l. 5. The judge then ruled: "Mr. Chambers, I'm going to relieve you as counsel in this case. Would you please ask the public defender to send someone to the courtroom to sit with him [Appellant] and answer and address any questions that he may have during this trial?" Tr. 174, ll. 6-11. A break in the proceedings then occurred.

After the break, the judge stated, "I believe the record speaks for itself with respect to what has transpired. I will state that we conducted a hearing in accordance with [Faretta] v. California and I have made a determination that the waiver of prior counsel has been made

knowingly and intelligently and that the defendant does have a right to proceed pro se." Tr. 175, ll. 2-8.

The trial judge ultimately appointed Jake Erwin of the Greenville County Public Defender Office as stand by counsel. Tr. 175, ll. 8-12. In so doing, he stated, "Mr. Erwin's duties with respect to his representation and assistance of Mr. McCall [Appellant] shall be to answer any questions and to assist in any way that you feel is - - each of you feels is necessary. I will also say, Mr. Erwin, to the extent that you feel it is necessary [and] appropriate, I'll allow you to participate in the trial. However, I am not suggesting that you should or that it [is] appropriate that you will. I'm just giving you that leeway. Each of you can make that decision as you go forward in this case." Tr. 175, ll. 13-22.

Before the trial resumed, Appellant vehemently asserted, "I am not waiving my right to counsel." Tr. 175, ll. 23-24. He exclaimed, "I didn't ask to represent myself . . . You're forcing me." Tr. 177, ll. 16-22.

In response to Appellant's assertions, the trial judge stated:

> I've also held a hearing in accordance with State versus Fuller, 523 S.E.2d 168.[1] In this case there has been a request for relief of counsel during the pendency of the case after the jury had been impaneled and after the presentation of a significant and substantial amount of evidence. It is within the discretion of a trial judge to grant the motion for the relief of counsel during the pendency of the proceeding and I've elected to do that based on the totality of the circumstances.
>
> I find specifically that the motion was ill-timed and that the ultimate end of the motion to continue and the motion for relief of counsel is to delay and hinder the administration of justice.
>
> I will tell you the continuance of this case would have a significant prejudicial effect on the state because the state has subpoenaed all of its witnesses which are substantial in amount, over 40 in reading the witness list. Also, the defendant has had the opportunity to witness and view a specific amount of

[1] State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999).

> presentation of the case to include all of its tactical proceedings in opening statements and its order and method of presentation of evidence.

Tr. 175, l. 25 – 176, l. 23.

The trial then resumed with Appellant *pro se* and Jake Erwin acting as standby counsel. Tr. 179, ll. 5-24. During the remainder of the trial, Erwin engaged in improper hybrid representation. Both Erwin and Appellant cross examined witnesses, voiced objections, and raised motions. Erwin gave the closing argument. See Tr. 364, l. 14 – 369, l. 13.

ARGUMENT

1.

S.C. Code Ann. § 56-5-2946, South Carolina's implied consent statute, is unconstitutional under the Fourth Amendment because it operates as a *per se* exception to the warrant requirement in violation of *Missouri v. McNeely*, 569 U.S. 141 (2013).

How the Issue was Presented Below

Appellant moved pretrial to suppress the evidence obtained from an analysis of his blood and urine samples, which were collected without a warrant pursuant to S.C. Code Ann. § 56-5-2946. He argued § 56-5-2946, our state's implied consent statute, is unconstitutional under the United States Supreme Court's holding in Missouri v. McNeely, 569 U.S. 141 (2013), which held "a warrantless search of a person is reasonable only if it falls within a recognized exception" to the warrant requirement. Partly quoting the Court in McNeely, Counsel for Appellant asserted "that in drunk driving investigations, the natural dissipation of alcohol, or we can argue by extrapolating drugs in the blood stream, does not constitute an [exigency] in every case sufficient for conducting a blood test without a warrant." Tr. 12, l. 15 – 13, l. 11. Counsel argued there was no way to read McNeely and not conclude that a "statute that allows for a warrantless intrusion into the body of a defendant . . . is unconstitutional." Tr. 13, ll. 12-17.

The state argued in return that McNeely "has no effect on [§ 56-5-2946] in terms of its constitutionality." Tr. 16, ll. 14-16. The assistant solicitor stressed that in South Carolina all statutes are presumed constitutional and are to "be construed so as to render them valid." Tr. 21, l. 22 – 22, l. 1. Additionally, the solicitor asserted that implied consent statutes have [withstood constitutional muster] by the United States Supreme Court and that the Court in McNeely even referenced "implied consent statutes as a means by which states can obtain this evidence." Tr.

21, ll. 17-21. The state filed a Brief in Opposition to Suppression of Blood and Urine Samples and Analysis, which was marked as Court's Exhibit No. 2. See R. *.

The trial judge ultimately found the statute was constitutional. He ruled:

> With respect to the unconstitutionality of the statute per McNeeley, . . . I believe the responsive case in this instance is [Schmerber]. When you look at McNeeley, I don't think it changes the state of the law with regard to drug samples and illegal search and seizures related to the blood sample in DUI cases. I think it simply clarifies [Schmerber] versus California.[2]
>
> In [Schmerber], there's a portion in the case which suggests if taken to its logical conclusion that because of the dissipation of the half life of alcohol in the system that there's an argument that could be made that you could take a drug sample under any set of circumstances. I think that McNeeley if you read it in its entirety essentially it's clarifying that to say that [Schmerber] does not stand for the proposition that you can pull a blood test under any set of circumstances in a DUI case. What it says is you look at the totality of the circumstances and you may be able to and you may not be able to.
>
> However, such as in the case of McNeeley, an officer can't simply redirect to the hospital because he's gotten a clear indication from the defendant that he won't take a Breathalyzer test, which is what had happened, which is clearly unconstitutional.
>
> However, when you look at [Schmerber], the facts are very similar and the distinguishing fact in [Schmerber] was there actually was an objection to taking the blood and notwithstanding the objection to take the blood, it still allowed that evidence to be admissible.
>
> I also say one additional thing with respect to the illegal search and seizure and the nonconsentual taking of a blood sample. One thing that distinguish[es] this case in the State of South Carolina from the cases that were before the Supreme Court is that there is an implied consent statute. It's a specific statutory mechanism for felony DUI which means you do apply the implied consent to the taking of a blood sample in the event of the felony DUI.
>
> Now, the Supreme Court may look at that and say that is, in keeping with McNeeley and with [Schmerber], unconstitutional but that will be a decision for them to make. I presume it's constitutional at inception and find that there was an implied consent under the statute in the State of South Carolina.

Tr. 87, l. 20 – 89, l. 15.

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[2] Schmerber v. California, 384 U.S. 757 (1966).

Discussion

S.C. Code Ann. § 56-5-2946, also known as the implied consent statute, states in relevant part:

> (A) Notwithstanding any other provision of law, a person *must* submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945 [felony DUI].
>
> (B) The tests must be administered at the direction of a law enforcement officer. The administration of one test does not preclude the administration of other tests. *The resistance, obstruction, or opposition to testing pursuant to this section is evidence admissible at the trial of the offense which precipitated the requirement for testing.* A person who is tested or gives samples for testing may have a qualified person of his choice conduct additional tests at his expense and must be notified of that right. A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial.

(emphasis added).

This statute is unconstitutional because it acts as a *per se* exception to the warrant requirement of the Fourth Amendment.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The Fourth Amendment is made applicable to the states by way of the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643 (1961).

A warrantless search of the person is reasonable only if it falls within a recognized exception to the warrant requirement. See United States v. Robinson, 414 U.S. 218, 224 (1973). "One well recognized exception 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." Kentucky v. King, 563 U.S. 452, 460 (2011) (internal citation and quotation marks omitted). The United States Supreme Court has "recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." Missouri v. McNeely, 569 U.S. 141, 149 (2013). In such circumstances, "a warrantless search is potentially reasonable because 'there is a compelling need for official action and no time to secure a warrant.'" Id. (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

In McNeely, the United States Supreme Court held that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . *it does not do so categorically*." 569 U.S. at 156 (emphasis added). The Court concluded that "[w]hether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Id.

In McNeely, the defendant was stopped by a Missouri police officer at 2:08 a.m. for speeding and repeatedly crossing the centerline. Id. at 145. The officer noticed several signs that McNeely was intoxicated, including his bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. Id. McNeely appeared unsteady on his feet when he exited his truck and admitted to the officer that he had drank "a couple of beers at a bar." Id. After performing poorly on field sobriety tests and refusing to provide a breathe sample, McNeely was placed under arrest. Id. When McNeely "indicated that he would again refuse to provide a breathe sample," the officer transported McNeely to a nearby hospital to have a blood sample drawn. Id. at 145-146. The officer did not attempt to secure a warrant. Id. at 146.

Once at the hospital, the officer, reading from a standard implied consent form, explained to McNeely that under Missouri state law refusal to submit voluntarily to the test would lead to

the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. Id. McNeely nonetheless refused to consent to a blood test. Id. The officer then directed a "hospital lab technician" to collect a blood sample. Subsequent testing measured McNeely's blood alcohol concentration (BAC) at 0.154 percent. Id.

Applying its holding in Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court looked at the totality of the circumstances to determine whether the officer faced an emergency that justified ordering McNeely's blood to be taken without a warrant. Id. at 149-150. The Court acknowledged that "because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." Id. at 152. However, the Court rejected the state's contention that "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent." Id. at 151-152. The Court also rejected the state's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant." Id.

The Court ultimately declined to adopt a bright line rule and held that "in drunk-driving investigations, the natural dissipation of alcohol in the blood stream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Id. at 165. The Court exclaimed, "**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 152 (emphasis added). Consequently, the Court concluded that "[w]hether a warrantless

blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." McNeely, 569 U.S. at 156.

In reaching this conclusion, the Court stated:

> **[T]he fact that people are accorded less privacy in . . . automobiles because of the compelling governmental need for regulation does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin.** As to the nature of a blood test conducted in a medical setting by trained personnel, it is concededly less intrusive than other invasions we have found unreasonable. For that reason, we have held that medically drawn blood tests are reasonable in appropriate circumstances. We have never retreated, however, from our recognition that **any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.**"

Id. at 159 (internal citations and quotation marks omitted) (emphasis added).

The Court further noted, "The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case." McNeely, 569 U.S. at 164. "[T]he metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required." McNeely, 569 U.S. at 165.

Numerous jurisdictions have read McNeely as prohibiting all *per se* exceptions to the warrant requirement and, consequently, have held implied consent statutes, like S.C. Code Ann. § 56-5-2946, are unconstitutional. See Weems v. State, 434 S.W.3d 655 (Tex. Ct. App. 2014). Such courts assert this reading of McNeely is supported by the United States Supreme Court's treatment of Aviles v. State, 385 S.W.3d 110 (Tex. Ct. App. 2012). See State v. Wulff, 337 P.3d 575, 580 (Idaho 2014).

In Aviles, the Texas Court of Appeals addressed whether Texas's implied consent statute was an exception to the warrant requirement. A law enforcement officer arrested Aviles with

probable cause for DUI and discovered that Aviles had two prior DUI convictions. Aviles, 385 S.W.3d at 112. After reading Aviles his statutory warning that he could refuse evidentiary testing, the officer requested Aviles provide a blood or breath sample. Id. Aviles refused. Id. The officer then required Aviles to submit to a blood draw under Texas's implied consent statute. Id. The Texas Court of Appeals affirmed the trial court's admission of Aviles' blood test results based on the implied consent statute. Id. at 113. Its holding that this warrantless blood draw was constitutional was based exclusively on the state's implied consent exception to the warrant requirement. Id.

The United States Supreme Court granted certiorari in Aviles, vacated the judgment of the Texas Court of Appeals, and remanded the case "for further consideration in light of Missouri v. McNeely." Aviles v. Texas, 134 S.Ct. 902 (2014). "While the remand does not state anything further about how McNeely should be interpreted, the [Supreme] Court's remand must indicate that McNeely's holding includes examining the totality of the circumstances in all cases where an officer orders a forced warrantless blood draw." Wulff, 337 P.3d at 581. "[V]acating and remanding Aviles in light of McNeely showed the United States Supreme Court rejected Texas's implied consent statute as a per se exception to the Fourth Amendment." Id.

While the United States Supreme Court has upheld implied consent statutes in Illinois v. Batchelder, 463 U.S. 1112 (1983) and S. Dakota v. Neville, 459 U.S. 553 (1983), these cases dealt with the statutory consequences placed on defendants who refused to comply. Wulff, 337 P.3d at 582. The Supreme Court has never addressed the constitutionality of implied consent as an exception to the Fourth Amendment's warrant requirement. See Id. However, the Supreme Court's language in McNeely, remand of Aviles, and precedent requiring a totality of the

circumstances analysis mean McNeely can only be interpreted as prohibiting all *per se* exceptions to the warrant requirement, including implied consent statutes. See Id.

In State v. Wulff, 337 P.3d 575 (Idaho 2014), the Supreme Court of Idaho held the state's implied consent statute was unconstitutional under the Fourth Amendment pursuant to McNeely. After concluding McNeely prohibits all *per se* exceptions to the warrant requirement, the court held Idaho's implied consent statute operated as a *per se* exception because it did not recognize a driver's right to revoke his implied consent. Id. at 582. The court emphasized that its conclusion that McNeely prohibits all *per se* exceptions to the warrant requirement is consistent with other states that have considered the issue, including Nevada and Kansas. Id. (citing Byars v. State, 336 P.3d 939 (Nev. 2014) and State v. Declerck, 317 P.3d 794, 797 (Kan. 2014)).

The Idaho court further held "irrevocable implied consent operates as a per se rule that cannot fit under the consent exception [to the warrant requirement] because it does not always analyze the voluntariness of that consent. Voluntariness has always been analyzed under the totality of the circumstances approach: 'whether a consent to search was in fact voluntary . . . is a question to be determined from the totality of the circumstances.'" Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)). Moreover, the Idaho court emphasized that the state has the burden to prove that consent was freely and voluntarily given. Id.

Based on the United States Supreme Court's holding in McNeely, it is undeniable that § 56-5-2946, our state's implied consent statute, is unconstitutional because it operates as a *per se* exception to the warrant requirement. The statute permits a law enforcement officer to collect a breath, urine, and/or blood sample from a defendant *without a warrant* merely if the officer has probable cause to believe the defendant committed felony DUI or if the defendant is under arrest for felony DUI. As such, the statute clearly violates the Supreme Court's mandate in McNeely

that, "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." McNeely, 569 U.S. at 152.

In light of McNeely, Appellant respectfully requests this Court hold § 56-5-2946 is unconstitutional and suppress the evidence obtained from the warrantless collection of his blood and urine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963 (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

2.

The trial judge erred by denying Appellant's motion to suppress the evidence obtained from the warrantless collection of his blood and urine where law enforcement was required to obtain a warrant before directing hospital personnel to collect a blood and urine sample from Appellant since there were no exigent circumstances to justify the warrantless search, and since Appellant did not consent, and if he did consent, his consent was not freely and voluntarily given.

How the Issue was Presented Below

In conjunction with his motion to suppress the evidence obtained from the warrantless collection of his blood and urine because S.C. Code Ann. § 56-5-2946, our state's implied consent statute, is unconstitutional, was Appellant's argument that law enforcement did not have exigent circumstances to obtain these samples without a warrant and that Appellant did not voluntarily consent to providing the samples.

The state proffered extensive evidence in support of its contention that even if the trial judge found § 56-5-2946 was unconstitutional, Appellant's blood and urine samples and the results from the analysis of those samples should not be suppressed because law enforcement had exigent circumstances to obtain the samples without a warrant. See Tr. 26, l. 10 – 74, l. 18. Additionally, while the state initially argued Appellant consented to providing the samples, it later abandoned this argument. Tr. 26, ll. 3-6.

Because the trial judge found § 56-5-2946 was constitutional and did not violate the warrant requirement of Fourth Amendment under Missouri v. McNeely, 569 U.S. 141 (2013), he did not specifically rule on whether law enforcement had exigent circumstances to collect

Appellant's blood and urine samples without a warrant. Instead, the judge found the samples were legally obtained pursuant to the implied consent statute. See Tr. 87, l. 20 – 89, l. 15.

Discussion

The trial judge erred by denying Appellant's motion to suppress his blood and urine samples and the results from an analysis those samples because law enforcement was required to obtain a warrant before directing hospital personnel to collect a blood and urine sample from Appellant since there were no exigent circumstances to justify the warrantless search, and since Appellant did not consent, and if he did consent, his consent was not freely and voluntarily given.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV; See Mapp v. Ohio, 367 U.S. 643 (1961 "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966). In Schmerber v. California, the United States Supreme Court exclaimed, "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." 384 U.S. at 770. The Supreme Court explained that the importance of requiring authorization by a "neutral and detached magistrate" before allowing a law enforcement officer to "invade another's body in search of evidence of guilt is indisputable and great." Id. (internal citation and quotation marks omitted).

A warrantless search of the person is reasonable only if it falls within a recognized exception to the warrant requirement. Missouri v. McNeely, 569 U.S. 141, 148 (2013) (citing United States v. Robinson, 414 U.S. 218, 224 (1973)). "One well recognized exception 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." Kentucky v. King, 563 U.S. 452, 460 (2011) (internal citation and quotation marks omitted). The United States Supreme Court has "recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence." McNeely, 569 U.S. at 149. In such circumstances, "a warrantless search is potentially reasonable because 'there is a compelling need for official action and no time to secure a warrant.'" Id. (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

In McNeely, the defendant was stopped by a Missouri police officer at 2:08 a.m. for speeding and repeatedly crossing the centerline. Id. at 145. The officer noticed several signs that McNeely was intoxicated, including his bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. Id. McNeely appeared unsteady on his feet when he exited his truck and admitted to the officer that he had drank "a couple of beers at a bar." Id. After performing poorly on field sobriety tests and refusing to provide a breathe sample, McNeely was placed under arrest. Id. When McNeely "indicated that he would again refuse to provide a breathe sample," the officer transported McNeely to a nearby hospital to have a blood sample drawn. Id. at 145-146. The officer did not attempt to secure a warrant. Id. at 146.

Once at the hospital, the officer, reading from a standard implied consent form, explained to McNeely that under Missouri state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. Id. McNeely nonetheless refused to consent to a blood test. Id. The officer then directed a "hospital lab technician" to collect a blood sample. Subsequent testing measured McNeely's blood alcohol concentration (BAC) at 0.154 percent. Id.

Applying its holding in Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court looked at the totality of the circumstances to determine whether the officer faced an emergency that justified ordering McNeely's blood to be taken without a warrant. Id. at 149-150. The Court acknowledged that "because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results." Id. at 152. However, the Court rejected the state's contention that "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent." Id. at 151-152. The Court also rejected the state's argument that "so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant." Id.

Specifically, the Court asserted, "[T]he general importance of the government's interest in [combating drunk driving] does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." Id. at 160. The Court further exclaimed, "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 152. Finally, the Court concluded that "[w]hether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Id. at 152.

Here, after an examination of the totality of the circumstances as required by Schmerber and McNeely, it is readily apparent that no exigency existed to justify the warrantless seizure of Appellant's blood and urine. Law enforcement suspected from very early in the investigation

that Appellant was under the influence of an illegal substance. Sergeant Hiatt testified that before Appellant was transported to the hospital, which took place less than forty minutes after the accident, he spoke to Appellant in the back of an ambulance. Appellant denied he had been drinking and told Hiatt that his brakes failed. Hiatt claimed that, during his discussion with Appellant, he noticed Appellant's eyes were "glassy and his pupils were dilated." Tr. 212, l. 7 – 214, l. 5. However, he did not smell any alcohol on Appellant's person. After speaking with Appellant, while he did not think Appellant had been drinking, Sergeant Hiatt suspected Appellant was "on some kind of drug." Tr. 214, ll. 6-9. His opinion was based not only on his observation of Appellant in the back of the ambulance, but also based on the nature of the car accident in which Appellant crossed the centerline and struck another vehicle head on. Tr. 216, l. 16 – 217, l. 18.

Hiatt further admitted there were approximately *nine* other troopers with the highway patrol, in addition to himself, at the location of the accident. Tr. 210, ll. 5-7. Any one of these officers could have aided in getting a search warrant from a magistrate based on Hiatt's observations and the nature of the accident. Moreover, Appellant had already been transported to the hospital via ambulance by emergency medical personnel, which eliminated any need to have him transported to the hospital by law enforcement to collect the blood and urine samples. Despite these factors, law enforcement made no effort whatsoever to secure a search warrant. Instead, Trooper McAlhaney relied exclusively on the state's implied consent statute, which authorizes law enforcement to take "breath, blood, and urine" samples without a warrant "if there is probable cause to believe that the person violated or is under arrest for" felony DUI. See S.C. Code Ann. § 56-5-2946(A).

In short, there was no evidence law enforcement faced an emergency which would have threatened the destruction of evidence, other than the possible dissipation of drugs from Appellant's blood. Under the totality of the circumstances, the police were required to secure a warrant before collecting a blood and urine sample from Appellant. Accordingly, any evidence obtained from the unlawful seizure of Appellant's blood and urine, including the results from the analysis of those samples, should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 484 (1963 (the exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine).

Moreover, Appellant did not voluntarily consent to providing law enforcement with a blood or urine sample. "Consent is recognized as an exception to the general rule that searches conducted without a warrant are unreasonable." State v. Harris, 277 S.C. 274, 276, 286 S.E.2d 137, 138 (1982) (citing State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978)). "However, the state bears the burden of proving the voluntariness of a consent to search from the totality of the surrounding circumstances." Id. (citing State v. Wallace, 269 S.C. 547, 238 S.E.2d 675 (1977)).

Appellant testified pretrial that he did not sign the implied consent advisement form nor did he consent to proving a blood or urine sample. Tr. 77, l. 17 – 78, l. 1. Moreover, the assistant solicitor withdrew any argument at trial that Appellant voluntarily consented to providing a blood or urine sample. Tr. 26, ll. 3-6. The trial judge even found that "based on the evidence" it is "very difficult . . . to say that Mr. McCall [Appellant] consented to this [providing a blood and urine sample], that is an expressed consent. I don't think he expressly consented to it. Once that implied consent is read and the officer is essentially saying to him under the law I can take your blood or a sample regardless of whether you want me to or not and he has been

placed under arrest, then it's difficult to make the argument that he consented thereto after the fact." Tr. 89, ll. 16-25.

Consequently, it is undisputed that Appellant did not consent to providing a blood or urine sample, and that even if he did consent, his consent was not freely and voluntarily given due to the language of the implied consent form which was read to Appellant by Trooper McAlhaney.

Respectfully, this Court should hold the state did not have any exigent circumstances to seize Appellant's blood and urine without a warrant, and that Appellant did not voluntarily consent to providing law enforcement with a blood or urine sample. Accordingly, this Court should suppress any evidence obtained from an analysis of these samples and remand for a new trial. See Wong Sun v. United States, 371 U.S. 471, 484 (1963 (the exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine).

3.

The trial judge abused his discretion by denying Appellant's motion for a continuance where "good cause" existed since the judge granted Appellant's motion to relieve counsel midtrial, even though it was timely filed six weeks before the start of trial, but refused to permit Appellant adequate time to retain other counsel, and where Appellant was prejudiced because he was ultimately forced to proceed *pro se* with stand by counsel who was unfamiliar with his case and the prior proceedings.

How the Issue was Presented Below

Appellant filed a *pro se* motion to relieve counsel on March 27, 2015, approximately six weeks before trial. R. *. For whatever reason, a hearing on Appellant's motion was never heard and a ruling was never made. On the morning of the second day of trial, Appellant renewed his motion to relieve counsel. Randy Chambers, Appellant's counsel, informed the trial judge:

> He [Appellant] has summoned me back this morning saying that he needed to talk to me and has told me that he feels I am not doing an adequate job. He doesn't want me to represent him anymore. I'll let him state what his reasons [are] more but he made statements that led me to believe that my continuance as an attorney basically would put me in jeopardy as far as allegations he planned to make against me. So *I think he has created a conflict between us.*
>
> He clearly does not want me to continue as his lawyer and it's my understanding that he wants the Court to grant him a continuance and allow him to hire an attorney . . .

Tr. 167, ll. 6-22 (emphasis added).

Appellant told the judge that he "filed a motion to relieve Mr. Chambers back in March." Tr. 167, l. 24 – 168, l. 1. Appellant then orally renewed his motion to relieve counsel arguing that he and Chambers had a conflict that could not be resolved. Appellant emphasized that the trial started without a hearing ever being held on his motion to relieve counsel and he never got "to be heard in relation to it." He strongly asserted that he "was supposed to be heard on the

motion first" before the trial began. Tr. 168, l. 3 – 170, l. 23. Chambers then joined in Appellant's motion stating that he did not believe he could "effectively represent him [Appellant] anymore." Tr. 170, l. 24 – 171, l. 5.

Appellant again stated that he wished for Chambers to be relieved and moved for a continuance so that he could retain other counsel. The trial judge immediately denied the motion for a continuance asserting Appellant "waited until we have impaneled a jury" and "begun the presentation of evidence." Tr. 171, l. 17 – 173, l. 25.

When asked by the trial judge, Appellant asserted that he was not willing to assume the risks of proceeding *pro se*. Tr. 172, l. 23 – 173, l. 6. As far as the possible appointment of stand by counsel, Appellant stated, "I'm going to leave that up to you, Judge." Tr. 173, l. 7 – 174, l. 5.

When Appellant again requested the trial judge "give us a continuance," the judge ruled, "No, sir, I'm not. I'm making that very clear to you and you don't have to ask me again." Tr. 173, ll. 19-25.

The trial judge ultimately appointed Jake Erwin of the Greenville County Public Defender Office as stand by counsel. Tr. 175, ll. 8-12. In so doing, he stated, "Mr. Erwin's duties with respect to his representation and assistance of Mr. McCall [Appellant] shall be present to answer any questions and to assist in any way that you feel is - - each of you feels is necessary. I will also say, Mr. Erwin, to the extent that you feel it is necessary [and] appropriate, I'll allow you to participate in the trial. However, I am not suggesting that you should or that it [is] appropriate that you will. I'm just giving you that leeway. Each of you can make that decision as you go forward in this case." Tr. 175, ll. 13-22.

Before the trial resumed, Appellant vehemently asserted, "I am not waiving my rights to counsel." Tr. 175, ll. 23-24. He exclaimed, "I didn't ask to represent myself. You're forcing me." Tr. 177, ll. 16-22.

In response to Appellant's assertions, the trial judge stated:

> I've also held a hearing in accordance with State versus Fuller, 523 S.E.2d 168. In this case there has been a request for relief of counsel during the pendency of the case after the jury had been impaneled and after the presentation of a significant and substantial amount of evidence. It is within the discretion of a trial judge to grant the motion for the relief of counsel during the pendency of the proceeding and I've elected to do that based on the totality of the circumstances.
>
> I find specifically that the motion was ill-timed and that the ultimate end of the motion to continue and the motion for relief of counsel is to delay and hinder the administration of justice.
>
> I will tell you the continuance of this case would have a significant prejudicial effect on the state because the state has subpoenaed all of its witnesses which are substantial in amount, over 40 in reading the witness list. Also, the defendant has had the opportunity to witness and view a specific amount of presentation of the case to include all of its tactical proceedings in opening statements and its order and method of presentation of evidence.

Tr. 175, l. 25 – 176, l. 23.

The trial then resumed with Appellant *pro se* and Jake Erwin acting as standby counsel. Tr. 179, ll. 5-24. During the remainder of the trial, Erwin engaged in improper hybrid representation. Both Erwin and Appellant cross examined witnesses, voiced objections, and raised motions. Erwin even gave the closing argument. Tr. 364, l. 14 – 369, l. 13.

Discussion

The trial judge abused his discretion by denying Appellant's motion for a continuance where "good cause" existed since the judge waited to grant Appellant's motion to relieve counsel until midtrial, even though it was timely filed six weeks before the start of trial, but refused to permit Appellant adequate time to retain other counsel. Appellant was undisputedly prejudiced

because he was ultimately forced to proceed *pro se* with stand by counsel who was appointed during the middle of trial, was unfamiliar with Appellant's case and the prior proceedings, and engaged in improper hybrid representation.

The Fourteenth Amendment to the United States Constitution guarantees criminal defendants the right to due process of law. U.S. Const. Amend. XIV. "The authority of the court to grant continuances and to determine the order in which cases shall be heard is derived from its power to hear and decide cases. This adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

The South Carolina Rules of Criminal Procedure provide that the presiding judge may grant a continuance based upon "a showing of good and sufficient legal cause." Rule 7(c), SCRCrimP. As such, "[t]he granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005). "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001); See State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249-250 (Ct. App. 2006) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law").

"It is axiomatic that determination of [a motion for continuance] must depend upon the particular facts and circumstances of each case." State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012) (quoting State v. Babb, 299 S.C. 451, 454-455, 385 S.E.2d 827, 829 (1989)). While "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," the decision must rest upon "the circumstances present

in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Ungar v. Sarafitr, 376 U.S. 575, 589 (1964).

In Winkler v. State, 418 S.C. 643, 795 S.E.2d 686 (2016), our Supreme Court held the trial judge erred in failing to grant Winkler an extension of time in order to investigate evidence of brain damage. After Winkler was convicted of murder and sentenced to death, he filed an application for post-conviction relief (PCR) and was appointed counsel. Id. at 659, 795 S.E.2d at 695. Approximately two months into the representation, counsel suspected Winkler may suffer from brain damage. Id. at 660, 795 S.E.2d at 695. Counsel requested funding to investigate, which was approved, and retained a neuropsychologist. Id. The neuropsychologist recommended neuroimaging and consulting a neurologist or neuropsychiatrist. Id. Counsel, thereafter, requested funding for neuroimaging. Id. The judge approved the request. Id Subsequently, counsel moved to extend the deadlines in the scheduling order by ninety days, explaining the testing and analysis would require approximately ten weeks. Id. at 660-661, 795 S.E.2d at 696. The judge extended the deadline for filing an amended application, but refused to extend the PCR hearing date. Id. at 661, 795 S.E.2d at 696.

Although Winkler obtained the recommended MRI scan, he was unable to obtain the recommended PET scan because of elevated blood glucose levels. Id. Thereafter, counsel began working to treat Winkler's previously undiagnosed and untreated diabetes. Id. Despite Winkler receiving diabetes treatment, weeks later, a physician explained his blood sugar was still too high to perform an accurate study of his brain, and that an additional six to eight weeks of treatment would be required, followed by an additional six to eight weeks for analysis. Id. Counsel filed a second motion to extend the deadlines, requested a continuance of six months to file his final

amended PCR application and adjustments of other dates, including the hearing date. This request was denied. Id. at 662, 795 S.E.2d at 696.

Our Supreme Court explained that the PCR statute, much like the Rules of Criminal Procedure, provided that additional time should be granted "if 'good cause is shown to justify a continuance.'" Id. (quoting S.C. Code Ann. § 17-27-160(c)). The Court found the PCR judge abused his discretion in denying Winkler's second motion for additional time because Winkler presented "good cause" for the continuance. Id. at 663, 795 S.E.2d at 697. The Court emphasized the diligence with which counsel acted at each stage. Id. The Court found no evidence to support the PCR judge's finding that PCR counsel had "ample opportunity" to investigate and develop the evidence related to potential brain damage. Id. In fact, the Court found "it would have been impossible for PCR counsel to obtain PET scans in time to have an expert review them and be prepared to testify at the PCR trial." Id. Thus, Winkler provided "good cause" to justify a continuance. Id. According to the Court, the PCR judge's denial of the continuance request "left PCR counsel in a position from which they could not present evidence to support the claim that trial counsel was ineffective for failing to investigate Winkler's brain damage." Id.

In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605 (2002), our Supreme Court held the trial judge abused his discretion in denying McMillian's motion for continuance in order to obtain the transcript of his first trial, which ended in a hung jury, in order to prepare for his second trial. McMillian requested the transcript timely, but the second trial started prior to his receipt of the transcript. Id. at 19, 561 S.E.2d at 603. He moved for a continuance to obtain the transcript in order to impeach the witnesses against him, but this request was denied. Id. The Court explained that "[t]he only 'neutral' witness for the state during McMillian's second trial

was Dorothy Williams Rumph." Id. at 21, 561 S.E.2d at 604. As such, the Court found "her credibility was essential to McMillian's defense." Id. This fact was reinforced by the fact that the first jury deadlocked, eight to four, after rehearing her testimony. Id. According to the Court, "[t]he crucial nature of Rumph's testimony cannot be overstated." Id. In fact, the Court concluded "the verdict hinged upon her credibility, and that McMillian was hindered in his ability to impeach her" without the transcript from the first trial. Id. at 23, 561 S.E.2d at 605.

In State v. Tanner, 299 S.C. 459, 462, 385 S.E.2d 832, 834 (1989), our Supreme Court held the trial judge erred in failing to grant a continuance. Tanner and Taylor were in a car accident in which two people died. Id. at 461, 385 S.E.2d at 833. At trial, the evidence was conflicting as to whether Tanner or Taylor was the driver, with Tanner's defense being he was not the driver. Id. Although Tanner's counsel was aware that blood, skin, and hair samples were taken from the car in which he and Taylor were occupants, the solicitor informed counsel that the samples were lost or misplaced. Id. at 462, 385 S.E.2d at 834. Ten minutes before the pretrial hearing, SLED brought the samples to court, and defense counsel learned of their availability. Id. Requesting a continuance, Tanner's counsel asked to conduct an independent examination of the samples, or at least to wait for a SLED analysis. Id. Denying the request, the judge ruled the state could not use the samples in its case against Tanner. Id.

The Court held the trial judge abused his discretion in denying the defense's motion for a continuance because the judge failed to consider the potential exculpatory value of the samples. Id. at 463, 385 S.E.2d at 834. In light of Tanner's defense that he was not the driver, the samples were "critical" to the case because "[a] testing of the samples could have supported Tanner's contentions that he was merely a passenger by demonstrating that some of Ms. Taylor's hair or blood was located on the driver's side of the car. Discovering who the samples belonged to and

the samples' exact location in the car may also have aided Tanner's accident reconstruction expert in arriving at his opinion about who was driving." Id. Consequently, the Court held "the eve of trial production of these samples warranted the granting of a continuance so that the defendant could adequately ascertain the samples' full evidentiary harm," and that "[n]o real harm would have befallen the state from this continuance." Id.

The Supreme Court has also held a defendant was entitled to a continuance where his attorneys were incapacitated due to illness. Varn v. Green, 50 S.C. 403, 403, 27 S.E. 862, 862 (1897). One attorney was "confined to his bed and unable to attend court," and the other, "although attending court was unable to articulate above a whisper, and only then with great pain, owing to an attack of grip and sore throat." Id. The trial judge refused to grant the continuance request because the case "had been so long upon the docket." Id. "Considering all the circumstances," the Court held the defendant was entitled to a continuance of the case on account of the illness of his counsel, and that the circuit judge abused his discretion in forcing the case to trial under the circumstances." Id. The Court concluded the judge committed an error of law by allowing his exercise of discretion "be controlled by his custom to require clients to employ other counsel when the counsel engaged were too sick to conduct the cause, and the cause had been long on the docket." Id.

Here, the trial judge abused his discretion by denying Appellant's motion for a continuance where "good cause" existed since the judge granted Appellant's motion to relieve counsel midtrial, even though it was timely filed six weeks before the start of trial, but refused to permit Appellant adequate time to retain other counsel. Appellant was undisputedly prejudiced because he was ultimately forced to proceed *pro se* with stand by counsel who was appointed

during the middle of trial, was unfamiliar with Appellant's case and the prior proceedings, and engaged in improper hybrid representation.

The judge granted Appellant's motion to relieve counsel based on the agreement between Appellant and Counsel Chambers that the two had a conflict and Chamber's confession that, based on the circumstances, he could not "effectively" represent Appellant. Tr. 170, l. 24 – 171, l. 3. However, the judge erroneously found the motion to relieve counsel was not timely made, which was the basis for his decision to deny Appellant's motion for a continuance. See Tr. 168, ll. 12-16 and Tr. 176, ll. 10-13. Appellant timely filed a *pro se* motion to relieve counsel on March 27, 2015, approximately six weeks before trial, but for whatever reason, a hearing on the motion was never held and the motion was never heard. Appellant merely renewed his motion during the trial after it became abundantly clear that Appellant and Chambers had a conflict that could not be resolved and which affected Chambers ability to represent Appellant.

Because the judge granted Appellant's motion to relieve counsel, he likewise should have granted his motion for a continuance. The judge's failure to grant a continuance forced Appellant to proceed *pro se* with stand by counsel who was only appointed on the second day of trial and was unfamiliar with the case or the prior proceedings. The judge's refusal to grant a continuance also violated Appellant's Sixth Amendment right to counsel. Therefore, it is obvious Appellant was severely prejudiced by the judge's abuse of discretion.

Appellant respectfully requests this Court hold the trial judge abused his discretion by refusing to grant a continuance after the judge relieved Appellant's counsel, reverse Appellant's conviction, and remand for a new trial.

4.

Appellant's Sixth Amendment right to counsel was violated when the trial judge granted Appellant's motion to relieve counsel without conducting a proper hearing pursuant to *Faretta v. California*, 422 U.S. 806 (1975) or advising Appellant of the dangers and disadvantages of self-representation.

How the Issue was Presented Below

Appellant filed a *pro se* motion to relieve counsel on March 27, 2015, approximately six weeks before trial. R. *. For whatever reason, a hearing on Appellant's motion was never heard. On the morning of the second day of trial, Appellant renewed his motion to relieve counsel. Randy Chambers, Appellant's counsel, informed the trial judge:

> He [Appellant] has summoned me back this morning saying that he needed to talk to me and has told me that he feels I am not doing an adequate job. He doesn't want me to represent him anymore. I'll let him state what his reasons [are] more but he made statements that led me to believe that my continuance as an attorney basically would put me in jeopardy as far as allegations he planned to make against me. So *I think he has created a conflict between us.*
>
> He clearly does not want me to continue as his lawyer and it's my understanding that he wants the Court to grant him a continuance and allow him to hire an attorney . . .

Tr. 167, ll. 6-22 (emphasis added).

Appellant told the judge that he "filed a motion to relieve Mr. Chambers back in March." Tr. 167, l. 24 – 168, l. 1. Appellant then orally renewed his motion to relieve counsel arguing that he and Chambers had a conflict that could not be resolved. Tr. 168, l. 3 – 170, l. 23. Chambers joined in Appellant's motion stating that he did not believe he could "effectively represent him anymore." Tr. 170, l. 24 – 171, l. 5.

Appellant ultimately moved for a continuance so that he could retain other counsel. The trial judge denied the motion for a continuance asserting Appellant "waited until we have impaneled a jury" and "begun the presentation of evidence." Tr. 171, l. 17 – 173, l. 25.

The following colloquy then took place between the trial judge and Appellant:

> The Court: You understand that you would be proceeding on your own and you assume certain risks because you may not have the knowledge and experience that an attorney can afford you in the trial of a case.
>
> Defendant McCall: I understand that.
>
> The Court: And are you willing to assume those risks, sir?
>
> Defendant McCall: No, I am not.

Tr. 172, l. 23 – 173, l. 6.

As far as the possible appointment of stand by counsel, Appellant stated, "I'm going to leave that up to you, Judge." Tr. 173, l. 7 – 174, l. 5. The judge then ruled: "Mr. Chambers, I'm going to relieve you as counsel in this case. Would you please ask the public defender to send someone to the courtroom to sit with him [Appellant] and answer and address any questions that he may have during this trial?" Tr. 174, ll. 6-11. A break in the proceedings was then taken.

After the break, the judge stated, "I believe the record speaks for itself with respect to what has transpired. I will state that we conducted a hearing in accordance with [Faretta] v. California[3] and I have made a determination that the waiver of prior counsel has been made knowingly and intelligently and that the defendant does have a right to proceed pro se." Tr. 175, ll. 2-8.

[3] 422 U.S. 806 (1975)

Discussion

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." State v. Cabrera-Pena, 350 S.C. 517, 533, 567 S.E.2d 472, 480 (Ct. App. 2002) (quoting Faretta v. California, 422 U.S. 806, 807 (1975)) (internal quotation marks omitted). However, an accused may waive the right to counsel and proceed *pro se.* Id. "Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it 'must be honored out of that respect for the individual which is the lifeblood of the law.'" State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998) (quoting Faretta, 422 U.S. at 834.

"The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel." Reed, 332 S.C. at 41, 503 S.E.2d at 750 (citing Faretta, 422 U.S. at 834). "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." Id. (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "The only relevant inquiry is whether the defendant has made a knowing and intelligent waiver of the right to counsel." Id. (citing Faretta, 422 U.S. at 834).

In State v. Barnes, 407 S.C. 27, 31, 753 S.E.2d 545, 548 (2014), our Supreme Court held Barnes should have been allowed to represent himself where he "demonstrated an understanding of the process of capital *voir dire*, stated his intention to pursue a third-party guilt defense at trial and discussed relevant case law, the burden of proof, and his right to testify." Barnes also demonstrated that he had read relevant case law and showed some understanding of the rules of evidence when questioned by the trial judge. Id. at 33, 753 S.E.2d at 548.

None of the factors in Barnes, which evidenced an intelligent waiver of the right to counsel and that the defendant was proceeding with the full understanding of the dangers and disadvantages of self-representation, exist in the record before this Court.

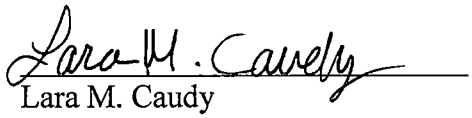
Here, the trial judge failed to advise Appellant of the dangers and disadvantages of proceeding *pro se*. In total, the judge informed Appellant "that you would assume certain risks because you may not have the knowledge and experience that an attorney can afford you." Tr. 172, l. 24 – 173, l. 2. This colloquy was insufficient to satisfy the requirements of Faretta. Moreover, the judge wholly failed to inquire into Appellant's background, experience with the criminal justice system, and knowledge of the rules of evidence and relevant case law. Accordingly, the record fails to demonstrate Appellant made a knowing and intelligent waiver of the right to counsel. See Reed, 332 S.C. at 41, 503 S.E.2d at 750.

Accordingly, this Court should hold the trial judge erred by allowing Appellant to waive his right to counsel and proceed *pro se*.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
FEB 20 2018
SC Court of Appeals

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY EDWARD MCCALL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon Terry Edward McCall, #233236, at Livesay Correctional Institution, P.O. Box 580, Una, SC 29378, this 20th day of February, 2018.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of February, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.