THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Maité Murphy, Circuit Court Judge

Appellate Case No. 2016-001977

The State of South Carolina, ... Respondent,

v.

Breanna Flannery, ... Appellant.

FINAL REPLY BRIEF OF APPELANT

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Statement of the Case

Procedural Facts

Breanna Flannery was arrested on September 1, 2014. Officer Tuck charged her with Driving Under the Influence 1st Offense and Unlawful Use of a License. She pled not guilty and was tried before the Honorable Judge P. Brandt Shelbourne and a jury on April 13, 2015 in the Summerville Magistrate Court. She was convicted on both charges. He sentenced her to a fine of $1229.50 or 30 days on the DUI and a fine of $237.50 for Unlawful Use of a License. Defense Counsel filed a Motion to Set Aside the Conviction and Grant a Directed Verdict or for a New Trial. An order was issued on August 17, 2015 denying each ground. Notice of the Court's decision was provided to Counsel via email on August 28, 2015. Notice of intent to Appeal was then filed on August 28, 2015. The appellate Judge vacated judgment against Ms. Flannery regarding the unlawful use of a license, however her appeal was denied with regard to her conviction for DUI in an order dated August 5, 2016; the Appellant received written notice on August 10, 2016.

The Notice of Appeal was then filed on September 9, 2016.

Factual Statement

Breanna Flannery was driving on Dorchester Rd, when Dorchester County Deputy Hayes decided he was going to follow her. At the time, Deputy Hayes was not trained in DUI detection. He pulled behind her vehicle at a red light, at the intersection of Ladson Rd. and Dorchester Rd. Deputy Hayes proceeded to follow her vehicle for 2.8 miles, stopping at two more red lights and passing through a third intersection before stopping at the North Charleston Fire Department, where flashing yellow lights suddenly turned red and both vehicles stopped to allow a fire truck to exit the station and answer an emergency call. Deputy Hayes continued to follow Ms. Flannery for another 1.8 miles before initiating a traffic stop at the corner of Dorchester Rd. and Appian Way. In total, Deputy Hayes followed Ms. Flannery for more than 8 minutes over a distance of nearly 4 ½ miles. Deputy Hayes testified that in the entire time he followed Ms. Flannery, he noticed her tires cross the lane lines twice. He first sees her tires touch the line on a curve after three minutes and twenty seconds of following her and then again nearly five minutes later. Upon the second instance of her a tire touching the lane line in 8 minutes of pursuit, Deputy Hayes initiates a traffic stop. Rec. on App. at 4, ll 11-25 to 5, 1-23

Deputy Tuck, is called to the scene to investigate for a potential DUI as he was properly trained and qualified in DUI detection. Deputy Tuck performs Standardized Field Sobriety Tests (SFSTs) and concludes there is probable cause to arrest Ms. Flannery for DUI. Upon searching Ms. Flannery's vehicle Deputies find a driver's license belonging to another person. As a result of their investigation, Ms. Flannery is arrested and transported to Dorchester County Sheriff's Office for Blood/Alcohol Breath Testing. Ms. Flannery provided a sample and the machine produced a result of 0.143, indicating the level of alcohol in her system was 143 thousandths of a percent.

Argument

Respondent's initial brief makes repeated reference to what it considers an insufficient record for the Court of Common Pleas and/or this Court to review. In each and every argument of the State's position, Respondent's brief attempts to employ a catch-all default to undermine Appellant's legitimate issues raised on appeal. The Dorchester County Magistrate Court is not a court of record. SC Code 22-3-710 et seq. defines Magistrate courts as summary in nature. And where a stenographer would be available to transcribe proceedings in General Sessions Court, so that the record on appeal would include testimony, Magistrate level prosecutions do not include this protection for the Defendant.

An evaluation of the arguments made in Respondent's initial brief, regarding the sufficiency of the record for review, would seem to indicate that no fact may be disputed on appeal, except as it is written and recalled by the Magistrate defending his decisions during trial. To take this position is to effectively say that no meritorious issue or argument can be properly raised on appeal without the Magistrate admitting he made a mistake or an improper ruling. While that is certainly a convenient stance for the State to take, it lacks credibility under the law. The State cites cases that are substantially different in form and facts having been tried originally in Family Court, Bowers v. Bowers, 304 S.C. 65 & Shinn v. Kreul, 311 S.C. 94 note "Arguments of Counsel are . . . not evidence" and "a court cannot consider facts appearing only in argument of counsel." Those rulings involved attempts made by parties to cite trial court statements made by the attorney. The issues before this Court relate to facts and testimony presented by witnesses and the evidence submitted by the parties.

In Defendant's post trial Motion to Set Aside the Conviction, the Grounds for Appeal and the transcribed hearing before the Common Pleas Court, facts and testimony were presented to the courts, by way of reference and recitation, and no objections were made as to the

form or content of those statements. Arguments of counsel were not being presented as evidence. Furthermore, the facts and evidence being argued occurred at trial. The trial judge acknowledged those facts in drafting his return and the State acknowledged those facts in arguing on appeal to the Court of Common Pleas. The State may very well like to revise history, and enter objections after the fact, however, a sufficient record exists for this Court to review the facts, evidence and decisions of the trial court. In each instance of an argument raised on appeal, there is ample information in the record for this Court to review and rule on the merits.

I. The trial court erred in allowing the State to submit a video into evidence without any testimony to authenticate or identify the video and without laying a sufficient foundation.

The South Carolina Rules of Evidence, Rule 901 requires as a condition precedent to admissibility that items entered into the record and submitted as evidence, for a jury to consider in its finding of fact, be authenticated or identified. In the instant case, the only witness capable of identifying the video evidence or authenticating it as an official copy was Deputy Hayes.

The State would have this Court refer to the Magistrate's return indicating **"Defense Counsel agreed at the hearing that it was Deputy Hayes' video."** This mischaracterization is directly followed by another misstatement suggesting argument was made that "it was insufficient to support probable cause for an arrest." No stipulation or agreement was made that the video be entered into evidence. Instead, the video was objected to because the officer failed to give the jury or the court the type of testimony needed to authenticate it, and subsequently have that video entered into evidence. He did not testify that it was a fair and accurate representation of what occurred, he also did not testify that the video played was in fact

the video taken from his vehicle. The lack of such testimony is clear in the Magistrate's attempt to buttress his erroneous finding pointing out "Hayes testified that the took the video and entered into [sic] the Sheriff's evidence." Pointing out the other issue in the Magistrate's return, the Defendant made a motion to dismiss for lack of reasonable suspicion, not probable cause. As discussed later, the initial detention was not proper and therefore any subsequent investigation was inadmissible.

At no point during Deputy Hayes' testimony did the State attempt to place the copy of his in-car video into evidence. (R. p. 31, line 25-p. 32 line 19) Rec. on App. at 6, l 25 to 7 ll 1-19. After the witness had been excused, the State attempted to offer a video into evidence. Defense Counsel objected to the submission of an unidentified, unauthenticated video into evidence. The Judge took a recess to determine his ruling and returned with the explanation that it was an unorthodox method, but that the State laid a sufficient foundation to enter the video into evidence. (R. p. 7) Return at 2.[1]

Respondent's brief cites to Willett v. Russell M. Stookey, P.C., 568 S.E.2d 520, which notes that plaintiff identified the voices in the conversation as the defendant and himself, **and plaintiff testified that it was a fair, accurate and complete recording of the conversation** (emphasis added). Conversely, Deputy Hayes testimony made reference to the Sheriff's evidence. Instead of following the law, and requiring the State to comply with the SC Rules of Evidence, the court ruled that the State got close enough and entered the video into evidence without any foundation at all. SCRCE 901. (R. p. 32, line 25-p. 33 line 15) Rec on App. at 7, ll1-25 to 8, ll 1-15.

[1] While the Magistrate's return fails to address the significant recess taken to decide whether a sufficient foundation was laid for entry of the video into evidence, or its finding that the foundation was unorthodox, it makes reference to pre-trial testimony about what happened in a video and specifically references that "Hayes testified that he took the video and entered into the Sheriff's evidence," as proof the disc Officer Tuck submitted into evidence was properly identified and authenticated.

The trial judge ruled improvidently that a video could be placed in evidence without the State's needing to follow proper procedure in an effort to show deference to the well-intentioned but poorly executed procedure of a police officer attempting to manage a jury trial. The judge was well aware of the fatal nature of the mistake made by the State, and further that it was a mistake no lawyer would likely commit. The fact that a recess was taken, with the Judge returning and ruling that an unorthodox but sufficient foundation had been laid sheds light on the stretch the court decided to make. The Rules of Evidence do not bend for the State, and officers prosecuting their own cases without the aid of an attorney should not receive any deference or special treatment, especially not when it erodes the protections afforded to the Defendant under due process.

II. The trial court erred in failing to dismiss the case or direct a verdict of not guilty on the charge of DUI first offense where the State failed to properly submit the statutorily required in-car video into evidence.

South Carolina law requires that the video recording at the incident site must not begin later than the activation of the officer's blue lights, include any field sobriety tests administered and include the arrest of a person for violation of §56-5-2930, or Driving Under the Influence.[2] The key case in the analysis of the video taping requirement is City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). In Suchenski, the defendant was convicted in municipal court for driving with an unlawful alcohol concentration (DUAC). Id. At 14, 646 S.E.2d at 879. On appeal, the circuit court reversed the conviction based on the City of Rock Hill's failure to videotape the defendant's entire arrest as the arresting officer's camera "ran out of tape." Id. Although the decision in Suchenski indisputably established that the videotaping

[2] See §56-5-2953

provisions of section 56-5-2953 are mandatory and not optional, certain statutory exceptions could exist which might excuse the lack of a video. Here, no such exceptions apply.

Respondent's brief cites State v. Branham, 392 S.C. 225 arguing that the legislature only intended for a video recording to be created. That case was about a breath test video and what obligation the State had to produce the video under the statute. It had nothing to do with what the impact would be if the State failed to enter the video into evidence. It was ultimately a discovery issue, not an evidentiary issue. Here, an unauthenticated and improperly identified video should not have been entered into evidence. And under the requirements of SC Code 56-5-2953 and Suchenski, the case should have been dismissed.

The return filed by Judge P. Brandt Shelbourne attempts to ground its reasoning for entering the video into evidence by referencing Deputy Hayes' testimony that "he took the video and entered it into the Sheriff's evidence." (R. p. 7) Further reference to the discussion of Defendant's motion prior to trial, challenging Deputy Hayes' reasonable suspicion for the stop, is made in an effort to validate what was deemed an unorthodox method, but what the court fails to note tells more of the story. Deputy Hayes testified about video shown to the court and described the events that took place in the video. What the return does not mention and what Deputy Hayes never mentioned at any point in his testimony was that the video presented to the court and the jury was in fact recognized by him as *the video* taken from his car on the night of the incident and fairly represented the events that took place on the day of arrest (emphasis added).

As evidenced by this Court's decision in Suchenski, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape

of a DUI arrest.[3] The State failed to properly submit a key piece of evidence into the record through the testimony of the only witness with knowledge, the only witness capable of properly identifying or authenticating video evidence crucial to the prosecution of a DUI offense. No such entry was made into evidence. Only later, after Deputy Hayes had been excused, did the State attempt to submit a video into evidence. (R. p. 32, lines 3-24). The lower court erred in giving inexperienced police officers a pass on the requirements of Rule 901, SCRE, a rule of evidence designed to protect parties from inaccurate or potentially misleading information entering into evidence before the trier of fact, and in doing so, attempted write a new set of rules which unfairly and unconstitutionally abridge a defendant's right to due process in violation of the 5th and 14th amendments to the Constitution.

III. The trial court erred in failing to sequester the State's witnesses, despite granting the Defendant's motion to sequester, allowing officer Tuck to conduct a direct examination of a witness and then later testify himself, in addition to providing an opening statement and a closing argument.

Respondent's brief focuses on the lack of actual prejudice shown, however, the prejudice is inherent in the overall result of the ruling. The substance of Appellant's objection was not only to Deputy Tuck's presence in the courtroom, but more importantly to his being able to conduct examination of the witness. (R. p. 34, line 18-p. 35 line 25) Rec. on App. at 9 ll 18-25 to 10 ll 1-25. Practically assessing the result of that ruling, Deputy Tuck gave an opening statement, examined his fellow deputy as a witness, presented evidence, sat on the stand himself and testified, and finally, he presented closing argument. Take away the numerous missteps and oversights of an officer handling a jury trial and the prejudices flowing therefrom, of which there

[3] *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011)

were plenty, and you still end up with an individual who has far too much exposure to the jury.

In State ex rel. McLeod v. Seaborn, the Court decided that a supervisory officer could assist in prosecuting a case. The Court saw no distinction, for the purpose of evaluating a violation of the statute prohibiting the practice of law without being enrolled as a member of the South Carolina Bar, between the arresting officer and a supervisory officer handling the prosecution of a case.[4] That would have been an appropriate protection for Ms. Flannery's trial and an option that does not create such obvious prejudice. Instead, the jury was treated to the Deputy Tuck show. Allowing Deputy Tuck to wear so many hats most certainly created an unfair picture of authority and trustworthiness to the jury, both in his statements and arguments as well as in his questions and testimony, but more importantly, it allowed him to present the jury with a seamless presentation of the State's case, free of any contradiction, discrepancy or possible human error. (R. p. 20) Grounds for App. at 3. This should never have been allowed and it created reversible error.

IV. The trial court erred in failing to order a mistrial regarding hearsay evidence that was suppressed by the court prior to trial, upon the State's three overt attempts to present such inadmissible hearsay in opening statements, leading questions on direct and finally in the witness' introductory testimony.

Respondent's brief asserts first that the arguments are unsupported by the record beyond counsel's personal recollections, but then goes on to quote the Magistrate's Return which acknowledges the very facts upon which those arguments are made. While the Magistrate's Return may neglect to address each of the specific instances where objections had to be made, there is nothing in the return nor on the record from the state objecting to the form or content of

[4] SC Code §40-5-310

what Ms. Flannery's appeal alleges. (R. p. 21) Grounds for App. at 4. Both the return and the State's argument on appeal are focused on the effectiveness of the curative instruction.

In nearly every case where the South Carolina Supreme Court has addressed the issue of hearsay testimony serving as cause for a mistrial, the Court generally states that the defendant must show both error and resulting prejudice. State v. Gardner and State v. Chisolm both find that where testimony is cumulative and a curative instruction is given, the appearance of hearsay on the record does not amount to reversible error. These and other similar cases all involve attorneys trained in legal theory, the rules of evidence and, more than likely, lawyers with previous trial experience. In such a scenario, both the State's attorney and Defense counsel are well aware of what constitutes inadmissible hearsay, and both will generally not make overt attempts to put such evidence into the record, especially when previously cautioned by the court.

The scenario in this case was far different. Counsel for the Defendant, being fully aware the State's case would be presented by inexperienced police officers, took the time to very deliberately move the court in advance of opening statements seeking to make sure both Deputy Tuck and Deputy Hayes understood that any reference to Deputy Hayes' having been "flagged down in reference to an impaired driver" was inadmissible hearsay. Normally, Defense counsel would wait to object during testimony, but there was concern about the officers' understanding of the rule and the motion was made pre-trial as a motion to suppress any mention of being flagged down, as that individual was not available to testify. The Judge agreed and took time to explain to both officers that no mention could be made regarding Deputy Hayes being flagged down. (R. p. 36, line 17-p. 37 line 1) Rec. on App. at 11 ll 17-25 to 12 l 1. All parties agreed and stated that they understood and the jury was called in to begin opening statements.

In the course of his opening statement, Deputy Tuck made specific mention of Deputy Hayes being flagged down in reference to an impaired driver. Defense Counsel had to

object within less than 2 minutes of the State's presentation of it's case. Then, after asking Deputy Hayes to introduce himself to the jury, the very first question of substance from Deputy Tuck was "what reason did you have to be following the Defendant's car?" Defense counsel was forced to object again, and a sidebar was held in the presence of the jury where the judge explained to Deputy Tuck that he could not directly solicit the hearsay testimony. After the sidebar, Deputy Tuck returned to questioning Deputy Hayes. His opening question was amended to "Tell us what happened on September 1, 2014." Deputy Hayes responded saying, "Well, I was flagged down in reference to an impaired driver." Defense counsel had now lodged three objections from the beginning of opening statements through the second question on direct and the jury was required to leave the courtroom for the judge to admonish Deputy Tuck and Deputy Hayes. (R. p. 37, line 1-22) Rec. on App. at 12 ll 1-22 (R. p. 21) Grounds for App. at 4.

Rather than respond or offer any contradictory insight to the detailed references of Appellant's Grounds for Appeal, the Magistrate's Return tends to simply list the court's decision and details favorable to that response. However, ignoring those points and references made in the Appellant's Grounds for Appeal does not render them invalid. There is reference to the court granting Defendant's motion to exclude the testimony, however the return fails to address the two prior instances where Counsel had to object, before the third time the State attempted to introduce previously suppressed hearsay when Deputy Hayes made "what appeared to be inadvertent reference . . . to being 'flagged down by a concerned citizen.'" (R. p. 7) Return at 2. (R. p. 21) Grounds for App. at 4 & (R. p. 37 lines 19-22) Rec. on App. at 12 ll19-22. The Return also fails to mention the subsequent removal of the jury, and continued explanation to the officers that the hearsay they so desperately wanted to put in front of the jury was inadmissible, before a curative instruction was given. (R. p. 21) Grounds for App. at 4.

The harm and prejudice to the Defendant was clear, in that just as the Deputies

began to tell the jury what happened, the attorney kept jumping up and objecting. He must have been trying to hide something. That first impression could not be undone. To have the State's presentation of its case go so terribly wrong at such an early phase of the trial, especially in such a manner that so easily could have been avoided, there would have been no harm or prejudice to either side in simply declaring a mistrial and docketing the case for a future date to pick a new jury. Conversely, the prejudice to the Defendant was enormous. Had it been a single mistake, handled with an objection and a curative instruction to disregard, the error would arguably be harmless. But on a third occasion, for the jury to spend less time in the courtroom than out of the courtroom for the opening statements and the first two questions on direct, it turned the entire trial into a circus. Failing to order a mistrial was an error and it resulted in immediate and permanent prejudice in violation of Appellant's rights to due process under the 5th and 14th Amendments to the Constitution.

The State's attempts to argue the statement at-issue is not hearsay cannot be considered at this stage of review. Had such an argument been made at the time of trial, perhaps it would be relevant to this appeal. However, trying to enter the minds of the Deputies at the time of trial and discern whether or not they were attempting to provide the out of court statement for the truth of the matter asserted or not is impossible. In each of the cases cited in Respondent's brief, the issue of why the statement was offered and why it was or was not allowed occurred first in the trial court.

Respondent's brief again asserts the record is insufficient and cites State v. Wilson, 389 S.C. 579 "finding prejudice not demonstrated where record on appeal only contained twenty-five pages of a transcript in excess of four hundred pages." In this instance the State is citing a decision from a criminal case, however, the case was tried in General Sessions, a court of record. In that case, a vast majority of the transcript was not included in the record on appeal. As such,

the Court decided it needed more to find prejudice. While the record on appeal from the Magistrate court is not so detailed, the record does present the entirety of the issues on appeal. More than enough exists in the record for this Court to find prejudice and rule it was error.

V. The trial court erred in finding that Officer Hayes had reasonable suspicion to initiate a traffic stop on the Defendant.

In response to this issue, Respondent's brief again attempts to assert that the Magistrate's ruling was not in error, but then propose the record is not sufficient for review. As is mentioned previously, Officer Hayes followed the Defendant's vehicle for more than 8 minutes before initiating a traffic stop. He testified that he was not trained in DUI detection (per NHTSA) at the time of the arrest. (R. p. 29, lines 12-20) Rec. on App. at 4 ll 12-20. (R. pp. 20-21) Grounds for App. at 3 to 4. The National Highway Traffic Safety Administration has promulgated a uniform training guide for officers all over the country to detect and investigate DUI. According to NHTSA, Phase one of a DUI investigation is observing the vehicle in motion. Officers are trained that this is the time to decide whether reasonable suspicion exists. NHTSA provides one of three answers: yes – do it now; wait – look for additional evidence; and no – don't do it. Officers must observe the vehicle, what first attracted their attention to the vehicle and note details about the driving before initiating a traffic stop.[5]

The State's brief notes that Ms. Flannery's argument is premised on the NHTSA manual and that the limited record does not indicate the applicability of the manual to a Fourth Amendment determination. In Deputy Hayes' case, he delayed the decision to stop for 8 minutes over the course of a 4 ½ mile stretch. His testimony indicated that the vehicle's tires touch the outside lane line twice during his observation. (R. p. 30, lines 1-10) Rec on App. at 5 ll 1-10.

[5] NHTSA 2013 Participant Manual

When asked on cross examination which of the 24 cues he used to develop reasonable suspicion, he could not articulate any such knowledge at the time of the stop, since he lacked NHTSA training. (see Grounds on App at 3-4 referring to Hayes' lack of training) What became apparent in his testimony and from watching the in-car video was that Deputy Hayes had been flagged down by an unknown motorist who put the idea in his head that Ms. Flannery was an impaired driver. (R. p. 30, lines 11-17) Rec. on App. at 5 ll 11- 17. (R. p. 20) Grounds for App. at 4. From the point he began following her, he was simply waiting, patiently for 8 minutes, to find some confirmation of a bystander's suggestion. And as Warren Buffet is quoted saying, "you put a police car on anyone's tail for 500 miles, he's gonna get a ticket."

Reasonable suspicion requires an articulable set of facts and inferences. A police officer may stop and briefly detain and question a person for investigative purposes, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). "Reasonable suspicion" requires a "particularized and objective basis that would lead one to suspect another of criminal activity." United States v. Cortez, 449 U.S. 411, 418 (1981). In determining whether reasonable suspicion exists, the totality of the circumstances—the whole picture—must be considered. *Id.* At 417.[6] By this standard, Deputy Hayes' explanation that he was on the hunt for an impaired driver, and during the course of following a vehicle for 8 minutes he observed a vehicle touch the outside lane line twice, does not rise to the required standard of particularized and objective articulable facts or inferences to believe a person is involved in criminal activity. The lower court's ruling was made in error and the case should have been dismissed for lack of reasonable suspicion to conduct a traffic stop.

[6] *State v. Williams* (S.C. App., 2016)

VI. The trial court erred in allowing the State to introduce the result of the breath test into evidence when it was shown to the court that the machine was 7 months past the expiration date of Calibration, in direct violation of SLED policy and procedure, and material evidence was presented to bring the reliability of the machine into question.

The State argues that a violation of SLED policy and procedure, with regard to the upkeep and maintenance of the datamaster machine, is a jury question as functionality or reliability of an improperly maintained machine goes to the weight of the evidence. In essence, lay jurors with no experience or understanding of how a datamaster machine works are best left to weigh the validity of evidence from a defective machine that has not been maintained in accordance with SLED regulations. South Carolina Code allows a trial judge, on motion of either party, to exclude evidence of any test results where the court finds a failure to follow SLED policies and procedures and such failure materially affects the accuracy or reliability of the test results or the fairness of the testing procedure.[7] In deciding to exclude such evidence the trial judge should rule specifically as to the manner in which the reliability of the test results was affected. Prior to the State's introduction of the Breath Test Result, Counsel for the Defendant objected and moved to suppress or exclude the result of the test under §56-5-2950 (J). Counsel presented the court with documents retrieved from SLED's online records showing the machine used in taking Ms. Flannery's sample was 7 months outside of the expiration date for Calibration, a clear violation of SLED policy. (R. p. 39, lines 1-15) Rec. on App. at 14 ll1-15. These documents were later introduced into evidence through cross-examination of Deputy Tuck. (R. pp. 45-46) Defense Exhibits 9 & 10 (see bottom two lines of Exhibit 9 showing expiration on 2/21/2014 and not calibrated again until 9/25/2014; Ms. Flannery's sample was collected on 9/1/2014 (R. p. 45))

[7] SC Code §56-5-2950 (J)

In arguing the motion for exclusion of the result from the Datamaster, Defense Counsel first presented the court with a violation of SLED regulations. The court was then provided a list of all breath test results taken from the machine at issue between July 19, 2014 and September 1, 2014.[8] During the 45-day period directly preceding Ms. Flannery's sample, 17 breath samples were taken. Of those 17 samples, 3 of them registered the exact same reading, 0.143 or 143 thousands of a percent. (see designated areas of Defense exhibit 10) (R. pp. 46-47). Defense counsel explained that this was all but a mathematical impossibility. For three separate individuals, two men and Ms. Flannery, to all register the exact same reading within a total of 17 tests administered over the short span of 45 days, this machine would have the court believe that their blood alcohol levels were all exactly the same to the 100,000th. A percent is 100th and the machine's readings are to the 1,000th. Rather than issue a finding that the violation of SLED policy had a material impact of the accuracy of the reading, the Judge decided it was a jury question.

State v. Landon establishes that the Defendant must make a prima facie showing of prejudice in order to shift the burden to the State, regarding a violation of S.C. Code §56-5-2954, which deals with SLED's mandatory record-keeping of machine results and repairs. While not directly on point with the issue here, it provides guidance on what is required of the defendant in alleging a violation of §56-5-2950 (J), regarding other violations of SLED policy and informing the court of how the credibility of the machine's results are materially affected. In the instant case, the court was provided with a violation of SLED policy and a series of results which give rise to obvious and substantial questions about the frequency of a singular result, repeated far too often to make any logical sense, and consequently the same reading or result at issue in the case before the court. Under such circumstances, it was error for the court to ignore what even a

[8] The final sample listed was the Defendant's.

degenerate gambler would consider long odds. The breath test result and the entire BAC room video should have been excluded from the trial, and failing to do so creates reversible error.

Respondent's brief is again focused on a lack of transcript and argues that this Court cannot review what arguments Flannery's counsel made to the magistrate. Ms. Flannery would submit that the record could not be any clearer in exactly what arguments were made regarding the reliability of the machine. The SLED reports tell the story. The numbers prove the machine was not reliable.

VII. The trial court erred in forcing a Monday morning trial to continue into the night, well beyond normal working hours and what any juror might have reasonably expected, because the trial Judge is part time and only works on Mondays.

Respondent's brief states that the magistrate noted in his return that Ms. Flannery did not raise the issue of juror fatigue in her motion to set aside the verdict. Review of the written motion reveals otherwise. Appellant contends the objection was raised during trial as well as in the post trial motion to set aside the verdict. As the trial continued into the late afternoon, it was clear that it would not finish by 5PM. Defense Counsel requested an adjournment for the day, concerned about juror fatigue and the potential for inattentive participation. (R. p. 40, lines 10-17) Rec. on App. at 15 ll10-17. The trial judge made it clear that he only sat on the bench on Mondays, and the trial would have to finish that day. Defense counsel objected, citing the fact that no juror who was summoned for court at 10AM could possibly have expected to be required to stay after normal working hours. This was not evening court, and it was a Monday morning trial. With plenty of time left in the week to finish the case, Defense Counsel asked the court to reconsider its position.

No such consideration was given, to either the inconvenience of jurors who sat for

hours past when they expected to go home, or to the impact it had on the fairness of the Defendant's trial. The trial judge did finally inquire with the jury around 8PM if they wished to come back the following day or if they would rather wrap up the trial, and hear arguments before deliberating. (R. p. 6) Return at 1. (R. p. 19) Grounds for App. at 2. At that point, with the end in sight, the jury did agree to stay a while longer. Having invested the better part of a 9-hour day at the court, jurors were presented with the option of returning again the next day or sitting through a bit more and being able to put the case behind them. Defense Counsel requested this question be addressed far earlier in the day, but the court was adamant that the trial continue until it finished. While the trial judge may not have foreseen just how long the proceedings would last into the night, neither the parties nor the jury should have been held so late on the first day of the workweek. The Defendant's right to a fair trial, before an attentive jury was compromised by the schedule of a part-time trial judge. This was a violation of due process and constitutes reversible error.

VIII. The trial court erred in forcing Defense Counsel to manually turn down the volume on the television, during the State's presentation of in-car video, after suppressing information discussed in the video.

Nearly halfway through the video presented by the State, Deputies Tuck and Hayes have a conversation about Zero Tolerance. Defense counsel objected to allowing this portion of the video to be presented to the jury under Rule 403 SCRE as it might potentially confuse the jury regarding the State's burden of proving material and appreciable impairment as presumed by a BAC reading above 0.08. The court granted the Defendant's motion and agreed the jury should not hear that discussion. Defense Counsel requested the State stop the tape before the discussion began and start the video again at the appropriate time. Over Defense Counsel's objection, the

trial judge ruled that the if the Defendant wanted to suppress that conversation, Defense Counsel would be required to manually turn down the volume on the television, while the tape continued to play, all being done right in front of the jury. (R. p. 38, lines 10-25) Rec. on App. at 13 ll 10-25

Once again, the jury was presented with the familiar image of Defense Counsel intervening in the State's narrative. At the proper time in the video, Defense Counsel had to leave his seat, approach the television with the remote (which did not have a mute button) and hold down the volume button until the audio was completely muted. Then again at the appropriate time, Defense Counsel turned the volume back up until the audio was loud enough for all to hear. Requiring this exercise was completely unnecessary, prejudicial in and of itself, and taken together with the sheer volume of times Defense Counsel had to address an issue of law outside the jury's presence or explain the most basic rule of hearsay for a third time, the Defendant's right to due process and a fair trial was irreparably damaged.

IX. The trial court erred in allowing the entire trial to proceed in a manner which continuously showed deference to inexperienced officers attempting to try a jury trial without the benefit of legal training, ultimately creating an unfair, unjust and unconstitutionally partial environment as a cumulative result wherein it was impossible for the Defendant to receive a fair trial before an impartial jury as required under the due process clauses of the Constitutions of South Carolina and the United States.

Respondent's brief again cites to a case well outside the bounds of informing authority with reference to Germain v. Nichol, 278 S.C. 508, as finding appellant failed to provide a sufficient record for review where appellant did not provide the Court with any of the trial testimony. That case was a conversion claim between private parties where the appellant was not

present at the trial. In any event, this is an appeal from a conviction in Magistrate Court. Ms. Flannery would contend that an argument about the cumulative impacts of errors at trial is relevant, supported by the record and been reviewed in the past by the State's highest Court. Quite often, those are very complex trials with extremely bad facts, like State v. Charping, 313 S.C. 147 and State v. Nichols, 325 S.C. 111. While the findings in those cases were not favorable to the argument, Ms. Flannery's case is quite different. Additionally, the fact that the Court took the time to address the argument gives credit to its potential viability. In the instant case, Appellant would argue this is exactly the type of case where cumulative errors can be taken together to find prejudice and reversible error.

The cumulative impact of mistakes committed by the State, spearheaded by two County Deputies who very clearly did not possess the experience necessary to manage a complex and contested DUI trial in front of a jury, and the trial court's valiant efforts to aid those officers in presenting their case to the jury for deliberation, resulted in an undermining of the Defendant's constitutional protections time and time again. It began with a Deputy who wore every hat possible, aside from that of the judge or the jury. It continued with bending the Rules of Evidence to make accommodation for clumsy presentation of the State's case in chief, and where necessary forcing Defense Counsel to repeatedly appear to be hiding vital facts and information from the jury. And because of the trial judge's part-time status, the farce carried on late into the evening, asking a panel of 6 female jurors to enjoy their delivery pizza and deliberate in earnest, after an 11 hour Monday in the Summerville Magistrate Courthouse. (R. p. 40, line 10-p. 41 line 7) Rec. on App. at 15 ll10-25 to 16 ll 1-7.

Lastly, Respondent's brief attempts to cite State v. Lopez, 352 S.C. 373, as authority for the argument that the preceding issue was not preserved for appeal due to the ruling of the Court of Common Pleas not specifically addressing it in the order. Review of the record

plainly shows the issue was raised. (R. p. 40, line 10-p. 41 line 10) Rec on App. at 15 ll 10-26 & 16 ll 1-10. Further, review of the Common Pleas Court Order shows the conviction is affirmed. Therefore, the issue was raised to and ruled upon by the lower court.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of Breanna Flannery and direct that a judgment of not guilty be entered in this matter. In the alternative this matter should be remanded for a new trial.

Respectfully submitted,

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North Charleston, South Carolina
February 19, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY MAGISTRATE COURT
Court of Common Pleas

Maité Murphy, Circuit Court Judge

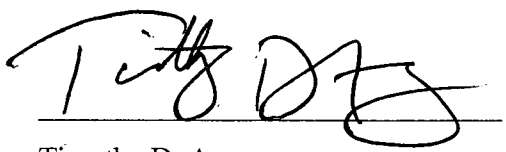
Case No. 2016-001977

The State of South Carolina, ... Respondent,
v.

Breanna Flannery, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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