

**STATE OF SOUTH CAROLINA  
In The Supreme Court**

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**APR 27 2018**

**S.C. SUPREME COURT**

**APPEAL FROM YORK COUNTY**

**John C. Hayes, III, Circuit Judge**

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**Appellate Case No. 2018-000029**

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**The State.....Respondent,**

**v.**

**Sean Robert Kelly..... Petitioner.**

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**BRIEF OF PETITIONER**

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## STATEMENT OF ISSUE ON APPEAL

### **I. DID THE COURT OF APPEALS ERR IN REVERSING PETITIONER'S VERDICT OF ACQUITTAL?**

#### STATEMENT OF THE CASE

Petitioner was arrested for Driving Under the Influence, First Offense, in York County by a York County Deputy Sheriff on September 11, 2013. On September 17, 2015, the case was called for a bench trial before the Honorable Clayburn Barnette, Jr. in the York County Magistrate's Court. The State's witnesses were sworn and the magistrate heard and received evidence from the State. Following the presentation of the State's case, counsel for Petitioner moved for a directed verdict. The magistrate took the matter under advisement and recessed until November 25, 2015. When the parties reconvened, Judge Barnette granted Petitioner's motion and entered a judgment of acquittal (Amended App. p. 11 - 13).

Respondent filed an appeal in the York County Court of Common Pleas on or about December 1, 2015 (Amended App. pp. 14 - 19). The parties appeared before the Honorable John C. Hayes, III on March 23, 2016 in order to address the State's appeal. By Order filed March 29, 2016, Judge Hayes affirmed the magistrate's decision (Amended App. pp. 44 - 47). On or about March 31, 2016, the State filed a Motion to Reconsider pursuant to Rule 59(e), SCRPC (Amended App. pp. 48 - 53). By Order filed April 13, 2016, the State's Motion to Reconsider was denied (Amended App. p. 54).

Respondent filed a timely appeal to the Court of Appeals (Amended App. p. 55) The Court of Appeals reversed the decisions of the lower courts in *State v. Sean Robert Kelly*, Unpublished Opinion No. 2017-UP-391 (S.C. Ct. App. filed October 18, 2017) (Amended

App. pp. 1 – 2). Petitioner filed a timely Petition for Rehearing on October 30, 2017 (Amended App. pp. 3 – 5). The Petition for Rehearing was denied by Order filed December 11, 2017 (Amended App. p. 6). On March 28, 2018, this Court granted Petitioner’s writ of certiorari to review the decision of the Court of Appeals.

### **FACTS**

On September 11, 2013, Investigator Kevin Tolson responded to radio traffic concerning a possible impaired driver. Investigator Tolson is a York County Deputy Sheriff assigned to the Sixteenth Circuit Solicitor’s Office. Investigator Tolson located Petitioner and witnessed Petitioner travel onto Interstate 77. He observed Petitioner being unable to maintain his lane of travel and travelling at a slow rate of speed. Investigator Tolson then initiated a traffic stop. Deputy Stagner of the York County Sheriff’s Department subsequently arrived on the scene and arrested Petitioner for Driving Under the Influence, First Offense.

At the bench trial, Investigator Tolson testified that upon approaching Petitioner, he noticed the odor of alcohol. He indicated that Petitioner seemed incoherent and “out of it.” He further testified that Petitioner had slurred speech, slow movements and did not seem to understand Investigator Tolson’s instructions. It is undisputed that Investigator Tolson’s patrol car was not equipped with video recording equipment. Therefore, he did not video or audio record the stop of Petitioner or any of the initial contact with Petitioner (Audio of Magistrate Court Trial, 04:36 – 17:08).

At the conclusion of the State’s case, counsel for Petitioner moved for a directed verdict based upon Investigator Tolson’s failure to video record Petitioner at the incident site.

The magistrate granted the motion finding that the State failed to produce a video recording in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

### **STANDARD OF REVIEW**

“In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous.” *State v. Gordon*, 414 S.C. 94, 99, 777 S.E.2d 376, 378 (2015).

### **ARGUMENT**

#### **I. THE COURT OF APPEALS ERRED IN REVERSING PETITIONER'S VERDICT OF ACQUITTAL.**

##### **A. Petitioner's double jeopardy argument is proper for consideration by this Court.**

As a threshold matter, Petitioner's double jeopardy argument is contained in the record below and appropriate for consideration by this Court. Before the Court of Appeals and in its Return to Petition for Writ of Certiorari, the State has contended that Petitioner's double jeopardy argument is not properly preserved for appellate review. The State's position essentially asks this Court to ignore Rule 220(c), SCACR, this Court ruling in *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) and ensuing precedent with regard to issue preservation by a prevailing party.

In *I'On*, this Court explained the application of Rule 220(c), SCACR and reversed several Court of Appeals cases requiring a prevailing party to present an argument and obtain a ruling on it in order for the argument to be preserved for appellate review. The Court stated:

Under the present rules, a respondent – the “winner” in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions.

*I’On*, 338 S.C. at 419, 526 S.E.2d at 723. The *I’On* Court further noted that “[t]his approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court’s judgment for any reason appearing in the record on appeal. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies.” *Id.*, 338 S.C. at 420 – 421, 526 S.E.2d at 723.

Petitioner’s case was called for a bench trial, witnesses were sworn and evidence was received as indicated in the record below (Amended App. pp. 11 – 13). The State seems to confuse the strict issue preservation requirements placed upon non-prevailing parties with an appellate court’s authority pursuant to Rule 220(c), SCACR. The State urges this Court to decline to address the Double Jeopardy issue because the issue “. . . is not preserved and specifically waived by Petitioner.” This position ignores the *I’On* court’s holding which required neither the presentation nor a ruling on an issue by the prevailing party as long as the issue appears in the record. Therefore, as the prevailing party in both lower courts and because the issue appears in the record below, Petitioner’s double jeopardy argument is properly before this Court.

**B. The State’s appeals in this matter are barred by the Double Jeopardy Clause.**

The Court of Appeals erred in reversing Petitioner’s acquittal when jeopardy attached

in the bench trial before the magistrate. The State's appeals in this matter were not appealable to the circuit court or Court of Appeals and should have been dismissed. It is well settled that the State has no right of appeal from a directed verdict of not guilty. *State v. McWaters*, 246 S.C. 534, 144 S.E.2d 718 (1965); *State v. Ludlam*, 189 S.C. 69, 200 S.E. 361 (1938); *State v. Ivey*, 73, S.C. 282, 53 S.E. 428 (1906); *State v. Gathers*, 15 S.C. 370 (1881).

The South Carolina Constitution provides that “[n]o person shall be subject to the same offense to be twice put in jeopardy of life or liberty, . . .” S.C. Const. art. I, 12. Likewise, the United States Constitution states that “. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .” U.S. Const. amend. V. “The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147 (1978). “This state of jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353 (1977).

"That the State has no right of appeal from judgment upon verdict of acquittal in a criminal case seems to have been recognized and accepted as the law of this jurisdiction from the beginning of our judicial history." *State v. Lynn*, 120 S.C. 258, 260, 113 S.E. 74, 75 (1922). The State has a limited right of appeal in criminal cases and generally has no right of appeal from an acquittal except in circumstances where the acquittal was procured by the accused's fraud or collusion. This principle applies even in cases where there has been legal error. *State v. Holliday*, 255 S.C. 142, 144-45, 177 S.E.2d 541, 542-543 (1970).

In *Horry County v. Parbel*, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008), this Court addressed the issue of a double jeopardy violation following the dismissal of a defendant's charge. In *Parbel*, several female dancers and the manager of an adult entertainment establishment were cited for alleged criminal violations of Horry County zoning ordinances. All individuals charged requested a jury trial and a criminal trial was held before an Horry County magistrate. After Horry County rested its case, counsel for the defendants moved for a dismissal of all charges. The magistrate granted the motion to dismiss.

Horry County appealed the magistrate's ruling to the circuit court. The circuit court held that the magistrate's interpretation of the zoning ordinance was incorrect but also held that double jeopardy prevented the defendants from being tried a second time. Based upon double jeopardy principles, this Court held that the circuit court did not have the authority to review possible legal errors following an acquittal.

In addition to decisions cited above, the *Parbel* court based its holding on our Supreme Court's decision in *State v. Tillinghast*, 375 S.C.201, 652 S.E.2d 400 (2007). In *Tillinghast*, the defendant was charged with possession of alcohol by a minor. Following the State's case, the magistrate found that the statute under which the defendant was charged to be unconstitutional and directed a verdict of acquittal. The State appealed the magistrate's decision to the circuit court but indicated that it was not seeking to reinstate the charge against the defendant.

The circuit court held that it had jurisdiction to hear the appeal and that the magistrate erred in finding the statute unconstitutional. The Supreme Court reversed stating:

The *Holliday* court noted that "no writ of error, appeal, or other proceeding lies on behalf of the state to review or to set aside a verdict or a judgment of

acquittal in a criminal case, although there may have been error committed by the court, or a perverse finding by the jury.”

*Id.*, 375 S.C. at 203, 652 S.E.2d at 401. The court further noted that the denial of the right of the State to appeal is “. . . premised upon the basic double jeopardy principle that a defendant in a criminal prosecution is in legal jeopardy when he has been placed on trial. . . .” *Id.*

The facts in *Parbel* and *Tillinghast* are similar to the present case. The case was called for a bench trial. The State’s first witness, Investigator Kevin Tolson, was sworn in and jeopardy attached (Audio of Magistrate Court Trial at 4:36). Investigator Tolson testified with regard to his initial stop of Petitioner and the fact that his car had no video recording equipment. The State then called Deputy Stagner of the York County Sheriff’s Department who testified at length with regard to the arrest of Petitioner. The State rested its case. Counsel for Petitioner moved for a directed verdict (Amended App. p. 11). The motion was taken under advisement and after a lengthy recess, the magistrate dismissed the case based upon the State’s failure to produce a video in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013).

The State contends that jeopardy has not attached because the magistrate’s verdict does not amount to an acquittal. The State cites *Evans v. Michigan*, 568 U.S. 313, 133 S.Ct.1069 (2013) and its definition of an acquittal. The *Evans* court defined an acquittal as follows:

. . . [O]ur cases have defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense. Thus an “acquittal” includes “a ruling by the court that the evidence is insufficient to convict,” a “factual finding [that] necessarily establish[es] the criminal defendant’s lack of criminal culpability,” and any other “rulin[g] which relate[s] to the ultimate question of guilt or innocence.

*Evans*, 568 U.S. at 318 – 319, 133 S.Ct. at 1074 – 1075 (citations omitted). Right or wrong, the magistrate’s ruling fits squarely within the definition of an acquittal as defined by *Evans*.

S.C. Code Ann. § 56-5-2953 (Supp. 2013) is a unique statute that requires the State to video record all facets of an arrest for driving under the influence. Compliance is not optional and failure to comply is accompanied by the harsh remedy of dismissal. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). Consequently, a statutorily compliant video recording, absent a qualifying exception, is necessary in order for the State to establish criminal liability. As such, the magistrate’s decision amounts to a ruling by the court that the evidence is insufficient to convict based upon the State’s failure to produce evidence required by S.C. Code Ann. § 56-5-2953 (Supp. 2013).

Additionally, the present case is procedurally similar to *Tillinghast*. The magistrate in *Tillinghast* found the statute under which the defendant was charged to be unconstitutional and directed a verdict of acquittal. Therefore, the magistrate did not explicitly rule on the evidence and elements of the statute but ruled that the State’s proof failed as a matter of law because the statute was unconstitutional. Similarly, in the present case the magistrate held that the State’s case failed based upon its failure to show proof of its compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013). The *Tillinghast* court had no concerns with the form of or procedure in obtaining the acquittal and the same should hold true in the present case.

As noted above, jeopardy attaches in a bench trial when the court begins to receive evidence. *Martin Linen Supply Co.*, 430 U.S. at 569, 97 S.Ct. at 1353. In the present case, witnesses were sworn and the State presented its entire case-in-chief. Jeopardy unquestionably attached. Assuming *arguendo* that the State is correct that the magistrate

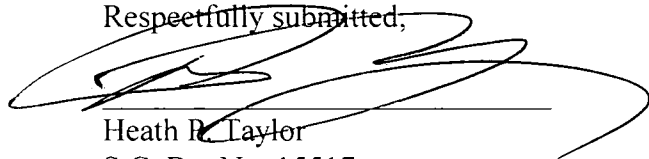
erred as a matter of law in acquitting Petitioner, this decision of the Court of Appeals should be reversed. Although the magistrate did not specifically rule on the evidence presented by the State and whether the State proved the *corpus delicti* of driving under the influence, his ruling was based upon the State's failure to comply with S.C. Code Ann. § 56-5-2953 (Supp. 2013) and Petitioner cannot be subjected to another trial for this offense. As the *Tillinghast* court noted: "**Whether or not the magistrate erred in his ruling of law**, appellant was acquitted and is now out of court." *Tillinghast*, 375 S.C. at 203, 652 S.E.2d at 401 (emphasis added). Consequently, this Court should reverse the decision of the Court of Appeals.

### CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals.

April 27, 2016

Respectfully submitted,



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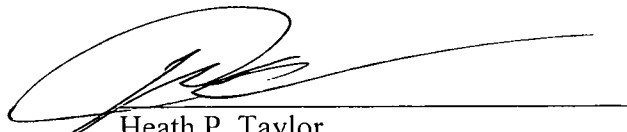
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PROOF OF SERVICE

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I certify that I have served the Brief of Petitioner by causing it to be mailed to its attorneys of record, Alan M. Wilson, Esquire and William Blicht, Jr., Esquire, at their office, P.O. Box 11549 Columbia, SC 29211-1549 and Kevin S. Brackett, Esquire, 16<sup>th</sup> Circuit Solicitor's Office, 1675-IA York Highway, York, South Carolina 29745 on April 27, 2018.

April 27, 2018



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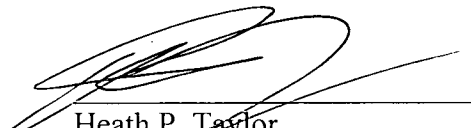
v.

Sean Robert Kelly.....~~Respondent,~~

Petitioner

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Brief of Petitioner in the above captioned matter complies with Supreme Court Order 2007-08-13-02 filed August 13, 2007.



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