THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO COURT OF APPEALS
Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-000424

Unpublished Opinion No. 2018-UP-166
Submitted March 1, 2018-Filed April 18, 2018

Thomas A. Williams, ... **Petitioner,**

vs.

State of South Carolina, ... **Respondent.**

PETITION FOR WRIT OF CERTIORARI

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. 06188
864-229-5010

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Certificate of Counsel

I hereby certify that a Petition for Rehearing was filed with the South Carolina Court of Appeals on May 3, 2018. This Petition was denied on May 24, 2018.

Question Presented

Did the South Carolina Court of Appeal err in failing to address the argument that the word "acts" contained in the phrase "if arrested for an offense arising out of acts alleged to have been committed" contained in S.C. Code 56-5-2950 could not have included the act of driving under the influence when the adverbial clause modifying "committed" specifically contained driving under the influence and therefore such an interpretation would render much of the wording of the statute superfluous?

Statement of the Case

Procedural History

Thomas A. Williams was arrested for driving under the influence on March 30, 2013 when he entered a Highway Patrol safety checkpoint. He was tried before the Honorable C. Ryan Johnson and a jury on August 26, 2014. (Rec. on Appeal 1). The jury convicted Mr. Williams. Mr. Williams, through his attorney, filed a Notice of Appeal on August 27, 2014. (Rec. on Appeal 35).

The appeal was heard before the Honorable Donald B. Hocker. By order dated October 9, 2015, Judge Hocker affirmed the conviction. (Rec. on App. 65). Mr. Williams, through his attorney, filed a timely Motion under Rule 59 for the Court to re-consider the opinion. (Rec. on App. 71). By order dated February 12, 2016 and filed February 18, 2016, Judge Hocker affirmed his previous ruling. (Rec. on App. 90).

On February 23, 2016, Mr. Williams filed the Notice of Appeal to this Court. (Rec. on App. 93). On April 18, 2018, the South Carolina Court of Appeals affirmed the lower court in an unpublished opinion. *Williams v. State*, Op. № 2018-UP-166 (S.C.Ct. App. filed April 18, 2018). A Petition for Rehearing was filed on May 3, 2018. The Petition was denied on May 24, 2018.

Factual History

Thomas A. Williams approached a roadblock set up on North Main St., just off Montague Avenue in Greenwood, SC. The testimony and the findings by the lower court is that as Mr. Williams approached the roadblock, he did not violate any traffic laws. Order dated October 9, 2015. (Rec. on App. 65). Mr. Williams timely objected to evidence of his refusal to take the datamaster test. (Rec. on App. 94). He contended that the arresting officer had no statutory right to require him to take the breath test.

Mr. Williams did refuse the datamaster test and evidence of his refusal was admitted before the jury. He further performed the walk and turn and the one leg stand test which were captured on the video. (CD) . The arresting officer testified the defendant did not perform well on the field sobriety tests. The officer also testified Mr. Williams admitted to consuming five beers.

Mr. Williams testified in his own defense. He attributed his performance and other attributes as to his intoxication, to the fact that he had a lifelong speech impediment, that he had bad knees and he did not have his glasses. After his conviction, this appeal followed.

Question

Did the South Carolina Court of Appeal err in failing to address the argument that the word "acts" contained in the phrase "if arrested for an offense arising out of acts alleged to have been committed" contained in S.C. Code 56-5-2950 could not have included the act of driving under the influence when the adverbial clause modifying "committed" specifically contained driving under the influence and therefore such an interpretation would render much of the wording of the statute superfluous?

In the brief before the South Carolina Court of Appeals, Thomas Williams urged the Court of Appeals to examine the statute using basic grammatical principles. The Court of Appeals declined. The unpublished opinion discussed the issue in a very cursory manner. They never discussed the English principles argued in the brief. As this issue will continue to arise in numerous driving under the influence cases, this Court should grant this Petition for Writ of Certiorari, declare that the implied consent law does not apply to a person arrested for driving under the influence with no underlying traffic offense as required by the statute and reverse the conviction of Mr. Williams.

This case involves a combination of statutory construction and an understanding of grammar, specifically the "adverbial clause." An "adverbial clause" is used to modify a verb or adverb, but never a noun. The relevant sentence of S.C. Code § 56-5-2950 provides as follows:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs.

The question before this Court is whether a person gives consent to give a breath test if he is arrested only for driving under the influence and has not committed any other offense under the South Carolina traffic code. In interpreting this statute, the phrase "while the person was driving a motor vehicle while under the influence of alcohol . . . ." is a subordinate adverbial clause used to modify the word "committed." As such, if the word "acts" includes driving under the influence, then the driving under the influence would be in the sentence twice and render many words in the statute useless.

The statute can be broken down into one clause and two dependant clauses. The primary clause is "A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs . . . ." This clause contains a complete thought and the legislature could have stopped there. If they did, that would mean that law enforcement could simply stop motor vehicles for any reason or no reason other that the statute says the person driving has given his consent to a breath test simply by driving on the highway. Recognizing the harshness of such a rule, they added the first dependent clause that a traffic violation had to have occurred. The first dependent clause says "if arrested for an offense arising out of acts alleged to have been committed . . . ." So, this limits the arrest to drivers who have been arrested for a traffic offense which obviously makes the law less harsh. As to whom has given their consent, the statute is limited even further by the second dependent adverbial clause. It says "while the person was driving a motor vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs." This clause further limits the person who has given their consent to a person who has been stopped even further. Of the group who of drivers who have

been stopped and arrested for a traffic offense, the person must also be under the influence of alcohol. The two dependant clauses do not express an independent thought. They are limited in their application as to what has gone before each clause.

The proper use of subordinate or dependent adverbial clauses has been discussed in several cases. *See, e.g. Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015); *ILHC OF EAGAN, LLC v. County of Dakota,* 693 N.W.2d 412 (Mn. 2005); *Frere v. Commonwealth,* 19 Va. App. 460, 452 S.E.2d 862 (1995); *State v. Thomas,* 292 N.C. 251, 232 S.E.2d 411 (1977). The dependent or subordinate adverbial clause is not repetitive of the things that it modifies. If it were, there would seldom be a purpose of using a dependant adverbial clause. This is generally a clause that limits the application of the verb it modifies. In this case, each adverbial clause further limits the independent clause or adverbial clause that proceeds it.

The lower court ruled in essence that when a person is arrested for driving under the influence, they have consented to have a breath sample taken. This interpretation renders many words in the statute useless. If this were the intent of the statute, the legislature would have simply and easily said:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for driving under the influence of alcohol, drugs, or a combination of alcohol and drugs.

If the holding of the lower court is correct, there is simply no need for the phrase "if arrested for an offense arising out of acts alleged to have been committed . . . ." As a person who is being offered a breath test has in fact been arrested for driving under the influence, there will

never be a case where such an arrest has not occurred. The very next sentence in S. C. Code § 56-5-2950 says "A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs." The Advisement of Implied Rights form informs a person "You are under arrest for Driving Under the Influence (DUI) . . . ." Implied Consent form of Appellant. (Rec. on App. 94). Only when a person has been arrested for driving under the influence can a person be required to take a breath test. By including the phrase "if arrested for an offense arising out of acts alleged to have been committed . . . ." the legislature clearly indicated the original arrest had to have been for an act, i.e. a separate traffic violation, other than driving under the influence.

As one Court has said when discussing subordinate adverbial clauses "The role of the subordinate clause is to modify the independent clause; thus the issue with regard to the meaning of 'while' is properly framed as how the 'while' clause modifies the [independent clause]." *ILHC of Eagan, LLC.* at 419-420. "While" may have several meanings. The oldest meaning is "during the time that." MERRIAM-WEBSTER DICTIONARY OF ENGLISH USAGE, (1994). In the context of the statute in question here, this is what is meant. The law requires one to submit to a breath test if they are arrested for an offense arising out of an act committed during the time they are driving and under the influence. The statute is truly almost nonsensical if the law is read to require one to submit to a breath test if arrested for driving under the influence during the time they are driving under the influence. As noted above, as a driver must be arrested for driving under the influence before they are asked to take a breath test, a portion of the statute would become mere excess words that give no meaning or have no importance to the statute. As our

Supreme Court has said "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." *State v. Smith,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)(internal citations omitted). "It is presumed that no unnecessary words or provisions were used by the legislature." *Cleco Evangeline, LLC v. Louisiana Tax Comm'n, 2001-0561* (La. App. 1 Cir.), 808 So. 2d 740, 745, (2001) *see also, State ex rel. Ballard v. Vest*, 136 W. Va. 80, 87, 65 S.E.2d 649, 653 (1951) ("We cannot assume in the absence of wording clearly indicating contrariwise that the Legislature would use words which are unnecessary, and use them in such a way as to obscure, rather than clarify, the purposes which it had in mind in the enactment of the statute."); *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 860 So. 2d 1112, 1119 (La. 2003) ("It is also presumed that every word, sentence or provision in a statute was intended to serve some useful purpose, that some effect be given to each such provision, and that the Legislature used no unnecessary words or provisions.")

A person cannot be stopped without probable cause to believe a traffic offense has occurred. As this Court has said, "Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable *per se.*" *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010); *Whren v. United States*, 517 U.S. 806 (1996). An officer simply may not stop a driver who has not committed a traffic violation. Thus, the statutory provision that says a driver has consented to take a breath test requires that a driver must have committed a traffic offense other than driving under the influence. This makes logical sense.

The only interpretation of the statute that uses all the words in the phrase "if arrested for

an offense arising out of acts alleged to have been committed" would be to exclude driving under the influence from the "acts" as used in the adverbial clause. A reviewing Court must accept the fact that the legislature knew that before a person could be offered a breath test, they had to have been arrested for driving under the influence. Thus, the only logical conclusion is that the legislature meant for the offense arising out of the act committed for which the driver was arrested was something other than driving under the influence.

In addition, the Statute refers to "an *offense arising out of* acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs." S. C. Code § 56-5-2950 (emphasis added). To say that the act of driving under the influence arose out of a driving under the influence is simply nonsensical. All the words in the sentence make sense only when read as urged by Mr. Williams. For example, the offense of speeding would be committed while driving under the influence. The clear meaning is that some traffic offense must have occurred while the defendant was driving under the influence. At the time of the drawing of the statute, the legislature simply may not have thought about traffic stops in which no other traffic offense had been committed. This Court cannot guess as to this supposition. The failure of the legislature to contemplate a certain type of traffic stop is not a reason for this Court to read such into the statute. If there is an error in the statue, the legislature has to correct the error. This Court has no authority to re-write the statute to correct a mistake if they in fact made one. As has been said " It is the Legislature, not this Court, which defines a crime under a penal statute . . . ." *Brown v. State*, 343 S.C. 342, 350, 540 S.E.2d 846, 850 (2001)(holding a day care facility is not a school) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)

While Mr. Williams contends that the meaning of the statue is clear, even if there is an ambiguity, Mr. Williams should still prevail. As this has repeatedly said "Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). If the statute is unclear as to whether the "act" includes driving under the influence, this Court is required to resolve that ambiguity against the State and in favor of Mr. Williams.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of Thomas A. Williams and remand the matter for a new trial to exclude any reference to his refusal to take the Datamaster test.

June 15, 2018

C. RAUCH WISE
Attorney at Law
305 Main St.
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Thomas A. Williams

THE STATE OF SOUTH CAROLINA
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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on June 15, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to S.C. Court of Appeals, Jenny Abbott Kitchings, Clerk, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211 and Mark R. Farthing, Attorney General Office, Rembert C. Dennis Building P.O. Box 11549, Columbia, SC 29211

SWORN to and Subscribed
before me this 15 day
of June, 2018.
_______________(L.S.)
Notary Public for South Carolina
My Commission expires: 12/7/2019

Sandy Traynham

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
Greenwood, SC 29646
e-mail rauchwise@gmail.com

C. Rauch Wise

Telephone
(864) 229-5010
Facsimile
(864) 229-2665

June 14, 2018

RECEIVED
JUN 18 2018
S.C. SUPREME COURT

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

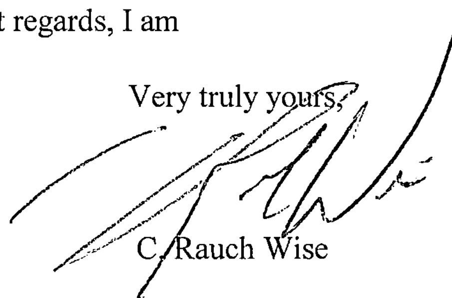
Re: Thomas A. Williams vs. The State of South Carolina

Dear Mr. Shearouse:

I am enclosing herewith the original and six copies of the Petition for Writ of Certiorari and the original unbound and one bounded copy of the Appendix together with an unbound and bound copy of the Brief of Appellant, Final Brief of Respondent, Reply Brief of Appellant and Record on Appeal in the Court of Appeals regarding the above matter. I am also enclosing herewith the original Affidavit of Service. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,



C. Rauch Wise

CRW/slt
Enclosure

cc South Carolina Court of Appeals
Mark Farthing