THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2018-001109

Thomas A. Williams, ... Petitioner,

vs.

State of South Carolina, ... Respondent.

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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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?

Argument

Alternative theory of the Stat

As an alternative theory, or as an additional sustaining grounds, the State has argued that even if the implied consent statute did not apply to Mr. Williams, he had no right to refuse the breath test. Ret. of Resp. at 8, 14. This is simply untrue. The implied consent statute says a driver does not have to take the test. "(1) the person does not have to take the test or give the samples . . . ." S.C. Code § 56-5-2950. Under the State's theory a driver has fewer rights if the arresting officer operates outside of the implied consent statute rather than within it.

The United States Supreme Court opinion in *Missouri v. McNeely*, 569 U.S. 141 (2013) is support for the position the argument of the State is not constitutional. If what the State asserts is correct, the United States Supreme Court would not have needed to declare that a search warrant was required. As no officer can physically compel a person to blow into a devise, what does it mean to say Mr. Williams had no right to refuse outside of the implied consent law? No judge would have charged the jury that Mr. Williams did not have the right to refuse the breath test other than as required under the implied consent law.

Argument

The State agrees that the implied consent statute should be interpreted to mean that the sole basis for the arrest may be driving under the influence. Ret. of Resp. at 9. What this means is that a driver in South Carolina may be stopped with no probable cause, an odor of alcohol or a suspicion of being under the influence of drugs being present and the driver can be required to submit to a breath test. At first blush this has some appeal. But a closer analysis is required. Law enforcement could set up outside an establishment that sells alcohol to be consumed on premises. The high probability of finding a driver with alcohol on his breath and arresting him for driving under the influence would be pretty high.

In determining the intent of the legislature, a perfectly logical reading of the implied consent statute is the legislature did not want law enforcement stopping drivers on the reasonable expectation of finding a driver who had been drinking when there was no other reason to stop the driver. To achieve this worthy goal, the legislature required that there be an actual violation of the traffic laws other than driving under the influence. The State correctly argues that rules of statutory construction are subservient to legislative intent. *State v. Morgan,* 353 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). The legislative intent suggested here is as plausible as the one suggested by the State, if not more so. The legislative intent suggested by Mr. Williams gives meaning to all the words and not just some. The legislative intent given by Mr. Williams involved a correct understanding of the rules of construction of the English language. This Court can presume the legislature understood the common rules of English construction.

The State in its Return did not try to explain that if the interpretation urged by the State is proper, why the legislature simply did not write the statute as noted in the Petition of Mr.

Williams. The interpretation would have been beyond dispute as there would be no adverbial clause limiting the meaning of any of the terms. Leaving out the phrase "for an offense arising out of acts alleged to have been committed" would have accomplished exactly what the State argues. But that phrase is in the Statute and cannot be ignored. The only way, and the State has not suggested another, to give meaning to that phrase is to say the initial arrest, or stop with probable cause, has to be for a traffic offense other than driving under the influence. The phrase either has a significant meaning and impact on the statute or it is mere surplusage. The presumption is it is not surplusage. "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).

Harmless Error

Nor can the State succeed on the theory of harmless error. In the video, Mr. Williams explains that he has a bad knee. Further, while he is standing in front of the patrol vehicle, he is steady on this feet and not swaying. While Mr. Williams did admit to drinking 5 beers, he was not asked over what period of time. Without knowing how long he had been drinking, this information by itself is not sufficient to establish Mr. Williams was under the influence. While the State in its brief describes Mr. Williams as "struggling to maintain his balance while simple [sic] standing" (Ret. of Resp. at 17) the video shows this is not correct. Nor does the video show Mr. Williams had trouble walking. Ret. of Resp. at 17. Mr. Williams did tell the officer on the way to the datamaster room that he would not blow. The State should not have been permitted to argue he refused to take the datamaster when he was not legally required to take the datamaster. The jury was left wit h the impression he refused a test he was required to take. The error was

not harmless.

CONCLUSION

For the reasons in this Reply and for the reasons set forth in the Petition for Writ of Certiorari, this Court should grant the Petition and resolve the heretofore unresolved issue of how to interpret S. C. Code § 56-5-2950 and reverse the conviction of Thomas Williams.

June 28, 2018

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S.C. SUPREME COURT

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

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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 28, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petitioner's Reply to Respondent's Return to Petition For Writ of Certiorari in the above case addressed to Mark R. Farthing, Attorney General Office, Rembert C. Dennis Building, P.O. Box 11549, Columbia, SC 29211.

Sandy Traynham

SWORN to and Subscribed
before me this 28th day
of June, 2018.

(L.S.)
Notary Public for South Carolina
My Commission expires: 12/7/2019