STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM LEXINGTN COUNTY
COURT OF COMMON PLEAS

William P. Keesley, Circuit Judge
R. Knox McMahon, Circuit Judge

Appellate Case No. 2018-000979

The State.....RESPONDENT

Vs.

Steven E. Nelson_____APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an Appeal from a Jury Verdict in the Lexington County Central DUI Court. Prior to Trial the Appellant moved for an Order Suppressing any and all evidence either written or oral of the Appellant refusal to allow a blood sample to be obtained from him on three grounds: (1) taking the blood sample was in violation of his Constitutional rights under both the United States and South Carolina Constitutions; (2) 1976 South Carolina Code of Law, Section 56-5-2950 (as amended) is unconstitutional as it authorizes implied consent for the drawing of blood and provides a penalty for refusing to allow blood to be drawn; and (3) the request for a blood sample was made more than three (3) hours after the arrest of the Appellant. All motions were denied by the Magistrate. Following a trial by jury and a guilty verdict the Appellant was sentences to thirty (30) days suspended on service of fourteen (14) days. Appellant duly Appealed his conviction and sentence to the Court of Common Pleas as required by Law. The Appeal was first heard by the Honorable William P. Keesley who entered an Order requiring the Magistrate to file an amended return clarifying numerous issues. An Amended Return was filed and the Appeal argued before the Honorable R. Knox McMahon who denied all issues. From that Order this Appeal is taken.

ARGUMENTS

1. THE LOWER COURT ERRED IN REFUSING TO SUPPRESS ANY AND ALL DOCUMENTS OR TESTIMONY CONCERNING THE APPELLANT'S REFUSAL TO ALLOW A BLOOD SAMPLE TO BE OBTAINED FROM HIM IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND HIS SIMILAR RIGHTS UNDER ARTICLE I, SECTION 10 OF THE SOUTH CAROLINA CONSTITUTION.

The United States Supreme Court in Birchfield vs. North Dakota , ___US___. 136 S.Ct.2160, 195 L.Ed2d 560 (decided June 23, 2016) held that the drawing of blood from a suspect required a warrant as the suspect had a Constitutionally protected right under the Fourth Amendment to be free from intrusive examinations, and that the drawing of blood was such an intrusive examination. In the instant case the Appellant refused to allow the drawing of his blood, thus asserting his Constitutional right to be free from such invasive intrusions without a warrant. Article I, Section 10 of the South Carolina Constitution clearly sets forth that in all searches a warrant is required, the word exigent circumstances do not appear in the South Carolina Constitution. Article 1, Section 10 must be interpreted in light of Article 1, Section 23, which is an interpretation clause that clearly states that the words in the South Carolina Constitution "shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or promissory by its own terms." This interpretation clause must be read in connection with the declaration in the Preamble which reads, "We, the people of the State of South Carolina, in Convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same." The only reason we in South Carolina have a constitution is to protect and

preserve our liberties. Article 1, Section 10 contains no directory or permissive words, except maybe the word "unreasonable" and the drawing of blood from a suspect has now been defined as unreasonable without a warrant by the United States Supreme Court. There is no greater Liberty Interest than being free from unreasonable searches and seizures.

II. THE LOWER COURT ERRED IN REFUSING TO DECLARE 1976 SOUTH CAROLINA CODE OF LAW SECTION 56-5-2950 (as amended) UNCONSTITUTIONAL AS IT VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSITTUTION AND ARTICLE 1, SECTION 10 OF THE SOUTH CAROLINA CONSTITUTION AS IT AUTHORIZES IMPLIES CONSENT FOR THE DRAWING OF BLOOD AND PROVIDES A PENALTY FOR REFUSING TO ALLOW BLOOD TO BE DRAWN

Birtchfield, supra. Specifically held that criminal statutes criminalizing the assertion of a constitutional Right to be free from unreasonable searches and seizures without a warrant violated the Fourth Amendment and therefore were unconstitutional under the United States Constitution. Section 56-5-2950 provides a civil penalty of the suspension of the individual's Drivers License for refusal. There is no difference between a criminal penalty and a civil penalty for the same act, i.e. refusing to submit to the drawing of one's own blood. If the suspect has a Constitution Right under the Fourth Amendment the same suspect has that same right under Article 1, Section 10 of the South Carolina Constitution. To penalize one for insisting on a warrant, no matter what the penalty, is the same whether the penalty be civil or criminal in nature. There should never be a penalty for asserting a Constitutional Right no matter what that right is. The Implied Consent features if Section 56-

5-2950 operate on the principle that by having a drivers license one has consented to various things and the license is conditional on that person doing those things. 56-5-2950 was passed by the Legislature prior to the Birchfield decision and must be reviewed in light of that decision. One cannot waive a Constitutional Right in advance of the situation arising that might give rise to the assertion of that Constitutional Right. The Implied Consent provisions of 56-5-2950 operate on exactly that principle. The waiver of a Constitutional Right must be freely, knowingly and intelligently given. How can anyone waive a right until the circumstances where the right might be asserted arise. The right to free speech and religion mean practically nothing, and are merely rights that are taken for granted until the situation arises where someone on the government's behave attempts to prevent one from saying whatever or worshiping whatever God the person chooses, or attempts to require the individual to worship in some other way. Then and only then do these rights become important. Until that happens people in this Country go about their lives unconcerned with those rights. The same applies to searches and seizures, People in this Country are generally unconcerned about that subject until confronted by the government or government agents demanding the right to search your house, look at what you've been looking at on your computer, or take your blood. Then and only then does the requirement of a warrant come into play, and the right becomes important. If a warrant is required to draw blood in a DUI case, that right cannot be waived in advance, but must be decided by the individual at the time the situation arises, not in advance.

For the foregoing reasons the Implied Consent provisions of 56-5-2950 are constitutional.

III. THE LOWER COURT ERRED FAILING TO PROHIBIT THE INTRODUCTION OF ANY DOCUMENT OR TESTIMONY CONCERNING THE ARRESTING OFFICER'S REQUEST FOR A BLOOD SAMPLE AS THAT REQUEST WAS NOT MADE WITHIN THREE (3) HOURS OF APPELLANT'S ARREST.

Deputy Louis Rivera, Jr. of the Lexington County Sheriff's Department testified that at 5:47 A.M. on July 21, 2016, he was dispatched to investigate a motor vehicle reported in a ditch in the Pelion Area of Lexington County. Deputy Rivera located a vehicle in a ditch on the side of the road occupied by the Appellant, who supplied Deputy Rivera with his Driver's License. Deputy Rivera inquired of the Appellant whether he was injured and received a negative reply. Deputy Rivera further testified that he noticed a strong oder of Alcohol and that he notified dispatch that the Highway Patrol was needed at his location to investigate a possible intoxicated driver. (TR p___) Trooper Ricky Martin of the South Carolina Highway Patrol testified that he arrived on the scene at approximately 7:20 A.M. and arrested the person of the Appellant at 7:43 A.M. (TR p____). Trooper Martin further testified that he inquired of the Appellant whether he was injured or had any medical problems, and the Appellant replied that he was not injured and did not have any medical problem, but was just tired. (TR p___) Trooper Martin for reasons known only to him decided to call EMS to check out the Appellant, and that EMS arrived on the scene approximately 45 minutes later, checked out the Appellant and found nothing wrong with him. Trooper Martin then decided to have the Appellant transported to the ER at the Lexington County Hospital, where the Doctors found nothing medically wrong with the Appellant. At 11:00 A.M. on July 21, 2016, in the ER of the Lexington County Hospital

Trooper Martin presented the Appellant with the Implied Consent Forms and requested a Blood Sample. The Appellant refused to comply.(TR p___) At trial the Implied Consent Form was introduced into evidence after the Magistrate had denied the Appellant's motion to suppress.(TR___) Trooper Martin testified at trial that he never requested a breath sample, that he only requested a blood sample.

1976 SC Code Section 56-5-2950 reads in pertenent part as follows:

(A) A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, 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 while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must by 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. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken...A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest...

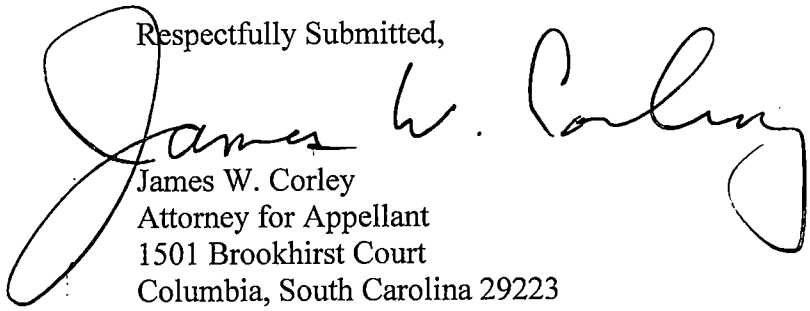
The Appellant was not offered a breath test that the statute mandates was required to be offered first, meaning before other tests. In this case, the URINE/BLOOD COLLECTION REPORT indicates the time of arrest as being 0743, and the time of test as 1100 AM on 7/21/16 (TR p___) . The statute specifically mandates by the use of the word must that the sample be collected with three hours of the arrest. The elapsed time between 11:00 AM and 7:43 AM is three hours and seventeen minutes, more than the three hour time limit in the statute. The Trooper has offered no explaination for why he

could not have done a breath test within two hours of the arrest or why he couldn't have requested a blood sample within the statutory three hour time limit. The obvious reason for these time limits is that tests administered after those time limits are unreliable. The results of test administered after those time limits are not admissible and the fact of a request for tests after the time limits should be equally inadmissible. The detrimental effect of admitting evidence, either written or oral, of a request for a test outside the time limit imposed by statute is obvious as it allows the State to argue to the Jury who but a guilty person would refuse a test that might clear them, thus possibly prejudicing the Jury against the Defendant. The exclusionary rule has been in effect in South Carolina since Mapp v. Ohio, 367 US 643, 81 S Ct 1684, 84 ALR2d 933 (1961) and adopted by the South Carolina Supreme Court in State v. York, 250 SC 30, 156 SE2d 326 (1967). Evidence obtained in violation of the Defendant's Constitutional Rights is not admissible against the Defendant. It is not a stretch to conclude that an attempt to collect evidence outside of a mandatory statutory time limit is similarly inadmissible and that evidence of attempts to collect evidence outside of those time limits is not admissible. It was, therefore, error for the Magistrate to deny the motion to suppress and admit the Implied Consent Forms and Urine/Blood Report into evidence or to allow testimony concerning the State's request for a blood sample or the Appellant's refusal to submit to one..

CONCLUSION

For the foregoing reasons The Conviction and sentence of the Appellant be reversed and the case remanded for a new trial, or the conviction and sentence be vacated.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of June, 2018 three (3) copies of the Initial Brief of Appellant and of the Designation of Matter were served upon the Lexington County Solicitor and the South Carolina Attorney General by placing them in the United States Mail at Columbia, South Carolina, in a securely sealed envelope with proper postage duly affixed thereto and return address printed thereon by regular mail, addressed to :

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June 26. 2018

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