THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
COURT OF COMMON PLEAS

Letitia H. Verdin, Circuit Court Judge

Case No.: 2017-CP-39-00391

Zebbulin Alan Short.....Appellant,

v.

The State of South Carolina.....Respondent.

APPELLANT'S FINAL BRIEF

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January 11, 2018

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STATEMENT OF THE CASE

Zebbulin Alan Short (hereinafter Short) was arrested on May 11, 2013 and charged with driving under the influence first offense under ticket no.: F838374. On September 15, 2015, a pre-trial hearing was held and the State, via a preprinted form, provided Short a written offer to plead guilty to driving with an unlawful alcohol concentration .08% time served and court costs and nol pros the driving under the influence charge. The notice stated "You have 30 days from the date of this form to accept this offer. If you or your client does not enter a guilty plea by October 12, 2015, then the case will be placed on the docket for trial. At that time, the case will be tried as charged, and NO recommendation will be made". At the bottom of this preprinted plea offer form a box was checked stating, "DUAC Notice: Pursuant to § 56-5-2933 and § 56-5-2930 (J) of the South Carolina Code of Laws, you are hereby notified that the State intends to try this case as a violation of Driving with an Unlawful Alcohol Concentration. The case will appear on an upcoming trial docket no sooner than 30 days from the date of this notice". The case was scheduled for roll call and jury trial on October 12, 2015 but continued. The case was also scheduled for roll call and jury trial on January 11, 2016, October 10, 2016 and November 7, 2016 but continued again.

The case was scheduled for roll call and jury selection beginning the term of March 13, 2017. Prior to the start of the trial, Short moved to dismiss the charge of driving with an unlawful alcohol concentration first offense on the grounds that Short was never charged with the offense of driving with an unlawful alcohol concentration by way of uniform traffic ticket or arrest warrant and therefore the magistrate court did not have jurisdiction to commence proceedings on that charge. (R. pp. 46-64). That motion was denied and Short was tried before the Honorable

Michael A. Baker and a jury on March 15, 2017 for the charge of driving with an unlawful alcohol concentration first offense in the Pickens County Summary Court. He was convicted of driving with an unlawful alcohol concentration first offense on March 15, 2017. Short filed a motion for a new trial on March 24, 2017, which was denied by order filed March 30, 2017.

On April 3, 2017 Short filed his notice of appeal to the Pickens County Court of Common Pleas. Judge Baker filed his return on May 1, 2017. Oral arguments were held before the Honorable Letitia H. Verdin on June 30, 2017. (R. pp. 229-247). Judge Verdin issued an order filed August 3, 2017 finding that the magistrate court had jurisdiction to try Short for driving with an unlawful alcohol concentration and affirming the decision of the magistrate court. Short filed a motion to reconsider on August 13, 2017. Judge Verdin issued an order denying the motion to reconsider on August 24, 2017. Short filed and served his notice of appeal with this court on September 22, 2017.

STATEMENT OF FACTS

On May 11, 2013, Trooper Brian Mayfield (hereinafter Trooper Mayfield) arrived on the scene of a one car collision on North Old Pendleton Road in Pickens County. (R. p. 91). The vehicle had gone off the right side of the road and collided with a utility pole. (R. p. 92). Short was on the scene and had called a tow truck. (R. pp. 92-93). Trooper Mayfield asked Short about drinking and Short replied "not enough for this to occur but that he fell asleep, or dozed off and ran off the road and hit a utility pole". (R. p. 93). Short advised Trooper Mayfield that his wife was with him and somebody had picked her up and taken her home. The Trooper inquired about whether she was injured and Short replied, "I think the air bag got her". Trooper Mayfield then sent Trooper Baldwin to speak to Short's wife and check on her injuries. Trooper Baldwin advised Mayfield that Short's wife had an injured nose and declined an ambulance. (R. pp. 93-95). Trooper Mayfield had Short perform field sobriety tests and arrested him for driving under the influence first offense. (R. pp. 96-106; p. 249). (Trooper Mayfield's in car camera video).

Short was taken to the Pickens County Jail for the datamaster test. Short was offered a breath test and he elected to take the test. Trooper Mayfield testified that the breathalyzer machine goes through a series of checks, itself, and it will shut itself down if it has a problem. It did not shut itself down. It verified and checked each point that it supposed to. Verified that it was working properly. Short gave a sample point zero nine percent (.09%). (R. pp. 111-118). (Breath Site video).

On cross examination, Trooper Mayfield testified that he arrived on scene about 3:30 a.m. and it was possible that a substantial amount of time had passed before he actually got to the scene of this accident. It was at least enough time for somebody that was in the car to leave the scene, for somebody to come by and pick Mr. Short's wife up and take her to the parties' residence. (R. pp.

129-130). Trooper Mayfield never spoke with Mrs. Short or traveled to the parties' residence to talk to Mrs. Short. The car was off the side of the road and the passenger side was facing Trooper Mayfield's patrol car. Both air bags had deployed. (R. p. 131). Trooper Mayfield was standing by the driver's side door of the car when he stated that there was blood on the air bags. (Trooper Mayfield's in car camera video). (R. p. 133). He never performed any tests or forensic tests on the contents or anything that was in the car. (R. pp. 131-132). Trooper Mayfield testified that Short was cooperative, respectful, and the fact that he stayed on scene to try to call a tow company and address the situation was an appropriate thing to do, when he could have left the scene. (R. pp. 132-133). Trooper Mayfield never talked to the individual who picked Mrs. Short up from the scene of the accident. (R. p. 133). He admitted he did not know the time the accident happened. (R. p. 133). Short did not have the keys to the car and Trooper Mayfield couldn't remember anything about the keys. (R. pp. 138-139). There was a conversation on the in car video that Mrs. Short had the car insurance information with her. (R. pp. 139-140).

Trooper Mayfield testified that he charged Mr. Short in this case with Uniform Traffic Ticket No.: F83874 for driving under the influence first offense, pursuant to SC Code Ann. § 56-5-2930. He further testified that he had never written a uniform traffic ticket or got an arrest warrant for driving with an unlawful alcohol concentration to Short. That the only ticket in this case is for driving under the influence first degree and not driving with an unlawful alcohol concentration. (R. pp. 140-141). Trooper Mayfield was not familiar with the datamaster operational protocol and testified that he mashes the buttons. He testified that he did not know when the breathalyzer was calibrated or when the machine was inspected. He was also not aware of the datamaster machine having multiple errors in the month of May 2013. (R. pp. 143-148). Trooper Mayfield testified to

his knowledge that SLED maintains records on its website for specific datamaster machines across the State of South Carolina. (R. p. 150). However, the magistrate court refused to allow Short to enter into evidence or cross examine the Trooper in regards to SLED's status records on datamaster (BAC/DMT) serial number - 107607 that showed the datamaster had an error or malfunction nine times between April 24, 2013 and May 28, 2013. (R. pp. 150-161). Short took the datamaster on May 11, 2013. This document was electronically signed by Deborah H. Banks, Lieutenant, Supervisory Special Agent, Implied Consent Department and said document stated that this report represents true and correct copies of the original documents maintained by SLED in the normal course of business. Short proffered the document to the Court. (R. pp. 156-157).

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE MAGISTRATE COURT DID NOT HAVE JURISDICTION TO COMMENCE PROCEEDINGS ON THE CHARGE OF DRIVING WITH AN UNLAWFUL ALCOHOL CONCENTRATION

The circuit court issued a Form 4 Order and found that the magistrate court had jurisdiction to try Short for driving with an unlawful alcohol concentration and affirming the decision of the magistrate court. (R. pp. 1-3). The circuit court did not rule on Short's remaining exceptions. The circuit court then issued a Form 4 Order holding that Appellant's motion to reconsider is denied. (R. pp. 4-6).

Short was found guilty by the jury of the charge of driving with an unlawful alcohol concentration first offense. Short moved prior to the State's case-in-chief to dismiss the charge of driving with an unlawful alcohol concentration, specifically, S. C. Code Ann. § 56-5-2933, because the Defendant was never charged with the offense of driving with an unlawful alcohol concentration by way of uniform traffic ticket or arrest warrant and therefore the magistrate court did not have jurisdiction to commence proceedings on said charge. *See State v. Ramsey*, 398 S.C. 275 (2012). (R. pp. 46-65). Short was charged with driving under the influence, ticket number F838374. (R. p. 140). Trooper Mayfield testified that he never charged Short with the offense of driving with an unlawful alcohol concentration, by way of uniform traffic ticket or arrest warrant. The only ticket in this case is for driving under the influence first degree and not driving with an unlawful alcohol concentration. (R. pp. 140-141).

While S. C. Code Ann. § 56-5-2933(I) states in part....."A person charged for a violation of Section 56-5-2930 may be prosecuted pursuant to this section....," § 56-5-2933(J) goes on to

state..,"At trial, a person **charged with a violation of this section** is allowed to present evidence relating to the factors enumerated above and the totality of the evidence produced at trial may be used by the jury to determine guilt or innocence. **A person charged with a violation of this section** must be given notice of intent to prosecute under the provisions of this section at least thirty calendar days before his trial date." *Id.* As set forth above, Short was never charged with section 56-5-2933. The Statute is clear and unambiguous.

State v. Leopard, 349 S.C. 467, 470–71, 563 S.E.2d 342, 344–45 (Ct. App. 2002) holds:

> The basic principles of statutory construction as applied to criminal statutes have been clearly and repeatedly set forth by our supreme court and by this court.
>
> It is well established that in interpreting a statute, the court's primary function is to ascertain the intention of the legislature. When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning. Furthermore, in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.
>
> If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.
>
> While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Id.* at 563, S.E.2d at 344–45. (internal citations omitted).

As set forth above, the circuit court erred in finding that the magistrate court had

jurisdiction to commence proceedings on the charge of driving with an unlawful alcohol concentration and as such, Short respectfully asks that his conviction be reversed.

II. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE MAGISTRATE COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT ON THE CHARGE OF DRIVING WITH AN UNLAWFUL ALCOHOL CONCENTRATION ON THE GROUNDS THAT THE STATE FAILED TO PRESENT SUFFICIENT INDEPENDENT EVIDENCE CORROBORATING APPELLANT'S EXTRA-JUDICIAL STATEMENTS TO ESTABLISH THE CORPUS DELICTI OF DUAC

The magistrate court erred in failing to grant a directed verdict on the charge of driving with an unlawful alcohol concentration on the grounds that the State failed to present sufficient independent evidence corroborating Defendant's extra-judicial statements to establish the *corpus delicti* of driving with an unlawful alcohol concentration. Trooper Mayfield testified that he came upon a one car accident and Short was outside the vehicle on the side of the road talking to a tow truck company. (R. p. 92). Trooper Mayfield asked Short if he had been drinking, to which he replied, "not enough for this to occur but that he fell asleep, or dozed off and ran off the road and hit a utility pole". (R. p. 93). Short advised Trooper Mayfield that his wife was with him and somebody had picked her up and taken her home. The Trooper inquired about whether she was injured and Short replied, "I think the air bag got her". Trooper Mayfield then sent Trooper Baldwin to speak to Short's wife and check on her injuries. Trooper Baldwin advised Mayfield that Short's wife had an injured nose and declined an ambulance. (R. pp. 93-95).

Trooper Mayfield was standing by the driver's side door of the car when he stated that there was blood on the air bags. (Trooper Mayfield's in car camera video). (R. p. 133). He never performed any tests or forensic tests on the contents or anything that was in the car. (R. pp. 131-

132). Trooper Mayfield testified that Short was cooperative, respectful, and the fact that he stayed on scene to try to call a tow company and address the situation was an appropriate thing to do, when he could have left the scene. (R. pp. 132-133).

Trooper Mayfield never talked to the individual who picked Mrs. Short up from the scene of the accident. (R. p. 133). He admitted he did not know the time the accident happened. (R. p. 133). Short did not have the keys to the car and Trooper Mayfield couldn't remember anything about the keys. (R. pp. 138-139). There was a conversation on the in car video that Mrs. Short had the car insurance information with her. (R. pp. 139-140). At the close of the State's case, Short moved for a directed verdict arguing that the State failed to present sufficient independent evidence corroborating Defendant's extra-judicial statements to establish the *corpus delicti* of driving with an unlawful alcohol concentration, i.e., that Short was driving the car. (R. pp. 163-167; pp. 169-175).

"It is well-settled law that a conviction cannot be had on the extrajudicial confessions of a defendant unless they are corroborated by proof aliunde of the corpus delicti." *State v. Osborne*, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999) (footnote omitted). The corroboration rule applies to statements whether those statements are confessions or admissions. *Id.* at 177–78, 516 S.E.2d at 203–04. "[T]he corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extrajudicial statements and, together with such statements, permits a reasonable belief that the crime occurred." *Id.* at 180, 516 S.E.2d at 205. Corroboration requires "substantial independent evidence," which is sufficient "if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.* at 179, 516 S.E.2d at 204 (quoting *Opper v. United States*, 348 U.S. 84, 93, 75 S.Ct.

158, 99 L.Ed. 101 (1954)). *Id.* at 180, 516 S.E.2d at 205. *See State v. Russell*, 345 S.C. 128, 132–33, 546 S.E.2d 202, 204–05 (Ct. App. 2001).

The State argued that these line of cases are no longer good law pursuant to *State v. Abraham*, 408 S.C. 589 (2014). (R. pp. 167-168; p. 175). That is not so. The law is well settled and *Abraham* held, "As our supreme court in *Osborne* clarified this state's law to be consistent with the rule outlined in *Opper*, we speculate that continued reference to the requirement that a defendant's extra-judicial statements must be corroborated by "proof aliunde of the corpus delicti " has caused confusion amongst the bench and bar. We anticipate that this confusion could be avoided by ceasing reference to "proof aliunde of the corpus delicti " and similar terms, and instead echoing the language in *Opper*, in that the State must "introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." *Opper*, 348 U.S. at 93, 75 S.Ct. 158. *Id.* at 593, 759 S.E.2d at 442.

As set forth herein, the State failed to introduce substantial independent evidence which would tend to establish the trustworthiness of Short's statement." *Opper*, 348 U.S. at 93, 75 S. Ct. 158. Therefore Short respectfully asks that his conviction be reversed.

III. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE MAGISTRATE COURT ERRED IN FAILING TO CHARGE THE JURY THE WELL SETTLED LAW AS SET FORTH IN *OPPER V. UNITED STATES*, 348 U.S. 84, 75 S.CT. 158, 99 L.ED. 101 (1954)

The magistrate court erred in failing to charge the jury the well settled law as set forth above in *Opper v. United States*, 348 U.S. 84, 93, 75 S.Ct. 158, 99 L.Ed. 101 (1954)) and the case law of this State. The Court refused to charge the jury this law stating that it would in essence be confusing to the jury and that we were there because of Short's admission of driving.

(R. pp. 177-178; pp. 180-181). If there is any evidence to support a jury charge, the trial judge should grant the requested charge. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Clark*, 339 S.C. at 390, 529 S.E.2d at 539. To warrant a reversal, however, the error must result in prejudice to the party requesting the charge. *Id. See State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

In this case Short was prejudiced because the State emphasized greatly Short's statement or a variation thereof, "Not enough to do what I did", when asked by Trooper Mayfield if he had been drinking. In fact, the State crafted it's closing argument around Short's statement, "Not enough to do what I did". (R. pp. 182-186). The failure of the magistrate court to charge the jury was not harmless error and it cannot be said beyond a reasonable doubt that the error complained of did not contribute to the verdict.

Short certainly requested that the charge be given and repeatedly raised an exception to the magistrate court. (R. pp. 177-178; pp. 180-182; pp. 204-205). Therefore Short respectfully asks that his conviction be reversed and/or that a new trial be granted.

IV. THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT THE MAGISTRATE COURT ERRED IN REFUSING TO ALLOW THE APPELLANT TO ENTER INTO EVIDENCE OR CROSS EXAMINE THE TROOPER IN REGARDS TO SLED'S STATUS RECORDS ON DATAMASTER (BCA/DMT) SERIAL NO. 107607

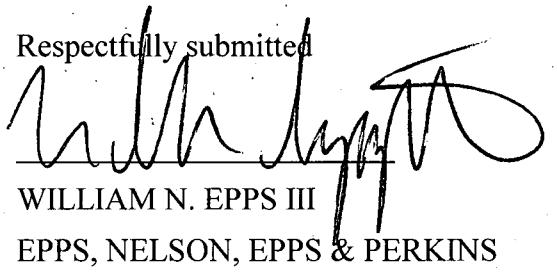
The magistrate court erred in refusing to allow Short to enter into evidence or cross examine the Trooper in regards to SLED's status records on datamaster (BAC/DMT) serial number - 107607 that showed the datamaster had an error or malfunction nine times between

April 24, 2013 and May 28, 2013. (R. pp. 150-161; pp. 248). Short took the datamaster on May 11, 2013. This document was electronically signed by Deborah H. Banks, Lieutenant, Supervisory Special Agent, Implied Consent Department and said document stated that this report represents true and correct copies of the original documents maintained by SLED in the normal course of business, attached hereto. Short proffered the document to the Court. (R. pp. 156-157). Not only was this document a public record pursuant to Rule 803(8) SCRE, but also within the business records exception pursuant to Rule 803(8) SCRE. This document was also self authenticating pursuant to S.C. Code Ann. § 19-5-10, as amended. *See also* S.C. Code Ann. § 56-5-2954, as amended. This being a driving with an unlawful alcohol concentration case, these documents were material to the defense and the defense's case was materially impaired by the failure to cross examine the Trooper as to this document. Said documents should have been disclosed by the State pursuant to Rule 5, SCRCrimP and *Brady v. Maryland,* 373 U.S. 83 (1963) and as set forth above Short was prejudiced. Therefore, Short respectfully asks that his conviction be reversed and/or that a new trial be granted. *See State v. Landon*, 370 S.C. 103 (2006).

CONCLUSION

Based on the above, the Appellant respectfully asks that his conviction be reversed and/or that a new trial be granted.

Respectfully submitted



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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief complies with Rule 211(b), SCACR.

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