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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3692

The City of Columbia ..... Appellant,

v.

Carol A. Davis ..... Respondent.

FINAL BRIEF OF APPELLANT

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2. Did the Circuit Court err in applying the holding in City of Rock Hill v. Suchenski in affirming the trial court's dismissal?

3. Did the trial court err in finding that the breath test result should be suppressed because of an anomalous entry in the database records?

4. Did the trial court err in suppressing the video from the breath test site merely because the test result itself had been suppressed?

STATEMENT OF THE CASE

The Respondent, Carol A. Davis, was arrested and charged with Driving Under the Influence (DUI) on October 8, 2008. At a hearing on May 12, 2011, the trial court suppressed Davis' breath test result, breath test site video, and ultimately dismissed the charge of DUI.

Appellant, City of Columbia ("City"), filed its Notice of Intention to Appeal on May 23, 2011. The appeal was heard by the Circuit Court on February 3, 2012. The Circuit Court affirmed the dismissal of Davis' case by Order dated March 15, 2012. On April 11, 2012, the City filed this Notice of Appeal.

FACTS[1]

On October 8, 2008, at approximately 3:18 a.m., City of Columbia police officer Joseph C. Ross was dispatched to an accident between Davis and another vehicle. Upon arrival, Officer Ross made contact with Davis, observed indications of alcohol impairment, and determined that she was also underage to legally consume alcohol. Davis admitted to consuming alcohol and stated that the accident was a result of her texting while driving. After failing field sobriety tests, Davis was arrested for DUI and transported to Columbia Police Department Headquarters for a DataMaster breath test. After having been advised of her Implied Consent rights, pursuant to S.C. Code Ann. § 56-5-2950, Davis agreed to provide a breath sample and registered a .17% blood alcohol content (BAC), at approximately 4:57 a.m.

[1] This case was dismissed pretrial on motion from Davis. The facts are provided by way of background but are not part of the record.

ARGUMENT

I. THE TRIAL COURT AND CIRCUIT COURT ERRED IN FINDING THAT A CORRECT AFFIDAVIT SUBMITTED PURSUANT TO S.C. CODE ANN. § 56-5-2953 WAS NOT IN COMPLIANCE WITH THE STATUTE EVEN THOUGH IT WAS SUBMITTED MORE THAN ONE YEAR BEFORE A HEARING.

At a hearing before the trial court on May 12, 2011, Davis initially moved to dismiss her charge of DUI based on the lack of a roadside video, pursuant to City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (S.C. 2007) and Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011).[2] Davis additionally argued that the charge should be dismissed because the affidavits submitted by the City for failure to produce a roadside video were improper.

The trial court ultimately dismissed Davis' charge of DUI based on the perceived untrustworthiness of the submitted "Affidavit for Failure to Produce Videotape." (R. p. 63, lines 4-19). The trial court based its decision on the determination that the submitted affidavits were flawed and did not conduct a Sucheski analysis. The Circuit Court affirmed the trial court's dismissal of Davis' charge based on the same affidavit issue and another basis (See Argument II). (See also R. pp. 2-4).

A. A CORRECT AFFIDAVIT WAS PROVIDED IN PLENTY OF TIME TO AVOID CONFUSION OR PREJUDICE.

S.C. Code § 56-5-2953 requires a video recording of the roadside arrest but recognizes that there will be circumstances that make that impossible. Failure to produce the videotape is not alone a ground for dismissal of the DUI charge if the prosecution asserts one or more of the statutory exceptions contained in subsection (B) of § 56–5–

[2] Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011), was decided on July 11, 2011, approximately one month after the trial court hearing in this appeal. At the time of the original hearing for this appeal, Roberts existed as a Circuit Court Order.

2953 that excuse noncompliance with the mandatory videotaping requirement.[3] In order to accomplish this, the prosecution submits an "Affidavit for Failure to Produce Videotape", completed by the arresting officer, to the Defendant prior to trial indicating which § 56-5-2953(B) exceptions apply.[4] In addition, a roadside video is not required if the police vehicle has not been equipped with a videotaping device by the South Carolina Department of Public Safety (SCDPS).[5] See S.C. Code Ann. § 56-5-2953(G).

An "Affidavit for Failure to Produce Videotape" generally serves two purposes in DUI cases in which there is no roadside video or where there is an insufficient video: 1) it is required by statute in order to assert a subsection (B) exception and is often used to assert a subsection (G)[6] exception to the videotaping requirement; and 2) it provides the Defendant with notice of the reason(s) why no video recording exists.

In the case at hand, there was no roadside videotape because the arresting officer's vehicle had not yet been equipped with video recording equipment. The City

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[3] S.C. Code Ann. § 56-5-2953(B) exceptions to the videotaping requirement include: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

[4] The "Affidavit for Failure to Produce Videotape" is a standard form prepared and provided by the South Carolina Department of Public Safety (SCDPS), and used statewide by South Carolina law enforcement agencies.

[5] § 56-5-2953(G) states that the provisions of the videotaping requirement statute only take effect once the law enforcement vehicle is equipped with a video recording device. A limited exception has been created where municipalities decline to equip police vehicles with video recording equipment. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011). There is no evidence of such conduct by the City in this record and neither court below based its decision on that theory.

[6] While there is no statutory affirmative affidavit requirement in S.C. Code Ann. § 56-5-2953(G), as the form affidavit provided by SCDPS contains a section to select when the police vehicle is not equipped with video recording equipment, the City frequently provides one out of an abundance of caution when asserting a § 56-5-2953(G) exception.

originally forwarded a form "Affidavit for Failure to Produce Videotape" to Davis, dated March 31, 2010, indicating that "[a]t the time of the defendant's arrest or probable cause determination, the video equipment in the vehicle [the officer] was operating was in an inoperable condition and reasonable efforts had been made to maintain the equipment in an operable condition." (R. pp. 101-102). Five days later, the City discovered that it had sent the wrong affidavit and subsequently forwarded Davis a second "Affidavit for Failure to Produce Videotape," dated April 5, 2010, indicating that "[a]t the time of defendant's arrest the vehicle [the officer] was operating had not yet been equipped with a videotaping device and therefore pursuant to Section 18 of Act 434 of 1998, the videotaping requirement regarding vehicles is not applicable." (R. p. 103). Neither of the submitted form affidavits contained any identifying features (e.g., case caption, ticket number) or labels, and both bore the signature of the arresting officer.

At the hearing on May 12, 2011, Davis moved to dismiss the DUI charge based on the incorrect affidavit and alleged resulting prejudice. (R. p. 58, lines 2-24). The prosecutor for the City, as an officer of the Court, represented that the affidavit dated April 5, 2010, and information contained therein indicating the arresting officer's vehicle had not yet been equipped with a camera, was the correct and accurate affidavit for Davis' case. (R. p. 60, lines 21, 24-25; p. 61, lines 1-9). It was further explained that the affidavit dated March 31, 2010, pertained to another DUI case and was forwarded to Davis in error. (R. p. 61, lines 1-9). The error was discovered almost immediately by the City and the correct affidavit was prepared and forwarded to defense counsel five days later, more than one year prior to the hearing. (R. pp. 59-61).

Davis argued that the affidavit dated April 5, 2010, is improper, unreliable, and/or the result of impropriety on behalf of the City. (R. p. 58, lines 19-23; p. 60, lines 17-19; p. 80, lines 1-2, 14-18). That position is not supported by the record. The only evidence in the record is that the April 5, 2010 affidavit is the only true and accurate affidavit relating to Davis' case. The record also establishes that the affidavit dated March 31, 2010, pertains to another case and was simply forwarded to Davis in error. (R. pp. 59-62). The mistake was discovered by the City and remedied almost immediately. There is no evidence of any misconduct and Davis' allegations are misguided and unsubstantiated.

There is no authority, and Davis has provided nothing to either of the lower courts, to support the notion that submission of an affidavit prohibits that affidavit from being corrected, amended, supplemented or negated based on subsequently obtained information. The only argument Davis provided the lower courts as her basis for dismissal were mere allegations and speculation. (R. p. 58, lines 20-23; p. 60, lines 11-19.)

The trial court and Circuit Court expressed concern and appeared to have, at least in part, based dismissal on the lack of identifying features on the submitted affidavits. Specific references were made to the lack of a caption, ticket number, vehicle number and identify of the arresting officer in addition to a signature. (R. p. 61, lines 10-17; p. 91, lines 8-12); (see also R. pp. 2-4). It is agreed that such measures would have made the mistake less likely and would have been beneficial. However, such suggestions are not a legal requirement. In this case, the City used a form provided by SCDPS, and the mistake resulted purely from human error. Taken to its logical conclusion, if such identifying features were a legal requirement, all affidavits on an unaltered SCDPS form

would be deficient and cause for dismissal. This is not a result required by the law. Although captioned affidavits would be preferable, the correct affidavit without a caption is still legally sufficient to preserve a case in the absence of video. This ruling, in effect, holds that a mistake on an affidavit cannot be corrected or supplemented with testimony from the arresting officer. Nothing in the videotaping requirement statute requires such a result, and in the absence of an intent to mislead, there is no legal basis for a case to be bound by a mistakenly forwarded affidavit.

In addition, Davis suffered no prejudice as a result of the correct affidavit being submitted five days later, on April 5, 2010. This occurred more than one year before the hearing on May 12, 2011 and provided Davis with more than an adequate amount of time to prepare her motion.

The April 5, 2010 affidavit complied with all statutory requirements and dismissal of the case was therefore improper.

B. IF CONFUSION STILL EXISTED, THE PROPER COURSE WOULD HAVE BEEN TO ALLOW THE TESTIMONY OF THE OFFICER AS TO WHICH AFFIDAVIT WAS THE ONE APPLICABLE TO THIS CASE.

To the extent the trial court had a question as to the legitimacy of one affidavit over the other, the appropriate remedy should have been for the trial court to allow testimony from the arresting officer who filled out the affidavits and was present at the hearing. The City was afforded no opportunity to proffer testimony, and when it inquired about the basis for the dismissal, the trial court cut off any further discussion or advocacy. (R. p. 63, lines 23-25). The issue of which affidavit correctly applied to Davis' case would have been easily determined by very brief and basic questioning of the officer under oath.

There was no roadside video from Davis' arrest. The only contested issue was whether this was the result of an inoperable camera or because the arresting officer's vehicle had not yet been equipped with video recording equipment. Although the substance of what the arresting officer would have testified to had already been proffered to the trial court by the City prosecutor, the opportunity for indisputable finality to this particular issue was easily obtainable by the trial court. The trial court committed an error of law and/or an abuse of discretion by invalidating both affidavits without a basis in the law and without allowing the prosecutor the opportunity to conduct a basic examination of the available witnesses and/or facts. Because there was no statutory violation in correcting an erroneous affidavit, dismissal of the charge was in error and the lower courts should be reversed and the matter remanded for a trial.

II. THE CIRCUIT COURT ERRED IN APPLYING CITY OF ROCK HILL V. SUCHENSKI IN AFFIRMING THE TRIAL COURT'S DISMISSAL.

Because the trial court based its dismissal of the charge of DUI solely on the propriety of the affidavits submitted by the City, and not on the applicability of Suchenski and/or Roberts, this is the only issue properly preserved for appellate review. (R. p. 63, lines 4-19). The Circuit Court affirmed the trial court's dismissal of the DUI based on the perceived unreliability of the submitted affidavits, but went further than the trial court, and thus beyond its scope on appeal, in conducting and applying a Suchenski analysis to the facts in the record. (R. pp. 2-4).

Suchenski governs whether a roadside video, or lack of one, complies with the videotaping requirement provisions of S.C. Code Ann. § 56-5-2953. Suchenski, 374 S.C. 12. Suchenski does not address any standard for the submission, adequacy, or reliability

of affidavits, nor does it provide a remedy for instances such as in the case at hand, where a correct affidavit is subsequently submitted. See Suchenski, 374 S.C. 12. The Circuit Court was premature in applying a Suchenski analysis to the case at hand as the issue of whether or not the City complied with the videotaping requirement statute, § 56-5-2953, was neither addressed nor ruled upon by the trial court below. Because the trial court did not conduct a Suchenski and/or Roberts analysis, and dismissed the case based solely on an alleged faulty affidavit, it was error for the Circuit Court to then apply Suchenski as additional basis for dismissal.

III. THE TRIAL COURT ERRED IN SUPPRESSING THE BREATH TEST RESULT BECAUSE THERE WAS UNCONTROVERTED TESTIONY BY AN IMPLIED CONSENT EXPERT THAT THE MACHINE WAS WORKING PROPERLY AND PROVIDED A SCIENTIFICALLY ACCURATE AND RELIABLE READING.

Following her arrest for DUI, Davis was properly offered a breath test pursuant S.C. Code § 56-5-2950. Davis elected to take the DataMaster breath test, which resulted in a blood-alcohol reading of .17%. At the May 12, 2011 hearing, the trial court granted Davis' motion to suppress her reading based on the allegations that the DataMaster breath test machine was inaccurate or had been tampered with. However, after granting Davis' motion to suppress, the trial court acknowledged there was no evidence of tampering, only that the question of an anomalous entry could not be explained. (R. p. 57, lines 18-20). The Circuit Court declined to rule on this issue as it affirmed the trial court's dismissal of Davis' charge based on the affidavits. (See R. pp. 2-4).

Davis' allegations of tampering were based on the DataMaster reports maintained by the South Carolina Law Enforcement Division (SLED) for the machine used in her breath test. The SLED report contained an entry by an individual listed as "K-U-L" for a

simulator solution change[7] made on October 2, 2008, registering an anomalous solution bottle and lot numbers and a non-existent DataMaster certification number. (R. p. 35, lines 1-25; p. 36, lines 1-20). The entry reveals that a non-Implied Consent test was run and marked as a refusal. Entries after October 2, 2008, revert back to the proper solution number with verifiable DataMaster operator certification numbers used in each subsequent test.

The City presented testimony from David Bruce Smith, SLED toxicologist and Implied Consent expert in charge of Columbia-area DataMaster machines. Mr. Smith testified that the entry by a "K/U/L" on October 2, 2008, was an anomaly and that no such individual exists according to SLED records, that the solution was not in fact changed on October 2, 2008, that the DataMaster machine was working properly and had not been tampered with, and that Davis' resulting breath test was scientifically accurate. (R. pp. 38-44).

The City also presented testimony from Columbia Police Officer S.A. Wilson, the officer in charge of maintaining the Columbia Police Department Breath Analysis room. Officer Wilson testified that he was the sole officer charged with changing DataMaster

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[7] "The purpose of a simulator test is to ensure the breathalyzer machine produces an accurate, reliable breath-alcohol reading, and ultimately, an accurate blood-alcohol analysis." State v. Huntley, 349 S.C. 1, 5, 562 S.E.2d 472, 474. "The alcoholic breath simulator is a part of the breathalyzer devised for the purpose of providing a standard alcohol-air mixture. By mixing an amount of absolute alcohol with distilled water, a desired concentration of breath alcohol may be achieved. The breathalyzer operator, by pumping room air through the simulator solution, is able to determine whether the breathalyzer machine is functioning properly. For instance, if the simulator solution contains .10 of one percent alcohol, room air pumped through the simulator will result in a corresponding reading on the breathalyzer machine." State v. Parker, 271 S.C. 159, 162, 245 S.E.2d 904, 905 (1978); see Richard E. Erwin, Defense of Drunk Driving Cases, § 18.04 (2001) (simulator test provides a known quantity of alcohol to the testing device to determine the capability of the device to properly analyze a sample at the time of the subject test).

solutions and maintaining the Columbia Police Department Breath Analysis room and he did not change the solution on October 2, 2008. (R. pp. 52-54). In addition, when the solution was eventually replaced, the original solution bottle, not the anomalous bottle, was the one removed from the DataMaster machine. (R. pp. 10-14; p. 54, lines 1-15).

The entry on October 2, 2008, appears to have been a prank. (R. p. 6, lines 9-10, 20-25; p. 11, lines 21-22; p. 12, line 4). Regardless, it is clear that the simulator test is "used to determine the reliability of the breathalyzer machine's test results; it neither calibrates the breathalyzer machine nor affects the capability of the machine to properly measure the subject's blood-alcohol level." State v. Huntley, 349 S.C. 1, 5, 562 S.E.2d 472, 474. See also State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978). Here, the correct simulator solution was in place in the machine and the expert witness from SLED established that the machine had not been tampered with, was working properly and yielded a scientifically reliable test result. There is no evidence to the contrary and Davis' motion is based on no more than speculation. Davis has not shown prejudice and the test result should have been admitted into evidence. Huntley, supra, at 474. (Exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, absent proof of prejudice by the defendant).

Therefore, because it is evident that Davis' blood-alcohol result was scientifically accurate, and because the alleged anomaly did not in any way affect the accuracy of the DataMaster machine, and based on the trial court's acknowledged finding that there was no evidence of tampering, the trial court's ruling was not supported by the evidence and Davis' blood-alcohol test result was improperly suppressed. (R. pp. 44, lines 7-8; p. 49, lines 17-25; p. 50, lines 1-4).

For these reasons, the trial court's suppression of Davis' breath test result should be reversed.

IV. THE TRIAL COURT ERRED WHEN IT SUPPRESSED THE VIDEO FROM THE BREATH TEST SITE WHEN REDACTION OF PORTIONS OF THE VIDEO OR CURATIVE INSTRUCTIONS WOULD HAVE BEEN SUFFICIENT TO REMOVE ANY ALLEGED PREJUDICE.

After suppression of Davis' blood-alcohol reading, Davis moved to suppress her entire breath test site video recording on the basis that it was "highly prejudicial." (R. p. 56; lines 16-18). The basis of the prejudice was not articulated. (R. p. 57, lines 23-25). The trial court granted the motion without explaining the bases of the ruling. The Circuit Court declined to rule on the issues of suppression, declaring them moot, as it affirmed the trial court's dismissal of the charge based on the affidavit issue. (See R. pp. 2-4).

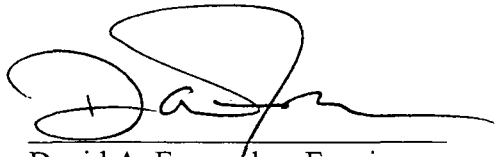
It is clear that the Legislature, in enacting the videotaping requirement statute, section 56-5-2953, desired that any video recording relating to DUI be provided to the triers of fact whenever possible. See City of Rock Hill v. Suchenski, 374 S.C. 12; See also Town of Mt. Pleasant v. Roberts, 393 S.C. 332. In the case at hand, Davis' breath test was properly run in accordance with all Implied Consent laws, S.C. Code Ann. § 56-5-2950, and there are no allegations otherwise. It appears the trial court suppressed the breath test site video recording largely based on its prior suppression of the results of the blood-alcohol test. Should the blood-alcohol test be ruled admissible, there would be no basis for suppression of the video. Even if that were not the case, any alleged prejudice that may result from Davis being shown taking a breath test, but without any resulting reading, would be easily cured by redacting the relevant portion of the video or by a curative jury instruction.

For these reasons, Davis' breath test site video recording was improperly suppressed and should be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the rulings of the lower courts and remand for trial. The March 31, 2010, affidavit was only submitted to Davis in error and not as a result of any intent to mislead or misrepresent. Further, the matter was cured by both the subsequent submission of the April 5, 2010, affidavit, and representations by the City as to the validity of this affidavit. In addition, there is no authority for an "Affidavit for Failure to Produce Videotape" to irrevocably bind a governmental entity, such that correction could never be made, to an incorrectly submitted affidavit. Davis' breath test results were scientifically reliable and accurate as determined by the SLED implied consent expert, and her breath test site video complied with all relevant statutory safeguards and requirements and should not have been suppressed. Because the suppression of the breath test result and breath site video severely compromised the prosecution's case, the ruling of the trial court should be reversed and remanded for trial.

Respectfully submitted,



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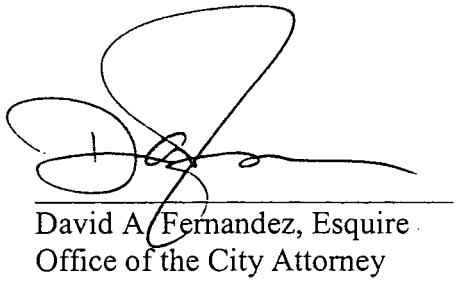
CERTIFICATE OF COUNESEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the *Final Brief of Appellant* on Carol A. Davis by depositing a copy of it in the United States Mail, postage prepaid, on September 19, 2012, addressed to her attorney of record, John A. O'Leary, Esquire, at his office at 714 Calhoun Street, Columbia, South Carolina 29201.

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