THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Case nos. 2011-CP-40-3692 & 2012-211166

THE CITY OF COLUMBIA, ... Appellant,

V.

CAROL A. DAVIS ..... Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower courts err in determining that two inconsistent affidavits, signed two years after the arrest at issue, and lacking any identifying marks associating the affidavits with the arrest at issue do not comply with S.C. Code Ann. § 56-5-2953?

II. Did the Circuit Court err in applying *City of Rock Hill v. Suchenski* to dismiss Ms. Davis's case where *City of Rock Hill* and S.C. Code Ann. § 56-5-2953 are related?

III. Did the Circuit Court err in determining that the issue surrounding the City of Columbia's argument against the suppression of the breath test result and the Datamaster room video are moot?

STATEMENT OF THE CASE

On May 12, 2011, Respondent Carol A. Davis appeared before the trial court for a pretrial hearing following her October 8, 2008, arrest and charge for driving under the influence. The trial court suppressed the Datamaster breath test result as well as the Datamaster test room video from the incident. The trial court then dismissed the charge against Ms. Davis. (R., pp. 5 - 63).

The City of Columbia appealed, and the Circuit Court affirmed the trial court's dismissal of Ms. Davis's charge following a hearing on February 3, 2012. (R., pp. 64-100) The Order affirming the trial court's dismissal dates March 15, 2012. (R., pp. 2-4)

This appeal is now before the court following the City of Columbia's Notice of Appeal filed April 11, 2012.

FACTS

Between 3:15 and 3:20 a.m. the morning of October 8, 2008, City of Columbia Police Officer Ross was dispatched to tend to a rear-end incident between a taxi and Respondent, Ms. Carol A. Davis, on the 600 block of Harden Street. Ms. Davis stated

that the incident was a result of her texting while driving. Officer Ross suspected that Ms. Davis was under the legal age of alcohol consumption and that she had consumed alcohol. Officer Ross arrested Respondent following a roadside sobriety test and transported her to Columbia Police Department for a Datamaster breath test.

Officer Ross's patrol vehicle was not equipped with a standard front dashboard patrol vehicle camera, and, as a result, a roadside video of this stop, a video which typically accompanies similar stops and is required by statute, is unavailable. In relation to the lack of video equipment in the patrol car, counsel for Ms. Davis received an affidavit from the City of Columbia dated March 21, 2010. (R., p. 101) The affidavit was a form indicating via check-mark that the equipment in the patrol car was inoperable at the time of the stop. The City subsequently sent another affidavit to Ms. Davis's counsel dated April 5, 2010. (R., p. 103) This affidavit indicated via check-mark that the patrol vehicle was not equipped with video.

Both of the affidavits Ms. Davis's counsel received were dated 2010, two years after the incident occurred. Additionally, neither affidavit bore a legible signature indicating the arresting officer. Neither included a date of arrest, any identifying information indicating that Ms. Davis is the individual that was arrested, the location of the arrest, case or ticket number, or any type of information or verifying details that sufficiently associates the affidavits with the arrest at issue.

Additionally, though Ms. Davis consented to and did provide a breath test sample in the Datamaster room at the police station, an anomaly exists within the machine's recordkeeping. Every transaction made with the machine is electronically recorded and includes information identifying the person running the machine, the machine's

registration number, and details relating to the solution that is kept in the machine and changed every few months. The machine is kept under lock and key; only a few authorized individuals can access it or change the solution.

In the case of the Datamaster machine used for Ms. Davis, an entry on its records bears the initials KUH. These initials do not match any police officer or any person with access to the machine at issue. The records also show a registration number not associated with, and too high to match, any Datamaster machine on record. Finally, the solution that is kept in the machine as part of its self-regulation had not been changed at the time that "KUH's" record indicated it having been changed. Discussion of these facts led the trial court to suppress the Datamater test results and the Datamaster room video of Ms. Davis's sample. (R., pp. 5 - 63)

ARGUMENT

I. THE LOWER COURTS DID NOT ERR IN DETERMINING THAT THE TWO AFFIDAVITS SUBMITTED BY THE CITY OF COLUMBIA DO NOT COMPLY WITH S.C. CODE ANN. § 56-5-2953 WHERE BOTH AFFIDAVITS WERE INCONSISTENT, DATED TWO YEARS AFTER THE INCIDENT, AND LACKED ANY VERIFYING DETAILS TYING THE FORM AFFIDAVITS TO THE ARREST AT ISSUE.

Pursuant to South Carolina Code, a video recording device must be installed in patrol cars and a video is to be taken of the roadside site of the incident and of the breath test site when an arrest for driving under the influence is effectuated. S.C. Code Ann. § 56-5-2953(A) (2009). However, exceptions to the videotaping requirement exist where the arresting officer submits a sworn affidavit attesting that at the time of the arrest, the video equipment was (1) inoperable with reasonable efforts having been made to rectify the inoperability, (2) unavailable at the time of arrest or (3) another physical impossibility

arising from exigent circumstances or need for medical attention precluded the ability to record the roadside incident. S.C. Code Ann. § 56-5-2953(B) (2009). "Failure by the arresting officer to produce the video recording required by the section is not alone a ground for dismissal of any charge." *Id.*

In order to prove a § 56-5-2953(B) exception where a roadside video is unavailable, the arresting officer may complete an "Affidavit for Failure to Produce Videotape." This affidavit is a form where the officer checks a box indicating that video's unavailability results from one of the § 56-5-2953(B) exceptions, or because the patrol car was not equipped with a recording device at the time of the incident. Only one form is needed.

Where more than a single affidavit is submitted in regards to one topic, South Carolina, the Fourth Circuit, and other federal courts have upheld the sham affidavit or competing affidavit rule. This rule provides that "a court may disregard a subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement." *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). "The competing affidavit rule is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used only when the affidavit is an attempt to create a sham issue of material fact." *Id.* Such a general prohibition of judicial conduct mirrors Canon 1 of the South Carolina Code of Judicial Conduct, where "[a] judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." S.C. Code J. Conduct Canon 1.

In Ms. Davis's case, the City of Columbia first submitted an "Affidavit for Failure to Produce Videotape" dated March 31, 2010. This affidavit was check-marked to indicate that the video equipment in the patrol vehicle was inoperable and therefore a roadside video was unavailable. (R., p. 101). This affidavit did not contain any information relating to the October 8, 2008, arrest of Ms. Davis, and the arresting officer's signature was illegible. *See Id.* The affidavit lacks any features verifying that the 2010 affidavit corresponds with the 2008 arrest. *See Id.*

Approximately one week later, on April 7, 2010, the City of Columbia forwarded Ms. Davis's counsel "the 'correct' affidavit" to replace the March 31, 2010, affidavit "which was sent in error." (R., pp. 103-104). Enclosed was a similar, though more brief, affidavit check-marking that the reason the roadside video does not exist is because "at the time of the defendant's arrest the vehicle [the officer] was operating had not yet been equipped with a videotaping device and therefore . . . the videotaping requirement regarding vehicles is not applicable." (R., p. 103). Again, the affidavit contained no verifying detail or information to show that it related to Ms. Davis's 2008 arrest, and the signature was illegible. *See Id.*

Ms. Davis's case was dismissed pre-trial, the court noting that there are "two conflicting affidavits and [thinking] that *the procedure of obtaining these affidavits is flawed.* . . . There should have been a case caption or at least a name and a ticket number on them." (R., p. 63, lines 6-9, (emphasis added)). The trial court did not abuse its discretion in dismissing Ms. Davis's charge based upon the conflicting affidavits, noting the gap of time between the 2008 arrest and the 2010 affidavits and stating "it would also

be a good idea for [this affidavit] to be filled out at the time the situation occurs if there's no video in the car." (R., p. 61, lines 11-13).

The Circuit Court's order affirming the trial court's dismissal reasons the same, going so far as to indicate that "[n]either [affidavit] had a date of the arrest, the defendants name (or the name of the person arrested), the arresting officer's name, the location of the arrest, the case number for the arrest, nor any type of indicator regarding to which case these Affidavits applied. *Clearly they are inconsistent Affidavits. One or both of them is false.*" (R., p. 3, (emphasis added)). The Circuit Court noted the illegible signatures on the form affidavits, and found that "[b]ased on the totality of the circumstance and the irregularities referenced above, it is apparent that [the trial court] acted reasonably, correctly, and in no way abused her discretion in refusing to accept the affidavits as complying with the provisions of Section 56-5-2953." *Id.* The circuit court went on to note that "they are not trustworthy and do not provide sufficient information to allow any court to make any intelligent decision as to whether the reasons asserted apply to the arrest of this defendant and are reasons for the video tape not being available." *Id.*

The lower courts did not err in using a totality of the circumstances analysis to refuse to accept the affidavits. Unlike the general prohibition against a judge's exclusion of a contradictory affidavit from consideration, the lower courts looked to each submitted affidavit and determined that neither included sufficient identifying detail to substantiate the methodology used by the City of Columbia Police Department. Even if the lower courts looked solely to the latter, April 5, 2010, affidavit submission, the court was faced with the same dearth of verifying detail on the face of the replacement affidavit. The

review of both affidavits was not to remedy an issue of material fact as required by the sham affidavit rule, nor was it the prohibited exclusion of a contradictory affidavit. Instead, the court's decision was based upon a review undertaken with the purpose of determining if one or both affidavits on their face were trustworthy enough to serve as proof of compliance with § 56-5-2953(B). The courts did not find this to be the case. (R., p. 4)

The lower courts decidedly preserved the integrity of the judicial system by rejecting sworn documents found insufficiently trustworthy. Such protection of judicial integrity cannot be found to exist as an abuse of discretion when given the facts above. The affidavits clearly lacked any verifying information and were not specifically created to relate to Ms. Davis's case, but instead represent an untrustworthy practice within the City of Columbia whereby prepared forms are marked and sworn to by police officers years after an arrest, when recollection of the specific arrest at issue is destined to be faulty. Accordingly, the appellant's argument asserting abuse of discretion must fail.

II. THE CIRCUIT COUT DID NOT ERR IN APPLYING THE HOLDING OF *CITY OF ROCK HILL V. SUCHENSKI* TO MS. DAVIS'S CASE WHERE *CITY OF ROCK HILL* WAS THE LEADING CASE ON POINT AT THE TIME OF THE INCIDENT AND ITS APPLICATION WAS DIRECTLY RELATED TO THE GROUNDS FOR THE CIRCUIT COURT'S DISMISSAL.

A. Appellant did not properly preserve this issue on appeal.

"The circuit court has the authority to hear motions to alter or amend the judgment when it sits in an appellate capacity, and these motions are required in order to preserve issues for further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party." *Williams v. Williams,* 329 S.C. 569, 579, 496 S.E.2d 23, 29 (Ct. App. 1998).

Appellant's brief explains that "because the trial court based its dismissal . . . solely on the propriety of the affidavits submitted by the City . . . this is the only issue properly preserved for appellate review. (Br. of Appellant, p. 7, July 3, 2012) The record on appeal is void of any attempt by appellant to make a motion or object to *Suchenski's* application. As such, the issue is not properly preserved for consideration by this Court, as noted by Appellant's initial brief. However, the circuit court embodies the appellate capacity to alter or amend the judgment, therefore, in affirming the trial court's dismissal, the circuit court rightfully amends its reasoning to include *City of Rock Hill v. Suchenski.*

B. Regardless of Appellant's failure to properly preserve this issue on appeal, the circuit court identified *Suchenski* as the applicable law in relation to Ms. Davis and the statutory requirements governing her arrest.

Where no roadside video recording is available, and no exception within S.C. Code Ann. § 56-5-2953(B) applies, S.C. Code Ann. § 56-5-2953(A) must be strictly followed by the arresting officer. S.C. Code Ann. § 56-5-2953 (2009); *City of Rock Hill v. Suchenski,* 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007). In *Suchenski,* the defendant's charge of driving with an unlawful alcohol concentration (DUAC) was reversed by the circuit court because the City of Rock Hill police officer did not provide a videotape of the roadside incident. *Id.* at 14, 646 S.E.2d at 879. The Supreme Court of South Carolina affirmed the circuit court ruling, holding that "dismissal of the DUAC charge is an appropriate remedy provided by § 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions." *Id.* at 17, 646 S.E.2d at 881. *Suchenski* is the applicable law governing the case at hand because *Town of Mt. Pleasant v. Roberts* had not been decided. (R., p. 94, lines 6-8, (circuit court stating that in regards to Ms.

Davis's case, "all the law required at the time is that if there was no videotape, then there had to be the affidavit.") (*Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 713 S.E.2d 278, decided in 2011)).

However, the circuit court's order of affirmation correlates *Suchenski* and the statutory requirements as its basis for dismissal. Since the submitted affidavits were determined to fail § 56-5-2953(B) compliance[1], the lower court took the next logical step and dismissed the charge, as the procedure used at the time of Ms. Davis's arrest also failed to comply with § 56-5-2953(A) requirements. The circuit court makes this point clear in its order: "it was clear that Judge Hanna was left with a situation in which § 56-5-2953(A) mandates that the entire incident be videotaped at the incident site as well as the breath site. Pursuant to *Rock Hill v. Suchenski,* it is required that the case be dismissed." (R., pp. 2-4) Since no recording existed, the court must dismiss the case in line with the requirements of § 56-5-2953 and *Suchenski.*

III. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT BECAUSE MS. DAVIS'S CASE IS DISMISSED ON DIFFERENT GROUNDS, THE APPELLANT'S ISSUES RAISED IN REFERENCE TO SUPPRESSION OF THE BREATH TEST RESULTS AND DATAMASTER ROOM VIDEOTAPE ARE MOOT.

The circuit court declined to rule on the latter two issues argued by the Appellant and, as such, they are not properly preserved for appeal. The issues are also moot, stemming from the lower courts' dismissal of Ms. Davis's Case. "The court does not concern itself with moot or speculative questions." *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (citing *Sloan v. South Carolina Dep't of Transp.*, 379 S.C. 160, 167–68, 666 S.E.2d 236, 239–40 (2008)). "A case becomes moot

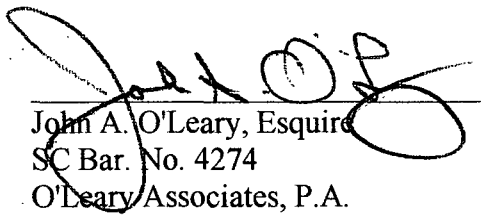
[1] Refer to Argument I.

when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Id.*

Because the lower courts dismissed Ms. Davis's case on the issue of the unreliability of the Affidavits for Failure to Produce Videotape, consideration of the Datamaster room video and test results had no practical effect upon the charge.

CONCLUSION

Because the circuit court did not abuse its discretion in determining that the City of Columbia produced untrustworthy Affidavits for Failure to Produce Videotapes and affirmed the trial court's dismissal of Ms. Davis's case on these grounds, and because the circuit court declined to rule on the other issues raised by the Appellant, the circuit court ruling should be AFFIRMED.



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CERTIFICATE OF COUNSEL

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

September 11, 2012

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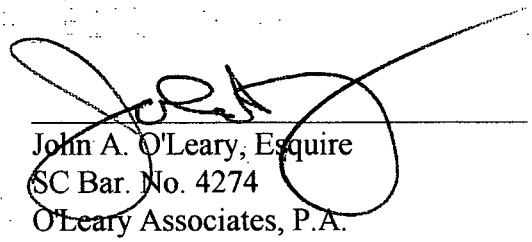
PROOF OF SERVICE

I certify that I have caused to be served Respondent's Final Brief by causing a copy of it to be deposited in the United States Mail, postage prepaid, on September 13, 2012, addressed to Appellant's attorney of record, David A. Fernandez, Office of the City Attorney, P. O. Box 667, Columbia, SC 29202.



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