

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.

REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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ARGUMENT

I. THE “COMPETING AFFIDAVIT” RULE WAS NOT PRESERVED FOR REVIEW, IS INAPPLICABLE TO THE CASE ON APPEAL, AND IN THE ALTERNATIVE, IF APPLIED, SUPPORTS THE CITY’S POSITION.

A. Davis did not raise the “competing affidavit” rule below as a ground for dismissal of her charge.

In *Respondent’s Initial Brief*, Davis raises for the first time the argument that her charge of Driving Under the Influence (DUI) was properly dismissed by the trial court, and subsequently upheld by the Circuit Court, pursuant to the “competing affidavit” rule, also referred to as the “sham affidavit” rule.

Davis based her argument for dismissal, at her original hearing, solely on the allegation that the two submitted affidavits are “contradictory.” (R. p. 58, lines 12, 21). At her Circuit Court appeal hearing, Davis repeated her allegations that the two affidavits are contradictory, and expanded on the trial court’s ruling by now adding that they lack suitable identification and are unreliable due to the length of time they were prepared after her arrest. (R. p. 78, lines 20-25; p. 79, lines 4-10, 24-25; p. 80, lines 1-3, 14-18). During her original hearing or Circuit Court appeal, Davis did not raise or argue the applicability of the “competing affidavit” rule, nor did she provide any authority for this rule to apply.

An issue may not be raised for the first time on appeal. Talley v. S.C. Higher Ed. Grants Comm., 289 S.C. 483, 347 S.E.2d 99 (1986); See also Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980) (Issues not raised below could not be raised for the first time on review); See also State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (A party may not argue one ground below in trial and then an alternative ground on appeal).

B. Regardless of preservation, the “competing affidavit” rule is inapplicable to the case on appeal and dismissal on its basis would be improper even if it had been raised.

Davis relies on the holding in Cothran v. Brown to support her argument that the “competing affidavit” rule supports the dismissal of her DUI charge. See Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004).

To begin, the “competing affidavit” rule concerns civil, not criminal, matters. Id. The “competing affidavit” rule, as contemplated by the Supreme Court and Fourth Circuit, applies only to situations where a subsequently submitted affidavit, which contradicts that party’s own prior statement, is regarded as an attempt to thwart *summary judgment* by attempting to create an issue of fact. Id. at 218. (emphasis added). Applying the “competing affidavit” rule to the criminal context would be improper as it goes beyond settled South Carolina case law.

Davis specifically alleges that dismissal of her DUI charge was permissible under the “competing affidavit” rule because the affidavits submitted in her case were “an attempt to create a sham issue of material fact.” Id. at 218. There is nothing in the record to support such a claim.

The second “Affidavit for Failure to Produce Videotape,” dated April 5, 2010, submitted pursuant to S.C. Code Ann. § 56-5-2953, was a clarifying affidavit rather than a contradictory one. Both affidavits clearly represent that there exists no roadside video concerning Davis’ arrest for DUI. The main divergence between the affidavits concerns the reason why there is no roadside video.¹ Not only was the correct affidavit of April 5,

¹ The affidavit of March 31, 2010, indicates that no roadside video exists because the vehicle’s video recording equipment was in an inoperable condition. The subsequently submitted, correct affidavit of April 5, 2010, indicates that no roadside video exists because the vehicle the officer was operating had not yet been equipped with a

2010, submitted more than one year before her hearing, but the difference between the two affidavits would in no way prejudice or affect Davis' position, as any expected motion to dismiss would be based on the same authorities and video recording statute. Therefore, the basis of dismissal of Davis' DUI from both of the lower courts, whether based on the "competing affidavit" rule or a general notion of impropriety, was improper and unsupported by case law and facts in the record. See R. p. 63, lines 6-9; R. pp. 2-4.

C. If applied, the "competing affidavit" rule supports the admissibility of the subsequently submitted, correct affidavit, and dismissal of the charge based on alleged contradictory affidavits was improper.

Even if Davis and the lower courts are credited with raising, contemplating and considering the "competing affidavit" rule, it was improper to base dismissal of the DUI on the circumstances surrounding the submitted affidavits, pursuant to Cothran v. Brown itself. Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004).

The Court in Cothran v. Brown found that the "competing affidavit" rule did not apply in that case. The Court reasoned that there existed legitimate grounds for the subsequent submission of a superficially contradictory affidavit, and that it cannot be said that the "second affidavit was admitted for the *sole purpose* of creating a 'sham' issue of fact." Id. at 219 (emphasis added). In Davis' case, it is an absurd allegation that the affidavit of April 5, 2010, was offered for the sole purpose of creating a sham issue of fact. To the contrary, all representations by the prosecutor for the City, as an officer of the court, indicated that the March 31, 2010 affidavit was forwarded to Davis only in

videotaping device.

error² and that information contained in the April 5, 2010 affidavit was correct and accurate to Davis' arrest. (R. p. 60, lines 21, 24-25; p. 61, lines 1-9).

The Cothran Court further offered a number considerations to provide courts with guidance as to how to distinguish a sham affidavit from a correcting or clarifying one: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted. Id. at 218, citing Pittman v. Atlantic Realty Co., 359 Md. 513, 754 A.2d 1030, 1042 (2000). Following the Court's guidelines: (1) the City offered a credible and substantiated explanation of why a subsequently submitted affidavit was necessary and correct, (2) an "Affidavit for Failure to Produce Videotape" is arguably statutorily necessary in order for the State to assert exceptions to the videotaping requirement statute, § 56-5-2953; (3) no deception exists as the first affidavit applied to another DUI case and was submitted solely in error; (4) variations between the submitted affidavits are minor as they relay the substantially same information, that there exists no roadside video; (5) there exists no confusion by the affiant as the first affidavit was submitted purely in error by the prosecution, not the affiant himself; (6) although summary judgment is inapplicable in the criminal context, the second affidavit was submitted to Davis more than one year

² Davis designates and includes in her brief correspondence from the City, dated April 7, 2010, indicating that the March 31, 2010 affidavit was sent in error, supporting the assertions from the prosecution.


before her hearing. Davis now argues that the holding in Cothran v. Brown should be applied as the sustaining basis for her dismissal, and if it were applied, the result would necessarily support the City's argument as to the validity of the second affidavit and the improper dismissal of the charge.

CONCLUSION

For the reasons stated above, and in addition to the grounds argued in the *Final Brief of Appellant*, this Court should reverse the rulings of the lower courts and remand for trial. The "competing affidavit" rule was not properly raised or considered by either of the lower courts and is inapplicable in the criminal context. The second affidavit submitted by the City was clarifying affidavit, not contradictory, and not offered for the sole purpose of creating a sham. Finally, if applied, the holding in Cothran v. Brown supports all aspects of the City's position concerning the correct second affidavit, and would require reversal based on the incomplete and improper analysis and conclusions conducted by the lower courts.

Respectfully submitted,

September 19, 2012



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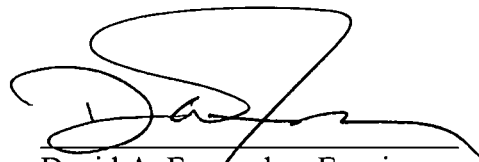
v.

Carol A. DavisRespondent.

PROOF OF SERVICE

I certify that I have served the *Reply 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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