

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-211546

THE STATE,

Appellant,

v.

MICHAEL J. HILTON,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the circuit court commit an error of law in applying a statutory amendment retroactively where the amendment was procedural and applied to evidentiary matters, and did the state fail to preserve this purported error for appellate review where the circuit court did not rule on the savings clause and Appellant did not seek a ruling on the savings clause?

II.

Did the circuit court commit reversible error in excluding from trial the results of a breath test where there is evidence in the record supporting the circuit court's conclusion that the test was not performed within two hours of Respondent's arrest?

STATEMENT OF THE CASE

Respondent agrees with Appellant's Statement of the Case. Respondent would add that the original hearing on Respondent's motion to exclude the breath test results was scheduled for October 3, 2011. Respondent sought and was granted a continuance of the hearing after the prosecutor produced a letter minutes before the hearing began purporting to set forth the time of Respondent's arrest. The October 3, 2011 letter and its significance are discussed in more detail below.

STATEMENT OF FACTS

On the evening of May 10, 2008, Officer Peter Christopher Schmidt (Officer Schmidt) of the Myrtle Beach Police Department arrested Respondent and charged him with two counts of felony driving under the influence, one count resulting in death and the other resulting in great bodily injury, in violation of South Carolina Code Section 56-5-2945.¹ R. p. 135, lines 2-3; pp. 288-89. Following arrest, Officer Schmidt transported Respondent to the Myrtle Beach Police Department and offered him a breath test. After several failed attempts in which the DataMaster breath-test machine gave erroneous measurements of the simulator solution, Officer Schmidt changed the simulator solution and at 12:32 a.m. on May 11, 2008, the officer administered a breath test to Respondent. R. p. 149, line 13-p. 151, line 5.

After the test, Officer Schmidt provided Respondent with four "Breath Alcohol Analysis Test Reports" (BAAT Reports). R. pp. 284-87. Three of the BAAT Report evidence failed simulator tests. The fourth BAAT Report, generated after the DataMaster machine allegedly began working properly, generated a result in response to Respondent's breath sample. Each of these BAAT Reports lists Respondent's time of arrest as 10:15 p.m. on May 10, 2008. R. pp. 284-87.

On October 3, 2011, when the Respondent's motion to suppress was originally scheduled to be heard, the prosecutor provided defense counsel with a letter signed by the prosecutor. The letter purported to "amend" Respondent's time of arrest from 10:15, as stated in all four BAAT Reports, to 10:47 p.m., "as recorded on the roadside video." R. p. 295. However, the prosecutor was not present at the time of Respondent's arrest. Officer Schmidt testified he had no independent recollection of the time of arrest. R. p. 140, lines 1-3; p. 147, line 7-p. 148, line 4.

¹ Contrary to Appellant's Statement of Facts, it has not been established and Respondent has not conceded that he was operating the vehicle involved in the wreck.

On April 10, 2008, one month prior to Respondent's arrest, the General Assembly amended the implied consent statute, South Carolina Code Section 56-5-2950, along with several other Code Sections. In relevant part, the amendment provided:

AN ACT . . . TO AMEND SECTION 56-5-2950, RELATING TO A DRIVER'S IMPLIED CONSENT TO TESTING FOR ALCOHOL OR DRUGS, **SO AS TO MAKE TECHNICAL CHANGES**, TO PROVIDE WHEN BREATH SAMPLES MUST BE COLLECTED UNDER THIS PROVISION, TO DELETE THE PROVISION THAT PROVIDES THAT AN OFFICER MAY NOT REQUIRE ADDITIONAL TESTS OF A PERSON UNDER CERTAIN CIRCUMSTANCES, TO DELETE THE TERM "DEPARTMENT OF PUBLIC SAFETY" AND REPLACE IT WITH THE TERM "SOUTH CAROLINA CRIMINAL JUSTICE ACADEMY", **TO REVISE THE PROVISIONS THAT PROVIDE THE PROCEDURES FOR ADMINISTERING BREATH TESTS OR OBTAINING SAMPLES**, TO REVISE THE INFORMATION THAT A PERSON CHARGED WITH VIOLATING THIS PROVISION MUST BE GIVEN, TO PROVIDE THE CIRCUMSTANCES IN WHICH A PERSON MUST PAY FOR THE COST OF TESTS PERFORMED UNDER THIS SECTION AND PROVIDE FOR THE DISBURSEMENT OF THESE MONIES, TO DELETE THE PROVISION THAT PROVIDES THAT A CERTAIN LEVEL OF ALCOHOL CONCENTRATION IS A VIOLATION OF SECTION 56-5-2933, AND TO REVISE THE CIRCUMSTANCES IN WHICH CERTAIN EVIDENCE MAY BE EXCLUDED IN A PROCEEDING THAT OCCURS UNDER THIS SECTION;

Act No. 201, 2008 S.C. Acts _____. (emphasis added) [hereinafter the "Act"]. Pursuant to the Act,

S.C. Code § 56-5-2950(A) was amended to provide that:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or 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 sample taken for testing must be collected within two hours of the arrest.

S.C. Code Ann. § 56-5-2950(A) (Supp. 2011). The Act became effective on February 9, 2009.

Section 23 of the Act contained a savings clause which provided that:

The repeal or amendment by this act of any law, whether temporary or permanent, civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter discharge, release or extinguish any penalty, forfeiture,

or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by the act must be taken or treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of any rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Act No. 201, § 23, 2008 S.C. Acts ____.

At the hearing on his motion to suppress, Respondent argued the results of the DataMaster should not be admitted at trial because the test was not performed within two hours of his arrest, as required by the Act. He further argued the particular DataMaster machine that performed the test was inherently unreliable based on the unusually high rate of error reports generated by the machine.

Appellant argued there was no temporal requirement for the administration of a breath test, although there was a practical limit of three hours separately imposed by the videotaping statute, S.C. Code Section 56-5-2953. Appellant further argued the DataMaster machine was reliable, as evidenced by the correct reading on the simulator solution test conducted after Officer Schmidt changed the solution.

The circuit court found the DataMaster machine was in proper working order as indicated by the fact that the machine gave a correct reading after the simulator solution was changed and that the previous errors generated by the machine were the result of the simulator solution and not the DataMaster machine. R. pp. 1-2. However, the circuit court found the results of the DataMaster test should be excluded because the test was not administered within two hours of the Respondent's arrest. In addition, the circuit court found that Respondent was not provided with a written report setting forth the time of arrest, the time of testing, and the results of the testing, as required by South Carolina Code Section 56-5-2950(I). R. pp. 2-4. The circuit court's

order did not address Appellant's argument that the savings clause applied to prohibit retroactive application of the Act. Appellant did not make a motion asking the circuit court to specifically rule on the application of the savings clause and whether the savings clause prohibited retroactive application of the Act.

ARGUMENT

I.

The circuit court correctly held that the statutory amendment applied retroactively where the amendment, by its express terms, was procedural in nature and applied only to evidentiary matters and Appellant is barred from arguing that the savings clause prohibits retroactive application having failed to preserve this argument by not seeking a specific ruling on it from the circuit court.

South Carolina appellate courts have consistently held that “statutes that are remedial or procedural in nature are generally held to operate retrospectively.” S.C. Dep’t of Revenue v. Rosemary Coin Machines, Inc., 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000). Further, amendments relating to the admissibility of evidence are procedural in nature and apply retroactively. See, e.g., State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004).

Here, the Act specifically provides that the changes made to the implied consent statute are “technical” and revise the “procedures for administering breath tests or obtaining samples.” In construing a statute, the Court will “presume the General Assembly is ‘aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.’” Grier v. AMISUB of S. Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (quoting State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997)). A straightforward application of the principle described in Grier supports the circuit court’s conclusion. By explicitly describing the changes to the implied consent statute as “procedural” changes, the General Assembly intended those changes to be retroactively applied.

The issue before the Court in Frey, supra, is virtually indistinguishable from the issue here. In Frey, the Court of Appeals held that an amendment to Section 56-5-2950 applied retroactively to the defendant where the amendment addressed procedural, rather than

substantive, rights and where the amendment was remedial in nature. Id. The Court reached this conclusion even though the statute was amended after the conclusion of the defendant's trial.

The amendment at issue in Frey, like the amendment at issue here, dealt with the admissibility of evidence in a prosecution for driving under the influence (DUI). In Frey, Act No. 61, 2003 S.C. Acts __, changed the procedural requirements for collecting human samples as evidence for chemical testing in DUI cases. Appellant attempts to distinguish Frey by maintaining the statutory amendment in Frey contained no savings clause. Appellant's Br. 15. But Appellant is wrong. Section 10 of Act No 61 provided that:

All proceedings pending and all rights and liabilities existing, acquired, or accrued at the time this act takes effect are saved. The provisions of this act apply prospectively to crimes and offenses committed on or after the effective date of this act.

Notwithstanding the savings clause, the Frey Court reasoned that "[s]ince the statutory mandate in question is inextricably connected to the accuracy and reliability of . . . blood test results, we remand to the trial court" with instructions to apply the statute **as amended**. Id. at 518, 608 S.E.2d at 878 (emphasis added). The Court further reasoned that "[b]ecause [the amendment] addresses procedural rather than substantive rights, it is remedial in nature, and therefore retroactive in its application." Id. at n.3. The Frey opinion did not discuss or even mention the savings clause. The issue turned solely on the procedural, as opposed to substantive, nature of the amendment.

Subsequent to Frey, this Court decided a similar issue in State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009), cert. denied, April 8, 2010, and again held that statutory amendments concerning the admissibility of evidence, but not making substantive changes to the charged offense, apply retroactively. Bryant considered the retroactive application of S.C. Code Section 17-23-175 (2003), a statute enacted after the defendant was criminally charged but

before his trial. The statute allowed a child sexual abuse victim's videotaped, out-of-court statements to be admissible at trial under certain circumstances. Prior to the statute's enactment, such statements were inadmissible hearsay. This Court held that the statute applied retroactively to Bryant's pending prosecution. The Court reasoned that the amendment was not penal in nature, but instead dealt with "procedural, evidentiary matters." Id. at 512, 675 S.E.2d at 820. Significantly, the statute implicated in Bryant also contained a savings clause identical to the savings clause used in the Act in this case. See Act No. 342, 2006 Acts, § 10.

The Supreme Court has also recognized that statutory amendments affecting procedural rights and determining the admissibility of evidence are to be applied retroactively. After the Court of Appeals' decision in Bryant, the Supreme Court decided State v. Stahlnecker, 386 S.C. 609, 690 S.E.2d 565 (2010). Stahlnecker dealt with the same issue addressed in Bryant: retroactive application of Section 17-23-175 allowing out-of-court statements of children to be admitted as evidence at trial. In holding that this evidence was admissible against the defendant even though the statute was enacted after he was indicted, the Court cited Bryant with approval.

In interpreting section 17-23-175, the court of appeals concluded the section was not penal in nature but rather "deals with procedural, evidentiary matters." State v. Bryant, 382 S.C. 505, 512, 675 S.E.2d 816, 820 (Ct. App. 2009). . . . The amount or type of evidence required at the time of the commission of the offense in order to convict the offender is not altered by section 17-23-175. Because section 17-23-175 merely authorizes the introduction of new evidence and does not alter substantial personal rights, it does not violate the *ex post facto* laws.

Stahlnecker, 386 S.C. at 619-20, 690 S.E.2d at 571. The Court concluded the trial court correctly determined Section 17-23-175 applied retroactively.

Similarly, the Act's amendment to Section 56-5-2950 does not affect substantive rights. It does not change the elements of any offense and it does not change the quantum of evidence needed to sustain a conviction. Nor does the amendment alter the manner in which evidence is

collected. The amendment merely establishes temporal requirements concerning the admissibility of highly ephemeral evidence by revising “the procedure for administering breath tests or obtaining samples” in order to ensure that only reliable evidence is admitted at trial. The amendment, by the clear language used therein, is the sort of procedural, evidentiary amendment to which South Carolina appellate courts have consistently given retroactive effect. Because the arresting officer did not administer Respondent’s breath test within two hours of his arrest, as required by law, the test results are unreliable, inadmissible, and properly excluded by the trial court.

The adopted procedure also reflects the General Assembly’s judgment that a two-hour collection procedure is necessary in order to ensure that ephemeral blood-alcohol evidence is reliable. It is presumed that “the Legislature in adopting an amendment to a statute intended to make some change in the existing law.” Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964). “The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.” Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002). The Act prescribed a time limit for the administration of breath tests relative to the time of arrest. It follows that Appellant’s failure to administer the breath test within two hours of arrest materially affects the accuracy and reliability of the breath test results. To hold that this time limit does not apply in this case would defeat the remedial and procedural purposes of the Act and ignore the intent of the Legislature.

Furthermore, the statutory two-hour time limit does not go to the machine’s capability to measure blood alcohol level, rather, the time limit ensures the breath sample measured by the machine is a reliable indication of the driver’s blood intoxication level *at the time the driver was operating a motor vehicle*. “The timing of the administration of [blood alcohol] tests is crucial

because of the ephemeral nature of blood intoxication levels.” State v. Bull, 350 S.C. 58, 62, 564 S.E.2d 351, 354 (Ct. App. 2002). Accordingly, the breath test must not only be performed by a machine which accurately measures the blood intoxication, but it must also be performed within the statutorily-prescribed timeframe. Here, retired SLED captain Andrew Jordan, the State’s expert in DataMaster machines called to testify by the Appellant, testified that DataMaster tests should be administered “as soon as possible” relative to the time of the alleged offense. R. p. 199, lines 11-13. In recognition of these facts, the General Assembly amended the implied consent statute to provide a time limit in which samples must be collected.²

To the extent Appellant relies upon the savings clause to argue the circuit court erred, that issue is not preserved because the circuit court did not rule upon it. “For an issue to be properly preserved it has to be raised to and ruled on by the trial court.” State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011). See also, State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (“In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.”).

The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments. On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

State v. Porter, 389 S.C. 27, 37-38, 698 S.E.2d 237, 242 (Ct. App. 2010). The circuit court did not rule upon Appellant’s argument that the savings clause prohibits retroactive application of

² Prior to adoption of the Act, South Carolina law already required that breath tests be administered within two hours of arrest where an offender was to be charged with driving with an unlawful alcohol concentration. See S.C. Code Ann. §56-5-2933 (2006). The Act’s amendment brings Section 56-5-2950 in line with the General Assembly’s prior determination with respect to Section 56-5-2933.

the Act. Appellant failed to make a motion seeking a ruling on this issue and therefore it is not preserved for review by this Court.

Even if the issue is preserved, it is without merit for the reasons set forth above. Contrary to Appellant's assertion, the Court in Frey retroactively applied amendments to the implied consent statute – the same statute in issue here – despite a savings clause. In Bryant, this Court gave retroactive application to a statute that made previously-inadmissible evidence admissible. The statute at issue in Bryant contained a savings clause that is word-for-word the same as the savings clause at issue here. In Stahlnecker, the Supreme Court adopted whole-cloth the reasoning in Bryant. The General Assembly is presumed to know the common law, including the abundance of cases holding that procedural changes apply retroactively. The General Assembly described the temporal requirement contained in the Act as a change in “procedure.” It follows that the change should be applied retroactively, and the circuit court should be affirmed.³

³ Appellant cites Murphy v. State, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011) and State v. Branham, 392 S.C. 225, 708 S.E.2d 806 (Ct. App. 2011) to argue that the issue of retroactive application of the Act has already been decided adversely to Respondent. However, neither of those cases analyzes or discusses retroactive application of the Act. It appears the issue was not raised in those cases.

II.

The circuit court did not err in excluding the results of the breath test where there is evidence in the record that the test was not performed within two hours of Respondent's arrest.

There is ample evidence in the record to support the circuit court's conclusion that the DataMaster test was not administered within two hours of Respondent's arrest and, therefore, the ruling should be affirmed.

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973)). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by *any* evidence. Id. The findings of the circuit court are binding on the reviewing court unless unsupported by the evidence or clearly wrong, or controlled by an error of law. State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997) (citing State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994)).

Here, after applying clear precedent of this Court and the Supreme Court to determine the procedural change in the implied consent statute applied retroactively, the circuit court found the breath test was not conducted within two hours and excluded the evidence from trial. There is overwhelming evidence to support this factual determination and the Court of Appeals should affirm the circuit court.

As set forth above, during the motion hearing on October 3, 2011, the prosecutor provided Respondent a letter purporting to change the time of arrest from 10:15 p.m., as evidenced by the BAAT Reports, to 10:47 p.m. Respondent objected to Appellant's post-hoc attempt to change the arrest time on the basis that the prosecutor's letter was provided only minutes before the hearing began, was inadmissible to alter the time of arrest indicated in the BAAT Reports, and was also inadmissible hearsay. Due to the belated nature of the letter's production to Respondent, the circuit court continued the October 3 hearing.

Subsequently, at the October 25 hearing, Respondent introduced four BAAT Reports.⁴ R. pp. 284-87. Each of these BAAT Reports indicates the "arrest time" as 22:15, or 10:15 p.m. Officer Schmidt testified that he had no independent recollection of the arrest time. R. p. 140, lines 1-3; p. 147, lines 7-10. The fourth BAAT Report indicates that the "subject sample" was taken at 00:32 (12:32 a.m. the day after the arrest). R. p. 287.

The only evidence presented to the circuit court that indicated an arrest time other than 10:15 p.m. was a letter dated October 3, 2011 and signed by the prosecutor. R. p. 295. The prosecutor's letter contradicts the four BAAT Reports and purports to establish the time of Respondent's arrest as "22:47:54" (10:47 p.m.). According to the letter, this is the time "recorded on the roadside video." R. p. 295. There is no factual dispute that the prosecutor was not present at the arrest scene and has no personal knowledge of the Respondent's time of arrest. R. p. 148, line 24-p. 149, line 9. Furthermore, the Appellant introduced no evidence to establish, or even suggest, that the clock appearing on the "roadside video" was synchronized with the clock on the DataMaster machine. R. p. 155, lines 14-22. Officer Schmidt testified he could not change the

⁴ The first three BAAT Reports were generated after failed simulator tests and copies provided to the Respondent. The fourth BAAT Report was generated after Respondent submitted a breath sample.

clock on the video camera and he never checked the clock for accuracy. R. p. 155, lines 5-6; lines 21-22.

There is abundant, competent evidence to support the circuit court's ruling that the breath test was not administered within two hours of arrest. The only contrary "evidence" is the prosecutor's October 3 letter. This letter is admittedly not based on her firsthand knowledge but relies on the roadside video timestamp as the basis for its determination of Respondent's time of arrest. Officer Schmidt, the custodian of that video, could not vouch for the accuracy of the time depicted in the video, had no independent recollection of the time of arrest, and could not say that the time on the video and the time on the DataMaster report were the same. R. p. 155, lines 12-22. Therefore, the circuit court correctly held that the October 3 letter is not admissible for the purpose of establishing the time of arrest or for any other evidentiary purpose.

As an additional basis for excluding the results of the breath test, the circuit court found the Appellant never provided Respondent with a written report that complied with the requirements of Section 56-5-2950(I) and indicating the breath test was performed within two hours of the time of arrest. R. p. 4. Section 56-5-2950(I) requires the arresting law enforcement officer to provide the defendant charged with driving under the influence "a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence."⁵ While the statute does not specify the precise form this report should take, argument and statements of counsel, like the prosecutor's October 3 letter, are not evidence. See, e.g., S.C. Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003). Officer Schmidt did, however, testify

⁵ At the time of the Respondent's arrest, this provision was codified at Section 56-5-2950(d). When the statute was amended by the Act, effective on February 9, 2009, the written report requirement was re-codified in subsection (I) with no change in the language used.

that he provided Respondent with “breath alcohol analyst test report” which set forth the date of arrest and the time of the arrest as 22:15 (i.e. 10:15 p.m.). R. p. 147, line 15-p. 148, line 4; p. 148, lines 17-23.

The circuit court properly concluded that the prosecutor’s October 3, 2011, letter does not establish or alter Respondent’s time of arrest and nor does it constitute a “written report” for the purpose of Section 56-5-2950(I). The letter purports to set forth the time of arrest only; but the written report required by subsection (I) must also set forth the time of the tests, and the results of the tests. The prosecutor’s letter contains neither the time nor the results of the test. Further, the prosecutor’s letter is not based on first-hand knowledge but appears to be based solely on the timestamp in the videotape produced by officers at the accident scene. The timestamp depicted in the videotape is hearsay: an out-of-court statement that Appellant now attempts to rely upon for the truth of the matter stated. As such, the timestamp and the prosecutor’s letter based thereon do not change the time of arrest set forth in the BAAT Reports. The letter would not be admissible under Rule 802, SCRE, or any rule of evidence. Moreover, the letter is essentially argument or a statement of counsel for the State. As such, it is not admissible as substantive evidence. See S.C. Dep’t of Transp. v. Thompson, supra (argument by counsel is not evidence).

The only writing that complies with the plain requirements of Section 56-5-2950(I) is the fourth BAAT Report provided to Respondent by Officer Schmidt on the night of the arrest. That document contains all of the information prescribed by Section 56-5-2950(I): the time of arrest, the time of the test, and the results of the test. The prosecutor’s letter is not competent evidence of anything and the circuit court correctly declined to consider it in reaching its conclusion.

The evidence supports the circuit court's conclusion that the Appellant failed to provide the Respondent with a written report as required by Section 56-5-2950(I), other than the BAAT Report. R. p. 287. The BAAT report is the only written report that complies with Section 56-5-2950(I), and it indicates the time of arrest was more than two hours prior to the administration of the breath test. Because this conclusion is supported by the evidence, it should be affirmed.

CONCLUSION

In enacting the statutory amendments to the implied consent law, the General Assembly described the changes as "technical" changes to "procedure." The amendment was adopted prior to Respondent's arrest, but did not become effective until afterwards. However, our appellate courts have consistently applied procedural changes retroactively. To the extent the Appellant argues retroactive application is foreclosed by the savings clause, this issue is not properly before the Court because it was not ruled upon by the trial court. Regardless, the savings clause argument fails on its merits. This Court gave retroactive application to an amendment to the procedures for collecting blood samples in DUI cases in Frey despite the fact that the amending act contained a broadly-worded savings clause. Moreover, both this Court and the Supreme Court gave retroactive application to statutory changes concerning the nature of admissible evidence where the amending legislation contained a savings clause *identical* to the one used in the Act. See Bryant and Stahlnecker, supra. The Court should adhere to this precedent and affirm the circuit court's retroactive application in this case.

Finally, there is ample evidence to support the circuit court's conclusions that the breath test was not administered to Respondent within two hours and that Respondent was not provided with a written notice of certain facts as required by §56-5-2950(I), apart from the BAAT Report

indicating the Appellant did not meet the two-hour time limit. Because there is evidence to support the circuit court's factual conclusions, the Court should affirm on these issues as well.

Respectfully submitted,



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April 15, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-211546

State of South Carolina,

Appellant,

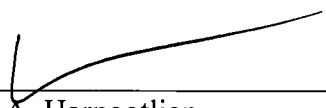
v.

Michael J. Hilton,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent Michael J. Hilton, certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.



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