

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-211546

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I.

The circuit court judge committed reversible error by retroactively applying the statutory changes to the implied consent statute and excluding the results of Hilton's breath alcohol test because the changes to the statute were substantive in nature as opposed to procedural in nature and because the savings clause included in the amending legislation expressly prohibited retroactive application of the statutory changes. Furthermore, the issue regarding the applicability of the savings clause was properly preserved for appellate review because it was specifically and timely raised by the prosecutor and ruled upon by the circuit court judge, which was all that was necessary to preserve the issue for appellate review.

In his appellate brief, Respondent Michael J. Hilton asserts the circuit court judge correctly determined the statutory amendments to S.C. Code Ann. § 56-5-2950 were retroactively applicable to Hilton's case despite the fact those amendments took effect several months after Hilton's arrest. In support of that contention, Hilton maintains the statutory amendments were procedural in nature, which he argues meant they had to be applied retroactively regardless of the legislature's inclusion of a savings clause in the amending legislation to expressly limit the effect the amendments would have on pending cases. Hilton further contends the State failed to preserve for appellate review any argument regarding the applicability of the savings clause because the circuit court judge allegedly did not rule on that argument in granting Hilton's motion to suppress the breath alcohol test results. Initially, the issue regarding the applicability of the savings clause was properly preserved for appellate review because it was specifically and timely raised by the State and ruled upon by the circuit court judge. Furthermore, contrary to Hilton's contentions, the circuit court judge erred in determining the statutory amendments to Section 56-5-2950 applied retroactively because those amendments were substantive in nature and because the savings clause included in the amending legislation specifically precluded retroactive application of the statutory changes. Accordingly, the circuit court

judge's decision to suppress the breath alcohol test results was erroneous and should be reversed, and Hilton's case should be remanded for trial.

A. Preservation of the State's Argument Regarding the Applicability of the Savings Clause

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005).

However, once an issue has been raised to and ruled upon by the trial judge, “[a] party is not required to harass the trial judge with repetitive objections when an intelligible one has been made.” Long v. Norris & Assocs., Ltd., 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2010). Significantly, a party in a criminal case is only required to raise an objection and receive an adverse ruling before that party can properly appeal the ruling without raising any further objections to the matter. See State v. Wilson, 389 S.C. 579, 584, 698 S.E.2d 862, 864 (Ct. App. 2010) (“[W]hen an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error.” (italics in original)). “So long as the judge had an opportunity to rule on an issue, and did so, it was ‘not incumbent upon [the losing

party] to harass the judge by parading the issue before him again.’ ” State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995).

In the case sub judice, Hilton contends the State failed to preserve for appellate review its arguments regarding the applicability of the statutory savings clause because Hilton maintains the circuit court judge did not expressly rule upon the savings clause in his order suppressing the breath alcohol test results and the State did not make a motion following the issuance of the ruling seeking to have that matter expressly addressed in the circuit court judge’s order. Contrary to Hilton’s contentions, the issue regarding the applicability of the savings clause was properly preserved for appellate review because it was specifically and timely raised by the State and ruled upon by the circuit court judge, which was all that was necessary to preserve the issue pursuant to South Carolina’s issue preservation rules.

Notably, in arguing against Hilton’s motion seeking suppression of the breath alcohol test results, the prosecutor asserted to the circuit court judge that the statutory changes to Section 56-5-2950 were substantive in nature and did not apply retroactively to Hilton’s case based on the plain language of the savings clause included in the amending legislation. (R. pp. 36-40). Subsequently, after considering the arguments raised by the prosecutor along with those raised by defense counsel, the circuit court judge granted Hilton’s motion to suppress the breath alcohol test results after finding the changes to Section 56-5-2950 were procedural in nature, which he concluded required retroactive application of those changes. (R. p. 2; p. 4).

Thus, in Hilton’s case, the prosecutor raised the arguments currently being raised on appeal to the circuit court judge, and the circuit court judge rejected those arguments by granting the motion to suppress the breath alcohol test results. Cf. State v. Brown, 389

S.C. 473, 480, n. 1, 698 S.E.2d 811, 815 (Ct. App. 2010) (“Trial counsel asked the trial court to suppress the evidence, and the trial court denied this request. The issue was raised to and ruled upon by the trial court and is properly before this court.”), rev’d on other grounds, 401 S.C. 82, 736 S.E.2d 263 (2012). Once the issue was raised to and ruled upon by the circuit court judge, the prosecutor was not required to repeat her previous arguments to the circuit court judge or to take any further steps in order to preserve the issue for appellate review. See Wilson, 389 S.C. at 584, 698 S.E.2d at 864 (“[W]hen an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error.” (italics in original)); see also Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 493 (Ct. App. 2007) (“Hardaway admits in its brief that Hall raised the ice issue below. However, Hardaway argues the master **failed to address these specific arguments in its order**. In fact, the master reviewed the evidence and the arguments of both parties and determined that Hardaway was entitled to charge for ice based on the first contract and the fax between the parties. Because Hall raised the issue of whether Hardaway was entitled to charge for ice and the master determined Hardaway was entitled to do so, the issue was raised to and ruled upon by the master. Accordingly, the issue is preserved for appellate review.” (emphasis added)). Accordingly, because the issue and arguments that the State is raising on appeal were raised to and ruled upon by the circuit court judge, the issue was properly preserved for appellate review and should be addressed on appeal.

B. Substantive Nature of the Statutory Changes to S.C. Code Ann. § 56-5-2950 and the Significance of the Legislature’s Inclusion of a Savings Clause in the Amending Legislation

When construing a statutory provision, “[r]etroactivity is not favored in the law.” Bowen v. Georgetow Univ. Hosp., 488 U.S. 204, 208 (1988). Courts will **not** apply statutes retroactively unless the result “is so clearly compelled as to leave **no room for reasonable doubt**[.]” Hyder v. Jones, 271 S.C. 85, 87-88, 245 S.E.2d 123, 125 (1978) (emphasis added). “It takes a clear expression of legislative purpose to justify a retroactive application.” Id. at 88, 245 S.E.2d at 125.

Pursuant to the rules of statutory construction and absent a specific provision or clear legislative intent to the contrary, statutes are construed to apply prospectively as opposed to retroactively unless the statutes are remedial or procedural in nature. Edwards v. State Law Enforcement Div., 395 S.C. 571, 579, 720 S.E.2d 462, 466 (2011). Statutes are considered to be remedial in nature when they create new remedies for existing rights or enlarge the rights of persons under disability. Id. Likewise, statutes are considered to be procedural in nature when they set out a mode of procedure **for a court to follow** or prescribe a method of enforcing rights. Id. at 580, 720 S.E.2d at 466; see BLACK’S LAW DICTIONARY 1323 (9th ed. 2009) (defining “procedural law” as “[t]he rules that prescribe **the steps for having a right or duty judicially enforced**, as opposed to the law that defines the specific rights or duties themselves” (emphasis added)). Conversely, statutes are considered to be substantive in nature when they create, define, and regulate the rights, duties, and powers of parties. See BLACK’S LAW DICTIONARY 1567 (9th ed. 2009) (defining “substantive law” as “[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of the parties”). Importantly though, regardless of whether a statute is remedial, procedural, or substantive in nature, the intent of the legislature is

paramount and ultimately determines whether a statute will have prospective or retroactive application. Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990).

In the case at bar, Hilton contends the circuit court judge correctly determined the statutory amendments to Section 56-5-2950 were retroactively applicable to his case despite the fact those amendments took effect several months after his arrest and despite the fact the legislature expressly included a savings clause in the amending legislation. In support of that contention, Hilton argues the statutory changes should have been applied retroactively because they were procedural in nature and, just as the circuit court judge did, primarily relies on this Court's decision in State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005). However, due to key distinctions between the statutory changes involved in Frey and those involved in Hilton's case, the decision in Frey does not support the circuit court judge's ruling and does not establish the statutory changes to Section 56-5-2950 enacted after Hilton's arrest were retroactively applicable to his case.

Looking to the decision in Frey, Frey sought the suppression of his blood alcohol test results on the basis that his blood sample was not drawn by a qualified individual as mandated by the applicable provisions of the implied consent statute. Id. at 515, 608 S.E.2d at 877. Importantly, at both the time Frey's blood sample was collected and at the time Frey's case was considered on appeal, the versions of Section 56-5-2950 in effect at each time required blood samples in driving under the influence cases to be drawn by licensed physicians, registered nurses, or other trained medical personnel. See S.C. Code Ann. § 56-5-2950(a) (Supp. 2003) ("Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples

in a licensed medical facility.”); S.C. Code Ann. § 56-5-2950(a) (Supp. 2001) (“Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility.”). However, at the time of Frey’s arrest, Section 56-5-2950 did **not** contain a provision specifically outlining the procedure for a court to follow in the event the provisions of the statute were not followed. S.C. Code Ann. § 56-5-2950 (Supp. 2001) (containing no provision addressing what a reviewing court should do in response to a violation of the statute’s provisions). Such a provision was only added to Section 56-5-2950 subsequent to Frey’s trial and conviction through an amendment to the statute. See S.C. Code Ann. § 56-5-2950(e) (Supp. 2003) (“The failure to follow any of these policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence any test results, if the trial judge or hearing officer finds that such failure materially affected the accuracy or reliability of the tests results or the fairness of the testing procedure.”). Pursuant to the amended version of the statute, evidence collected in violation of the mandates of the statute was inadmissible if the trial judge found the violation affected the accuracy or reliability of the test results or the fairness of the testing procedure.¹ S.C. Code Ann. § 56-5-2950(e) (Supp. 2003).

On appeal, Frey challenged the admission of his blood test results based on an alleged violation of the provision of Section 56-5-2950 requiring blood samples to be drawn by qualified medical personnel, and the State responded by arguing Frey’s blood sample was drawn in compliance with that provision and, even if it was not, suppression

¹ Notably, in suppressing the results of Hilton’s breath alcohol test, the circuit judge in Hilton’s case did **not** make any finding that the arresting officer’s alleged failure to administer the breath alcohol test within two hours of Hilton’s arrest affected the accuracy or reliability of the test results or the fairness of the testing procedure as required by Section 56-5-2950. (R. pp. 1-4).

of the evidence was not warranted without a finding of prejudice because the version of the statute in effect at the time of Frey's arrest was silent in regards to the effect of statutory noncompliance on the admissibility of evidence. Frey, 362 S.C. at 517-518, 608 S.E.2d at 877-878. After considering the issue, this Court rejected the State's contentions and determined the State had not satisfied the requirements of Section 56-5-2950 in regards to proving the blood sample was drawn by a qualified individual. Id. at 517, 608 S.E.2d at 877-878. Furthermore, this Court concluded a prejudice finding was required before the evidence could be suppressed while also determining the statutory changes to Section 56-5-2950 providing for the court to suppress evidence collected in violation of the statute where prejudice resulted were remedial in nature and were retroactively applicable. Id. at 518, n. 3, 608 S.E.2d at 878. As a result, this Court remanded the matter to the trial court to determine whether the State's noncompliance with the provisions of Section 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure. Id. at 519, 608 S.E.2d at 879.

Comparing the statutory changes involved in Frey to those involved in Hilton's case, the relevant statutory change addressed in Frey established a remedy for a violation of the established procedure for the collection of a blood sample in a driving under the influence case and outlined a procedure for the court to follow in the event a violation occurred without altering the actual collection procedure law enforcement officers and medical personnel were required to follow in collecting a blood sample. Thus, because the changes dealt with remedies and procedures **for the court to follow**, those statutory changes were remedial in nature and could properly be applied in a retroactive fashion. See Edwards, 395 S.C. at 579, 720 S.E.2d at 466 ("A statute is remedial where it creates new remedies for existing rights or enlarges the rights of persons under disability."); see

also BLACK'S LAW DICTIONARY 1323 (9th ed. 2009) (defining "procedural law" as "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves"). Conversely, unlike the changes in Frey, the statutory changes involved in Hilton's case were substantive in nature because they materially altered the established procedure for the performance of a breath alcohol test, creating a new duty and obligation on law enforcement officers regarding the administration of breath alcohol tests and granting the new right to have breath alcohol testing conducted within two hours to suspects in driving under the influence cases.² See Edwards, 395 S.C. at 579, 720 S.E.2d at 466 ("When a statute creates a new obligation or imposes a new duty, courts generally consider the statute prospective only."); see also BLACK'S LAW DICTIONARY 1323 (9th ed. 2009) (defining "procedural law" as "[t]he rules that prescribe **the steps for having a right or duty judicially enforced**, as opposed to the law that defines the specific rights or duties themselves" (emphasis added)); see, e.g., State v. Huntley, 349 S.C. 1, 4-5, 562 S.E.2d 472, 473-474 (2002) (characterizing an amendment that changed the simulator solution test level and its corresponding range of accuracy in regards to breath alcohol tests, increased the alcohol inference level, and increased the alcoholic concentration level at which a person must enroll in a safety program and at which an insurance penalty may be imposed as "substantive changes" to the legislation). As a result, the substantive statutory changes in Hilton's case, which did not alter any procedure for the court to

² In arguing the statutory changes to Section 56-5-2950 were procedural in nature, Hilton contends the changes did not "alter the manner in which evidence is collected." (Resp. Br. pp. 9-10). However, during the hearing before the circuit court judge, defense counsel acknowledged the statutory changes **did** change the manner in which breath alcohol tests were conducted, asserting: "The statute, I think we both can agree, at the time that Mr. Hilton was arrested **did not require a breathalyzer test to be had within two hours of arrest**. Within the year of his arrest **it was changed** to require a breathalyzer test within two years – within two hours of the arrest, and if not, if it was not within two hours the results were inadmissible." (R. p. 58) (emphasis added).

follow but, instead, created new substantive duties, obligations, and rights for law enforcement officers and individuals arrested for driving under the influence, should not have been applied retroactively, and the circuit court judge committed reversible error in relying on the decision in Frey to rule otherwise. Cf. Edwards, 395 S.C. at 582, 720 S.E.2d at 467 (“The amendments to section 23-3-430 do not provide a procedure for a court to follow, or prescribe a method for enforcing rights. Thus, the amendments are not procedural and cannot be applied retroactively to [Edwards’] case.”).

Furthermore, in addition to arguing the statutory changes were retroactively applicable because they were procedural in nature, Hilton contends the legislature’s inclusion of a savings clause in the amending legislation did not preclude retroactive application of the statutory changes. In support of that argument, Hilton notes the amending legislation involved in Frey had a savings clause but the statutory changes were still applied in a retroactive fashion.³ However, despite the fact this Court found the remedial statutory changes in Frey applied retroactively, this Court did not consider the significance of the savings clause in reaching its decision and did not address or mention the savings clause in its opinion. Thus, because this Court did not address the savings clause as part of its analysis, the decision in Frey does not stand for the proposition that procedural or remedial changes apply retroactively even in situations where the plain language of a savings clause would prohibit retroactive application. See Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) (“It is, of course,

³ In the Brief of Appellant, counsel for the State mistakenly and erroneously asserted the amending legislation in Frey did not contain a savings clause after overlooking that particular provision. Contrary to that original assertion, the amending legislation specifically included a savings clause stating: “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.” Act No. 61, § 10, 2003 S.C. Acts & Joint Resolutions.

settled law that ‘a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.’ ” (citations omitted)).

In further support of his argument that the legislature’s inclusion of a savings clause had no impact on the retroactive application of the procedural statutory changes to Section 56-5-2950 involved in his case, Hilton contends the statute involved in State v. Bryant, 382 S.C. 505, 675 S.E.2d 816 (Ct. App. 2009), was applied retroactively despite the fact the legislative act enacting that statute contained an identical savings clause. However, in reaching its decision in Bryant, this Court did not find the statute at issue in Bryant’s case was retroactively applicable merely because it was procedural in nature but, instead, specifically considered the significance of the enacting legislation’s savings clause before holding the statute was retroactively applicable.⁴ Id. at 510, 675 S.E.2d at 819. Significantly, this Court only determined the statute could be applied retroactively after determining the savings clause included in the enacting legislation expressly **did not apply** to the newly-enacted statute in Bryant’s case based on the fact the language of the savings clause only addressed statutory changes repealing or amending existing laws. Id. Therefore, this Court’s decision in Bryant establishes the circuit court judge erred by ignoring the plain language of the amending legislation’s savings clause instead of supporting the circuit court judge’s decision to apply the statutory changes to Section 56-5-2950 retroactively to Hilton’s case.

Despite Hilton’s contentions to the contrary, the legislature manifested its clear intention for the substantive statutory changes to Section 56-5-2950 to be applied

⁴ Similar to the statutory changes in Frey and unlike the statutory changes in Hilton’s case, the statute involved in Bryant was procedural in nature because it outlined a procedure **for the court to follow** by allowing for the admission of otherwise inadmissible evidence in the event a trial judge determined certain conditions were met. See Bryant, 382 S.C. at 510, 675 S.E.2d at 819 (recognizing the enactment of S.C. Code Ann. § 17-23-175, which the court found to be retroactively applicable, “provid[ed] a mechanism for admitting out-of-court statements by a child victim of sexual abuse”).

prospectively and not retroactively through the inclusion of the savings clause in the amending legislation. See Act No. 201, § 23, 2008 S.C. Acts & Joint Resolutions (“The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or 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 this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.”); see also State v. Bolin, 381 S.C. 557, 562, 673 S.E.2d 885, 887 (Ct. App. 2009) (“By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective.”). Accordingly, the circuit court judge committed reversible error in finding those statutory changes were procedural in nature and were retroactively applicable to Hilton’s case. See Bolin, 381 S.C. at 562, 673 S.E.2d at 887 (finding the language of a savings clause, which was identical to the one included in the act amending Section 56-5-2950(a), required prospective application of the legislation). For the foregoing reasons coupled with the reasons articulated in the Brief of Appellant, the circuit court judge’s ruling excluding the results of Hilton’s breath alcohol test should be reversed and Hilton’s case should be remanded for trial.

II.

Assuming the statutory changes to the implied consent statute applied retroactively and required Hilton's breath alcohol test to be administered within two hours of his arrest, the circuit court judge erred in finding either Hilton's test was not conducted within the two-hour time limit or Hilton was not provided with a complete written report as required by the implied consent statute because the evidence and testimony presented during the suppression hearing, including the testimony of the arresting officer confirming he was not present at the scene of the collision at the time the circuit court judge determined the officer arrested Hilton, established Hilton's breath alcohol test was conducted within two hours of his arrest and further established Hilton was provided with written notice of the correct time of arrest, the time of the breath alcohol test, and the results of that test prior to the commencement of any proceeding in which the test results were introduced as evidence.

In his appellate brief, Hilton asserts the circuit court judge correctly excluded the results of the breath alcohol test results after determining the breath alcohol test was not conducted within two hours of Hilton's arrest and alternatively finding Hilton was not provided with a proper written report conveying the time of the arrest, the time of the breath alcohol test, and the results of that test as required by the implied consent statute. In support of that contention, Hilton maintains overwhelming evidence was presented during the hearing on the suppression motion supporting the circuit court judge's determination that the breath alcohol test was not conducted within two hours of Hilton's arrest. Additionally, Hilton contends the circuit court judge correctly determined the prosecutor's letter provided to Hilton prior to the suppression hearing did not constitute a written report as required by the mandates of the implied consent statute. To the contrary, the circuit court judge's determination in regards to the time of arrest was clearly erroneous because the evidence presented during the suppression hearing, including the testimony of the arresting officer confirming he was not present at the scene of the collision at the time the circuit court judge concluded the officer arrested Hilton, clearly established Hilton's breath alcohol test was administered within two hours of the

time of his arrest. Furthermore, the circuit court judge erred in determining the letter provided by Hilton prior to the suppression hearing did not constitute a written report because the letter coupled with the initial report provided to Hilton put Hilton on notice of all the information required to be provided to him by the implied consent statute. Accordingly, the circuit court judge's decision to suppress the breath alcohol test results was erroneous and should be reversed, and Hilton's case should be remanded for trial.

Pursuant to S.C. Code Ann. § 56-5-2950(d) (2006), “[a] person required to submit to tests by the arresting law enforcement officer must be provided with 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.” However, aside from requiring the written report to be provided to the defendant prior to any trial or other proceeding in which the test results are used as evidence, Section 56-5-2950(d) does **not** contain any restrictions on how the written report is prepared, who prepares the written report, how the information contained within the written report is organized, or what information is used to prepare the written report. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) (“We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute.”). Significantly, the sole purpose of the statute is for the defendant to be notified of the timing and results of the testing used to determine whether alcohol or drugs were present in the defendant's system. See State v. Bull, 350 S.C. 58, 62, 564 S.E.2d 351, 353 (Ct. App. 2002) (“[T]he purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle.”).

In Hilton's case, Hilton contends the circuit court judge's determination that Hilton's breath alcohol test was not conducted within two hours of his arrest was supported by overwhelming evidence and should be affirmed. In support of that contention, Hilton argues the only evidence establishing the breath alcohol test was conducted within two hours of his arrest was the prosecutor's letter, which he maintains was inadmissible hearsay. To the contrary, substantial evidence was presented during the hearing establishing Hilton's breath alcohol test was conducted within two hours of his arrest and the time reflected as the time of arrest in the initial breath alcohol test report was incorrect.

Turning to the evidence presented during the hearing, Trooper Pete Schmidt, who was the arresting officer in Hilton's case, testified he entered the "time of arrest" into the Datamaster machine as 10:15 p.m. based on the operating policy of the Myrtle Beach Police Department at the time, which dictated officers enter the collision time as the time of arrest when conducting a breath alcohol test instead of entering the actual arrest time. (R. pp. 137-138). Most significantly, Trooper Schmidt further stated he was **not** present at the scene of the collision when it occurred but, instead, arrived within ten minutes of the collision. (R. p. 140). Furthermore, in addition to the officer's testimony establishing that the time of arrest could not have been 10:15 p.m., Hilton stipulated the videotape of his arrest reflected that he was arrested at 10:47 p.m. (R. p. 143). Thus, as Trooper Schmidt's testimony established the officer was not even on the scene at 10:15 p.m., the testimony and evidence presented during the hearing unquestionably established the circuit court judge's determinations regarding the time of Hilton's arrest were erroneous considering the arresting officer was not even present at the scene at the time the circuit court judge concluded he arrested Hilton.

Recognizing that the testimony and evidence presented during the hearing established Hilton was not actually arrested at 10:15 p.m. but, instead, was arrested less than two hours before the breath alcohol test was administered, the circuit court judge acknowledged in his order that Trooper Schmidt's testimony established the time of arrest listed in the initial written report was incorrect. (R. p. 3, n. 3). However, after affirmatively acknowledging the testimony of the officer who performed the breath alcohol test on Hilton confirmed the test was actually performed within two hours of Hilton's arrest, the circuit court judge concluded the breath alcohol test was performed at the time listed in the initial report based on his apparent assumption that the information contained in the initial written report was binding on the court. (R. pp. 3-4). Because the circuit court judge made his determination of the time of arrest based solely on the contradicted and unsupported information contained in the initial written report and not on the evidence presented to him during the hearing, the circuit court judge's ruling was not supported by the evidence and should be reversed.

Furthermore, in addition to arguing the circuit court judge's determination of the time of arrest was supported by overwhelming evidence, Hilton contends the circuit court judge also correctly determined the prosecutor's letter did not constitute a "written report" pursuant to the requirements of Section 56-5-2950. In support of that argument, Hilton contends the information contained in the prosecutor's letter is inadmissible hearsay while also noting the letter did not contain the time or results of the breath alcohol test. Initially, the provisions of Section 56-5-2950 neither require a written report prepared pursuant to the statute to contain only the first-hand recollections of the person who arrested the defendant or administered the breath alcohol test nor prohibit the inclusion of hearsay information in the written report. As a result, nothing in the

provision of Section 56-5-2950 prohibited the prosecutor from correcting the information listed in the initial written report and providing it to Hilton in writing prior to the commencement of Hilton's trial. See White, 338 S.C. at 58, 525 S.E.2d at 263 ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). Furthermore, by receiving the initial written report along with the correct time of arrest through the prosecutor's written letter, Hilton was provided with written notice of all of the information necessary for him to be fully apprised of the evidence the State intended to introduce during trial, which was the clear legislative purpose behind the enactment of Section 56-5-2950(d). See Bull, 350 S.C. at 62, 564 S.E.2d at 353 ("[T]he purpose of the statute is to provide for reciprocal discovery between the State and a defendant as to the time and results of tests conducted to determine the presence of alcohol or drugs in the operator of a motor vehicle."). Accordingly, the circuit court judge erred in finding the State failed to provide Hilton with a written report as required by the implied consent statute.

Prior to the commencement of "any trial or other proceeding in which the results of the tests [were] used as evidence[.]" Hilton was provided with a written report and a supplement to the written report notifying him of the correct time of his arrest, the time of the breath alcohol test, and the results of that test. S.C. Code Ann. § 56-5-2950(d) (2006). Thereafter, during the suppression hearing, evidence and testimony was presented establishing Hilton's breath alcohol test was conducted within two hours of his arrest. Assuming the circuit court judge had not been wrong in finding the amendments to Section 56-5-2950 applied retroactively to Hilton's case, the circuit court judge's findings regarding Hilton's time of arrest and receipt of a written report were clearly

erroneous and contrary to the evidence presented to him. For the foregoing reasons coupled with the reasons articulated in the Brief of Appellant, the circuit court judge's ruling excluding the results of Hilton's breath alcohol test should be reversed and Hilton's case should be remanded for trial.


CONCLUSION

For all the foregoing reasons coupled with arguments articulated in the Brief of Appellant, it is respectfully submitted that the ruling of the circuit court judge should be reversed and the case should be remanded for trial.

Respectfully submitted,

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March 26, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 26 2013

SC Court of Appeals

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2012-211546

THE STATE,

Appellant,

vs.

MICHAEL J. HILTON,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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