THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Alexander S. Macaulay, Circuit Court Judge

THE STATE, ...APPELLANT

v.

NEZAR ABRAHAM, ...RESPONDENT.

Appellate Case No. 2012-213136

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On July 7, 2011, the Respondent, Nezar Abraham, was arrested by Trooper Kevin N. Brown of the South Carolina Highway Patrol for driving under the influence. As referenced in the State's initial brief, Trooper Brown issued ticket number F225314; however, it is noteworthy that the traffic ticket was not in evidence at trial, nor was the information contained therein, particularly with reference to the description and registration of the vehicle, published to the jury nor was that information considered by the jury as evidence in the case at trial. (R.p.52 lines 7-11). The jury trial was held on April 17, 2012 before the Honorable William Derrick, assistant Oconee County Magistrate Judge. The Respondent was represented by C. Austin McDaniel, Esquire of the Cole Law Firm and the Anderson Bar, and the Appellant (the State) was represented by Assistant Solicitor Beth Blundy of the Tenth Circuit Solicitor's Office.

Prior to trial the judge suppressed the portion of the in car video (States exhibit 1) that contained the transportation of the Respondent from the arrest site to the detention center, the field sobriety test conducted off video was also suppressed, and the State agreed not to play any portion of the video that contained hearsay. (R.p.47 line 20-25, p. 50 line 9-17) At trial, the State presented only one witness, arresting officer Trooper Brown. At the conclusion of the State's case-in-chief the Respondent moved for a directed verdict of not guilty arguing that the State presented no evidence to establish the *corpus delicti* of the DUI charge. The trial court denied the directed verdict motion, and again denied the motion upon renewal by Abraham after the jury was charged. Abraham was convicted of driving under the influence 1st

offense, (.16) of one percent or more and sentenced to 90 days imprisonment suspended to one day time served and a fine of thousand, two hundred and sixty-seven dollars ($2,267.00). (R.p.173-177)

Abraham timely appealed the conviction to the Oconee County Court of Commons Pleas, and assigned Case No. 2012-CP-37-383. The appeal was heard by the Honorable Alexander S. Macaulay on September 4, 2012. The State was represented by Assistant Solicitor Blair Stoudemire of the Tenth Circuit Solicitor's Office and Mr. Abraham was represented by C. Austin McDaniel, Esquire. (R.p.155-156). Abraham argued that the magistrate judge erred in failing to direct a verdict of not guilty in favor of the defendant based on the State's failure to prove the *corpus delicti* of the offense of driving under the influence.

Abraham relied on City of Easley v. Portman, 327 S.C. 593, 490 S.E. 2d 613 (Ct. App. 1997), which was made court's exhibit 1 at trial (R. p. 130, lines 4-22) and the State relied on State v. Townsend, 321 S.C. 55, 467 S.E. 2d 138 (Ct. App. 1996). After hearing arguments, the circuit court granted Abraham's appeal and reversed his conviction. (R. p. 1-3).

STATEMENT OF FACTS

Sometime after midnight on July 7, 2011, Trooper Kevin N. Brown, with the South Carolina Highway Patrol, responded to a call from dispatch reporting a single car wreck alleged to have occurred on South Flagship Drive in Oconee County, South Carolina. Trooper Brown made contact with Abraham who was being held on the side of the road by an unidentified witness. Brown briefly interviewed Abraham, whom admitted that he had consumed a couple of glasses of wine. Brown administered standardized field sobriety test and arrested Abraham for driving under the influence. After Abraham was cuffed placed in the patrol car he stated that he was on his way home from the neighborhood's club house. Abraham was offered and submitted to a DMT breath test and gave a sample of .22%, or twenty-two one hundredths of one percent of alcohol at the time of testing.

At trial, Trooper Brown testified that upon arriving at the scene there were seven (7) to ten (10) initial responders that arrived at the incident location prior to him to include EMS, the fire department, and search and rescue (R. p. 100, lines 3-21). Trooper Brown admitted that he, "did not take the time to," identify, interview, and/ or take any written statements from those individuals that arrived at the incident site first, nor were any of them subpoenaed by the State to be present at trial to testify as to their observations on the night in question (R. p. 101, lines 3-12.). Further, the essence of Trooper Brown's testimony on direct examination was that he was unable to identify the make or model of the car alleged to have been wrecked and neither was he able to present any evidence as to the ownership or registration of the vehicle, but in fact testified that "off the top of my head" he thought the car might have come

back to a rental company or maybe leased out of Atlanta and may have been a later model dark in color car. (R. p. 77, lines 1-25)

Further, at no time during trial did the State attempt to establish what date and time the wreck occurred, nor was there any evidence presented as to what may have caused the single car accident. No video or photographic evidence was presented by the State of the car or wreck site because Trooper Brown failed to videotape the collision site with his in-car video system, nor were any pictures taken by him that night to be used at trial.

At the close of the State's case, Abraham moved for the trial court to direct a verdict of not guilty, arguing that the State had failed to establish any proof of corpus delicti for the charge of driving under the influence. That motion was denied and the jury subsequently convicted Abraham for driving under the influence.

ARGUMENT

The circuit court properly reversed the Respondent's conviction finding that the magistrate judge erred in failing to direct a verdict of not guilty where the State did not present sufficient independent evidence of the *corpus delicti* to corroborate the Respondents extra-judicial statement.

The trial judge erred by failing to grant the Respondent's motion for a directed verdict of not guilty because no sufficient independent evidence that Mr. Abraham was operating a motor vehicle under the influence of alcohol was presented by the State to corroborate the Respondent's alleged extra-judicial statement. Thus, the circuit court properly reversed the conviction finding that the State failed to provide any factual basis as to the time of the collision, the cause of the collision, the make, model or other pertinent information regarding the vehicle alleged to be involved, and that none of the emergency personnel that arrived on the scene before the arresting officer were present for trial. Therefore, the order of the circuit court reversing the Respondent's conviction should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C.1, 5, 545 S.E. 2d 827, 829 (2001). On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State. State v. Lollis, 343 S.C. 580, 583, 541 S.E. 2d 254, 256 (2001). The Defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E. 2d 30, 36 (2001). A circuit court judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Schrock, 283 S.C. 129. 132, 322 S.E. 2d 450, 451-52 (1984).

In a criminal case, "a conviction cannot be based solely on the defendant's uncorroborated extra-judicial confession. The State must offer some proof of the corpus delicti of the particular offense for which the defendant is charged to authorize admission of the confession of the defendant," City of Easley v. Portman, 327 S.C. 593, 595, 490 S.E.2d 613, 614 (Ct. App.1997). " The corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that a crime occurred," State v. Osborne, 335 S.C. 172,180, 516 S.E. 2d 201, 205 (1999). Evidence of the corpus delicti must be established by the best proof attainable by the State, it "may be sufficiently proved by presumptive or circumstantial evidence when that is the best obtainable," State v. Townsend, 321 S.C. 55, 57, 467 S.E. 2d 138, 140 (Ct. App. 1996).

The South Carolina Code of Laws, 1976 as amended, § 56-5-2930 states that, " it is unlawful for a person to drive a motor vehicle within the State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired." The corpus delicti of driving under the influence is : (1) driving a vehicle; (2) within this State; (3) while under the influence of alcohol...see Osborne, 335 SC 172, 180 (1999) "The act of operating a motor vehicle with impaired faculties is the gravamen of the offense," see Townsend, 321 S.C. 55, 58.

The South Carolina Supreme Court addressed the issue of corpus delicti in State v. Osborne, 335 S.C. 172, 516 S.E. 2d 201 (1999). The Court relied on specific evidence presented at trial in determining that the State had presented sufficient

independent evidence that corroborated the defendant's extra-judicial statement admitting to driving the vehicle at the time of the wreck. There the arresting highway patrolman discovered an abandoned car at 11:17 pm that had left the roadway and struck a speed limit sign; the hood was still warm to the touch. Responding to a stolen vehicle call, a second officer made contact with the defendant at 1:50 am at a gas station, and the defendant had apparently reported the wrecked vehicle stolen, and, after a brief interview it, was discovered that the defendant had been the driver of the wrecked vehicle found earlier by the highway patrol. The defendant was then transported back to the wreck site in which he admitted that he was driving the vehicle at the time of the wreck, he was in possession of the keys to the locked vehicle, which he had reported stolen, and gave the keys to the arresting officer, and finally, the defendant admitted that he had not consumed any alcohol since the wreck.

In applying the corroboration rule, the Court held that, "applying this rule to the facts at hand, we find that the State provided sufficient independent evidence to support the trustworthiness of the Respondent's statement to police," Id at 180. The Court found that the independent evidence gathered by the arresting officer(s) during their investigation, including that the hood of the wrecked car was warm to the touch, coupled with the defendant's report of his vehicle being stolen which connected him directly and temporally with the wreck and the wrecked vehicle, together with the keys to the locked vehicle being located in the Defendant's pocket, all combined to provide sufficient independent evidence to support, and render trustworthy, the defendant's extra judicial admission that he wrecked the car and all combined established a reasonable inference that the DUI had been committed.

This Court has similarly engaged in this factual examination in two separate opinions determining that the State had met its burden at trial by presenting sufficient independent evidence which corroborated the defendant's admissions of driving. In City of Easley v. Portman, 327 S.C. 593, 490 S.E.2d 613 (Ct. App.1997), the State presented evidence that the arresting officer arrived at the scene of a wrecked Ford Bronco within 13 minutes of being informed by dispatch, the vehicle was warm to the touch; and the officer determined that the wreck had occurred within minutes of his arrival because the smell of tires was still present in the air. Further, the officer identified other individuals at the scene, including the registered owner of the Bronco and the defendant who had his head resting against the rear mounted spare tire of the wrecked vehicle. The Court found no error as to the sufficiency of the independent evidence addressing the temporal element of the wreck and the arresting officer's additional investigation of the facts and circumstances surrounding the accident, which was found to satisfy the corroboration rule and support the admission by the defendant that "I was driving the vehicle. I'm drunk. Take me to jail," Id at 595.

Similarly, in State v. Townsend, 321 S.C. 55, 467 S.E. 2d 138 (Ct. App. 1996), this Court held that the corpus delicti, "must be established by the best proof attainable, direct evidence is not essential," Id at 57. There the State presented evidence that a call stated a 1991 Lincoln had reportedly struck a power pole and a building. The arresting officer arrived at the scene and questioned firemen present at the location as to the driver's identity, at which point the defendant was identified. The officer administered field sobriety tests, following which, the defendant admitted to driving the vehicle, whereupon, he was placed under arrest for DUI and,

apparently, again admitted driving the wrecked car. This Court determined there was sufficient independent evidence to meet the threshold requirement of sufficiency to corroborate the defendant's admission of driving the vehicle at the time of the wreck.

At first impression the Townsend case seems strikingly similar to the present case. Further analysis totally differentiates the cases beginning with the fact that the vehicle, a 1991 Lincoln was described in the initial call reporting the wreck. Following arrest, and at trial, Townsend admitted driving the wrecked vehicle and testified that he was, "angry over road rage that caused the wreck; therefore, he drank alcohol that he had in the car," after the wreck occurred. Id at 57. Thus, it appears from the facts available in the opinion, that the issue of the sufficiency of the evidence supporting admissibility of Townsend's extra judicial statements was rendered moot by Townsend's testimony at trial.

Further the present case is distinguishable from Townsend in that here the wrecked vehicle was never identified at trial nor connected to the defendant by any testimony or evidence. The date and time of the wreck were never established. The only extra judicial statements allegedly made by the defendant were essentially that he had consumed two glasses of wine and that he was heading home from the club. The defendant's home address and the location of the club were never established in relation to the incident location. The State presented no testimony or evidence tending to even suggest that faulty or impaired driving was apparent from the nature of the accident. "No police officer investigating a traffic accident shall necessarily deem the fact that an accident has occurred as giving rise to the presumption that a violation of law has occurred," S.C. Code Ann. § 56-5-6170, Enforcement.

Townsend and Osborne establish that the corpus delicti in a particular case must be established by the best proof attainable and may be sufficiently proved by presumptive or circumstantial evidence when that is the best obtainable. Despite the fact that the State's only witness testified that when he arrived at the scene there were seven (7) to ten (10) first responders from various agencies on scene, the State's witness never identified any of those key witnesses; nor, did he take any statements to determine their knowledge of the status of the incident and the status of the defendant at the time of their arrival. Unanswered questions abound, such as: When did the first responders arrive? Was the defendant there at the scene when they arrived? Upon arriving at the scene, what did the first responders learn through their senses that may have established a time frame of reference and/or connected the defendant to the wrecked car? What statements did the defendant make to any of them? Was anyone else present at the scene when they arrived? Therein would have been found the best proof attainable, perhaps direct, perhaps presumptive or circumstantial, perhaps exculpatory for the defendant, but nevertheless the best attainable. However, zero (0) of the seven (7) to ten (10) estimated first responders, including the unidentified witness that was holding the Respondent on the side of the road when Trooper Brown arrived at the scene, were identified, interviewed, or questioned and none were subpoenaed by the State to present testimony at trial.

Using the above cited cases as a guide to the evidence needed to satisfy the corroboration rule, the conclusion seems unavoidable that in this case there is critical missing evidence needed to satisfy the State's minimal threshold requirement of sufficient independent evidence of the DUI. The common facts that bind Osborne,

Portman, and Townsend, are that in all three the State was able to support the trustworthiness of the defendant's admission of driving by providing, at trial, evidence that developed temporally when and what date the wreck occurred; developed through investigation what fault possibly caused the wreck; developed through records the make and model of the vehicle involved, and the registered owner of the vehicle. Further, the arresting officers engaged in independent investigations in which they identified other witnesses located at the scene in an effort to correctly identify the driver and to provide the State and the Defendant with more evidence to be used at any potential trial.

In the light most favorable to the State, the evidence presented at Abraham's trial established his mere presence, apparently detained on the road way, some distance away from an unidentified wrecked vehicle. Questioned by Trooper Brown, the Respondent stated that he had consumed two glasses of wine at some unstated time, whereupon he was administered standardized field sobriety tests, was arrested, hand cuffed, and placed in Trooper Brown's patrol car, and made the statement that he was heading home from the club house. Trooper Brown engaged in no independent investigation in an effort to provide the State with any evidence tending to prove the offense of driving under the influence, in support of any statements made by the defendant. For reasons known only to the State, and despite the burden on the State to relentlessly seek the truth, no effort was made to identify or develop any further evidence from the available witnesses that arrived at the incident location before the arresting officer, to meet the State's burden to support the trustworthiness of the Respondent's statement to police. The jury was left with no alternative but to

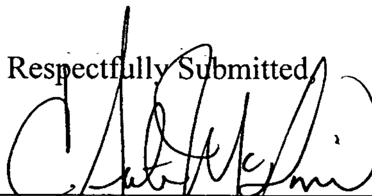
impermissibly speculate as to the facts not presented by the State; facts necessary as proof alliunde of the offense charged, and required in order to allow the State to even attempt to connect Abraham to the vehicle and the driving under the influence charge.

The State did not attempt to prove the corpus delicti with the "best proof attainable," State v. Townsend 321 S.C. 55, 57, 467 S.E. 2d 138, 140 (Ct. App. 1996), and failed to provide any sufficient independent evidence of the collision, the date and time of the wreck, the identity of the car involved, and none of seven to ten first responders that arrived on the scene before Trooper Brown were present at trial. The missing proof was not merely cumulative but in fact left material elements of the State's case uncorroborated and unsupported. Mr. Abraham entered court clothed with the presumption of innocence and the State assumed the burden of proving his guilt beyond a reasonable doubt. The South Carolina Supreme Court has stated that "the jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court," State v. Schrock, 283 S.C. 129, 134 322 S.E. 2d 450, 453 (1984). As such the Respondent respectfully asks this Court to affirm the circuit court's dismissal and find that the State failed to independently support the admission of extra judicial statements made by the defendant and failed to establish the corpus delicti of the charge of driving under the influence in this case.

CONCLUSION

For the aforementioned reasons, the Respondent respectfully asks this Court to affirm the decision of the circuit court dismissing the Respondent's conviction for DUI.

Respectfully Submitted,



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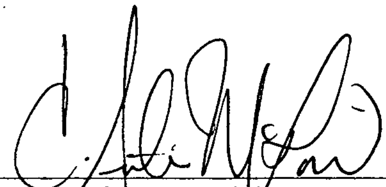
CERTIFICATE OF COUNSEL

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



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Anderson, South Carolina
April 16, 2013

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THE STATE, ...APPELLANT

v.

NEZAR ABRAHAM, ...RESPONDENT.

Appellate Case No. 2012-213136

PROOF OF SERVICE

I, Rhonda Brill, Legal Assistant, hereby certify that I have served the within Respondent's *Final Brief*, dated April 16, 2013, on The Honorable Jenny A. Kitchings, by depositing 15 copies of the same in the United States mail, postage prepaid, addressed to the Clerk of Court, South Carolina Court of Appeals:

The Honorable Jenny A. Kitchings
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I further certify that all parties required by Rule to be served have been served. This 19th, day of April, 2013.

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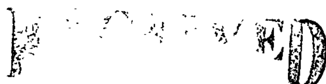
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