STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CARMINE JAMES MIRANDA, III,

APPELLANT

APPELLATE CASE NO 2016-001786

FINAL REPLY BRIEF OF APPELLANT

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I.

The chain of custody for the blood sample admitted at Appellant's trial was fatally incomplete.

The State argues that "the chain of custody was complete as far as practicable, as the State carefully tracked the movement of Appellant's blood sample between the time the sample was taken and the testing was performed, and each party who handled the evidence was identified." Resp.'t Br. p. 9. This contention is both factually and legally wrong.

At trial, the State was unable to establish the identity of the hospital employee who analyzed Appellant's blood sample. R. 193, l. 14 – 196, l. 22. The nurse who drew the blood testified. R. 190, ll. 12-20. The employee that transferred the blood from the emergency room to the hospital lab testified. R. 175, l. 17 – 176, l. 24. Two technicians working in the hospital lab when Appellant's blood sample was tested Chris Allsep and Christy Lazzo.

Only Allsep testified at trial. The State claims that his testimony:

> Allsep's testimony established that he was responsible for placing the samples into the machine for testing. . . . Allsep testified that as part of his duties as a lab technician, he retrieved **all** samples from the centrifuge and placed them in the Vista 1500, which performed the analysis without any technician intervention. . . . The State, thus presented an adequate chain of custody, fully accounting for the sample's whereabouts and the identity of the persons handling it. It was never left to conjecture as to who was in possession of the blood sample or what was done with it between seizure and analysis.

Resp't. Br. p. 12 (*emphasis original*). A review of the record the State relies on in making this claim, reveals that this was manifestly not what Allsep's testified to:

> Q: Were the two of you [Allesp and Lazzo] responsible for all blood alcohol testing that night?
>
> A: Yes.

Q: Would **you** have tested a blood alcohol sample received to the lab if it had been tampered with?

A: No. . . .

Q: And **you** wouldn't put a tube with a top that had been popped into the testing machine?

A: Correct.

R. 194, ll. 6-21. Contrary to the State's averments, Allsep never testified that he tested all of the samples submitted to the lab on the night of the incident. Resp't. Br. p. 12. He only stated that he would not have tested a sample that showed evidence of being tampered with or that had a broken vacuum seal. R. 194, ll. 6-21.

Allsep did not recall testing Appellant's sample. R. 193, l. 14 – 196, l. 22. The State never explained their failure to call Lazzo's as a witness. Moreover, the hospital's written report on the results of Appellant's blood specifically stated that there was "NO CHAIN OF CUSTODY" for the test results and that the "RESULT MUST NOT BE USED FOR NON MEDICAL PURPOSES (EMPLOYMENT OR LEGAL TESTING)." R. 284.

The State's legal analysis similarly mischaracterizes the problem with the chain of evidence. The State cites to several cases for the proposition that the chain of evidence in Appellant's case was sufficiently complete: *State v. Smith*, 326 S.C. 39, 482 S.E.2d 777 (1997) (officer transporting sample left sample in his home refrigerator for two days); *State v. Johnson*, 318 S.C. 194, 456 S.E.2d 442 (Ct. App. 1995) (chain of evidence for crack cocaine was complete despite discrepancy in the date the drugs were turned over to the evidence technician because all handlers were identified); *State v. Rogers*, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) (possession of purse that defendant's fingerprint was recovered from was sufficiently established despite purse being returned to owner prior to fingerprinting); *S.C. Dept't. of Soc. Servs. v.*

Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005) (courier for blood sample unknown); and *State v. Hatcher*, 392 S.C. 86, 708 S.E.2d 750 (2011).

Each of these cases dealt with the admissibility evidence when a person who handled the sample in the "middle" of the chain of evidence either did not testify, was unknown, or somehow mishandled the evidence. In all of these cases the sample sought to be tested arrived intact to the lab and the persons who evaluated the sample or evidence testified at trial. *Cf. State v. Williams*, 301 S.C. 369, 392 S.E.2d 181 (1990) (holding that evidence of blood test was inadmissible where there was no evidence of who took the sample).

In Appellant's case the missing link in the chain of evidence was the identity of who actually tested the blood sample. R. 196, l. 23 – 207, l. 23. Unlike in the cases the State relies on, here the missing link is at the end of the chain of evidence. The State's evidence left to conjecture as to who analyzed Appellant's blood sample and what was done with the sample after it reached the hospital lab. *See State v. Cribb*, 310 S.C. 518, 426 S.E.2d 306 (1992) (holding that State's failure to identify which nurse drew defendant's blood sample rendered chain of evidence incomplete); *see also Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d 534 (1957) (holding that party seeking to admit test results of blood into evidence must establish who had possession of the sample from when the sample was taken through to the final custodian who analyzed it).

Accordingly, the trial court committed an abuse of discretion when it admitted the results of Appellant's blood alcohol test and Appellant is entitled to a new trial.

II.

Instructing jurors they may infer a defendant was under the influence alcohol if he had an alcohol concentration of eight one-hundreds of one percent or greater was under the influence of alcohol is proper only when the tests for determining alcohol concentration were administered pursuant to the implied consent testing statute, S.C. Code Ann. § 56-5-2950.

The State's brief attempts to sever S.C. Code Ann. § 56-5-2950(G) from the rest of the implied consent statute, "Oo [*sic*] the contrary, the inference of intoxication is not tied to the implied consent procedures, whatsoever and to hold that an inference of intoxication only applies when police obtained a sample under the implied consent provision would generate an absurd result." Resp.'t Br. p. 16. Essentially, the State argues that unless a subsection of § 56-5-2950 specifically states that it applies only to alcohol concentration tests done pursuant to § 56-5-2950(A), the provisions of that subsection are applicable to any and all alcohol concentration tests. *Id.*

As will be discussed *infra*, the State's preferred interpretation of § 56-5-2950, including §56-5-2950(G), leads to truly absurd results if applied consistently to § 56-5-2950's subsections. The State's brief ignores the internal logic and cohesion of § 56-5-2950 by interpreting the statute's individual subsections in isolation. *Id.* at p. 17-18. The State's analysis also contravenes well-established rules of statutory construction and long standing South Carolina case law interpreting § 56-5-2950 and its antecedent implied consent statutes. *Mid–State Auto Auction of Lexington, Inc. v. Altman,*324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) ("a court should not focus on any single section or provision but should consider the language of the statute as a whole.").

Examination of S.C. Code Ann. § 56-5-2950

South Carolina Code § 56-5-2950, titled "Implied consent to testing for alcohol or drugs; procedures; inference of DUI," is the comprehensive statutory scheme controlling the administration and use in a DUI prosecution of the results of alcohol concentration tests taken at the behest of an arresting officers for investigative purposes. The statute consists of eleven subsections, only one of which expressly references subsection (A). *See* § 56-5-2950(H).

Subsection (A) defines the specific alcohol concentration tests a person implicitly consents to by driving a car in South Carolina:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, 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 test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing. A breath sample taken for testing must be collected within two hours of the arrest. Any additional tests to collect other samples must be collected within three hours of the arrest. The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies. Before the breath test is administered, an eight one-hundredths of one percent simulator test must be performed and the result must reflect a reading between 0.076 percent and 0.084 percent. 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. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

Subsection (A) controls all facets of the implied consent testing process: (1) the purpose of the tests, (2) who can order a driver to take the tests, (2) when a driver can be ordered to take the tests, (3) the circumstances under which different tests can be administered, (4) the timeframe for administering the tests, (5) the training a person administering the tests must undergo, (6) how the testing equipment is calibrated and tested, and (7) how test samples are to be handled.

Subsection (B) provides procedural safeguards for alcohol concentration testing done pursuant to the implied consent. "**No tests** may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that. . ." S.C. Code Ann. § 56-5-2950(B). The subsection then lists five rights that the person must be informed of prior to testing. *Id.*

Subsection (B), like subsection (G), does not expressly state that it applies only to the implied consent alcohol concentration tests found in subsection (A). Therefore, under the State's interpretation of § 56-5-2950, subsection (B)'s requirements would apply to all alcohol concentration tests regardless of how, why, when, where, and who administered them as the wording of subsection (B) is "not connected in any way to the implied consent language in subsection (A)." Resp.'t Br. p. 17. This is a plainly absurd result. *Hitachi Data Sys. Corp. v. Leatherman,* 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (observing that "the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose.").

Next, subsection (C) grants immunity to hospitals and their employees who conduct "the test in accordance with this section." § 56-5-2950(C). Subsection (D) states that "**persons tested or giving samples for testing**" are entitled to have a qualified person of their choice conduct additional, independent tests and to be notified of that right by the arresting officer. Subsection (E) obligates an arresting officer to "provide affirmative assistance" to a person seeking additional testing or risk the results of "the breath test" being inadmissible.

Under the State's proffered interpretation, because neither subsection (D) or (E) are expressly limited to implied consent blood alcohol concentration tests under subsection (A), these two subsection would obligate an arresting officer to – regardless of whether the arresting officer ordered an alcohol concentration test – notify and assist a person in securing independent testing whenever an alcohol concentration test is conducted, even if done for medical purposes at the direction medical personnel. This simply could not have been the intent of the General Assembly.

Finally, subsection (G) states that:

> In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 the alcohol concentration at the time of **the test**, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:
>
> (1) if the alcohol concentration was at that time five one-hundredths of one percent or less, it is conclusively presumed that the person was not under the influence of alcohol;
>
> (2) if the alcohol concentration was at that time in excess of five one-hundredths of one percent but less than eight one-hundredths of one percent, this fact does not give rise to any inference that the person was or was not under the influence of alcohol, but this fact may be considered with other evidence in determining the guilt or innocence of the person; or

> (3) if the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.
>
> The provisions of **this section** must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol and drugs.

By referring to "the test" instead of "any test" or "a test" the legislature clearly intended that jurors be instructed with the inferences in § 56-5-2950(G) only when a specific blood alcohol concentration test was administered. Further, the reference to "this section" as opposed to subsection, denotes that § 56-5-2950(G) is one subsection of a larger statutory scheme. Therefore, "the test" in § 56-5-2950(G) can only be rationally interpreted as referring to the implied consent alcohol concentration tests in § 56-5-2950(A).

South Carolina Jurisprudence Interpreting S.C. Code Ann. § 56-5-2950

The State attempts to distinguish Appellant's case from our Supreme Court's holding in *State v. Cribb*, 310 S.C. at 520, 426 S.E.2d at 308 (1992), and this Court's holding in *State v. Carrigan*, 284 S.C. 610, 328 S.E.2d 119 (1985). As an initial matter, the State contends that § 56-5-2950 has been amended numerous times in years between Appellant's case and *Carrigan* and *Cribb*. Resp't. Br. p. 19, n. 1. However, as will be shown *infra*, the amendments to the statute are immaterial to the interpretation of § 56-5-2950.

According to the State, *Cribb* "did not address the applicability of the presumption of intoxication in any way." Resp.'t Br. p. 18. In actuality, *Cribb* addressed the applicability of the whole of § 56-5-2950 when an alcohol concentration tests is not conducted pursuant to § 56-5-2950(a). In its analysis, the State's brief ignores the issue Cribb raised on appeal: "that [§] 56-5-2950 is triggered any time a law enforcement officer who is investigating a possible DUI requests a chemical analysis." *Cribb*, 310 S.C. at 521, 426 S.E.2d at 308.

Cribb posited on appeal that the officer's failure to comply with the procedural requirements of § 56-5-2950(A) rendered the results of his alcohol concentration tests, taken by a treating physician for medical purposes prior to Cribb's arrest, inadmissible at trial. *Id.* The Court rejected Cribb's argument, "the references to arrest and apprehension, when given their plain and ordinary meaning, indicate that the legislature intended to limit the operation of section 56-5-2950(a) to testing for evidence . . . after an arrest has been effected." *Id.*

With respect to *Carrigan*, the State's brief attempts to "cherry pick" this Court's opinion in an effort to narrow the scope of the *Carrigan's* holding:

> The Court of Appeal's judgment, thus, was not that the trial judge erred in instructing the jury on the presumptions contained in subsection (B) simply because subsection (A) was not followed. Rather the Court concluded the trial judge erred in reading subsection (B) to the jury because the State failed to comply with the requirements of subsection (B) that were applicable at the time.

Resp't. Br. p. 19. This assertion is, quite simply, incorrect.

Carrigan alleged that the trial court erred by reading § 56-5-2950(A) **and** (B) to jurors during the charge because the blood draw he underwent did not comply with either subsection. At the time of his trial, as now, subsection (A) addressed implied consent alcohol concentration testing done at the direction of the apprehending officer. 284 S.C. at 612, 328 S.E.2d at 120. Subsection (B) is the precursor to the current subsection (G) and, at that time, limited the inferences to situations when a breath test was administered. *Id.*

This Court reversed Carrigan's conviction concluding that, contrary to the State's assertions in its brief, the trial court erred in instructing jurors on both subsections:

> In our opinion, the trial judge erred in reading these subsections to the jury. It does not appear from the evidence that the test administered to Carrigan was at the direction of the law enforcement officer who arrested him, as required by subsection (a). Neither does it appear that the test was administered by a

> person trained and certified by the South Carolina Law Enforcement Division, using methods approved by that agency, as also required by subsection (a).
>
> Even more significantly, it does not appear that the amount of alcohol in Carrigan's blood was shown by chemical analysis of his breath, as required by subsection (b).

Id. at 615-616, 328 S.E.2d at 122. Tellingly, this Court rejected the same argument that the State now advances again in Appellant's case:

> The state argues it would be absurd to hold that the presumptions provided by subsection (b) arise based only on a test of defendant's breath and not his blood. While we concede the logic of this argument, we must reject it. This court has no legislative powers. In the interpretation of statutes our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature. We must do this based upon the words of the statutes themselves. To do otherwise is to legislate, not interpret. The responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts. A court may construe a statute by determining its meaning from the language used and its subject matter and purposes. However, there is a marked distinction between a court doing this and a court ingrafting upon a statute something the legislature has omitted from it, which the court believes ought to have been included. The legislature in its wisdom and view of justice can again amend its statute, but this court cannot.

Id. at 616-617, 328 S.E.2d at 122-123 (*internal citations omitted*).

Carrigan and *Cribb* are not isolated opinions, they fit squarely within South Carolina's case law strictly construing the requirements of § 56-5-2950 and DUI laws generally. *See: State v. Kinner*, 301 S.C. 209, 391 S.E.2d 251 (1990) (holding that instructing jurors on presumption of intoxication was error where tests did not comply with § 56-5-2950); *see also Taylor v. S.C. Dep't of Motor Vehicles.368 S.C. 33, 37, 627 S.E.2d 751, 753 (Ct.App.2006)* ("The implied consent laws of this State attempt to balance the interest of the State in maintaining safe highways with the interest of the individual in maintaining personal autonomy free from

arbitrary or overbearing State action."); *see also City of Columbia v Moore*, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995) (affirming trial court's suppression of alcohol concentration test results where officer failed to comply with § 56-5-2950(A)); *Cf. Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 697 S.E.2d 558 (2010) (holding that suppression of BAC results obtained in violation of § 56-5-2950 only applied to criminal cases).

Accordingly, the trial court erred in instructing jurors that they could infer Appellant was intoxicated pursuant to S.C. Code Ann. § 56-5-2950(G) where the State admitted that the blood draw was not conducted at the direction of the arresting officer, but was conducted for the purposes of medical evaluation. Appellant is entitled to a new trial.

CONCLUSION

Based on the foregoing additional arguments, Appellant Carmine Miranda respectfully requests that this Court reverse Appellant's conviction and remand this case to the Greenwood County Court of General Sessions.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of September, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 29, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of September, 2017.

John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of September, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025