

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

2017-CP-23-04936

State of South Carolina,)
)
)
vs.)
)
Danny Jame Plumley,)
)
)
Defendant.)

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SC Court of Appeals

THIS MATTER, came before the Court on October 30, 2017, and upon the State's timely filed and served appeal from the North Greenville Summary Court, Judge Southerlin. The original trial court's written order (which resulted from a pre-trial hearing) was executed on May 25, 2017; with the hearing that led to the trial court's order being held on January 26, 2017. Judge Southerlin's Order ruled with the Defendant in suppressing the breathalyzer result from being received as evidence in this DUAC prosecution. As mentioned above, the State appealed this order.

The State was represented by Assistant Solicitors Mitchell K. Byrd, Sr. and Haley Kernell. The defendant was represented by attorney Steve W. Sumner of the Greenville County Bar. Both parties filed and presented written memorandums and attachments for the Court's consideration. The hearing on the State's appeal was held in open court on October 30, 2017 in the Court of Common Pleas in Greenville, South Carolina.

FACTUAL BACKGROUND

The underlying facts of this case are basically undisputed. On March 28, 2016, the defendant was arrested and charged with DUI. Prior to conducting a breathalyzer test, the defendant was advised verbally and in writing of the standard "Advisement of Implied Consent Rights" (SLED Forensics Form #ICS 010, October 1, 2014). The defendant submitted to the

breath test, and registered .012 percent BAC. The defendant's license contains a "CDL" endorsement. The defendant was driving a private vehicle at the time of his arrest. The defendant was neither advised verbally or in writing of "Advisement of Implied Consent Rights - Commercial Driver's License Advisement" (SLED Forensics Form #ICS 013, February 2009).

The issue on appeal is whether or not the trial court was correct in suppressing the breath test results from evidence in the DUAC trial (the State timely informed the defendant that it was proceeding to trial as a DUAC charge) due to the fact that the defendant, while possessing a valid CDL endorsement on his South Carolina driver's license, was not also advised verbally and in writing of the "Advisement of Implied Consent Rights - Commercial Driver's License Advisement" (SLED Forensics Form #ICS 013, February 2009). For the reasons outlined below, this Court upholds the trial court's pre-trial ruling suppressing the breath test results from the trial of the case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This Court has both subject matter and personal jurisdiction over the issues in this case and the parties to same.
2. The State's appeal in this matter was timely filed with the Court and served upon the Defendant.
3. In reaching its conclusions, this Court considered the file in the case, arguments of counsel, materials submitted by both parties, applicable case law and statutes.
4. The State primarily argued two points; first, that because the defendant was driving a personal vehicle at the time of his arrest, the "Advisement of Implied Consent Rights - Commercial Driver's License Advisement" (SLED Forensics Form #ICS 013, February 2009) was not required to be given to the defendant prior to the breath test; and second, that even if said CDL advisement was required to be read, that the defendant had not demonstrated any specific

prejudice from lack of same and that the "trial judge or hearing officer had not found that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure."

5. The defendant primarily reiterated the arguments that he had made before the trial court. These were that under and pursuant to South Carolina Code Section 56-5-2110 our law considers it to be a "Commercial Driver's License" (CDL) violation if a CDL license holder is convicted of a driving under the influence offense in any vehicle (emphasis added). As to the "prejudice" argument from the state, the defendant referred the Court to Judge Southerlin's written order finding that the defendant was "prejudiced" by the breath testing procedure as it occurred in this case; and that a person cannot make a knowing and intelligent waiver of a right they possess if they have not been properly advised in the first place.

6. The Court finds that pursuant to South Carolina Code Section 56-5-2110, the defendant was required to have been advised both verbally and in writing of "Advisement of Implied Consent Rights - Commercial Driver's License Advisement" (SLED Forensics Form #ICS 013, February 2009) prior to the officer's request for a breath sample. The critical fact here is that pursuant to South Carolina Code Section 56-5-2110, it is considered a violation of his "commercial driver's license" if he is convicted of a driving under the influence (or DUAC) charge while operating any vehicle (emphasis added). It is not a prerequisite for a CDL violation to occur, against a driver who holds a "CDL" endorsement, that he be operating a commercial vehicle at the time of the infraction. Accordingly, it is immaterial if the defendant was driving a personal vehicle at the time of his arrest. Accordingly, this Court finds and concludes that the defendant should have been advised verbally and in writing pursuant to "Advisement of Implied Consent Rights - Commercial Driver's License Advisement" (SLED Forensics Form #ICS 013, February 2009) as part of the breath testing procedure.

7. The breath testing procedure employed in the case at bar was flawed due to the lack of the defendant being advised verbally and in writing of "Advisement of Implied Consent Rights -

Commercial Driver's License Advisement" (SLED Forensics Form #ICS 013, February 2009). Additionally, and at a minimum, the applicable statutes in this case as they relate to a proper breath testing procedure in this circumstance, are conflicting and ambiguous. A cardinal rule of statutory construction and application, in a criminal prosecution, is that any ambiguity (such as arguably exists here) inure to the benefit of the defendant.

8. The Court further finds and concludes that, under the facts of this case, that the defendant could not properly waive his statutory rights as a CDL driver due to the fact that he was not properly advised. see State v. Arthur, 374 S.E. 2d 291, 292 (S.C. 1988) (overruled on other grounds) and N.C. v. Butler, 441 US 369 (1979).

9. This Court agrees with the trial court that the defendant was prejudiced by the breath test procedure, as a whole, in this case.

ACCORDINGLY, the written order and ruling of the trial court is hereby affirmed and the breath test results in this case were properly suppressed from being received as evidence in the case.

The Honorable Edward W. Miller Date
Circuit Court Judge, Greenville, SC



Greenville Common Pleas

Case Caption: State Of South Carolina VS Danny Jame Plumley
Case Number: 2017CP2304936
Type: Order/Other

So Ordered

s/ Edward W. Miller