

STATE OF SOUTH CAROLINA)

IN THE MAGISTRATE'S COURT
THIRTEENTH JUDICIAL CIRCUIT

COUNTY OF GREENVILLE)

Ticket No: 20162370000379

State of South Carolina)

vs.)

ORDER

Danny Jarne Plumley,
Defendant.

RECEIVED
MAY 28 2019
SC Court of Appeals

THIS MATTER CAME BEFORE THE COURT, on January 26, 2017. Present and representing the State was Assistant Solicitor Haley Kernell; present for the Defendant was attorney Steve W. Sumner of the Greenville County Bar. The Defendant and arresting officer were also present. This case was timely called in accordance with a previously published trial docket set for the week of January 23, 2017. Jury selection was held on January 24, 2017, with the jury trial scheduled to begin on January 26, 2017. Prior to the beginning of the trial this Court asked both counsel if the Court needed to "hear any motions before the jury is sworn?" At that time, several agreed-upon stipulations regarding evidentiary issues were entered into the record by both counsel. Prior to the swearing of the jury, the Defendant brought and argued a motion to suppress the breath test site video recording and the Defendant's breath test result from being received as evidence in the trial of the case.

After careful and deliberate consideration of the facts in this case, the applicable law (both case law and statutory), and arguments and submissions of counsel, the Defendant's motion to suppress is hereby granted.

The Court's findings of fact and conclusions of law are as follows:

Exhibit A

FINDINGS OF FACT

1. That this court has jurisdiction over the parties and subject matter of this action.
2. That the Defendant was arrested on the above-referenced uniform traffic ticket number and charged with Driving Under the Influence (DUI) on March 28, 2016.
3. That prior to the trial of this case, in accordance with the applicable statutes, the defendant was timely and properly placed on written notice that this case would be tried by the State as a violation of "Driving with an Unlawful Alcohol Concentration."
4. That the Defendant's driver's license at the time of his arrest was a valid South Carolina driver's license bearing a valid Commercial Driver's License (CDL) endorsement, and that the "CDL" box on the uniform traffic ticket filled out by the arresting officer and issued to the defendant in this case was clearly marked "yes."
5. That the defendant was read and provided with a written copy of the standard "Driving Under the Influence Advisement" of implied consent rights (SLED Forensics Form #ICS 010) prior to providing a breath sample of 0.12% in this case.
6. That at no time was the defendant verbally or in writing advised of his implied consent rights as specifically provided for in the "Advisement of Commercial Driver's License Implied Consent Rights" (SLED Forensics Form #ICS 103).
7. That the defendant was not operating a licensed "commercial motor vehicle" at the time of his arrest for DUI; he was operating a "personal vehicle."

CONCLUSIONS OF LAW

1. That this Court has jurisdiction, and is the proper venue, for both the nature of this action and the parties involved. That this Court has both subject matter and personal jurisdiction over the parties and subject matter of this action and motion.

2. That in South Carolina, implied consent breath tests must be administered “pursuant to SLED policies.” S.C. Code §56-5-2950.
3. That SLED has provided South Carolina law enforcement officers with “rights advisement forms for implied consent tests.” South Carolina Law Enforcement Division, Policy 8.12.5(D)(1).
4. These include a “Driving Under the Influence Advisement,” which is to be read to subjects given breath alcohol tests for DUI violations, and a “Commercial Driver’s License Advisement,” which is to be read to subjects given breath alcohol tests for commercial driver’s license violations; if both a CDL violation and a DUI charge are involved, both advisements should be read. Id. at Policy 8.12.5(D)(2) and (3).
5. That South Carolina Code Section 56-1-2110 specifically states as follows:
 - “A. A person is disqualified from driving a commercial motor vehicle for not less than one year if convicted of a first violation of:
 1. Driving a motor vehicle under the influence of alcohol, a controlled substance, or a drug which impairs driving ability as prescribed by state law...”

S.C. Code §56-1-2110(A)(1).
6. Under South Carolina law, the waiver of a constitutional or statutory right requires a showing that the defendant made the waiver **knowingly and intelligently**. State v. Arthur, 374 S.E.2d 291, 292 (S.C. 1988) (overruled on other grounds) (emphasis added).
7. Because SC Code Section 56-1-2110 clearly states that any DUI conviction will result in the disqualification of a person from driving a commercial motor vehicle for not less than one year, it necessarily follows that whenever a CDL holder is charged with

driving any type of motor vehicle while under the influence of alcohol, a controlled substance, or a drug which impairs driving ability, it is a CDL violation.

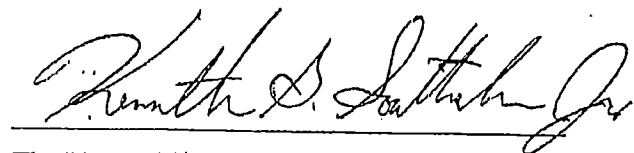
8. The officer's failure to administer the implied consent test pursuant to SLED policies by failing to properly advise the Defendant of the implied consent advisement required for alleged "CDL violations" materially affected the fairness of the testing procedure; The proper remedy for this prejudice is to exclude from evidence the Defendant's breath test result in this case.

9. In consideration of the law and policy as recited herein, the State's argument that the Commercial Driver's License Advisement is to be read to a subject only when "a law enforcement officer has probable cause to believe that you have a measurable amount of alcohol in your body while driving a commercial motor vehicle," which would be a violation of Section 56-1-2120, and that "it's been made clear defendant is not driving a commercial vehicle, so this policy does not apply to our situation here and the correct advisement was read" is without merit.

10. The rule of lenity applies when a statute at issue is penal in nature, and the statute must be construed strictly against the state, resolving any uncertainty or ambiguity against the State and in favor of the Defendant. See State v. Brannon, 666 S.E.2d 272 (S.C. Ct. App., 2008) (citing Lewis v. Gaddy, 173 S.E. 2d 376 (1970); State v. Blackmon, 403 S.E.2d 660 (S.C. 1991); State v. Graves, 237 S.E. 2d 584 (S.C. 1977); Berry v. State, 675 S.E.2d 425 (S.C. 2009).

ACCORDINGLY, the defendant's motion to suppress the breath test site video recording and the Defendant's breath test result in this case is granted.

AND IT IS SO ORDERED!



The Honorable Kenneth Gowan Southerlin, Jr.

5/25/17

Date

STATE OF SOUTH CAROLINA

IN THE MAGISTRATE COURT

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

State of South Carolina

RECEIVED

vs

MAY 28 2019

In Re: UTT# 20162370000379 (DUI)

Danny Jame Plumley,
Defendant

SC Court of Appeals

**NOTICE OF MOTION AND MOTION
TO RECONSIDER AND VACATE ORDER**

TO THE DEFENDANT, HIS COUNSEL, AND THIS HONORABLE COURT:

PLEASE TAKE NOTICE that on the tenth day hereafter or as soon as the Court may deem it necessary, the undersigned, on behalf of the State of South Carolina, will move and does hereby move this Court to reconsider and vacate its order granting the defendant's motion to suppress the breath alcohol test results dated May 25, 2017, and received May 30, 2017, upon the following grounds:

1. At the time of the accident leading to the defendant's arrest, the defendant was driving a 1979 Chevrolet TK (VIN# CCL449S115391), which is a personal motor vehicle, not a commercial motor vehicle.
2. A commercial motor vehicle is defined in South Carolina Code Ann. § 56-1-2030(4) as "a motor vehicle designed or used to transport passengers or property if the vehicle:
 - (a) has a gross vehicle weight rating of twenty-six thousand one or more pounds;
 - (b) is designed to transport sixteen or more persons, including the driver; or
 - (c) is transporting hazardous materials and is required to be placarded in accordance with 49 CFR Part 172, subpart F."

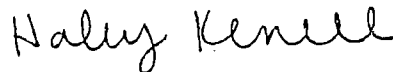
Denied 7/12/17
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has not been convicted of driving his personal motor vehicle while under the influence.
See S.C. Code Ann. § 56-1-2110(A)(1).

9. The defendant knew there would be consequences to his driving privileges when he was read his "DRIVING UNDER THE INFLUENCE ADVISEMENT" in accordance with SLED Policy 8.12.5(D)(2), and he knowingly and intelligently opted to provide a breath sample.
10. The defendant did not present any evidence to show the breath alcohol test's accuracy and fairness were materially affected in violation of South Carolina Code § 56-5-2950.
11. The defendant was properly advised of his rights and knew the possible effects of taking or refusing the breath test pursuant to South Carolina Code § 56-5-2950. The Court failed to articulate on the record or in the final order how the trooper's failure to follow SLED policy materially affected the accuracy or reliability of the test results or the fairness to the defendant such that the proper remedy would be suppression of the breath test results.

WHEREFORE, the State respectfully requests the Court to reconsider and vacate its order of May 25, 2017.

Respectfully submitted,



s/Haley Kernell
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864-467-8108

June 8, 2017
Greenville, South Carolina