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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY

Court of Common Pleas

Maité Murphy, Circuit Court Judge

Appellate Case No. 2016-001977

RECEIVED  
JAN 23 2018  
SC Court of Appeals

The State ..... Respondent,

v.

Breanna Flannery, ..... Appellant.

RECORD ON APPEAL

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INDEX

Jury Verdict Form, April 13, 2015..... 2  
Order of Judge Shelbourne, August 17, 2015..... 3  
Return on Appeal, April 18, 2016..... 6  
Order of Judge Murphy, August 3, 2016 ..... 9  
Motion to Set Aside Conviction or Direct Verdict or for New Trial, April 23, 2015 ..... 13  
Grounds for Appeal to Common Pleas, September 28, 2015 ..... 18  
Transcript of Common Pleas, December 2, 2016 ..... 26  
Defendant's Exhibit 9 ..... 45  
Defendant's Exhibit 10 ..... 46

1



STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

IN THE MAGISTRATE'S COURT  
CIVIL CASE # 66331GU

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

BREANNA FLANNERY,

Defendant

NOTICE OF DECISION

This matter came before me on Defendant's motion to set aside the conviction and to grant a directed verdict or new trial. After considering the arguments set forth by Defendant's counsel, this Court denies Defendant's motions.

Defendant argues that Deputy Tuck should not have been allowed to be in the Court room while Deputy Hayes testified. However, Defendant recognizes that Deputy Tuck was the Deputy charged with prosecuting the case. As the prosecuting deputy it was necessary and appropriate for Tuck to remain in the Court room despite witnesses being sequestered.

As for reasonable suspicion for the stop, the Court reviewed the video taken by Deputy Hayes and observed Defendant's vehicle crossing the lines. Further Hayes testified that he pulled the Defendant over because he was earlier flagged down by a concerned citizen and because he saw Defendant cross over the lines. Based on that the Court found that there was probably cause for the stop.

As for statements by the prosecution or its witnesses that the deputy was "flagged down", the Court gave a curative instruction to the jury that they should disregard any comments made by the witnesses towards that end. The Court has no reason to believe that the jury did not

follow the Court's instructions on disregarding said comments and considering only the evidence presented to the jury by the sworn testimony and evidence admitted at trial.

The Court granted Defendant's motion to suppress a portion of the audio portion of the video, but required Defendant to be responsible to mute the video. Defendant's counsel agreed to this without objection and has not heretofore raised that as a grounds for any motion. Notwithstanding that, since it was the Defendant that wished to suppress the audio portion of the video, it was incumbent on the Defendant to make arrangements to do so.

The Court found that the video was properly admitted into evidence. Deputy Hayes testified as to it being his video taken while he was driving.

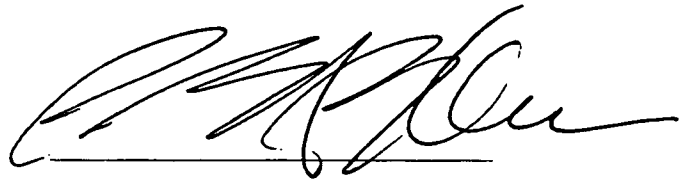
As for Deputy Tuck testifying with "open ended" statements, Tuck was the prosecuting authority as well as the arresting deputy and as such it was appropriate for Tuck to testify. The Court is cognizant that in so testifying it is possible for statements to be made without the opportunity to object before the statement is made. Defendant's counsel had the right to object and ask for any inappropriate statements to be stricken. The Court either did so if the objection was sustained.

Defendant objects to the introduction of the breath test results contending that the breathalyzer machine was not working properly and was not reliable. Defendant requested that the Court make a determination that SLED policy and procedures were violated and that there was a material question about the reliability of the machine's reading warranting the exclusion of the results. The Court denied this request finding that the alleged unreliability goes to the weight of the evidence. At no time did Defendant attempt to introduce any evidence or testimony that the machine was unreliable or that the results were unreliable or that there were any other challenges to the test data.

As for evidence of a violation of SC Code Section 56-1-510, the Deputies testified that Defendant had a false identification on her at the time of arrest.

Based on the testimony at trial and the evidence introduced, this Court finds there the Defendant's arguments to be non-persuasive and denies the same.

Dated this 17<sup>th</sup> day of August, 2015.



P. Brandt Shelbourne, Magistrate

STATE OF SOUTH CAROLINA

MAGISTRATE'S COURT

COUNTY OF DORCHESTER

CASE NO: 66331GU

15-CR-18-1916

DORCHESTER COUNTY

2016 APR 18 PM 3:08

State of South Carolina,  
Plaintiff

vs.

RETURN OF APPEAL

Breanna Flannery,  
Defendant(s)

This matter came before me for a jury trial on April 13, 2015. Deputy Sheriff Tuck prosecuted the Defendant for Driving under the Influence. After a trial, the jury returned a verdict of guilty. Defendant subsequently filed a Motion to set aside the conviction and to grant a directed verdict or new trial. After considering the arguments set forth by Defendant's counsel, this Court denied Defendant's motions and entered an order accordingly.

At the hearing on Defendant's Motion to Set Aside the Conviction, Defendant's counsel's arguments were limited to those matters set forth in the written Motion and actually argued at the hearing. AT the hearing, Counsel did not include any motion based in whole or part on the method of selecting a jury or the length of the trial. However, had those arguments been raised, this Court would have denied the Motion on those grounds as counsel did not object to the jury selection at trial or raise any of those issues at the trial. Following jury selection, both parties were given the opportunity to notify the court if there were any issues that needed to be addressed and none did. As for the length of trial, the Court's recollection is that it asked the jury to decide if they wished to continue with the trial and deliberation or wished to come back the following day. The jury indicated that they unanimously wished to continue the trial and conclude the matter that day. The Court ordered dinner for the jury to accommodate their deliberation. Defendant did not raise this at the Motion to Set Aside the Verdict, however, the Court would have denied the Motion on these grounds as it was within the Court's discretion to continue with the trial and the jury indicated unanimously that it wished to continue with the trial and Defendant did not object.

Defendant argued that Deputy Tuck should not have been allowed to be in the Court room while Deputy Hayes testified. However, Defendant recognized that Deputy Tuck was the Deputy charged with prosecuting the case. The Court found that as the prosecuting deputy it was necessary and appropriate for Tuck to remain in the Court room despite witnesses being sequestered. South Carolina law allows an arresting deputy to prosecute a case in Magistrate's Court and there was no practical way to exclude Deputy Tuck, the arresting deputy, from the Court room during the testimony of the other witnesses if Tuck was to be able to conduct direct examination and re-direct examination of the State's witnesses.

6

As for reasonable suspicion for the stop and probable cause, the Court reviewed the video taken by Deputy Hayes and observed Defendant's vehicle crossing the lines. Further Hayes testified, outside the presence of the jury, that he pulled the Defendant over because he was earlier flagged down by a concerned citizen and because he saw Defendant cross over the lines. Based on that the Court found that there was probable cause for the stop.

As for statements by the prosecution or its witnesses that the deputy was "flagged down", the Court granted Defendant's motion to exclude this testimony. Despite this, there was what appeared to be inadvertent reference by Deputy Hayes to being "flagged down by a concerned citizen". The Court did not believe that Deputy Hayes intentionally disregarded this Court's ruling on not admitting that statement or evidence. The Court gave a curative instruction to the jury that they should disregard any comments made by the witnesses towards that end. The Court has no reason to believe that the jury did not follow the Court's instructions on disregarding said comments and considering only the evidence presented to the jury by the sworn testimony and evidence admitted at trial.

The Court granted Defendant's motion to suppress a portion of the audio portion of the video, but required Defendant to be responsible to mute the video. Defendant's counsel agreed to this without objection and has not heretofore raised that as a grounds for any motion. Notwithstanding that, since it was the Defendant that wished to suppress the audio portion of the video, it was incumbent on the Defendant to make arrangements to do so.

The Court found that the video was properly introduced into evidence. Deputy Hayes testified as to it being his video taken while he was driving. Further, the Court had an opportunity to review the video pursuant to Defendant's motion to dismiss for lack of probable cause. Deputy Hayes, in the hearing prior to trial testified to the video being his and taken while he was following the Defendant. Defense Counsel agreed at the hearing that it was Deputy Hayes' video and argued that it was insufficient to support probable cause for an arrest. As discussed above, this motion was denied. At trial Hayes testified that he took the video and entered into the Sheriff's evidence.

As for Deputy Tuck testifying with "open ended" statements, Tuck was the prosecuting authority as well as the arresting deputy and as such it was appropriate for Tuck to testify. The Court is cognizant that in so testifying it is possible for statements to be made without the opportunity to object before the statement is made. Defendant's counsel had the right to object and ask for any inappropriate statements to be stricken. The Court either did so if the objection was sustained or there was no objection.

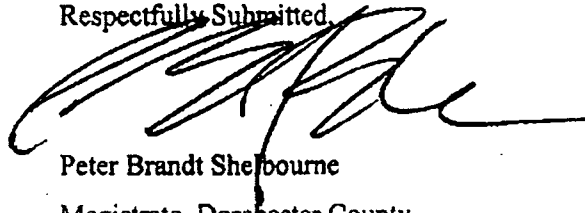
Defendant objected to the introduction of the breath test results contending that the breathalyzer machine was not working properly and was not reliable. Defendant requested that the Court make a determination that SLED policy and procedures were violated and that there was a material question about the reliability of the machine's reading warranting the exclusion of the results. The Court denied this request finding that the alleged unreliability went to the weight of the evidence. Defendant not attempt to

introduce any evidence or testimony that the machine was unreliable or that the results were unreliable or that there were any other challenges to the test data. This Court was not in a position to make findings of fact as to the reliability of a data master machine as this was within the jury's province.

As for evidence of a violation of SC Code Section 56-1-510, the Deputies testified that Defendant had a false identification on her at the time of arrest. Based on this, the Court allowed the issue to proceed to the jury and charged the jury with the appropriate law. The jury returned a verdict of guilty.

Dated this \_\_\_\_ day of April, 2016.

Respectfully Submitted,



Peter Brandt Shebourne

Magistrate, Dorchester County

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2015CP1801916**

<input checked="" type="checkbox"/> South Carolina State Of	2016 AUG -5 AM 9:	Breanna Flannery
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<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j), SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;
  - Reversed;
  - Remanded;
  - Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Maite' Murphy	2166	8/5/2016
Circuit Court Judge	Judge Code	Date

**For Clerk of Court Office Use Only**

This judgment was entered on 8/5/2016, and a copy mailed first class or placed in the appropriate attorney's box on 8/5/2016, to attorneys of record or to parties (when appearing pro se) as follows:

Kyle Leo Ward 140 N. Main Street Suite 102 Summerville,  
SC 29483

Tim Amey 1495 Remount Rd North Charleston, SC 29406

\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

*Cheryl Graham*

\_\_\_\_\_  
**Court Reporter**

\_\_\_\_\_  
**Cheryl Graham - Clerk of Court**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

cc: Summerville Mag. Ct. via email 8/5/16

STATE OF SOUTH CAROLINA )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS )  
FOR THE FIRST JUDICIAL CIRCUIT )  
CASE NO.: 2015-CP-18-1916 )

STATE OF SOUTH CAROLINA, )

-versus- )

BREANNA FLANNERY, )

Defendant. )

**ORDER**

2016 AUG-5 AM 9:18  
DORCHESTER COUNTY

**TO: ASSISTANT SOLICITOR, KYLE WARD  
DEFENSE COUNSEL, TIM AMEY**

This Appeal came before the Court on April 19, 2016. Based upon review and consideration of the file in this case, the Magistrate's Return, and oral arguments of counsel, the Court's rulings on each of the grounds set forth in Appellant's Appeal are as follows:

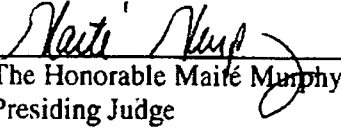
1. As no motion or objection regarding jury selection or trial length was made at the time of trial, this issue was not preserved for appeal.
2. This Court finds that Deputy Tuck's presence in the courtroom during Deputy Hayes' testimony was proper, as Deputy Tuck was the prosecuting officer; therefore, the Trial Court's ruling on this matter is affirmed.
3. This Court finds that the Trial Court did not err in finding that Deputy Hayes had probable cause to conduct the traffic stop based upon the evidence presented.
4. This Court finds that the Trial Court's curative jury instruction regarding testimony that the deputy was "flagged down" and denial of Defendant's Motion for Mistrial were proper.
5. As defense counsel made no objection or motion regarding muting certain portions of the video at trial, this issue is not preserved for appeal.
6. Based upon Deputy Hayes' testimony regarding the video, this Court finds that there was no abuse of discretion by the Trial Court in admitting the video as evidence.
7. It is not improper for the arresting officer to both prosecute the case and testify as a witness in Magistrate's Court. State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972). As Deputy Tuck was both the prosecuting officer and the arresting officer, it was proper for him to testify as such.

8. This Court finds that the Trial Court properly ruled that the issues surrounding the breath test went to the weight of the evidence, not the admissibility.

9. This Court finds, and the State agreed on the record at the hearing, that the Trial Court erred in denying defense counsel's Motion for Directed Verdict as to the charge of unlawful use of license, S.C. Code Ann. § 56-1-510, as no evidence was presented to show that Appellant used the license illegally.

10. Based upon the reasons set forth above, this Court finds that Appellant received a fair and impartial trial.

**IT IS SO ORDERED!**

  
The Honorable Maité Murphy  
Presiding Judge  
First Judicial Circuit

August 3, 2016  
St. George, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE DORCHESTER COUNTY
	)	MAGISTRATE COURT
COUNTY OF DORCHESTER	)	
	)	CHARGE: DUI 1 <sup>st</sup> & False ID
	)	Ticket #: 66331GU & 66332GU
STATE	)	
	)	
vs.	)	<b>MOTION TO SET ASIDE THE</b>
	)	<b>CONVICTION AND GRANT</b>
BREANNA FLANNERY	)	<b>DIRECTED VERDICT OR</b>
	)	<b>FOR A NEW TRIAL</b>
Defendant.	)	
_____	)	

The Defendant by and through her attorney, Timothy D. Amey, hereby moves this Honorable Court to set aside the conviction and grant a new trial. Defendant prays for this relief based on the following:

1. The Defendant was charged with Driving Under the Influence first offense with a 0.14 BAC Level and Borrowing an SCDL.
2. Trial was held on Monday April 13, 2015, with Jury Selection beginning at 11AM and deliberation beginning at 9PM; Defendant made timely motions for a Directed Verdict at the appropriate stages.
3. After a short deliberation, the jury returned with a unanimous verdict, finding the Defendant guilty on both charges.
4. This motion follows for the reasons set forth herein outlining the various injustices, evidentiary problems and general unfairness of the trial in violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> amendments to the Constitution of the United States.
5. During Pre-Trial motions, subsequent to the jury being sworn, Defense Counsel requested that the State's witnesses be sequestered, as neither was a party to the case and substantial risk exists for their stories to combine, it was argued that they should be separated until being excused as a witness; furthermore, it was argued that Officer Tuck's being allowed to prosecute the case extended only to his presentation of his case, not to examination of the State's other witness, Officer

Hayes, with whom he worked the investigation, and that in allowing Officer Tuck to conduct a direct examination of Officer Hayes, the court jeopardized the Defendant's right to a fair trial and to separately confront the witnesses against her, without the opportunity for them to purposefully or unknowingly develop what becomes an unnaturally cohesive singular depiction of the events and evidence, unnecessarily and unconstitutionally easing the State's burden and obligation to prove its case beyond a reasonable doubt, resulting in prejudice which necessitates a new trial.

6. Defense Counsel then argued for dismissal of both charges for lack of reasonable suspicion to conduct an investigative stop, with the officer taking the stand and explaining that he witnessed only two indicia of potentially impaired driving, despite his lack of training on the subject matter, in the course of an entire 8 minutes of observation of the Defendant's vehicle prior to initiating the stop; no further testimony being provided and the video having been introduced for the court's review, and to refresh the officer's recollection, the court improperly found that there was probable cause, failing to address the officer's inability to articulate a reasonable suspicion of impairment, or any other traffic offense, resulting in prejudice which necessitates a new trial.
7. The Court did correctly rule in pre-trial motions that any evidence of inadmissible hearsay regarding the officer's having been "flagged down" in reference to an impaired driver, be excluded from testimony and that no reference be made in front of the jury; when only moments later the Officer began his examination with a leading question first asking "Did you have reason to ..." before an objection could be entered, and subsequently after a sidebar was held, again explaining the importance of avoiding the hearsay testimony, the officer on the stand then testified "I was on patrol . . . when I was flagged down in reference to an intoxicated..." before yet another objection could be made, at which point the jury had to be removed from the court, now having heard three total attempts including the opening statement, and specifically hearing the State's two attempts to begin the presentation of their case; seeing the Defense twice having to interrupt and conceal evidence which should never have been bled into the record,

and which only gave rise to a singular conclusion that the State very much wanted to present it and that the Defense was attempting to keep them from hearing it, and finally that the Defense most certainly had something to hide, resulting in prejudice which necessitates a new trial.

8. In response to this clear violation of both the rules of evidence and the ruling of the Judge hearing the case, Counsel moved the court for a mistrial as the fairness of the entire trial had been compromised, the jury could not be reasonably asked to forget what they did hear, or to brainwash themselves about whatever it was that Defense Counsel was so adamantly attempting to cover-up and keep out of the trial; the State had been warned several times in the course of arguing motions, objected to in opening statements, and then again before the cat ultimately came out of the bag, and no curative instruction would exist, in a scenario where two police officers are up against a Defense attorney, where the jury could fairly and impartially evaluate the rest of the evidence or Defense Counsel's conduct, including subsequent objections, motions and final argument, and enter into unbiased, fair and impartial deliberation, resulting in prejudice which necessitates a new trial.
9. In the course of pre-trial motions, Defense Counsel also moved to suppress any portions of the video evidence in which the officer's discussed SC Code § 56-1-286 Zero Tolerance provisions and penalties in the course of their § 56-5-2930 investigation, as being irrelevant, prejudicial and inadmissible as the two sections mutually bar prosecution of the other; there was a clear risk of confusing the jury and potentially lowering the standard of law from .08 to .02, and while the motion was granted in part, the Court's remedy was to require Defense Counsel mute the video in front of the jury allowing the time to pass without sound, until such discussion ended and Defense Counsel could unmute the recording, resulting in prejudice which necessitates a new trial.
10. During the presentation of the State's case, officer Hayes was questioned about his experience and what he witnessed prior to making the arrest, and on re-direct Officer Tuck questioned Officer Hayes asking "Was your in-car camera activated?" and "Did you submit it into evidence?" with both being answered in

the affirmative, before allowing the witness to be seated; from there, Defense Counsel moved the court to exclude the video from Officer Hayes' car as it was not admitted into evidence and as no foundation of any sort had been laid by which it could be entered into evidence at trial, though after a recess the video was allowed based on an "unorthodox" manner of providing a foundation, the exclusion of which would require a Directed Verdict of Not Guilty.

11. Officer Tuck then took the stand and provided open-ended testimony, against the objection of Defense Counsel, in which he was able to leak all sorts of objectionable statements into the record without Defense Counsel having an adequate opportunity to hear a question and answer format, anticipate the subject matter, and offer timely objections where appropriate; essentially, allowing Officer Tuck free reign of the courtroom in his ability to examine his witness, testify and argue in seamless fashion where one statement to the jury under oath could not be separated from another made to the jury in closing argument, resulting in prejudice which necessitates a new trial.
12. Objection was made to the admission of the breath test result being introduced into evidence due to a violation of SLED policies and procedures, and a showing made to the court that the specific machine used to take a sample from the Defendant was 7 months past the expiration date according to the SLED Calibration records; as such it was argued that the judge should find the failure to follow SLED policy resulted in a material question about the reliability of the machine's reading, with the record being further supplemented by evidence of three separate readings, out of 17 taken during a 40 day period ending on the date of the Defendant's, registering exactly the same result to the thousandth of a single percent, however the evidence was admitted and Defense Counsel was left to argue hyper-technical issues to the jury in hopes that they discern the information before them and make a determination of fact, the exclusion of which would require a Directed Verdict of Not Guilty.
13. The Court refused Defendant's motion for a Directed Verdict, despite the State's failure to produce any evidence of a violation of SC Code §56-1-510.
14. Due to the nature in which the trial proceeded, the impact of various rulings, and

the strain placed on the jury over the course of the eleven hours they spent in the court house on April 13, 2015, it is impossible to ignore the cumulative impact of each singular component weighed together on balance against the Defendant's right to a fair trial, before an impartial audience of her peers, from whom justice can be expected, through diligent and thorough deliberation of all the evidence, and with whom the system can be reasonably assured will ensure that justice is done, all as required by Due Process under the Constitution of South Carolina and the United States, resulting in prejudice which necessitates a new trial.

THEREFORE, the Defendant respectfully requests this Honorable Court hear this motion, issue its order granting Defendant's motion for a Directed Verdict and adjudicate the Defendant Not Guilty. In the alternative, the Defendant respectfully requests The Court order the conviction set aside and grant a new trial, all based upon the arguments raised and those which may be subsequently presented, most important of which is the cumulative effect of those errors alleged.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. D. Amey', written over a horizontal line.

Timothy D. Amey  
TA – Attorney at Law  
1495 Remount Rd.  
North Charleston, SC 29406  
Cell: (843) 425-2269  
ATTORNEY FOR DEFENDANT

This 23<sup>rd</sup> day of April 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Common Pleas

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APPEAL FROM SUMMERVILLE MAGISTRATE COURT  
P. Brandt Shelbourne, Dorchester County Magistrate Court Judge

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TICKET #s: 66331GU & 66332GU

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The State of South Carolina ..... Respondent,  
v.  
Breanna Flannery ..... Appellant.

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\_\_\_\_\_  
GROUNDS FOR APPEAL  
\_\_\_\_\_

The Defendant hereby appeals to the First Circuit Court of Common Pleas, County of Dorchester, State of South Carolina, from trial of the above-captioned case originally tried on April 13, 2015 in the Summerville Magistrate Court before the Honorable P. Brandt Shelbourne. On April 23, 2015, the 10<sup>th</sup> day after the trial was held, Counsel filed a Motion to Set Aside the Conviction and Grant a Directed Verdict or for a New Trial. An order was issued on August 17, 2015 denying each ground. Notice of the Court's decision was provided to Counsel via email on August 28, 2015. This Appeal is timely filed within thirty (30) days of receiving notice of the Court's action.

The Appeal is based upon the following grounds:

1. Members of the jury were summoned to appear at 10:00 A.M. Initially, there were too few jurors answering their summons, but after a few late arrivals, the court was ready to begin jury selection. With a total of 15 potential jurors, Jury Selection began at 11:00 A.M. Among

the 15 potential jurors, Mark Schultz explained he'd been in 3 court marshalls with the armed service and that 2 of 3 were found guilty. Grant Mattingley was an officer for the City of Summerville, and Michael Hunter, an employee of the local shooting range, told the court he was involved in a previous trial with a guilty verdict. He added that he could not say he knew the prosecuting officers specifically, but they all came to shoot at the range where he worked. The Defense's strikes consisted of Mr. Shultz, Mr. Hunter, Mr. Mattingley and Ms. Stephanie White, a private investigator whose husband worked as a firefighter.

During the course of the trial, the Judge explained to the parties that he only sat on the bench one day a week, on Mondays. As such, the trial would not be able to continue into Tuesday, despite carrying on well beyond the end of a normal business day, and well beyond what any juror might have expected in making personal arrangements. Jurors were held until nearly 9:00 P.M. before they were sent back for deliberation. As an accommodation, seven female jurors were offered delivery pizza. After the verdict, when Counsel and the Defendant exited the courthouse, one of the female jurors was clearly distressed on the phone with her significant other. She handed the phone to Dorchester County Security personnel to explain to the gentleman that she was not out and about without his knowledge, rather she was truthfully just finishing with court as a juror.

The Court's decision to proceed with jury selection with such a small pool of jurors, comprised in part by law enforcement and those with very close ties to law enforcement, and further to carry a trial over to nearly a 12 hour day for those serving as members of the jury, on a Monday, was inherently unfair to the Appellant in violation of the 5<sup>th</sup> and 14<sup>th</sup> amendments to the Constitution of the United States.

2. During Pre-Trial motions, subsequent to the jury being sworn, Defense Counsel requested that the State's witnesses be sequestered, as neither was a party to the case and substantial risk exists for their stories to combine. Counsel argued that they should be separated until being excused as a witness. The Trial Court erred in interpreting South Carolina law as allowing Officer Tuck to act as both a witness in presenting testimony and then to switch hats and act as the examiner of another witness. Counsel made it clear that there was no objection to Officer Tuck prosecuting his case or presenting evidence. However, to allow Officer Tuck to first examine Officer Hayes on Direct and again on Redirect, and subsequently take the stand himself, creates too much risk for their testimony to combine. In any other scenario, where an attorney prosecutes the case, or where a superior officer performs the examinations, the Appellant's request to sequester the witnesses would be granted. But because the County had not supplied the appropriate personnel, the Trial court decided to erode the Appellants protection from either purposeful or unintended cohesion of the testimony, allowing for a singular depiction of the events and evidence, unnecessarily and unconstitutionally easing the State's burden to prove its case beyond a reasonable doubt.

3. The Trial Court erred in finding that Officer Hayes had probable cause to stop the Appellant. Counsel moved the court for dismissal of both charges for lack of reasonable suspicion to conduct an investigative stop. Officer Hayes testified outside the presence of the jury explaining that he was flagged down about an impaired driver so he began following the Appellant. He stated that he witnessed only two indicia of potentially impaired driving, despite also testifying that he lacked the training necessary to identify the symptoms of impaired driving. He further testified that he followed her for a full 8 minutes. After numerous stop lights, including an unexpected stop for a fire truck responding to a call, Officer Hayes could only

describe two clues of bad driving. Officer Hayes admitted he lacked the appropriate training to spot impairment. He followed the Appellant's vehicle for 8 minutes before deciding to initiate a traffic stop. His stated reason for doing so was being flagged down by a mystery witness, and seeing two clues during an 8 minute period. The Trial Court erred in finding probable cause in a scenario where the Officer lacked even reasonable suspicion. Appellant's detention and subsequent arrest were therefore both in violation of the 4<sup>th</sup> Amendment to the Constitution of the United States.

4. The Trial Court did correctly rule in pre-trial motions that any evidence of inadmissible hearsay regarding the officer's having been "flagged down" in reference to an impaired driver, be excluded from testimony and that no reference be made in front of the jury. Fully aware that the State's case was being handled by officers who lack the same training and understanding of the rules of evidence, Counsel made a point to request the Court caution both officers and make sure they fully understood the nature of the motion and also the Court's ruling. Counsel had to object during the State's opening statement to keep Officer Tuck from mentioning it. Then only moments later Officer Tuck began his examination with a leading question first asking "Did you have reason to ..." before an objection could be entered. After a sidebar was held, again explaining the importance of avoiding the hearsay testimony, the officer on the stand then testified "I was on patrol . . . when I was flagged down in reference to an intoxicated..." before yet another objection could be made, at which point the jury had to be removed from the court, now having heard three attempts by the officers to mention something that the Defense very clearly did not want them to hear. At that point the jury was well aware of something being concealed by Defense Counsel, and some jurors likely heard the testimony before Defense Counsel could for the third time object on the exclusion of the exact same thing.

The Trial Court erred in not granting Counsel's motion for a mistrial and instead offering a curative instruction. Regardless of the State's intent, whether purposeful or an innocent misunderstanding of the rules of the court, the jury was irreparably exposed to information they should never have heard and also to Defense Counsel's repeated attempts to try and conceal or keep them from hearing that information.

5. The Trial Court erred in its decision not to exclude the portions of the video in which the officers discussed the "Zero Tolerance" law in South Carolina because the Appellant was not yet 21 years old. Counsel argued in a pre-trial motion, for the suppression of the portion of the video (approximately 30-45 seconds) where officer's talked about a different charge, not before the court, where the standard is .02 BAC versus the .08 BAC, which the jury would be deliberating. Counsel explained that there was a clear risk of confusing the jury, and while the motion was granted in part, the Court's remedy was to require Defense Counsel to manually mute the video in front of the jury allowing the time to pass without sound, until such discussion ended and Defense Counsel could unmute the recording. Here again, Counsel for the Appellant was unnecessarily seen by the jury as concealing information. Stopping the tape and then restarting the tape at the appropriate times would have been a simple and solution that did not prejudice the jury.

6. The Trial Court erred in its decision to allow Officer Hayes' in-car video into evidence without the State ever laying an adequate foundation. The State's video evidence of the Appellant's driving and the entire roadside investigation was filmed by Officer Hayes' in-car video camera. His testimony concluded at the end of redirect without his video being offered into evidence. Counsel opted not to examine Officer Hayes any further, because he knew the video had not been entered into evidence. The State's failure to lay an adequate foundation for

the video evidence through Officer Hayes' testimony, failing to authenticate it as a fair and accurate representation of the video taken from his car, or to even identify it as the copy he submitted to his department's evidence locker, gave counsel every reason to allow Officer Hayes to be dismissed as a witness. Upon the Court's excusing Officer Hayes, Counsel moved the Court to exclude the video and to dismiss the case. Judge Shelbourne took a recess to attempt to research the issue and returned with a ruling that the foundation was unorthodox, but that he felt a sufficient foundation existed to allow the video into evidence. The record was devoid of any sort of specific identification by Officer Hayes of the video the State intended to introduce. The only reference made in a question by Officer Tuck to Officer Hayes was quickly at the end of redirect, where Officer Tuck asked, "Was your in-car camera activated?" followed by "and did you submit it into evidence." Officer Hayes answered yes to both questions, but he never identified the video that Officer Tuck later attempted to move into evidence. For all the court knew at that point, Officer Tuck was presenting a training video of how not to prosecute a DUI. The State's decision to prosecute its case without an attorney does not excuse a complete disregard for the rules of evidence, yet here again, the Trial Court's ruling gave the State a pass.

7. The Trial Court erred in allowing Officer Tuck what amounted to free reign of the courtroom. Against Counsel's objection, he was allowed to offer open-ended testimony and leak all sorts of objectionable statements into the record, without Counsel having an adequate opportunity to hear a question and answer format, anticipate the subject matter and offer timely objections where appropriate. The jury was subjected to an officer with the ability to examine his witness, take the stand to testify and later argue in a seamless fashion where one statement to the jury under oath could not be separated from another made to the jury in closing argument, resulting in extreme prejudice.

8. The Trial Court erred in admitting the result of the breath test into evidence due to a violation of SLED policies and procedures, and a showing made to the court that the specific machine used to take a sample from the Defendant was 7 months past the expiration date according to the SLED Calibration records. As such it was argued that the judge should find the failure to follow SLED policy resulted in a material question about the reliability of the machine's reading, with the record being further supplemented by evidence of three separate readings, out of 17 taken during a 40 day period ending on the date of the Defendant's, registering exactly the same result to the thousandth of a single percent. A machine well beyond the expiration date for maintenance read the exact same result to the thousandth of a hundredth (percent) nearly 20% of the times it registered a reading in a little over a month. Over Counsel's objection, the result was admitted into evidence and Counsel was left to argue a hyper-technical issue to the jury in hopes that they discern the information before them and make a determination of fact.

9. The Trial Court erred by not granting Counsel's motion for a Directed Verdict, despite the State's complete failure to present evidence of the Appellant's violation of SC Code §56-1-510.

10. The Trial Court erred in allowing the trial to proceed in the manner that it did given the entirety of the circumstances. Various incorrect rulings and the strain placed on the jury over the course of the eleven hours they spent in the court house on April 13, 2015, it is impossible to ignore the cumulative impact of each singular component weighed together on balance against the Defendant's right to a fair trial, before an impartial audience of her peers, from whom justice can be expected, through diligent and thorough deliberation of all the evidence, and with whom

the system can be reasonably assured will ensure that justice is done, all as required by Due Process under the Constitution of South Carolina and the United States.

WHEREFORE, the Defendant seeks an Order Directing a Verdict in favor of the Appellant or to Vacate the Conviction and remand this case for a new trial or for such other and further relief as may be just and proper.

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Attorney for Appellant

September 28, 2015

1	STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	COUNTY OF DORCHESTER	)	2015-CP-18-1916
2		)	
3	STATE OF SOUTH CAROLINA,	)	
		)	
4	PLAINTIFF,	)	APPEALS HEARING
		)	
5	vs.	)	TRANSCRIPT OF RECORD
		)	
6	BREANNA FLANNERY,	)	
		)	
7	DEFENDANT.	)	
	_____	)	

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Tuesday, April 19, 2016  
St. George, South Carolina

B E F O R E:

The Honorable Maite Murphy

A P P E A R A N C E S:

Kyle Leo Ward, Esq.  
Attorney for Plaintiff

Tim Aney, Esq.  
Attorney for Defendant

Maria Dempsey, RPR  
Official Court Reporter  
Charleston County Family Court  
Ninth Judicial Circuit  
Charleston, South Carolina

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INDEX TO PROCEEDINGS

PAGE

APPEALS HEARING	3
CERTIFICATE OF THE COURT REPORTER	20

E X H I B I T S

(No Exhibits Proffered.)

1           CLERK: The first case up is State of South Carolina  
2 versus Breanna Flannery. This is a criminal appeal.

3           MR. AMEY: Good morning.

4           MR. WARD: Good morning, Your Honor.

5           THE COURT: 'Good morning. How are you today?

6           MR. AMEY: Doing well, thank you.

7           THE COURT: All right. Are you ready to proceed?

8           MR. AMEY: Yes, ma'am. Please the Court. Tim Amey  
9 here on behalf of Ms. Breanna Flannery on this appeal from  
10 Magistrate Court in Dorchester County.

11           Judge, there are a number of issues before you on  
12 appeal today. I could say personally, this is one of the  
13 wildest trials I've ever been involved in. I think that's  
14 what happens maybe sometimes in lower courts when you don't  
15 have attorneys on the other side to prosecute the case.  
16 That has some to do -- I would say probably a lot to do with  
17 some of the issues that we find on appeal.

18           But to sort of try to narrow the focus, I guess, I'm  
19 going to focus on what are the two most important issues  
20 from our side of the appeal, which if ruled upon favorably,  
21 I believe would warrant vacating the conviction, and setting  
22 aside the verdict, ordering an acquittal on both of the  
23 charges. So I'll touch on those first. And if you'd like  
24 me to direct you to that point in the appeal I can or I can  
25 just go through it.

1 THE COURT: You can just -- whatever you feel  
2 comfortable with, I'll try to keep up.

3 MR. AMEY: Okay. I don't want to bounce around too  
4 much on you, but I think the first issue that I want to  
5 bring to the Court's attention was a motion made -- pretrial  
6 we had Officer Hayes come in and testify about what he  
7 intended to put before the jury into evidence to establish  
8 his reasonable suspicion for an investigative stop on my  
9 client. And after we'd sworn the jury, we went through that  
10 exercise, and after he had presented what he intended to  
11 present to the jury, I argued to the Court that they lacked  
12 reasonable suspicion for the stop. The reason being,  
13 Officer Hayes testified that he did not have advanced  
14 training in DUI detection. That his involvement with this  
15 case began having been flagged down about a potentially  
16 impaired motorist. So he caught up with my client and  
17 started following her to see if, in fact, she appeared to be  
18 intoxicated.

19 He ultimately ends up following her for a period of  
20 eight minutes, during which time they pass through  
21 stoplights. They even have an emergency vehicle, fire  
22 truck, where you typically see the blinking yellow lights,  
23 the fire truck's pulling out and those lights turn red  
24 abruptly, everybody stops, my client stops when she's  
25 supposed to. They wait for the fire truck to go, and then

1 he proceeds to follow her.

2 In the entirety of following her for eight minutes,  
3 he indicated two indicia of impairment, without the training  
4 to say so, but that he believed were indicia of impairment  
5 in that on the inside curve of the two lanes of traffic  
6 traveling the same direction, on the inside left curve that  
7 her tires touched, the lane of travel crossed over that;  
8 that was early on in the video. And then later about  
9 somewhere in the seven-minute range, right before he tried  
10 to pull her over, one of the tires leaves the roadway.

11 I cross-examined him about his understanding of  
12 these clues for impairment, about Nystagmus training and  
13 about the ways that you develop actual reasonable suspicion  
14 to pull somebody over, and the fact that these two issues  
15 came up so far apart, and there was nothing that he had to  
16 address any of that, other than to say, I was flagged down  
17 and I saw these two things happen, so I pulled her over.

18 You can hear him, and he testified to, and you hear  
19 him on video say, you know, I believe we may have an  
20 impaired driver here. He calls in an experienced officer.  
21 Officer Tuck arrives on the scene and he sort of conducts  
22 the entire stop from there. Officer Hayes doesn't really  
23 have anything else to do with it.

24 And the point that I'm trying to make to the Court  
25 at the time was, that's not enough. State law is very clear

1 about what you need. You need to be able to articulate the  
2 factors that you used in making a determination that you  
3 have reasonable suspicious to conduct an interrogative stop  
4 or in this case a traffic stop. You have to have some  
5 reason to do it, and he hadn't articulated or laid out  
6 specific elements or criteria that he used in making that  
7 decision.

8           It wouldn't be hard to extrapolate that he heard  
9 there was an impaired driver, he followed her as long as he  
10 did, he saw a wheel leave the road and he pulled her over.  
11 That's pretty much what you have in this instance. And so  
12 we argue to the Court, and we were denied, that we believe  
13 the Court erred in that regard, and that the case should  
14 have been dismissed for lack of reasonable suspicion to  
15 commit the original stop.

16           The next big issue would warrant, setting aside  
17 those convictions, Judge, is the video never having been  
18 properly submitted into evidence. And granted, we were in a  
19 scenario where we did not have an attorney prosecuting the  
20 case. However, in the same way that they would be afforded  
21 some protections, my client needs to be afforded the same  
22 protections where they might fail to meet some issue because  
23 of the lack of training or understanding of how the law  
24 works; they can't necessarily be protected by the Court.  
25 And so when Officer Tuck put Officer Hayes on the stand and

1 examined him, they talked about a video, they talked about  
2 all the things we just discussed about how he pulled her  
3 over, but he never offered the video into evidence. He  
4 never asked, is this the video? He never authenticated  
5 anything. And you don't need a whole lot to lay a proper  
6 foundation to get something into evidence properly, but it  
7 wasn't done, and all you need is the testimony, testimony  
8 from an individual with knowledge, which Officer Hayes  
9 certainly would have been that.

10           Officer Hayes was the guy who initiated the stop, it  
11 was his camera that followed the car the entire time, and it  
12 was in fact his camera that filmed the investigation of the  
13 DUI and the field sobriety test, the questions from the  
14 officer, all of that. It was all on one single video taken  
15 from his car, which as he testified, he had logged into  
16 evidence, but as we argued to the Court at the time, there's  
17 a difference between logging a disk into the evidence locker  
18 and submitting something into evidence in a courtroom during  
19 a trial.

20           Now, the Judge took the issue under advisement, and  
21 came back ruling that he found it an unorthodox foundation,  
22 which I believe that word alone is problematic towards the  
23 idea of laying a foundation, but said that it was an  
24 unorthodox foundation, but that he found it was sufficient.  
25 We believe that was a plain and simple error of law, Judge.

1 Without being able to specifically identify that video, we  
2 don't know what we're watching.

3 Now, would I argue that maybe that video was or  
4 wasn't the right video? Really and truly, that's not up for  
5 argument. The issue is, did they lay the foundation and did  
6 they adequately submit that into evidence on the record to  
7 prosecute this case, because the statute is clear, if we  
8 don't have a video, we don't have a DUI, and legislature  
9 made that very clear in the revisions that they've made  
10 since 2009; you have to have video of the incident site.  
11 And so without properly submitting that video into evidence,  
12 without my client having an opportunity to challenge the  
13 authenticity of that video, but to simply say that because  
14 the officer mentioned logging a video into evidence an  
15 unorthodox foundation has been laid, it's just error. And  
16 that's the argument before the Court today on that issue.

17 One other issue that would require, I believe, the  
18 setting aside of the conviction, vacating that conviction  
19 rather than setting aside the verdict, would be a motion  
20 made before the Court for directed verdict on the issue of  
21 unlawful use of a license, which was the charge against my  
22 client for possessing a license in her purse that belonged  
23 to another individual. As the charge is written and as the  
24 statute reads, an individual would have to have done  
25 something unlawful with that license to have used it in an

1 unlawful way. Simply possessing the license of another  
2 person is not inherently illegal. That was the argument  
3 made to the Court. No testimony was provided that my client  
4 was using the license, that she tried to offer the officer  
5 the license when she got pulled over as pretending to be  
6 someone else. The evidence was, they did a search of her  
7 car incident to arrest, and inside of her purse they found  
8 this ID, and they charged her with unlawful use of license.

9 That issue, we believe, was never presented in terms  
10 of any evidence that would give any founding or legitimacy  
11 to the charge, and so naturally, I made a motion for  
12 directed verdict. That motion was not granted. We believe  
13 that was also an error on the part of the trial court. From  
14 there, moving on, like I say, there are a bunch of issues  
15 here. I'll try to touch on these a little more briefly, I  
16 suppose, and let Your Honor do your own review of the appeal  
17 itself.

18 But we had a scenario, as I said, where we had an  
19 officer prosecuting the case. There is case law in South  
20 Carolina on how officers can and cannot prosecute cases, and  
21 I think the case law is pretty clear. An officer is allowed  
22 to prosecute his own case in Magistrate Court. However, in  
23 some scenarios, the case law says that a superior or a  
24 supervising officer can come in and handle the prosecution  
25 of the case and call that officer as the witness, argue the

1 facts to the jury and so on. In this situation, the reason  
2 the whole thing became an issue was, I made a motion to  
3 sequester, as neither of these officers are parties to the  
4 case. They should not be able to hear each other's  
5 testimony and potentially develop a cohesive story that  
6 unfairly erodes my client's rights in the defense of her  
7 case. And in their prosecution, and they're carrying the  
8 burden of proof of reasonable doubt, they ought to be  
9 sequestered, and so I made the motion, and the Judge said,  
10 well, I'm not doing that because he's prosecuting and he's  
11 going to be examined. And that's really where I believe  
12 this issue is different than what the case law has dealt  
13 with in the past.

14 And I have those cases if Your Honor would like to  
15 see them.

16 THE COURT: If you have extra copies of them.

17 MR. AMEY: So the cases, I believe, that are important  
18 here are Messervy, Ex rel., Seaborn, and State v. Sossamon.  
19 And they go through in each one and talk about this issue of  
20 the number of cases handled by Magistrate Court, and how the  
21 volume is just too much, that this serves a great public  
22 interest to have things adjudicated quickly, and to allow  
23 officers to prosecute their cases.

24 And I believe all that to be true, and would agree  
25 that if this were one of those cases, like a singular

1 incident where an officer saw something and prosecuted the  
2 case, or an assault, or a stop for marijuana where that  
3 officer was the only officer involved, but here where we  
4 have another officer, and the prosecuting officer  
5 interviewing that officer as a witness, we run into an issue  
6 that hasn't been decided by the courts yet, and I don't  
7 believe would have been the intention of the courts to allow  
8 it happening, because in essence, allowing them to stand in  
9 the courtroom together, hear each other as well, where  
10 Officer Tuck, to be able to hear everything that Officer  
11 Hayes says, it creates too much risk for his testimony to  
12 then mirror Officer Hayes', to tell a very cohesive and  
13 easy-to-digest story to the jury.

14           And so that's the basis of that motion, and we  
15 believe that that would warrant a remand and a retrial if  
16 the Court were to find favorably on that issue. Next was,  
17 early on in the appeal, we had a pretrial motion, and I knew  
18 who I was working with, and I knew that these guys were not  
19 savvy to all the rules of law, so we went into great detail  
20 on this issue of hearsay, of bringing in a comment about  
21 having been flagged down. Without that witness, you can't  
22 come in and testify that you were flagged down. You got  
23 that witness to present, great. Otherwise, it's hearsay.

24           We went over that, and I asked the Judge to again  
25 caution these officers, because I was still concerned that

1 they might not be getting it entirely. The Judge did. We  
2 went into opening statements, and the officer prosecuting  
3 the case, Officer Tuck, began to bring up this issue saying,  
4 you know, officer so and so was flagged, and I immediately  
5 objected in the middle of the opening statement, which I  
6 never like to do, but I had to do it in that scenario. He  
7 pulled Officer Tuck aside and said, you can't do that, you  
8 know. And from this point on, he left it alone for the rest  
9 of his opening statement.

10 THE COURT: Did you ask for a curative instruction?

11 MR. AMEY: At that point I had not. I thought that we  
12 were probably okay and there wasn't necessarily a need to  
13 highlight the issue at that point. Later on, I did. In the  
14 very first question to Officer Hayes, Officer Tuck asked  
15 this somewhat leading, but did you have reason to be -- I  
16 forget exactly how he worded it, but did you have reason to  
17 be out enforcing against this individual? I had to object  
18 again, explain to him, you know, can't bring this up, it's  
19 hearsay. And then finally when he asked the officer what  
20 happened that day, the officer said, well, I was flagged  
21 down in reference to an intoxicated driver, and of course I  
22 objected a third time.

23 At this point, the jury is watching me fly out of my  
24 seat trying to conceal some issue over and over and over,  
25 that clearly I don't want them to hear. And so I asked the

1 Judge, I said, Judge, I believe that this warrants a  
2 mistrial. You know, I don't know how we can proceed fairly  
3 from here, where the jury already is going to have  
4 preconceived notions about anything else I do because it  
5 looks like I'm in some kind of coverup game. And the Judge  
6 would not grant that motion, but he would, alternatively, he  
7 did issue a curative instruction. I don't believe that was  
8 enough to create a fair atmosphere for my client, and that's  
9 why we brought that issue up on appeal.

10 Following that, we had an issue of the officers  
11 discussing Zero Tolerance law as opposed to simple law for  
12 DUI. I made a motion to suppress that. The Judge did grant  
13 it, but instead of stopping the tape, the Judge required me  
14 to mute the volume while the tape played, and then unmute  
15 the volume once that discussion had ended. We knew on the  
16 time ticker when they were no longer talking about that.  
17 And we start to see a cumulative effect occurring at this  
18 point where defense counsel is repeatedly covering issues up  
19 from the jury so that they can't see or hear something that  
20 goes on. If we stopped the tape and restarted the tape, it  
21 wouldn't have made any difference in terms of what was  
22 presented to the jury factually and in terms of what was  
23 relevant for them to see and hear, but it would have made a  
24 huge difference in the appearance of my going and having to  
25 turn down that volume manually in front of them.

1           We also, and I lay this out pretty well, I think, in  
2 the appeal, we had an issue with the validity of the breath  
3 test and the procedure that was followed. It was pretty  
4 clearly laid out that the calibration of the machine, the  
5 date for expiration of the calibration of the machine had  
6 expired by a significant period of time, and that there were  
7 odd results occurring with the Breathalyzer, where in the  
8 course of 17 readings, three readings were exactly the same  
9 to a hundredth of a thousandth of a percent. I argued to  
10 the Judge that, number one, this showed that the machine is  
11 faulty and in need of repair. Number two, it was out of  
12 calibration, and that was a violation of SLED policy and  
13 procedure, and as such, he could find that the result should  
14 be suppressed. I was ruled against on that issue, and we  
15 bring that back up on appeal for you to make a decision on.

16           Lastly, and again touching on this same sort of  
17 recurring issue of a cumulative effect, we had a jury pool  
18 of 15 people. We didn't have a large number to select from,  
19 that we started with. Three of those folks all indicated  
20 affiliation with law enforcement. Another person worked at  
21 a shooting range, and told the Court that he wasn't  
22 necessarily familiar with those two officers in particular,  
23 but he knows that they all come to his shooting range to  
24 shoot. How do you select from that small pool with so many  
25 people with I think reasons to strike for cause, separate

1 than, you know, just to use your strike, but to have them  
2 removed as jurors. If I had made those motions, we wouldn't  
3 have had a jury pool left to choose from. So I was left  
4 striking jurors.

5 THE COURT: So you didn't make the motion at the time  
6 of the trial?

7 MR. AMEY: I did not make the motion at the time.

8 THE COURT: Well, then it's not preserved for this  
9 appeal. Let's move on.

10 MR. AMEY: So in addition, we had an issue where the  
11 Judge who was trying the case was only assigned to Mondays;  
12 he doesn't try cases on any other day. We had the jury in  
13 at 10:00, 10:30. We were stuck until 9:00 PM, when the jury  
14 was sent off to deliberate long after anybody would have  
15 normally have expected to be in a courtroom trying a case or  
16 listening to a case, with your loved ones at home wondering  
17 where they were.

18 There was an incident before we all left the  
19 courtroom that was indicative of this, where a woman had to  
20 hand the phone to the bailiff saying, please tell my husband  
21 I'm not out running around, I'm really am still in court.  
22 The cumulative impact of all of these things going on,  
23 holding jurors well after they should ever be held in the  
24 courtroom, and for way too long with being offered pizza as  
25 a condolence in all of it, the fact that we've got officers

1 who are no doubt inexperienced, but still inexcusably  
2 violating the rules repeatedly in front of the jury, and in  
3 a scenario where I believe the state law was not -- we  
4 weren't in compliance with what the state law is saying  
5 about how officers are supposed to prosecute cases. A  
6 supervisor could have been brought in to handle this. We  
7 could have avoided the issue of cohesive testimony.

8 For all those reasons, Judge, from a cumulative  
9 perspective, I believe my client wasn't afforded a fair  
10 trial. For those reasons stated in the appeal, and before  
11 you this morning we ask, one, that you -- on the primary  
12 issues, that you vacate the judgment, set aside the verdict,  
13 order an acquittal; and two, that you remand for a new  
14 trial.

15 THE COURT: Mr. Ward.

16 MR. WARD: Thank you, Your Honor. May it please the  
17 Court. I'm going to go backwards and hit some of these  
18 smaller issues first. As far as the jury being kept at  
19 court until 9:00, I don't find that to be unreasonable or  
20 uncommon. Whether it be Magistrate or General Sessions  
21 Court, I've seen cases go 'til 2:00 AM, where the jury's  
22 deliberating, 9:00 PM, 10:00 PM, they've been offered pizza  
23 and food to stay for dinner, so there's not any issues  
24 there. So I don't think that would be a reason for any  
25 prejudice on the defendant.

1           As far as the talk on the video about Zero Tolerance  
2 and the video being muted by the defense, it sounds like the  
3 Judge had instructed the defense to just mute the part that  
4 couldn't be played and continue playing. It doesn't sound  
5 like the defense ever asked to try and do anything  
6 differently, whether it be, you know, stop the tape, fast  
7 forward it and then play the rest. It was just on appeal  
8 that they said that would have been a better way of doing  
9 it. Doesn't sound like there was an objection or any type  
10 of ask from the defense to do it differently. So I don't  
11 think that issue would be appropriate for appeal.

12           As far as the hearsay and the curative instruction  
13 about being flagged down, there was a curative instruction  
14 given after the second or third time that this possible  
15 hearsay was mentioned. I believe the curative instruction  
16 would be enough at that point. I don't know exactly all the  
17 other evidence they had to show that the defendant was  
18 intoxicated or the reason for the driving under the  
19 influence, but even without any mention of being flagged  
20 down, they still found her guilty, and I don't think that  
21 the defense was prejudiced by that given; there was a  
22 curative instruction.

23           As far as the officer being allowed to prosecute and  
24 the sequestration, even if they were sequestered, the lead  
25 investigator or chief investigating officer is allowed to

1 stay in the courtroom during, if there is a prosecutor or a  
2 solicitor handling the case. So I think even if he was to  
3 be sequestered, there was sequestration. The lead officer,  
4 who was Tuck, is allowed to be in the courtroom anyway, so  
5 there's no issue there or prejudice, because he would be  
6 allowed in there no matter what.

7 As far as the directed verdict for the unlawful use  
8 of a license, I'm unfamiliar with that statute specifically,  
9 but without anything being in the record showing her having  
10 possession of a license and doing something unlawful with  
11 it, I think just having it in possession, I'd have to agree  
12 with the defense that there was not a substantial evidence  
13 to show that she was unlawfully using a license; she was  
14 just in possession of someone else's license.

15 The video not being properly admitted, as Your Honor  
16 is aware, the trial court is given wide discretion in  
17 admitting evidence. I believe Judge Shelbourne ruled that  
18 the officer testified that his video camera was on during  
19 that incident, and he had admitted the video into evidence,  
20 the sheriff's office evidence room. He found that it went  
21 more to the weight of the evidence rather than the  
22 admissibility, and without an abuse of discretion by the  
23 trial court judge, would be properly admitted. Obviously,  
24 the officer was able to -- or the whole court was able to  
25 see the car that was being stopped, the person that was

1 taken out of the vehicle, being the defendant, officers  
2 would have testified to that, that shows inherent foundation  
3 for the video. So I think that was properly admitted by the  
4 Judge.

5 On the reasonable suspicion, I believe officers  
6 conducting traffic patrol have wide discretion in  
7 determining when to make a traffic stop, given the fact that  
8 at pretrial, outside of the jury, the officer was able to  
9 testify to someone flagging them down and advising them of a  
10 possible intoxicated driver. Officer sees that vehicle,  
11 follows it for an entire eight minutes, and does see two  
12 traffic infractions; tire crossing over the separating line  
13 of the lanes, and then also on the other side of the lane,  
14 because it would have been on the -- leaves the road, the  
15 tire leaves the roadway. That would show going from one  
16 side of the lane to the next. I believe that would be  
17 reasonable suspicion, and the Judge would have denied --  
18 denying that motion, it was proper.

19 THE COURT: Thank you, gentlemen. I'll take the time  
20 to review the Court record and let you know of an opinion.

21 MR. WARD: Thank you, Your Honor.

22 MR. AMEY: Thank you, Your Honor.

23 (END OF TRANSCRIPT OF RECORD.)

24

25

South Carolina Law Enforcement Division - Calibration Records



Date Range From 01/01/1998 To 04/06/2015  
 DataMaster (BAC/DMT) Serial Number - 107207  
 Report Date - 4/6/2015

Legend I - Incomplete  
 R - Refusal  
 V - Invalid Sample  
 X - Interference Detected

Serial Number	Loc Number	Date/Time	Operator Name	Operator Agency	Operator Number	Simulator Lot	Simulator Bottle	Expiration Date	Ca	CaL	B1	B2	B3	Xa	B2L	B3L
107207	SC0180000	2/13/2009 11:47:11 AM	L C Ross	SCLED0000	DMT000015	08803	0558	2/10/2010	0.08	0.9772	0	0.002835	0.000017	0.086679	1.161789	0.607789
107207	SC0180000	2/13/2009 11:58:30 AM	L C Ross	SCLED0000	DMT000015	08803	0558	2/10/2010	0.08	0.976465	0	0.00309	0	0.086591	1.155537	0.601408
107207	SC0180000	10/20/2009 5:13:24 PM	J C Christy	SCNPAS0000	DMT000014	09803	1213	5/27/2011	0.08	1.026878	0.000334	0.004889	0.000818	0.085459	1.122699	0.612393
107207	SC0180000	10/20/2009 5:22:14 PM	J C Christy	SCNPAS0000	DMT000014	09803	1213	5/27/2011	0.08	1.002466	0.000372	0.005343	0.000491	0.085808	1.122783	0.611182
107207	SC0180000	2/12/2010 1:32:32 PM	J C Christy	SCNPAS0000	DMT000014	09803	0163	5/27/2011	0.08	0.987726	0.000097	0.004482	0.000028	0.085981	1.137094	0.599374
107207	SC0180000	2/12/2010 1:41:18 PM	J C Christy	SCNPAS0000	DMT000014	09803	0163	5/27/2011	0.08	0.986647	0.00023	0.005521	0.00007	0.086157	1.128014	0.594775
107207	SC0180000	1/14/2011 12:37:44 PM	J C Christy	SCNPAS0000	DMT000000	10801	0540	6/21/2012	0.08	1.000473	0	0.005137	0	0.084676	1.124175	0.615616
107207	SC0180000	1/14/2011 12:49:02 PM	J C Christy	SCNPAS0000	DMT000000	10801	0540	6/21/2012	0.08	0.995845	0.000334	0.005856	0.000372	0.084937	1.122054	0.60853
107207	SC0180000	10/25/2012 2:54:37 PM	J C Christy	SCNPAS0000	DMT000000	12802	0913	2/21/2014	0.08	1.020746	0	0.001174	0	0.085808	1.151844	0.61363
107207	SC0180000	10/25/2012 3:03:19 PM	J C Christy	SCNPAS0000	DMT000000	12802	0913	2/21/2014	0.08	0.990438	0.000077	0.003132	0.000059	0.086242	1.126445	0.60884
107207	SC0180000	9/25/2014 11:31:25 AM	D B BAKER	SCLED0000	DMT000012	14801	1024	3/19/2016	0.08	1.000665	0.000629	0.003808	0.000387	0.08764	1.146139	0.60012

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*Deborah H. Banks*

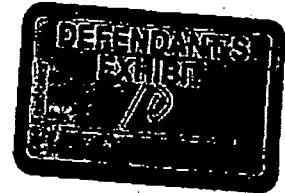
DEBORAH H. BANKS, LIEUTENANT  
 SUPERVISORY SPECIAL AGENT  
 IMPLIED CONSENT DEPARTMENT

DEFENDANT'S  
 EXHIBIT  
 9

45

South Carolina Law Enforcement Division - Chronological Report

Between - 07/18/2014 And 09/02/2014  
DataMaster (BAC/DMT) Serial Number - 107207



Acc Type	Arrest Date Arrest Time	Ticket Number	DOB	Sex	Race	Arrest Date Arrest Time	Officer 1 Name/Agency	Officer 2 Name/Agency	Subj Ale	Sim. Lev/ Bottle	Sim Temp
BR	7/19/2014 3:27 AM	G821172	3/15/1993	F	WHITE	7/19/2014 02:12	Neau/Todd/M SCSHP0600	Neau/Todd/M SCSHP0600	0.109	13802 0900	34
SO	7/19/2014							Neau/Todd/M SCSHP0600		13802 0903	33.98
BR	7/19/2014 11:08 PM	G75196U	1/14/1990	M	BLACK	7/19/2014 22:09	Conklin/R/ SC0180000	Conklin/R/ SC0180000	0.143	13802 0903	34
BR	7/19/2014 11:39 PM	G821172	3/15/1993	F	WHITE	7/19/2014 22:57	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600		13802 0903	33.99
BR	7/20/2014 8:48 PM	G763869	12/1/1978	M	BLACK	7/20/2014 20:20	McDonald/M/E SCSHP0600	McDonald/M/E SCSHP0600	R	13802 0903	33.97
BR	7/23/2014 6:55 PM	G66986U	7/9/1993	M	BLACK	7/23/2014 17:55	Tuck/Daniel/K SC0180000	Tuck/Daniel/K SC0180000	V	13802 0903	33.99
ST	7/23/2014 6:58 PM										
BR	7/23/2014 7:20 PM	G65986U	7/9/1993	M	BLACK	7/23/2014 17:55	Tuck/Daniel/K SC0180000	Tuck/Daniel/K SC0180000	0.146	13802 0903	33.99
BR	7/25/2014 10:54 PM	G823471	2/1/1959	M	WHITE	7/25/2014 22:15	Lutes/E/S SCSHP0018	Lutes/E/S SCSHP0018	R	13802 0903	33.99
BR	7/27/2014 11:10 PM	59225GT	1/17/1971	M	BLACK	7/27/2014 21:36	Intini/Michael/A SC0100800	Intini/Michael/A SC0100800	R	13802 0903	33.97
BR	7/29/2014 4:48 AM	G821995	11/11/1975	F	BLACK	7/29/2014 03:45	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600	0.201	13802 0903	33.98
BR	8/2/2014 8:20 AM		10/7/1981	M	WHITE			Phyco/Craig/G SC0180000	0	13802 0903	34.01
BR	8/3/2014 2:02 AM	59231GT	6/7/1977	M	WHITE	8/3/2014 01:14	Intini/Michael/A SC0100800	Intini/Michael/A SC0100800	R	13802 0903	33.98
BR	8/3/2014 9:17 PM	G824828	8/10/1995	M	WHITE	8/3/2014 20:17	Basel/C/P SCSHP0600	Basel/C/P SCSHP0600	0.2	13802 0903	33.99
BR	8/5/2014 3:33 AM	G822659	4/23/1991	M	WHITE	8/5/2014 01:58	Brooks/Brandon/S SCSHP0600	Brooks/Brandon/S SCSHP0600	0.157	13802 0903	33.99
BR	8/6/2014 10:45 PM	30449GR	1/11/1958	M	BLACK	8/6/2014 21:52	Brooks/Chris/ SC0180000	Brooks/Chris/ SC0180000	I	13802 0903	33.99
BR	8/6/2014 10:52 PM		1/1/1987	M	WHITE			Brooks/Chris/ SC0180000	0	13802 0903	33.99
BR	8/6/2014 10:59 PM	30449GR	1/11/1958	M	BLACK	8/6/2014 21:26	Brooks/Chris/ SC0180000	Brooks/Chris/ SC0180000	I	13802 0903	
BR	8/6/2014 11:00 PM		1/11/1958	M	BLACK			Brooks/Chris/ SC0180000	R	13802 0903	33.99
BR	8/7/2014 3:49 AM	G826304	1/15/1967	M	WHITE	8/7/2014 02:55	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600	I	13802 0903	33.99
BR	8/7/2014 3:57 AM	G826304	1/15/1967	M	WHITE	8/7/2014 02:55	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600	R	13802 0903	33.99
BR	8/7/2014 4:04 AM							Roberts/B/T SCSHP0600	0	13802 0903	33.99
BR	8/8/2014 2:04 AM	G826039	9/28/1982	M	BLACK	8/8/2014 00:36	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600	I	13802 0903	
BR	8/8/2014 2:25 AM	G826039	9/28/1982	M	BLACK	8/8/2014 00:36	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600	0.179	13802 0903	33.99
BR	8/9/2014 1:03 AM	G822668	2/13/1973	M	BLACK	8/8/2014 23:40	Brooks/Brandon/S SCSHP0600	Brooks/Brandon/S SCSHP0600	0.006	13802 0903	33.99
BR	8/9/2014 3:04 PM	G7602	1/12/1965	F	WHITE	8/9/2014 14:19	Jackson/Cathy/D SC0180000	Jackson/Cathy/D SC0180000	0.009	13802 0903	33.99
BR	8/10/2014 2:10 AM	G826932	3/17/1980	M	WHITE	8/10/2014 01:04	Bevins/M/D SCSHP0600	Bevins/M/D SCSHP0600	R	13802 0903	33.99
BR	8/10/2014 4:08 AM	G827006	12/3/1992	F	WHITE	8/10/2014 02:56	Kunze/Robert/S SCSHP0600	Kunze/Robert/S SCSHP0600	0.255	13802 0903	33.99
BR	8/11/2014 10:24 PM	G824843	2/18/1983	M	BLACK	8/11/2014 21:36	Basel/C/P SCSHP0600	Basel/C/P SCSHP0600	R	13802 0903	33.98
BR	8/12/2014 11:39 AM							Baker/Donald/B SCLE00000	0	13802 0903	33.98
DG	8/12/2014 11:44 AM							Baker/Donald/B SCLE00000		13802 0903	
EQ	8/12/2014 11:46 AM							DONALD B BAKER			
BR	8/15/2014 10:34 PM	G827415	8/10/1991	M	WHITE	8/15/2014 21:20	Wells/J/L SCSHP0600	Wells/J/L SCSHP0600	0.143	13802 0903	33.98
BR	8/17/2014 2:33 PM	G826059	7/28/1971	M	WHITE	8/17/2014 02:05	Roberts/B/T SCSHP0600	Roberts/B/T SCSHP0600	0.117	13802 0903	33.99
IQ	8/17/2014 3:20 AM							Dmt Auto Generated			
IQ	8/17/2014 3:26 AM							Dmt Auto Generated			
SO	8/17/2014 3:37 AM							Roberts/B/T		12803 0708	33.99
BR	8/17/2014 4:42 AM	G824122	9/21/1989	M	WHITE	8/17/2014 02:46	Erouta/Edgar/M SCSHP0600	Erouta/Edgar/M SCSHP0600	R	12803 0708	33.99
AR	8/17/2014 10:23 PM	G827438	1/3/1974	M	HISPANIC	8/17/2014 21:13	Wells/J/L SCSHP0600	Wells/J/L SCSHP0600	0.13	12803 0708	33.99
BR	8/18/2014 7:30 AM	G827440	5/23/1977	M	HISPANIC	8/18/2014 07:10	Wells/J/L SCSHP0600	Wells/J/L SCSHP0600	I	12803 0708	34

BR	8/18/2014 3:38 AM	G627440	5/23/1977	M HISPANIC	8/18/2014 02:10	Wells/J/L SCSH0600	Wells/J/L SCSH0600	0.167	12803 0708	33.99
BR	8/18/2014 12:25 PM	678990GU	12/8/1950	M WHITE	8/18/2014 11:17	Conklin/R/ SC0180000	Conklin/R/ SC0180000	0.219	12803 0708	33.99
BR	8/21/2014 11:15 PM	G628284	5/31/1985	F WHITE	8/21/2014 22:45	Clemens/T/L SCSH0600	Clemens/T/L SCSH0600	R	12803 0708	33.99
BR	8/24/2014 1:36 AM	G625463	9/6/1989	M WHITE	8/24/2014 00:50	Boelter/Robert/C SCSH0600	Boelter/Robert/C SCSH0600	0.158	12803 0708	33.99
BR	8/27/2014 12:11 AM	G628299	9/12/1970	M BLACK	8/26/2014 23:30	Clemens/T/L SCSH0600	Clemens/T/L SCSH0600	R	12803 0708	33.99
BR	8/29/2014 11:13 PM	G630411	7/29/1989	M WHITE	8/29/2014 22:45	Clemens/T/L SCSH0600	Clemens/T/L SCSH0600	R	12803 0708	33.98
BR	8/30/2014 9:44 PM	29738GR	6/20/1966	F WHITE	8/30/2014 20:45	Jackson/Terrance/W SC0180000	Jackson/Terrance/W SC0180000	I	12803 0708	33.99
BR	8/1/2014 9:00 AM	G625200	5/7/1957	M WHITE	8/1/2014 02:10	Pence/Sheri/A SCSH0600	Pence/Sheri/A SCSH0600	0.21	12803 0708	33.99
BR	8/1/2014 5:10 AM	66331GU	7/10/1995	F WHITE	8/1/2014 04:11	Tuck/Daniel/K SC0180000	Tuck/Daniel/K SC0180000	0.143	12803 0708	34.01

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