STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas
Hon. Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-000882

THE STATE,

Appellant,

v.

DANNY JAME PLUMLEY,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

When a police officer pulls over "the driver of a commercial motor vehicle" whom he has probable cause to believe "was driving a commercial motor vehicle while having a measurable amount of alcohol in his system," the officer must give a special warning before administering blood-alcohol tests. Respondent was pulled over driving a non-commercial vehicle. Was the officer required to give the special warning?

II.

Test results should be excluded if the trial court rules specifically that the failure to follow the statute or SLED policies materially affected the reliability or fairness of the testing procedure. Is general detriment to livelihood resulting from the administrative consequences of refusal sufficient to render the test process materially unfair, and did the magistrate err by not making specific findings required by statute?

STATEMENT OF THE CASE

Respondent Danny Plumley was pulled over in his personal vehicle on suspicion of DUI and offered a breath test. (Magistrate's order). The arresting officer read Plumley the implied consent warnings required by S.C. Code §56-5-2950 and agreed to submit to the test. His blood-alcohol content was .12%. Plumley was charged with DUI, but at trial the State elected to prosecute the case as a DUAC (driving under an unlawful alcohol concentration).

When the case was called for trial, Plumley moved to suppress the test results on the ground that he was not given the special warning required by S.C. Code §56-1-2130, the implied consent statute that lays out the procedure for BAC testing of a person who "drives a commercial vehicle within this State . . . ." S.C. Code Ann. §56-1-2130(A) (2018). The statute provides that BAC tests may be given "at the direction of a law enforcement officer, who after stopping or detaining the driver of a commercial motor vehicle, has probable cause to believe that *the driver was driving a commercial motor vehicle while having a measurable amount of alcohol in his system.*" S.C. Code Ann. §56-1-2130(B) (2018) (emphasis added). Subsection (C) provides that such drivers must be warned of the license suspension that results from refusal to give a sample. S.C. Code Ann. §56-1-2130(C) (2018).

Plumley argued the results of the test were inadmissible under S.C. Code §56-5-2950, the general implied consent statute that applies to "all person[s] who drive[] a motor vehicle in this State . . . ." S.C. Code Ann. §56-5-2950(A) (2018). The statute provides that the "failure to follow policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in

which the failure materially affected the accuracy or reliability of the test results or the failure of the procedure." S.C. Code Ann. §56-5-2950 (2018)(J). Plumley cited SLED regulation 8.12.3, which essentially repeats the requirements of §56-1-2130 with the additional stipulation that if "no DUI or felony DUI is involved, only the CDL warning should be read." (Magistrate's return).

It was undisputed that Plumley was *not* driving a commercial vehicle when he was pulled over. On the contrary, all parties agreed he was driving his personal vehicle on his own time. (Magistrate's order). Nonetheless, Plumley argued that because his license contained a commercial driver's license endorsement, the officer was required to give the special warning. The magistrate agreed and suppressed the results of the breath test. The State appealed to the circuit court, and the Honorable Edward W. Miller affirmed the magistrate court's ruling. This appeal follows.

ARGUMENT

I.

The arresting officer was not required to give the special warning required for drivers stopped while "driving a commercial vehicle" because Plumley was not driving a commercial motor vehicle.

S.C. Code §56-1-2130 requires that a special warning be given to drivers stopped while driving a commercial motor vehicle. Plumley was not driving a commercial vehicle when he was stopped. Accordingly, the arresting officer was not required to give the special warning. Both the magistrate and circuit court committed an error of law when they held otherwise. This Court should reverse.

Standard of review.

Questions of statutory interpretation are questions of law, which the appellate court is free to decide without any deference to the court below. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).

Discussion.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted).

S.C. Code §56-1-2130 is the implied consent statute applicable to drivers pulled over while driving a commercial vehicle. It provides that "A person who drives a commercial motor vehicle within this State is considered to have given consent" to testing to determine the presence of alcohol or other drugs in his body. S.C. Code Ann. § 56-1-2130(A) (2018). Tests may be administered by an officer "after stopping or detaining the driver of a commercial motor vehicle" when he "has probable cause to believe that the driver was *driving a commercial motor vehicle while having a measurable amount of alcohol in his system.*" S.C. Code Ann. § 56-1-2130(B) (2018) (emphasis added). The arresting officer must warn the commercial driver before administering tests that "refusal to submit to the test must result in that person being placed out of service immediately for twenty-four hours and being disqualified from operating a commercial motor vehicle for not less than one year . . . ." S.C. Code Ann. §56-1-2130.

The plain language of §2130 dictates that this warning must be given to persons stopped *while driving a commercial vehicle.* Although there are other circumstances which trigger a CDL suspension for conduct that occurs when the driver drives a non-commercial vehicle, the specific warnings of §2130(C) only apply to drivers pulled over and tested for DUI while driving a commercial vehicle. See S.C. Code Ann. § 56-1-2110(A) (2018). The statute is clear and unambiguous, and this court need not engage in a labored reading of the implied consent statutes to read into §2130 a requirement that is not there.

Furthermore, the CDL advisement would have been misleading and inappropriate to give to Plumley while he was driving a non-commercial vehicle. CDL drivers are held to a stricter standard for allowable BAC levels when driving a commercial vehicle—their BAC may not reach .04%, as opposed to the .08% levels applicable to drivers of a non-commercial vehicle. S.C.Code Ann. §56-1-2110(A)(2) (2018); S.C. Code §56-5-2933 (2018). The CDL advisement

warns drivers about the .04% level. (Magistrate's return Exhibit A). Accordingly, not only was the officer not required by statute to give the CDL advisement in this circumstance, it would have been confusing and inappropriate to do so. The officer correctly advised Plumley of the implied consent rights applicable to drivers of non-commercial vehicles.

At trial, Plumley cited SLED policy 8.12.3 to support his argument that Plumley should have been given the §2130 warning. (Magistrate's return; Trial Tr.p.13). But this policy provides that a CDL warning should be given for a CDL violation under §56-1-2120, which contains the same language as §2130: "A person may not drive a commercial motor vehicle within this State while having a measurable amount of alcohol in his body." S.C. Code Ann. § 56-1-2120 (2018). This policy provides no support for his argument.

Because Plumley was driving a personal vehicle, §2130 is inapplicable. The lower court's conclusion that "I don't think it's related to the vehicle, I think it's related to the person," conflicts with this plain meaning. (Oct.30 Tr.p.18, lines 22–24). Accordingly, the lower courts erred by ruling that the §2130 warning requirement applied to a traffic stop where Plumley was driving a personal vehicle. This Court should reverse the order of the magistrate excluding the breath test results and remand the case for trial.

II.

The record does not support the magistrate court's ruling that failure to give the warning resulted in an unfair testing procedure, and the magistrate erred by failing to make specific findings why the procedure was unfair.

The implied consent statute provides that the failure to carry out the provisions of that statute or regulations promulgated pursuant thereto shall result in the exclusion of test results if the trial court specifically finds the procedure materially affected the reliability or fairness of the procedure. As discussed above, the officer followed the correct testing procedure as laid out in the statute. But even if the officer did not carry out the provisions of the statute with "exacting precision," exclusion was not appropriate because the testing procedure was fair. Furthermore, the trial court committed an error of law when it failed to make the specific findings required by the statute. This Court should reverse.

Standard of review.

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012).

Discussion.

§56-1-2130(A) incorporates by reference S.C. Code §56-5-2950, the implied consent statute applicable to all drivers. §2950(J) provides that:

> Policies, procedures, and regulations promulgated by SLED may be reviewed by the trial judge or hearing officer on motion of either party. The failure to follow policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, *if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure* and the court trial judge or hearing officer *rules specifically* as to the manner in which the failure materially

affected the accuracy or reliability of the test results or the fairness of the procedure.

S.C. Code Ann. § 56-5-2950(J) (2018) (emphasis added).

The decision to admit or exclude breath test results under section 56-5-2950 should not turn solely on "whether the prescribed procedures were followed with the most exacting compliance." Instead, the question should be "whether the violation thwarted the clear policy objectives underlying the statute—that is, *to ensure suspects are informed of their rights to refuse any test and, if consent is obtained, to ensure the tests are conducted in an accurate, reliable, and fair manner*." City of Florence v. Jordan, 362 S.C. 227, 233, 607 S.E.2d 86, 89–90 (Ct. App. 2004) (emphasis added). An implied consent advisory is sufficient if the defendant is reasonably informed of his rights and is neither tricked nor misled into thinking he has no right to refuse the test. Percy v. S.C. Dep't of Highways & Pub. Transp., 315 S.C. 383, 385, 434 S.E.2d 264, 265 (1993). A violation of section 56–5–2950 without resulting prejudice will not lead to a suppression of the evidence obtained pursuant to this section. Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 38, 627 S.E.2d 751, 754 (Ct. App. 2006) (citing State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002)).

The testing procedure in this case was neither unreliable nor unfair. Plumley was aware that he could refuse to give a sample and that he would lose his driving privileges if he refused to give a sample. Knowing this, he made the decision to give a sample. It is true that he was not advised that his CDL suspension would last for twelve months rather than six months if he refused. S.C. Code Ann. § 56-5-2951(I) (2018) (providing for default six-month suspension for refusal to give sample). But *he did not refuse*. If he had, he may have a better argument that he was prejudiced by the officer's failure to warn him. But faced with the prospect of a six-month suspension if he did not give a sample, he decided to give a sample. If the prospect of a six-

month suspension was sufficient to induce Plumley to give a sample, surely the threat of a *lengthier* suspension would have had the same result.

Plumley argued at trial that the officer's failure to give §56-1-2130 warnings rendered the testing procedure unfair because he lost his ability to make a living as a commercial driver. The magistrate agreed, and reasoned the results must be suppressed because "his employment is at stake." (Magistrate's return, Trial Tr.p.26). But the adverse effect on his livelihood has no bearing on the fairness of the procedure. It is the result of him breaking the law. The fact that he suffered consequences for his conduct does not render the testing procedure unfair.

Furthermore, the magistrate did not "rule specifically" as to the reasons why the procedure was unfair. He erred under §2950 by failing to do so. State v. Bray, 342 S.C. 23, 31, 535 S.E.2d 636, 640–41 (2000) (holding trial court's failure to make specific findings of fact as required by law constitutes an error of law requiring reversal). The circuit court compounded this error when he ignored the standard of review applicable to his appellate capacity. Rather than remanding the case for specific findings, he repeated the magistrate's conclusory finding that "the defendant was prejudiced by the breath test procedure, as a whole, in this case," and further reasoned that because Plumley was not accurately advised of the administrative consequences of refusal, he could not knowingly waive his statutory right to refuse and therefore suffered prejudice. (Circuit court order). This was a factual finding, and the circuit court exceeded his authority as an intermediate appellate court by making this finding on his own on a different rationale than the magistrate rather than remanding the case.

The magistrate court abused his discretion when he excluded the breath test results because the record does not support a finding that the procedure was unfair. He committed an error of law when he failed to make specific findings as to the reasons why the test procedure

was unfair. The circuit court erred by failing to remand the case for these specific findings and by concluding that the procedure was unfair. This Court should reverse the order of the magistrate court excluding the test results and remand the case for trial. In the alternative, the Court should remand the case to the magistrate's court in order that he may make specific findings why the procedure was unfair so that this Court will have a proper ground on which to review its decision.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the order of the lower court excluding the blood-alcohol test results should be reversed.

Respectfully submitted,

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September 4, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
Hon. Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-000882

THE STATE,

Appellant,

v.

DANNY JAME PLUMLEY,

Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Steve W. Sumner, Esquire, 112 Manly Street, Greenville, SC 29601.

I further certify that all parties required by Rule to be served have been served.
This 4th day of September, 2019.

Anne Mueller

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ALAN WILSON
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September 4, 2019

Steve Wayne Sumner, Esquire
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RE: State v. Danny Jame Plumley
Appellate Case No. **2019-000882**

Dear Mr. Sumner:

I am enclosing two (2) copies of the Initial Brief of Appellant and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division