THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-000424

Thomas A. Williams, ... Appellant,

vs.

The State, ... Respondent.

BRIEF OF APPELLANT

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010

ATTORNEY FOR THE APPELLANT

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Statement of Issue on Appeal

Did the lower court err in concluding that the word "acts" contained in the phrase "if arrested for an offense arising out of acts alleged to have been committed" contained in S.C. Code 56-5-2950 included the act of driving under the influence when the adverbial clause modifying "committed" specifically contained driving under the influence and therefore such an interpretation would render much of the wording of the statute superfluous?

Statement of the Case

Thomas A. Williams was arrested for driving under the influence on March 30, 2013 when he entered a Highway Patrol safety checkpoint. He was tried before the Honorable C. Ryan Johnson and a jury on August 26, 2014. (Rec. on Appeal 1). The jury convicted Mr. Williams. Mr. Williams, through his attorney, filed a Notice of Appeal on August 27, 2014. (Rec. on Appeal 35).

The appeal was heard before the Honorable Donald B. Hocker. By order dated October 9, 2015, (Rec. on App. 65), Judge Hocker affirmed the conviction. Mr. Williams, through his attorney, filed a timely Motion under Rule 59 for the Court to re-consider the opinion. (Rec. on App. 71). By order dated February 12, 2016 and filed February 18, 2016, Judge Hocker affirmed his previous ruling. (Rec. on App. 90).

On February 23, 2016, Mr. Williams filed the Notice of Appeal to this Court. (Rec. on App. 93).

Facts

Thomas A. Williams approached a roadblock set up on North Main St., just off Montague Avenue in Greenwood, SC. The testimony and the findings by the lower court is that as Mr.

Williams approached the roadblock, he did not violate any traffic laws. Order dated October 9, 2015. (Rec. on App. 65). Mr. Williams timely objected to evidence of his refusal to take the datamaster test. (Rec. on App. 94). He contended that the arresting officer had no statutory right to require him to take the breath test.

Mr. Williams did refuse the datamaster test and evidence of his refusal was admitted before the jury. He further performed the walk and turn and the one leg stand test which were captured on the video. (CD) . The arresting officer testified the defendant did not perform well on the field sobriety tests. The officer also testified Mr. Williams admitted to consuming five beers.

Mr. Williams testified in his own defense. He attributed his performance and other attributes as to his intoxication, to the fact that he had a lifelong speech impediment, that he had bad knees and he did not have his glasses. After his conviction, this appeal followed.

Question

Did the lower court err in concluding that the word "acts" contained in the phrase "if arrested for an offense arising out of acts alleged to have been committed" contained in S.C. Code 56-5-2950 included the act of driving under the influence when the adverbial clause modifying "committed" specifically contained driving under the influence and therefore such an interpretation would render much of the wording of the statute superfluous?

This case involves a combination of statutory construction and an understanding of grammar, specifically the "adverbial clause." An "adverbial clause" is used to modify a verb or adverb, but never a noun. The relevant sentence of S.C. Code § 56-5-2950 provides as follows:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

The question before this Court is whether a person gives consent to give a breath test if he is arrested only for driving under the influence and has not committed any other offense under the South Carolina traffic code. In interpreting this statute, the phrase "while the person was driving a motor vehicle while under the influence of alcohol . . . ." is a subordinate adverbial clause used to modify the word "committed." As such, if the word "acts" includes driving under the influence then the driving under the influence would be in the sentence twice and render many words in the statute useless.

The proper use of subordinate or dependent adverbial clauses has been discussed in many

cases. *See, e.g. ILHC OF EAGAN, LLC v. County of Dakota,* 693 N.W.2d 412 (Mn. 2005); *State v. Thomas,* 292 N.C. 251, 232 S.E.2d 411 (1977); *Frere v. Commonwaelth,* 19 Va. App. 460, 452S.E.2d 862 (1995). In most cases, the dependent adverbial clause is not repetitive of the things that it modifies. If it were, there would seldom be a purpose of using a dependant adverbial clause. This is generally a clause that limits the application of the verb it modifies.

The lower court ruled in essence that when a person is arrested for driving under the influence, they have consented to have a breath sample taken. This interpretation renders many words in the statute useless. If this were the intent of the statute, the legislature would have simply and easily said:

> A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for driving under the influence of alcohol, drugs, or a combination of alcohol and drugs.

If the holding of the lower court is correct there is simply no need for the phrase "if arrested for an offense arising out of acts alleged to have been committed . . . ." As a person who is being offered a breath test has in fact been arrested for driving under the influence, there will never be a case where such an arrest has not occurred. The very next sentence in S. C. Code § 56-5-2950 says "A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs." The Advisement of Implied Rights form informs a person "You are under arrest for Driving Under the Influence (DUI) . . . ." Implied Consent form of Appellant. (Rec. on App. 94). Only when a person has been arrested for

driving under the influence can a person be required to take a breath test. By including the phrase "if arrested for an offense arising out of acts alleged to have been committed . . . ." the legislature clearly indicated the original arrest had to have been for an act, i.e. a separate traffic violation, other than driving under the influence.

As one Court has said when discussing subordinate adverbial clauses "The role of the subordinate clause is to modify the independent clause; thus the issue with regard to the meaning of 'while' is properly framed as how the 'while' clause modifies the [independent clause]." *ILHC of Eagan, LLC.* at 419-420. "While" may have several meanings. The oldest meaning is "during the time that." MERRIAM-WEBSTER DICTIONARY OF ENGLISH USAGE, (1994). In the context of the statute in question here, this is what is meant. The law requires one to submit to a breath test if they are arrested for an offense arising out of an act committed during the time they are driving and under the influence. The statute is truly almost nonsensical if the law is read to require one to submit to a breath test if arrested for driving under the influence during the time they are driving under the influence. As noted above, as a driver must be arrested for driving under the influence before they are asked to take a breath test, a portion of the statute would become mere excess words that give no meaning or have no importance to the statute. As our Supreme Court has said "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." *State v. Smith,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)(internal citations omitted)

A person cannot be stopped without probable cause to believe a traffic offense has occurred. As the South Carolina Supreme Court has said, " Temporary detention of an individual in the course of a routine traffic stop constitutes a Fourth Amendment seizure, but

where probable cause exists to believe that a traffic violation has occurred, such a seizure is reasonable *per se." State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010); *Whren v. United States*, 517 U.S. 806 (1996). An officer simply may not stop a driver who has not committed a traffic violation. Thus, the statutory provision that says a driver has consented to take a breath test requires that a driver must have committed a traffic offense other than driving under the influence. This makes logical sense.

The only interpretation of the statute that uses all the words in the phrase "if arrested for an offense arising out of acts alleged to have been committed" would be to exclude driving under the influence from the "acts" as used in the statute. A reviewing Court must accept the fact that the legislature knew that before a person could be offered a breath test, they had to have been arrested for driving under the influence. Thus, the only logical conclusion is that the legislature meant for the offense arising out of the act committed for which the driver was arrested was something other than driving under the influence.

In addition, the Statute refers to "an *offense arising out of* acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs." S. C. Code § 56-5-2950 (emphasis added). To say that the act of driving under the influence arose out of a driving under the influence is simply nonsensical. All the words in the sentence only make sense when read, for example, the offense of speeding that was committed while driving under the influence. The clear meaning is that some traffic offense occurred while the defendant was driving under the influence. At the time of the drawing of the statute, the legislature simply may not have thought about traffic stops in which no other traffic offense had been committed. The failure of the legislature to contemplate

traffic stops is not a reason for this Court to read such into the statute. If there is an error in the statue, the legislature has to correct the error. This Court has no authority to re-write the statute to correct their mistake. As has been said " It is the Legislature, not this Court, which defines a crime under a penal statute . . . ." *Brown v. State*, 343 S.C. 342, 350, 540 S.E.2d 846, 850 (2001)(holding a day care facility is not a school) *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)

While Mr. Williams contends that the meaning of the statue is clear, even if there is an ambiguity, Mr. Williams should still prevail. As the South Carolina Supreme Court has repeatedly said "Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). If the statute is unclear as to whether the "act" includes driving under the influence, this Court is required to resolve that ambiguity against the State and in favor of Mr. Williams.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of Thomas A. Williams and remand the matter for a new trial to exclude any reference to his refusal to take the Datamaster test.

March 8, 2017

C. RAUCH WISE
Attorney at Law
305 Main St.
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Thomas A. Williams