THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

EDWARD W. MILLER, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-000882

State of South Carolina.....Appellant,

v.

Danny Jame Plumley.....Respondent.

INITIAL BRIEF OF RESPONDENT

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2. **DOES LAW ENFORCEMENT'S FAILURE TO ADVISE PLUMLEY OF HIS IMPLIED CONSENT RIGHTS MATERIALLY AFFECT THE FAIRNESS OF THE BREATHALYZER TESTING PROCEDURE SUCH THAT THE RESULTS OF THE BREATHALYZER TEST SHOULD BE EXCLUDED FROM EVIDENCE?**

STATEMENT OF THE CASE

On March 28, 2016, Respondent Danny Plumley ("Plumley") was arrested for suspicion of driving under the influence ("DUI"). (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 2). Prior to trial, Appellant State of South Carolina ("State") elected to try this case as a violation of "Driving with an Unlawful Alcohol Concentration" and properly notified Plumley of this decision. (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 3).

Prior to swearing in the jury on January 26, 2017, the Magistrate heard motions of the parties dealing with evidentiary issues. As relevant to this appeal, Plumley moved to suppress the blood alcohol concentration breathalyzer test ("Breathalyzer Test") and the video tape of the Breathalyzer Test. (R. p. ___, Motion to Suppress Breath Test Site Video Recording and Defendant's Refusal; Magistrate's Court Order p. 1, Motion to Suppress Breath Cite Video Recording and Defendant's Refusal). Plumley argued that all evidence of the Breathalyzer Test should be excluded from evidence because the State failed to advise him of the applicable implied consent rights in light of the fact that Plumley had a valid Commercial Drivers License ("CDL").

The Magistrate granted Plumley's Motion to Suppress. (R. p. ___, Magistrate's Court Order pp. 1, 3). The State elected not to proceed with trial. (R. p. ___, 1/26/17 Tr. p. 27 ll.1-4).

The Magistrate issued its formal written Order on May 25, 2017. (R. p. ___, Magistrate's Court Order).

The State filed a Notice of Motion and Motion to Reconsider and Vacate Order on June 8, 2017. (R. p. ___, Notice of Motion and Motion to Reconsider and Vacate Order).

On June 13, 2017, Plumley filed Defendant's Response to the State's Motion to Reconsider and Vacate Order. (R. p. ___, Defendant's Response to the State's Motion to Reconsider and Vacate Order).

The Magistrate denied the State's motion on July 2, 2017. (R. p. _____, Notice of Motion and Motion to Reconsider and Vacate Order (hand written denial)).

The State appealed to the Court of Common Pleas for Greenville County, South Carolina. (R. p. ___, Notice of Intent to Appeal).

After a hearing held October 30, 2017, the Honorable Edward W. Miller issued an Order on July 10, 2018 affirming the Magistrate's Court Order. (R. p. ___, Order filed July 10, 2018).

The State filed its Notice of Appeal on May 24, 2019.

STATEMENT OF THE FACTS

Plumley was arrested on March 28, 2016 and charged with DUI. (R. p. ____, Magistrate's Court Order p. 2, Finding of Fact 2). At the time of his arrest, Plumley possessed a valid CDL. (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 4). When arrested, Plumley was driving his personal vehicle. (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 7). On the Uniform Traffic Ticket, the arresting officer marked the "CDL" box "yes." (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 4, Uniform Traffic Ticket #20162370000379).

At the Breathalyzer Test site, the law enforcement officer read and provided Plumley with a "copy of the standard "Driving Under the Influence Advisement" of implied consent rights (SLED Forensics Form # ICS 010)." (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 5). The officer did not advise Plumley verbally or in writing of "his implied consent rights as specifically provided for in the "Advisement of Commercial Drivers License Implied Consent Rights (SLED Forensics Form #ICS 010)." (R. p. __, Magistrate's Court Order p. 2, Finding of Fact 6).

Plumley the took the Breathalyzer Test resulting in a breath sample of 0.12%. (R. p. ___, Magistrate's Court Order p. 2, Finding of Fact 5).

STANDARD OF REVIEW

Absent evidence to the contrary, an appellate court presumes the regularity and legality of criminal proceedings. Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995).

In criminal cases, an appellate court sits to review errors of law only. State v. Nance, 393 S.C. 289, 712 S.E.2d 446 (2011). The trial court's factual findings are binding on the appellate court unless unsupported by any evidence, clearly erroneous or controlled by error of law. State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010).

Questions of statutory construction are questions of law which are subject to *de novo* review without any deference to the lower court. State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

ARGUMENT

I. THE MAGISTRATE PROPERLY SUPPRESSED ALL EVIDENCE RELATED TO THE BREATHALYZER TEST BECAUSE LAW ENFORCEMENT FAILED TO ADVISE RESPONDENT OF ALL OF HIS IMPLIED CONSENT RIGHTS.

The Magistrate suppressed all evidence related to the Breathalyzer Test because the State failed to properly advise Plumley of his implied consent rights as expressly required by law. The Magistrate did not err as a matter of law in suppressing this evidence.

The facts are not really in dispute. At the time of his arrest, Plumley had a valid CDL. The arresting officer knew Plumley had a valid CDL. (R. p. ___, Uniform Traffic Ticket). The officer administering the Breathalyzer Test advised Plumley of the general law of implied consent pursuant to S.C. Code Ann. §56-5-2950(B). (hereinafter "DUI Implied Consent Statute"). The officer did not advise Plumley of the CDL implied consent law pursuant to S.C. Code Ann. §56-1-2110. (hereinafter "CDL Implied Consent Statute").

South Carolina's implied consent law is set forth primarily in S.C. Code Ann. §§56-5-2950, 56-5-2951, 56-1-2110 and 56-1-2130. These statutes cannot be read in isolation. They must be read together to fully understand the law as applied to the case at bar. "A statute must be receive such construction as will make all of its parts harmonize with each other and render them consistent with the general scope and object." Davis v. Greenville Cnty.,322 S.C. 73, 470 S.E.2d 94 (1996).

The **DUI Implied Consent Statute** provides that:

> (A) A person who drives a motor vehicle in this State is considered to have given consent to chemical test of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, 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. S.C. Code Ann. §56-5-2950(A).

As relevant to this appeal, the DUI Implied Consent Statute further provides that:

> (B) No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:
>
> (1) The person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least **six months** with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court. S.C. Code Ann. §56-5-2950(B) and 56-5-2950(B)(1).

The **CDL Implied Consent Statute** provides that:

> (A) A person who drives a commercial motor vehicle within this State is considered to have given consent, subject to provisions of Section 56-5-2950, to take a test of that person's blood, breath or urine for the purpose of determining that person's alcohol concentration or the presence of other drugs. S.C. Code Ann. §56-1-2130(A).

The CDL Implied Consent Statute further provides that:

> (C) A person requested to submit a test as provided in subsection (A) must be warned by the law enforcement officer requesting the test, that a 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** under Section 56-1-2110. S.C. Code Ann. §56-1-2130(C).

As particularly relevant to this appeal, a person with a CDL who refuses to submit to a test to determine his alcohol concentration while driving ***any motor vehicle*** is "disqualified from driving a commercial motor vehicle for not less than one year." S.C. Code Ann. §56-1-2110(A)(5).

SLED is required to promulgate regulations necessary to carry out the implied consent law. S.C. Code Ann. §56-5-2950(E). All chemical tests pursuant to the implied consent laws must be administered "pursuant to SLED policies." S.C. Code Ann. §56-5-2950(A).

Pursuant to its statutory obligation, SLED created "rights advisement forms for implied consent tests." SLED Policy & Procedures §8.12.5(D)(1). (R. p. ___, Respondent's Memorandum to Circuit Court p. 16). The "'DRIVING UNDER THE INFLUENCE ADVISEMENT' is to be read to subjects given breath alcohol test for Driving Under the Influence (DUI) violations.'" SLED Policies & Procedures §8.12.5(D)(2). (hereinafter "DUI Advisement"). The "'COMMERCIAL LICENSE ADVISEMENT' is to be read to subjects given breath alcohol test for commercial drivers license (CDL) violations.'" Policy 8.12.5(D)(3). (hereinafter "CDL Advisement"). If both DUI and CDL charges are involved, the law enforcement officer must read both advisements. Id. (R. p. ___, Respondent's Memorandum to Circuit Court p. 14).

The **DUI Advisement** contains the information set forth in S.C. Code Ann. §56-5-2950(B) including:

> If you refuse to submit to the tests, your privilege to drive in South Carolina must be suspended or denied for at least six (6) months. SLED Forensics Form ICS010(B). (See R. p. ___, Respondent's Memorandum to Circuit Court p. 15).

The **CDL Advisement** contains the information set forth in S.C. Code Ann. §§56-1-2110 and 2130 including:

> If you refuse to submit to the tests or give samples, you will be immediately placed out of service for twenty-four (24) hours, and you will be disqualified from operating a commercial vehicle for not less than one (1) year. SLED Forensics Form ICS013(B). (R. p. ___, Respondent's Memorandum to Circuit Court p, 15).

In essence, a driver's refusal to submit to tests pursuant to the DUI Implied Consent Statute (and the DUI Advisement) results in a six month suspension of the privilege to drive in South Carolina. A person's refusal to submit to tests pursuant to the CDL Implied Consent Statute (and the CDL Advisement) results in that person being disqualified from operating a commercial vehicle for at least one year.

In cases where *both* the DUI Advisement and the CDL Advisement are required, a person's refusal to submit to tests results in a six month suspension of the privilege to drive any motor vehicle in South Carolina and disqualification from operating a commercial vehicle for at least one year. The repercussions from refusing to submit to tests or give samples are drastically different depending on which advisement is implicated.

In the present case, although both advisements were required, the officer only read the DUI Advisement. An individual has a right to require law enforcement to comply with the implied consent statutes as written. Peake v. Dept. of Motor Vehicles, 375 S.C. 575, 654 S.E.2d 284, 291 (Ct. App. 2007).

The State argues that the officer was not required to give the CDL Advisement because Plumley was not driving a commercial motor vehicle when he was stopped. This argument ignores the plain and ordinary meaning of all the statues in question.

The CDL Implied Consent Statute disqualifies a person from driving commercial vehicle for at least one year if that person refuses to submit to a test to determine the driver's alcohol concentration "while driving a motor vehicle." S.C. Code Ann. §56-1-2110(A)(5). This subsection does not require the person to be driving a commercial motor vehicle at the time of his arrest for the refusal to result in a one year disqualification.

When interpreting a statute, the court's primary function is to ascertain and give effect to the intent of the legislature. State v. Elwell, 403 S.C. 606, 743 S.E.2d 802, 806 (2013).

The intent of the implied consent statutes is to:

- "ensure suspects are informed of their rights to refuse any test"; and
- inform suspects "of the possible consequences arising from his decision to refuse or proceed with any test"; and
- if consent is obtained, "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 (Ct. App. 2004).

The court "must give clear and unambiguous statutory terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statutes operation." State v. Cribb, 310 S.C. 518, 521, 426 S.E.2d 306, 308 (1992). "Our courts have consistently held that the use of words such as 'shall' and 'must' indicates the Legislature's intent to enact a mandatory requirement." State v. Frey, 362 S.C. 511, 517, 608 S.E.2d 874 (Ct. App. 2004).

In this case, the legislature clearly intended that a CDL licensee's refusal to submit to a test while driving "any motor vehicle" would trigger the disqualification from driving a commercial vehicle. The driver "must" be warned and a refusal to submit to the test "must" result in disqualification from driving. S.C. Code Ann. §56-1-2130(c). If the legislature had intended the

disqualification to be triggered only by refusal to submit to a test after being stopped while driving a commercial vehicle, it would have said so.

For example, the legislature set forth seven (7) separate violations which trigger the minimum one year disqualification from driving a commercial motor vehicle. S.C. Code Ann. §56-1-2110(A)(1-7). Some violations involve acts while driving a commercial motor vehicle (S.C. Code Ann. §56-1-2110(A)(2), (6) and (7)). Other violations involve acts while driving any motor vehicle. (S.C. Code Ann. §56-1-2110(A)(1), (3), (4) and (5)).[1]

The legislature could have easily inserted the word "commercial" before "motor vehicle" throughout the statute but it elected to do so selectively. Courts cannot ignore statutory language. See e.g., Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (stating ""[e]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction."); Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993)("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning.").

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[1] Section 56-1-2110 Disqualification from driving commercial motor vehicle
(A) A person is disqualified from driving a commercial motor vehicle for not less than one year if convicted of a first violation of:
(1) driving a **motor vehicle** under the influence of alcohol, a controlled substance, or a drug which impairs driving ability as prescribed by state law;
(2) driving a **commercial motor vehicle** while the alcohol concentration of the person's blood or breath or other bodily substance is four one-hundredths or more;
(3) leaving the scene of an accident involving a **motor vehicle** driven by the person;
(4) using a **motor vehicle** in the commission of a felony as defined in this article;
(5) refusal to submit to a test to determine the driver's alcohol concentration while driving a **motor vehicle**;
(6) driving a **commercial motor vehicle** when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's commercial driver's license is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle;
(7) causing a fatality through the negligent operation of a **commercial motor vehicle**, including, but not limited to, the crimes of motor vehicle manslaughter, homicide by a motor vehicle, and negligent homicide. If any of the above violations occur while transporting a hazardous material required to be placarded, the person is disqualified for not less than three years.

Based upon the clear and unambiguous statutory terms, law enforcement is required to provide the DUI Advisement and the CDL Advisement to any person with a CDL who is 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..." S.C. Code Ann. §56-5-2950(A).

The State's argument reads the CDL Implied Consent Statute in a vacuum. If the DUI Implied Consent Statute did not exist, the State's position would have some merit.[2]

However, S.C. Code Ann. §56-1-2130 is not the only statute implicated in this case. Sections 56-1-2110 and 56-5-2950 are also on the books, and importantly, they are expressly referenced in the DUI Implied Consent Statute. Accordingly, if a driver with a CDL is arrested for DUI and asked to submit to a blood, breath or urine test, law enforcement must give the DUI Advisement as well as the CDL Advisement. Any other reading would render §56-1-2110(A)(5) meaningless.

To the extent there is any ambiguity in the implied consent statutes, which is not conceded, rules of statutory construction require courts to construe criminal statutes strictly with any ambiguity to be resolved in favor of the defendant. State v. Breech, 308 S.C. 356, 417 S.E.2d 873, 875 (1992). The Magistrate acknowledged this rule in his Order. (R. p. ___, Magistrate's Court Order p. 3, Conclusion of Law #10).

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[2] Under that hypothetical, only drivers with a CDL would be deemed to have given consent for alcohol concentration or drug testing. S.C. Code Ann. §56-1-2130(A). The law enforcement officer could only administer such test if he stopped a driver of a commercial motor vehicle and had probable cause to believe that driver had a "measurable amount of alcohol in his system." S.C. Code Ann. §56-1-2130(B). In that case, the officer would be required to advise the driver that a refusal to submit to the test would result in them being disqualified for operating a commercial motor vehicle for not less than one year. S.C. Code Ann. §56-1-2130(C).

If S.C. Code Ann. §56-1-2130 was the only statute implicated, the State is correct is the CDL Advisement would only be triggered if a driver was stopped or detained while driving a commercial motor vehicle.

The Magistrate did not err as a matter of law in finding that the law enforcement failed to advise Plumley of all of his implied consent rights in this case. When the relevant statutes are read together, they evidence the legislature's intent that law enforcement must advise CDL licensees of all of their implied consent warnings even if they are stopped while driving a personal vehicle. The circuit court did not err in affirming the Order of the Magistrate suppressing all evidence related to the Breathalyzer Test.

II. THE MAGISTRATE DID NOT ERR IN SUPPRESSING THE BREATHALYZER TEST RESULTS BECAUSE LAW ENFORCEMENT'S FAILURE TO ADVISE PLUMLEY OF HIS IMPLIED CONSENT RIGHTS MATERIALLY AFFECTED THE FAIRNESS OF THE TESTING PROCEDURE.

The State argues on appeal that the Magistrate should not have excluded the evidence related to the Breathalyzer Test even if law enforcement failed to give Plumley the required implied consent warnings. The State argues that the Magistrate erred in failing to make a specific finding of prejudice to Plumley. The Magistrate did not commit any error of law in requiring the State to follow its own laws and procedures and suppressing evidence obtained in violation of law.

The results of a Breathalyzer Test will generally be held admissible if:

- the arrested person is reasonably informed of his rights, duties and obligations under our implied consent laws

  AND

- he is neither tricked nor misled into thinking he had no right to refuse the test to determine the alcohol content in his blood, urine or breath. Percy v. S.C. Dept. of Highways & Public Transp., 315 S.C. 383, 385, 434 S.E.2d 264, 265 (1993); Sponar v. S.C. Dept. of Public Safety, 361 S.C. 35, 40, 603 S.E.2d 412 (Ct. App. 2004).

In the present case, Plumley was not informed at all of his rights, duties and obligations under the CDL Implied Consent Statute before he waived his right to refuse the Breathalyzer Test. However, under South Carolina law, a waiver of a statutory right is not effective unless it is made

freely, voluntarily, knowingly and intelligently. State v. Moses, Op. No. 4758 (S.C. Sup. Ct. filed Nov. 5, 2010); State v. Ray, 310 S.C. 431, 436, 427 S.E.2d 171, 174 (1999). Valid waiver will not be presumed. N.C. v. Butler, 441 U.S. 369, 373 (1979). Plumley had a right to refuse to take the Breathalyzer Test. He did not freely, voluntarily, knowingly and intelligently waive his right to refuse because law enforcement failed to fully and reasonably inform Plumley of his rights.

In light of the officer's failure to provide the correct implied consent warnings, the officer was not even authorized to administer the Breathalyzer Test and its results should be excluded from evidence. Accord Taylor v. Dept. of Motor Vehicles, 382 S.C. 567, 677 S.E.2d 588, 590 (2009)(Beatty, J., dissenting)(DMV cannot suspend a driver's license based upon a driver's refusal to take a test the law enforcement officer was never authorized to administer). "The South Carolina Legislature specifically set forth a pre-condition that must be met before any tests may be administered." Id.

Plumley acknowledges that the DUI Implied Consent Statute requires the trial court to perform a prejudice analysis before excluding from evidence any test results. However, the prejudice analysis is only required if law enforcement failed to follow SLED policies, procedures, regulations or the provisions of S.C. Code Ann. §56-5-2950. S.C. Code Ann. §56-5-2950(J).[3] Although the State did fail to follow its own policies, procedures, regulations and §56-5-2950, its failures did not end there.

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[3] The DUI Implied Consent 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 fairness of the procedure. S.C. Code Ann. §56-5-2950(J).

The State also failed to comply with §56-1-2130(c) which required the officer to warn Plumley that a refusal would disqualify him for operating a commercial motor vehicle for at least one year. Section 56-1-2130 does not contain the prejudice analysis.

The Magistrate was not required to perform a prejudice analysis based upon the State's failure to follow the CDL Informed Consent Statute. Unlike the DUI Implied Consent Statute, the CDL Implied Consent Statute does not specify the remedy for the State's failure to comply with the statute's requirement. S.C. Code Ann. §56-1-2130. When the applicable statute does not require a finding of prejudice before suppressing evidence obtained without full compliance with statutory requirements, the prejudice analysis is not required. See State v. Sawyer, Op. No. 27393 (S.C. Sup. Ct. field Nov. 5, 2013) (affirming suppression of evidence obtained in violation of statute governing Breathalyzer Test even though trial court did not determine prejudice; prejudice analysis not required when statute does not require prejudice analysis); City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879, 881 (2007) ("violation of a statute, with no mention of prejudice, may result in dismissal of the charges."). The CDL Implied Consent Statute does not expressly mention prejudice.

Furthermore, the prejudice analysis is not necessary when law enforcement fails to advise a criminal defendant of his rights. Accord State v. Henkel, 406 S.C. 626, 746 S.E.2d 347, 351 n. 3 (Ct. App. 2013) (omission of Miranda warnings requires dismissal without the need for an additional prejudice analysis).

Although not required to do so in light of the CDL Implied Consent Statute's silence on the issue, the Magistrate did find that the failure of the State to properly advise Plumley "materially affecting the fairness of the testing procedure." (R. p. ____, Magistrate's Court Order p. 3;

Conclusion of Law 8).[4] The prejudice to Plumley was the fact he waived a statutory right without being advised of his statutory rights as required by law. The Breathalyzer Test was fundamentally flawed.

The State presumes that Plumley would have still taken the Breathalyzer Test if law enforcement had given the CDL Advisement. The waiver of a right cannot be presumed. N.C. v. Butler, 441 U.S. 369, 373 (1979). Additionally, if law enforcement had advised Plumley of the increased penalties associated with refusal under the CDL Implied Consent Statute, Plumley could have realized the more serious nature of the charges against him and exercised his right to refuse the Breathalyzer Test.

The State argues for the first time in its Brief of Appellant that the circuit court exceeded its standard of review by making a finding of fact. The State did not raise this issue to the circuit court and that issue is not preserved for appellate review. Smith v. NCCI, Inc., 369 S.C. 236, 247-48, 631 S.E.2d 268, 274 (Ct. App. 2006) ("When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue."); City of Rock Hill v. Suchenski, 374 S.C. 12, 15-16, 646 S.E.2d 879, 880-81 (2007) (finding an issue was unpreserved when the circuit court, reviewing the magistrate judge's order, did not address an issue raised to the magistrate judge and the appellant did not filed a Rule 59(e) motion to reconsider).

Furthermore, the circuit court did not make any findings of fact. It merely affirmed the Magistrate's finding that Plumley was prejudiced by law enforcement not advising him of all of his rights.

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[4] The State implies in its Brief of Appellant that the Magistrate improperly based its order on a finding that Plumley's "employment is at stake." (Brief of Appellant p. 9). The Magistrate did not make a finding to that effect. (R. p. ___, Magistrate's Court Order). He merely made that comment during the motion hearing. (R. p. ___, 1/26/17 Tr. p. 26 ll. 7-12).

The State also failed to preserve its argument that it would have been inappropriate, misleading and confusing for law enforcement to give Plumley the CDL Advisement and the DUI Advisement. (Brief of Appellant pp. 5-6). The State did not raise this argument at the trial level. An issue cannot be raised for the first time on appeal. Id.

If this Court finds that the Magistrate should not have suppressed all evidence related to the Breathalyzer Test without a specific finding of prejudice, Plumley agrees with the State that the proper remedy is to remand for an evidentiary hearing on the issue of prejudice. (Brief of Appellant p. 10). State v. Landon, 370 S.C. 103, 634 S.E.2d 660, 663 (2006); State v. Frey, 362 S.C. 511, 519, 608 S.E.2d 874 (Ct. App. 2004) (remanding to trial court to determine whether State's failure to comply with DUI Implied Consent Statute "materially affected ...the fairness of the testing procedure.").

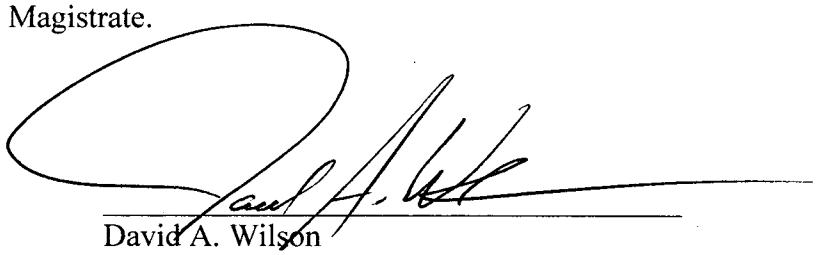
CONCLUSION

A CDL licensee will be disqualified from operating a commercial motor vehicle in South Carolina for at least one year if he refuses to submit to a test to determine his alcohol concentration "while driving a motor vehicle." S.C. Code Ann. §56-1-2110(A)(5). Before administering such a test, law enforcement "must" advise the CDL licensee that a refusal to submit to the test "must" result in the minimum one year disqualification. S. C. Code Ann. §56-1-2130(c). In this case, law enforcement did not inform Plumley of his right to refuse the test pursuant to the CDL Implied Consent Statute.

Plumley took the Breathalyzer Test. The law enforcement officer was not authorized to administer the test before he advised Plumley of all of his rights. Based upon the law enforcement officer's failure to follow the CDL Implied Consent Statue, the Magistrate properly excluded all evidence related to the Breathalyzer Test.

The CDL Implied Consent Statute does not require the trial court to find prejudice to Plumley before excluding the results of the Breathalyzer Test. Nevertheless, the Magistrate specifically found that law enforcement's failure to properly advise Plumley of all of his rights "materially affected the fairness of the testing procedure." Plumley did not waive his right to refuse to take the Breathalyzer Test freely, voluntarily, knowingly and intelligently because the law enforcement officer did not properly advise him of his rights. The Magistrate did not err in suppressing all evidence related to the Breathalyzer Test.

Based upon the foregoing, Respondent Danny Jame Plumley requests an order affirming the orders of the circuit court and the Magistrate.



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November 22, 2019

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State of South Carolina, Appellant v. Danny Jame Plumley, Respondent
Appellate Case No.: 2019-000882

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the following:

1. Initial Brief of Respondent;
2. Designation of Matter to be included in the Record on Appeal;
3. Proof of Service on opposing counsel.

Please return the filed copies to me in the enclosed self-addressed stamped envelope.

Respectfully,

David A. Wilson

DAW/ccb
Enclosures
cc: Danny Plumley (Via Email)
Mitchell E. Byrd, Sr., Esquire
Haley E. Kernell, Esquire
William M. Blitch, Jr., Esquire
Joshua A. Edwards, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT

EDWARD W. MILLER, COMMON PLEAS COURT JUDGE

CASE NO.: 2017-CP-23-04936
APPELLATE CASE NO. 2019-000882

Sate of South Carolina.....Appellant,

v.

Danny Jame Plumley.....Respondent.

PROOF OF SERVICE

I certify that I have served Initial Brief of Respondent on Appellant by depositing a copy to them and in the United States Mail, Postage prepaid, on November 22, 2019 addressed as follows:

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