STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
The Honorable R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2018-000988

THE STATE, Respondent,

v.

TAMMY DIANE BROWN, Appellant.

FINAL BRIEF OF RESPONDENT

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II.

Whether the trial judge properly admitted the results of the analysis performed on Appellant's blood sample into evidence when Appellant never requested an independent sample of her blood and even if she had, whether law enforcement already provided Appellant affirmative assistance under S.C. Code § 56-5-2950(E) by transporting her to the local hospital?

III.

Whether the trial judge properly admitted testimony regarding Appellant's blood alcohol level when neither S.C. Code § 56-5-2950 nor S.C. Code § 56-5-2953 requires the State to video record the taking of a defendant's blood sample? And if the statutes had such a requirement, whether S.C. Code § 56-5-2953(B) provides an exception to the video recording requirement when an defendant requires emergency medical treatment?

STATEMENT OF THE CASE

In March 2018, the Clarendon County Grand Jury indicted Appellant for one count of felony driving under the influence resulting in death and one count of felony driving under the influence resulting in great bodily injury (R. 710-11). On May 14-18, 2018, a jury trial was held in the Clarendon County Court of General Sessions with the Honorable R. Ferrell Cothran presiding. Appellant was represented by Charles David Barr, Esq. The State was represented by Assistant Solicitors Chris Durant and Hugh McMillian. At the conclusion of trial, the jury convicted Appellant of both counts. Following the verdict, the trial judge sentenced Appellant to a term of fifteen years' imprisonment for felony driving under the influence resulting in death and twelve years' imprisonment for felony driving under the influence resulting in great bodily injury. The sentences ran concurrently with each other resulting in an aggregate sentence of fifteen years' imprisonment. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Just before midnight on August 30, 2014, Appellant drove her White Hyundai Tiburon east on Highway 261 from Paxville towards Manning. (R. 212). Around the same time, Guillermo Lopez-Arenas was driving a black Dodge Dakota pickup truck along with his passenger Arturo Murrieta-Blas. The black truck turned from Home Branch Road onto Highway 261 to head east. As the black pickup turned, Appellant's vehicle collided with the rear end of the pickup and caused the truck to crash into a tree. (R. 274, 467, 703). Arenas was pronounced dead on the scene by Coroner, Hayes Samuels. (R. 220-21, 327-28). Blas was transported by helicopter to the hospital in Florence where he underwent emergency surgery. (R. 194-97, 220-21). Blas spent the next two months in the hospital. (R. 195).

The driver of the white Hyundai was identified as Appellant. (R. 209). When Trooper Jeffrey Minnix of the South Carolina Highway Patrol arrived at the scene of the wreck, Appellant was already in the back of an ambulance receiving treatment from EMS. (R. 209). Minnix positioned his car as close as possible to the wreck but was unable to get very close because of the way the vehicles of other first responders were parked at the scene. (R. 203). Because of the distance of Minnix's car from the ambulance and the limited capabilities of his car's camera system, Minnix's interaction with Appellant was not recorded. (R. 207-09). Minnix interviewed Appellant in the back of the ambulance. (R. 216-17). While interviewing Appellant, EMS informed Minnix that Appellant needed to be transported to the hospital. Therefore, Minnix did not request Appellant to perform any field sobriety tests. (R. 95, 219). Minnix observed that Appellant's eyes were bloodshot and she had an odor of alcohol coming from her person. (R. 216-17). Appellant initially told Minnix she had consumed two shots of tequila, but then revised her statement and said she drank wine coolers instead. (R. 205, 217-18). Appellant admitted that

the clear cup in the floorboard of her car previously contained a wine cooler that her friend made her for the road. (R. 205).

Appellant was transported to Clarendon Memorial Hospital for evaluation. At the hospital, she was interviewed again by Minnix and Trooper Paige Dubose. (R. 222, 314-15). Appellant was placed under arrest at the hospital and was read her Miranda rights and her implied consent rights. (R. 224, 315, 708). Appellant declined to voluntarily provide Minnix and Dubose with a blood sample. (R. 225). Minnix remained with Appellant at the hospital while Dubose left to obtain a search warrant for Appellant's blood sample from the on call magistrate. Dubose met with Judge Robin Locklair at Locklair's home where she provided sworn oral testimony to establish probable cause for the search warrant. (R. 152-53, 318-19). Judge Locklair issued the search warrant. (R. 154, 704-07).

Dubose returned to the hospital with the search warrant and Minnix asked for the assistance of hospital phlebotomist, Angela Floyd, to draw the blood sample. (R. 228). Minnix utilized the SLED blood and urine collection form to inform Appellant of her right to an independent blood sample. (R. 228-32, 702). Appellant refused to sign the blood collection report. (R. 231, 324). Two vials of Appellant's blood were collected and given to Minnix. (R. 234, 381-83). The portion of the blood collection report regarding Appellant's right to an independent blood test was checked in error by Floyd. (R. 378-79, 384, 702). According to Floyd, Minnix, and Dubose, Appellant never requested an independent blood sample in their presence. (R. 232-33, 325-26, 380, 385). Appellant acknowledged at trial that she never made a direct request to law enforcement for an independent sample. (R. 167). Appellant's blood was transported to SLED where it was analyzed by forensic toxicologist Kelly Budgen. According to Budgen's analysis, Appellant had a .210 blood alcohol concentration. (R. 423).

At trial, the State called Lance Corporal Bryan Ridgeway of the South Carolina Highway Patrol as an expert witness in accident reconstruction. (R. 465-66). The speed limit in the intersection where the accident occurred was 45 miles per hour. (R. 212-14). Ridgeway estimated that Appellant's vehicle was traveling at 64.6 miles per hour when she began to break and 55.92 miles per hour when her vehicle hit the black pickup truck. (R. 511, 513). According to Ridgeway, the wreck would not have occurred if Appellant had been traveling within the posted speed limit. (R. 531). Appellant was convicted of both counts at the conclusion of trial.

STANDARD OF REVIEW

I.

"The trial court's factual conclusions as to the sufficiency of an indictment will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Tumbleston, 376 S.C. 90, 94, 654 S.E.2d 849, 851 (Ct. App. 2007).

II., III.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I.

The trial judge properly refused to quash or dismiss Appellant's indictments when the indictments closely mirrored the language of S.C. Code § 56-5-2945 and notified Appellant of what charge she was called to answer at trial.

Appellant initially argues the trial judge erred in refusing to quash or dismiss Appellant's indictments because they did not specifically allege which traffic law Appellant violated to proximately cause the respective death and great bodily injury of the two victims. Accordingly, Appellant asserts she "was not sufficiently notified of what she would be required to defend at trial." (Initial Brief of Appellant 10). Appellant's argument is without merit. The language in Appellant's indictments closely mirrors the language of the statute Appellant is charged with violating, S.C. Code § 56-5-2945. The plain language in the indictment notified Appellant of what charge she would be called to defend against at trial and it notified the trial judge what judgement he should pronounce. Therefore, the trial judge did not abuse his discretion in refusing to quash or dismiss Appellant's indictments.

An indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). "Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime." S.C. Code § 17-19-20. A trial judge should judge the sufficiency of an indictment by determining whether "the offense is stated with sufficient certainty and particularity to enable the court to know what judgement to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon." Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500. Secondly, the trial judge should determine whether the indictment "apprises the defendant of the

elements of the offense that is intended to be charged." Gentry, 363 S.C. at 103, 610 S.E.2d at 500. "In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances." Id. "[W]hether the indictment could be more definite or certain is irrelevant." Id. "[T]he true test of an indictment's validity is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999).

Here, Appellant was charged with one count of felony driving under the influence resulting in death and one count of felony driving under the influence resulting in great bodily injury pursuant to S.C. Code § 56-5-2945. S.C. Code § 56-5-2945(A) provides:

> A person who, while under the influence of alcohol, drugs, or the combination alcohol and drugs, drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of a motor vehicle, which act or neglect proximately causes great bodily injury or death to another person, is guilty of the offense of felony driving under the influence.

S.C. Code § 56-5-2945(A). Appellant was indicted for two counts of violating the aforementioned statute. Appellant's indictment contained the following language:

> That in Clarendon County, South Carolina, on or about August 30, 2014, while driving a vehicle under the influence or alcohol, drugs or a combination of alcohol and drugs, [Appellant] did an act forbidden by law or neglected a duty imposed by law in the driving of said vehicle; and such act proximately caused the death of Guillermo Lopez-Arenas; all in violation of Section 56-5-2945, S.C. Code of Laws (1976, as amended).

(R. 711). The second count of Appellant's indictment contains identical language to the first count except it alleges that Appellant "caused great bodily injury to Arturo Murrieta-Blas." (R. 711).

Appellant's indictments notified Appellant that she was charged with violating S.C. Code § 56-5-2945 and that by violating § 56-5-2945 she committed the offenses of felony driving under the influence resulting in death and great bodily injury. The indictments closely resembled the language of the statute and enabled Appellant to know what she was called upon to answer. While the State could have added more detail to the indictment by specifically alleging what act Appellant did in her motor vehicle or what duty she neglected, the State was not required to do so. The indictment informed Appellant that she was called to answer the charge of felony driving under the influence resulting in death and great bodily injury. Appellant was not called upon to answer the charge of speeding. Had the State included language within the indictment accusing Appellant of speeding, the indictment may have been more specific but it would not have changed the nature of the offense that Appellant was charged with nor would it have changed the statute which Appellant was charged with violating. Appellant knew she was in court to answer whether she killed one motorist and greatly injured another while driving under the influence of alcohol or drugs. Therefore, the trial judge did not abuse his discretion in refusing to quash or dismiss Appellant's indictments prior to trial. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly admitted the results of the analysis performed on Appellant's blood sample into evidence when Appellant never requested an independent sample of her blood and even if she had, law enforcement already provided Appellant affirmative assistance under S.C. Code § 56-5-2950(E) by transporting her to the local hospital.

Appellant next argues the trial judge erred in admitting the results of the analysis of her blood sample performed by SLED because Appellant requested an independent sample of her blood and was not given affirmative assistance by law enforcement. On the contrary, Appellant

did not request an independent blood sample be taken for analysis. However, even if Appellant had requested an independent sample, law enforcement was not required to provide Appellant any further assistance to obtain a sample because Appellant was already at a hospital. Because Appellant was already at a hospital, law enforcement satisfied the affirmative assistance requirement articulated in S.C. Code § 56-5-2950(E). Therefore, the trial judge did not abuse his discretion in admitting the analysis of Appellant's blood sample.

S.C. Code § 56-5-2950(A) states that anyone who drives a motor vehicle in the State of South Carolina "is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination or alcohol and drugs" if the they are arrested for a DUI related offense. S.C. Code § 56-5-2950(A). The statute also mandates that a person arrested for DUI must be offered a breath test first, but "if the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting office may request a blood sample to be taken" S.C. Code § 56-5-2950(A). However, in the case of a felony DUI our Supreme Court has held that law enforcement may order a person suspected of felony DUI to submit to a chemical test before offering a breath test. State v. Long, 363 S.C. 360, 364, 610 S.E.2d 809, 812 (2005). Before law enforcement may administer a breath test or take a blood sample, the person must be informed verbally and given a written copy of rights that specify, among other things, that "the person has the right to have a qualified person of the person's own choosing conduct additional independent tests at the person's expense." S.C. Code § 56-5-2950(B)(3). Law enforcement must provide affirmative assistance to a person who requests independent testing.

S.C. Code § 56-5-2950(E) defines what affirmative assistance entails. S.C. Code § 56-5-2950(E) provides:

> (E) ...Affirmative assistance, at a minimum, includes providing transportation for the person to the nearest medical facility which performs blood tests to determine a person's alcohol concentration. If the medical facility obtains the blood sample but refuses or fails to test the blood sample to determine the person's alcohol concentration, SLED shall test the blood sample and provide the result to the person and to the arresting officer.

S.C. Code § 56-5-2950(E).

Here, Appellant's argument fails for two reasons. First, Appellant did not request an independent blood sample. Prior to drawing a blood sample from Appellant, Minnix read Appellant's implied consent rights to her using the SLED implied consent rights form. (R. 224, 315, 708). The rights on the SLED form included the following "You have the right to have a qualified person of your own choosing conduct additional independent tests at your expense and the officer, upon request, must provide you affirmative assistance." (R. 708). Minnix also filled out a SLED urine/blood collection report form before taking Appellant's blood sample. (R. 228-32, 702). A box on the SLED form which reads "A blood sample is requested by the subject for his/her own independent test" was checked in error by Floyd. (R. 378-79, 384, 702). Appellant refused to sign the form and otherwise made no markings on the form. (R. 231, 324). In fact, Dubose, Minnix, and Floyd each testified that Appellant never made a request for an independent sample in their presence. (R. 232-33, 325-26, 380, 385). Appellant acknowledged at trial that she thought about getting an independent test, but never communicated that request to law enforcement. (R. 167). Because Appellant never requested an independent sample of her blood to be taken, the trial judge did not err in admitting the results of the analysis of her blood performed by SLED.

Secondly, even if Appellant requested an independent sample of her blood, law enforcement had already met their obligation to provide Appellant affirmative assistance to obtain the sample. Appellant was being treated for her injuries at Clarendon Memorial Hospital at the time her blood was taken. Because Appellant was being treated at a hospital, she was already at the nearest medical facility. Therefore, law enforcement had already satisfied the affirmative assistance requirement mandated by S.C. Code § 56-5-2950(E) that a person being tested be transported to the nearest medical facility. Accordingly, law enforcement was not required to provide Appellant with any further assistance to obtain an independent blood sample. Appellant's convictions and sentences should be affirmed.

III.

The trial judge properly admitted testimony regarding Appellant's blood alcohol level because neither S.C. Code § 56-5-2950 nor S.C. Code § 56-5-2953 requires the State to video record the taking of a defendant's blood sample and even if either statute had such a requirement, S.C. Code § 56-5-2953(B) provides an exception to the video recording requirement when an defendant requires emergency medical treatment.

Finally, Appellant argues the trial judge erred in admitting Appellant's blood sample into evidence because the taking of the blood sample was not recorded on video. In support of her argument, Appellant contends that § 56-5-2950(B) requires the State to video record the taking of all blood samples[1], notwithstanding the exceptions provided in S.C. Code § 56-5-2953(B). Appellant's argument is meritless. Appellant's argument ignores the complete text of § 56-5-2950(B) and proposes an interpretation of the statute that was not intended by the Legislature. S.C. Code § 56-5-2950(B) mandates that law enforcement must advise a defendant of their implied consent rights on video in normal circumstances. S.C. Code § 56-5-2950(B) says nothing

[1] Appellant's broad assertion that "the plain language of the statute requires that test and samples which are intended to test a person's blood alcohol concentration may not be collected until video recording equipment is activated" (Initial Brief of Appellant 17) would logically apply to recording the taking of urine samples as well.

about videotaping the actual blood draw or taking of a urine sample and is therefore inapplicable to the question of whether a blood draw must be recorded. Furthermore, S.C. Code § 56-5-2953(B) provides an explicit exception to the video recording requirement if a defendant requires emergency medical treatment. Finally, it is unlikely the legislature intended law enforcement to record the taking of blood draws and collecting of urine samples, because such a practice would infringe on the privacy of citizens.

S.C. Code § 56-5-2953 is entitled "Incident site and breath test site video recording." S.C. Code § 56-5-2953(A) provides that "A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded." The statute further clarifies that the recording at the incident site must include "any field sobriety tests administered", the arrest of the defendant, and "show the person being advised of his Miranda rights." S.C. Code § 56-5-2953(A)(1)(a)(ii-iii). The statute also identifies which specific actions must be recorded at the breath testing site. S.C. Code § 56-5-2953(A)(2)(a-c). However, subsection B of 56-5-2953 outlines a number of exceptions that excuse noncompliance with the mandatory requirements of subsection A:

> (B) Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the times of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a grounds for dismissal.

S.C. Code § 56-5-2953(B).

"[T]he legislature is presumed to intend that its statutes accomplish something." Long, 363 S.C. at 364, 610 S.E.2d at 811. "Under our principles of statutory construction, the court must 'look to the plain language of the statute' to determine its meaning." State v. Elwell, 396 S.C. 330, 333, 721 S.E.2d 451, 453 (Ct. App. 2011)(quoting State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 810 (Ct. App. 2011)). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Sweat, 386 S.C. 339, 350, 699 S.E.2d 569, 575 (2010). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Sweat 386 S.C. at 351, 688 S.E.2d at 575.

Here, Appellant is asking this Court to conflate the video recording requirement for implied consent rights contained in § 56-5-2950(B) and the video recording requirement for Appellant's conduct at the incident and breath testing site contained in S.C. Code § 56-5-2953(A) all while ignoring the exceptions to the video recording requirement enumerated in S.C. Code § 56-5-2953(B). The passage that Appellant exclusively relies on in § 56-5-2950(B) contains the following language:

> (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[2]:

S.C. Code § 56-5-2950(B). Appellant correctly asserts that this portion of the statute requires the State to activate video recording equipment to record a defendant being read their

[2] The statute goes on to enumerate each implied consent right that must be read to a defendant. Each of the rights included in the statute were read to Appellant and are included in the SLED implied consent rights form. (R. 708).

implied consent rights. However, this portion of the statute does not require the State to record a blood draw, a breath test, any field sobriety test, or any other conduct of a defendant during an arrest. However, a different statute, S .C. Code § 56-5-2953(A), does articulate specific tests and actions of a defendant and law enforcement that must be recorded. S .C. Code § 56-5-2953(A) does not include the taking of a blood or urine sample as actions that must be video recorded. The only reference in either § 56-5-2950 or § 56-5-2953 to the taking of a blood or a urine sample occurs in § 56-5-2950(A). The relevant language reads as follows:

> If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting office may request a blood sample to be taken. If the officer has reasonable suspicion that the person is under the influence of drugs other than alcohol, or is under the influence of a combination of alcohol and drugs, the officer may order that a urine sample be taken for testing.

S.C. Code § 56-5-2950(A). Nowhere in the preceding language does the Legislature indicate that a blood test or a urine test has to be recorded. In fact in the entirety of both § 56-5-2950 and § 56-5-2953, there is no requirement that blood tests or urine tests be video recorded. Therefore, the Legislature did not intend for blood draws and urine collections to be video recorded. However, even if we assume for the sake of argument that the Legislature did intend for such tests to be recorded, they also included specific exceptions to that requirement in S.C. Code § 56-5-2953(B). Here, EMS personnel informed Minnix that Appellant required emergency medical treatment at Clarendon Memorial Hospital. (R. 95, 219). Therefore, the State was not required to video tape Appellant's conduct at the incident site or elsewhere pursuant to S.C. Code § 56-5-2953(B). The State produced a sworn affidavit as required by § 56-5-2953(B) and submitted it to the trial judge. (R. 709).

If this Court follows Appellant's argument to its logical conclusion, the State would be required to take a camera into a defendant's hospital room to film the taking of a blood sample as well as a urine sample. Our Legislature could not have possibly intended to require law enforcement to infringe on citizens' privacy interests by recording such intimate medical procedures in order to investigate DUI cases. Such an invasive search would be offensive to the United States Constitution, the South Carolina Constitution, and possibly violate federal legislation protecting the privacy of citizen's private medical information such as HIPAA. See U.S. Const. amend. IV; S.C. Const. art. I, § 10; 42 U.S.C. 1320d. Such an absurd result could not have been intended by the Legislature. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the sentences and convictions of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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