STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMMY DIANNE BROWN,

APPELLANT

APPELLATE CASE NO 2018-000988

FINAL BRIEF OF APPELLANT

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2.

Whether the court erred in admitting the blood sample taken from Appellant at the hospital where she requested an independent sample and was not offered affirmative assistance by law enforcement in obtaining an independent sample in violation of S.C. Code Ann. § 56-5-2950 (E)?

3.

Whether the court erred in admitting testimony regarding Appellant's blood alcohol level from a blood sample obtained by law enforcement at the hospital where it was not video recorded and therefore violated S.C. Code Ann. § 56-5-2950 (B)?

STATEMENT OF THE CASE

Appellant was indicted by the Clarendon County grand jury for the offenses of felony DUI resulting in death and felony DUI resulting in great bodily injury. R. 710-711. Appellant's jury trial was held before the Honorable R. Ferrell Cothran from May 14, 2018 through May 18, 2018. Appellant was represented by Charles Barr and the state was represented by Christopher Durant. R. 1.

The jury found Appellant guilty as charged and the court sentenced her to concurrent terms of imprisonment of fifteen years for the felony DUI resulting in death and twelve years for the felony DUI resulting in great bodily injury.

This appeal follows.

STATEMENT OF FACTS

On August 30, 2014 at around midnight, Appellant was involved in fatal car accident while traveling east on S.C. Highway 261 between Paxville and Manning, S.C. Appellant was driving a white sedan that hit a black pickup truck from behind when the truck had just pulled out onto the highway in front of Appellant. R. 204, ll. 23 – 25; R. 466, l. 21 – 467, l. 5; R. 515, ll. 6 – 11. The driver of the truck was pronounced dead on the scene. R. 56, l. 17 – 57, l. 3. The passenger of the truck survived but with permanent disabilities. R. 195, l. 11 – 198, l. 24.

Jeffrey Minnix, who was a Trooper with the Highway Patrol, testified that Appellant was inside of an ambulance when he arrived on the scene. R. 204, ll. 17 – 23. Minnix claimed that Appellant told him she was coming from a friend's house and that "[a]t that point in time you could smell a strong odor of some sort of alcohol beverage coming from her person." R. 205, ll. 1 – 4.

Prior to reading Appellant her Miranda[1] warnings, Minnix said that he asked her if she had been drinking and she admitted to drinking "two wine coolers." R. 205, ll. 4 – 9. EMS informed Minnix that they needed to transport Appellant to the hospital. R. 205, ll. 11 – 12. Even though Minnix's patrol car was equipped with dash cam video and audio, none of this interaction with Appellant was captured on either. R. 207, l. 10 – 15; R. 208, ll. 15 – 21.

Minnix and his supervisor went to the hospital to continue questioning Appellant. R. 205, l. 23 – 206, l. 4. Once again, prior to reading Appellant her Miranda warnings, Minnix and his supervisor questioned Appellant about the incident. R. 222, ll. 14 – 19. After questioning Appellant a second time, she was placed under arrest for driving under the influence and was read her Miranda rights and implied consent rights. R. 222, ll. 19 – 22.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

Appellant initially agreed to provide a blood sample but after she was told she was under arrest for felony DUI she revoked her consent. R. 222, l. 22 – 223, l. 3. Law enforcement then obtained a search warrant for a blood sample from Appellant. R. 226, ll. 7 – 10. A blood sample and urine sample were both obtained from Appellant while at the hospital. R. 226, ll. 11 – 19. None of Appellant's interactions with law enforcement at the hospital were video recorded, including the obtaining of the blood sample or the reading of her Miranda rights or implied consent warnings.

The state called Stacy Matthew as an expert in forensic toxicology who testified, over Appellant's objection, that the blood sample taken from Appellant at the hospital showed she had a blood alcohol concentration of .210. R. 393, l. 22 – 394, l. 7; R. 408, ll. 15 – 19; R. 418, ll. 17 – 25.

The state also called Bryan Ridgeway, an employee with the South Carolina Highway Patrol MAIT[2] team, who was qualified as an expert in the fields of accident reconstruction and animation. R. 465, l. 8 – 466, l. 6. Ridgeway testified extensively as to his methodology and calculations that he used to reconstruct the accident. He created several drawings and animations of the accident scene to demonstrate what, in his opinion, happened. R. 703. The drawings created by Ridgeway showed that Appellant was traveling down Highway 261 from Paxville towards Manning in an east bound direction. R. 703. According to Ridgeway's drawings, the decedent was stopped at a stop sign on Home Branch Road and then turned left onto Highway 261 traveling in the same direction as Appellant. R. 703. Appellant struck the rear of the decedent's vehicle, which caused it to careen off the roadway into a tree. R. 703.

[2] MAIT stands for multidisciplinary accident investigation. R. 457, ll. 24 – 25.

Ridgeway ultimately opined that Appellant was driving approximately sixty-five miles per hour prior to initiating her brakes and approximately fifty-five miles per hour at the point of impact with the black truck driven by the decedent. R. 513, ll. 9 – 21; R. 510, l. 19 – 511, l. 3. The posted speed limit at the crash site was forty-five miles per hour. R. 512, ll. 15 – 17. Ridgeway also opined that Appellant's vehicle would not have been visible to the driver of the black truck prior to his pulling out into the highway. R. 517, l. 13 – 518, l. 22.

STANDARD OF REVIEW

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. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion without evidentiary support. Id. Accordingly, an appellate court is bound by the trial court's factual findings when the findings are supported by the evidence and not controlled by error of law. Id.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

ARGUMENT

1.

The court erred in refusing to quash or dismiss the indictments against Appellant for Felony DUI resulting in death and great bodily injury because they did not allege the particular traffic violation that the state sought to prove as an essential element of each offense.

Relevant Facts

Prior to the swearing in of the jury, defense counsel moved to dismiss the indictments against Appellant for being insufficient. R. 11, l. 25 – 12, l. 3. Counsel argued that both of the indictments against Appellant failed to state with particularity what alleged act she had done that was forbidden by law which would form the basis for the state's case against her. R. 12, l. 3 – 13, l. 10. Counsel cited to State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986), which held that the defendant's right to be free from double jeopardy was violated when the state based its felony DUI prosecution on the same traffic violation for which the defendant had already been convicted in magistrate court.

The assistant solicitor argued that both of the indictments charged the language of the statute and then he said: "It's never been my understanding that the State would require [sic] to allege in the indictment particular act or law alleged [sic] to have been violated by the defendant with traffic violation [sic]." R. 13, ll. 13 – 22. The assistant solicitor further argued that "it's certainly no secret that the law that [Appellant] violated is speed." R. 13, ll. 22 – 24.

Defense counsel argued that Grampus supported his argument that if the state intended to rely on speed as the traffic violation to satisfy a necessary element of the offense of felony DUI then the indictment must state that with particularity. R. 14, l. 12 – 15, l. 9.

Ultimately the court denied Appellant's motion to dismiss the indictment by relying on State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004). The court noted that Appellant had preserved the issue pursuant to State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) by making her motion prior to the swearing of the jury. R. 18, ll. 2 – 21.

Discussion

The court erred in denying Appellant's motion to dismiss the indictments by improperly relying on State v. Campbell. In Campbell, the defendant argued that the indictment *to which she pleaded guilty* was insufficient to confer subject matter jurisdiction on the Court. Campbell, 361 S.C. at 531, 605 S.E.2d at 577. Campbell was overruled by State v. Gentry which made a critical distinction between the concepts of subject matter jurisdiction and the sufficiency of an indictment.

The Gentry Court noted, "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue." Gentry, 363 S.C. at 101, 610 S.E.2d at 499. Although Campbell held that an indictment for felony DUI was sufficient to confer subject matter jurisdiction on the circuit court even though it did not state with particularity the underlying traffic offense which the state intended to rely on in establishing an essential element of that offense, it did so only in the context of a guilty plea. Campbell, 361 S.C. at 533, 605 S.E.2d at 579. Furthermore, Campbell was overruled for conflating subject matter jurisdiction and sufficiency of the indictment by Gentry, which stands for the proposition that a criminal defendant *must object to the sufficiency of the indictment prior to the swearing of the jury.* Gentry, 363 S.C. at 103, 610 S.E.2d at 500. The Gentry Court further noted that if a defendant does not object to the

sufficiency of the indictment then he has waived that objection. Id. at 102, 610 S.E.2d at 499 n.6.

Appellant's case is distinguishable from Campbell because she did not plead guilty and she objected to the sufficiency of the indictment prior to the swearing of the jury. Contrary to the court's assertion that Campbell was directly on point, by not pleading guilty and challenging the sufficiency of the indictment Appellant in no way conceded this issue as was the case in Campbell. If a defendant pleads guilty on an indictment "it is clear she was aware of the nature of the charge against her." Campbell, 361 S.C. at 533, 605 S.E.2d at 579.

The objection Appellant made was to notice, not subject matter jurisdiction. In order to determine whether an indictment is sufficient, the court must determine, in part, whether the defendant was apprised of the elements of the offense and what she was called upon to answer at trial. Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500.

The indictments against Appellant read as follows:

> Count One – Felony Driving Under the Influence, Death Results: That in Clarendon County, South Carolina, on or about August 30, 2014, while driving a vehicle under the influence of alcohol, drugs or a combination of alcohol and drugs, the Defendant, Tammy Dianne Brown *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 . . .
>
> Count Two – Felony Driving Under the Influence, Great Bodily Injury Results: That in Clarendon County, South Carolina, on or about August 30, 2014 while driving a vehicle under the influence of alcohol, drugs or a combination of alcohol and drugs, the Defendant, Tammy Dianne Brown *did an act forbidden by law or neglected a duty imposed by law in the driving of said vehicle*; and such act proximately caused great bodily injury to Arturo Murrieta-Blas . . .

R. 710-711 (emphasis added). The emphasized language above told Appellant nothing about what she would be called upon to answer at trial.

Defense counsel argued that in a prosecution for Felony DUI, the state must charge in the body of the indictment what the underlying traffic offense it intends to rely on in establishing that element of the offense in order to satisfy the notice requirement. Appellant cited to State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986) (overruled on other grounds), which noted that in a prosecution for felony DUI, "the indictment must state with particularity the 'act forbidden by law or . . . duty imposed by law' which will be relied on by the State to support the felony DUI charge." Grampus, 288 S.C. at 397, 343 S.E.2d at 27 n.2.

Grampus was a case decided only on double jeopardy grounds because the defendant in that case, did not challenge the sufficiency of the indictment. The Court still made the point, however, that an indictment in a felony DUI case must include the underlying traffic offense the state intends to rely on. This requirement serves the end that a criminal defendant is apprised of the elements of the offense *and what she is called upon to answer at trial.* Because the indictments against Appellant did not state with particularity the "act forbidden by law" on which the state would rely, Appellant was not sufficiently notified of what she would be required to defend at trial.

Accordingly, Appellant's conviction should be reversed because the trial court erred in holding that the indictments against Appellant were sufficient. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Campbell, 361 S.C. 529, 605 S.E.2d 576 (Ct. App. 2004); State v. Grampus, 288 S.C. 395, 343 S.E.2d 26 (1986).

2.

The court erred in admitting the blood sample taken from Appellant at the hospital because she requested an independent sample and was not offered affirmative assistance by law enforcement in obtaining an independent sample in violation of S.C. Code Ann. §56-5-2950 (E).

Relevant Facts

After the first two witnesses testified in Appellant's trial, the court held a hearing on Appellant's motion to suppress the blood sample outside of the jury's presence. The state called Troopers Minnix and Dubose. Appellant also testified on her own behalf.

Minnix admitted that he did not do anything to assist Appellant in obtaining an independent test on her blood. R. 99, ll. 4 – 24. He also admitted that even though two blood samples were taken from Appellant, neither of them was given to her. R. 100, l. 23 – 101, l. 8.

Dubose also admitted that she did "[n]othing" to affirmatively assist Appellant in getting an independent test on her blood. R. 139, ll. 17 – 21. On the SLED blood collection report that was filled out regarding Appellant's blood, there is a box checked that reads: "A blood sample is requested by the subject for his/her own independent test." R. 702. Dubose claimed that Appellant never requested an independent test and that she believed the check mark on the SLED blood collection report was a mistake. R. 140, ll. 4 – 25.

Appellant testified that when she was getting her blood drawn she told them she needed "[her] proof. . . . [Her] sample." R. 161, ll. 16 – 21. Appellant said that she did not trust the hospital to provide an accurate test and that she needed her own. R. 162, ll. 8 – 13. Appellant testified that neither of the officers helped her to get an independent test. R. 162, ll. 19 – 24.

Defense counsel then moved to suppress the blood sample that was taken from Appellant at the hospital based on law enforcement's failure to provide her with affirmative assistance in

getting an independent test done on her blood as required by S.C. Code Ann. §56-5-2950(E). R. 171, l. 11 – 172, l. 19. Defense counsel argued that both Dubose and Minnix, who were present at the hospital with Appellant after the car accident, were on notice that she wanted an independent sample because the box requesting an independent sample on the SLED blood collection report was checked. R. 172, ll. 1 – 9; R. 702. Counsel argued that the officers did nothing to assist Appellant in getting an independent sample even though they were required to do so. R. 172, ll. 15 – 20.

The assistant solicitor argued that Appellant failed to make a clear and unambiguous request for an independent test and that the check mark on the form indicating that Appellant had requested an independent test was simply a mistake. R. 180, l. 8 – 181, l. 10. The assistant solicitor further argued that even if Appellant was entitled to receive affirmative assistance in getting an independent test done on her blood, that the officers had given her such assistance because she was already at a hospital and that if the subject does not request the independent test to be performed by a particular person the default is for SLED to test it. R. 181, l. 11 – 182, l. 2. Appellant's blood sample was in fact tested by SLED in this case. R. 182, ll. 1 – 3.

The court ruled that law enforcement "complied with the statute as far as giving her substantial assistance" and denied Appellant's motion to suppress the blood sample. R. 190, ll. 11 – 17.

Discussion

A person who submits to blood or breath tests under South Carolina's implied consent law has a right to have an independent test performed on their blood at their expense. S.C. Code Ann. §56-5-2950(B)(3). This statute further provides that:

> The arresting officer shall provide affirmative assistance to the person to contact a qualified person to conduct and obtain

> additional tests. 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. Failure to provide affirmative assistance upon request to obtain additional tests bars the admissibility of the breath test result in a judicial or administrative proceeding.

S.C. Code Ann. §56-5-2950(E).

In State v. Wickenhauser, 309 S.C. 377, 423 S.E.2d 344 (1992), the Court held that the defendant was given reasonable assistance when the arresting officer transported him to the Lexington Medical Center to get a blood sample *and the sample was given to him.* Wickenhauser, 309 S.C. at 380, 423 S.E.2d at 346. The Court further held that it was a jury question as to whether law enforcement's affirmative assistance was negated when the jail was unable to locate the blood sample which had been provided to the defendant. Id.

In State v. Knighton, 334 S.C. 125, 512 S.E.2d 117 (Ct. App. 1999) the defendant submitted to a breathalyzer and then requested an independent blood test. Knighton, 334 S.C. at 128, 512 S.E.2d at 118. The arresting officer called a local hospital and was informed that a blood test would cost fifty-two dollars. Id. Knighton was also informed that he needed to have a family doctor order the test. Id. Knighton did not have a family doctor or enough money to pay for the test and therefore did not get a blood test done. Id. The Knighton Court held that the officers were not required to obtain money or a doctor's order to authorize the defendant's blood test for him. Id. at 133, 512 S.E.2d at 121.

Here, Appellant testified that she requested a sample for an independent test because she did not trust the hospital to do an accurate test. She further asserted that she was informed by the nurse drawing her blood that she would get her own sample. However, instead of giving

Appellant her own sample, the officers collected both of the blood samples that were taken from her and retained them for themselves.

The fact that Appellant was already at the hospital is not dispositive because that is what §56-5-2950(E) requires *at a minimum.* Appellant's request for an independent test was corroborated by the check mark on the SLED blood collection report. The officers showed a flagrant disregard for Appellant's request by completely ignoring this. Their testimony that they believed the check mark was a mistake was pure conjecture and they never followed up with Appellant to ask if she wanted her own sample done. Defense counsel argued to the lower court: "[the officers] both signed this report and they would have . . . if they read it, they would have had to see that [Appellant] had requested an independent test." R. 172, ll. 4 – 6. Defense counsel continued: "[T]hey assisted [Appellant] in reading it. So they can't come to court today and say, well, no, she never asked us." R. 172, ll. 14 – 16.

The officers should have ensured that Appellant was provided her own sample to take to a qualified testing site of her choosing. Instead, they retained both vials of blood that were taken from Appellant and therefore denied her the right to an independent test.

The court erred in finding that Minnix and Dubose complied with the statute in providing Appellant with affirmative assistance when they retained both samples that were taken from her. The blood sample results should have been suppressed pursuant to S.C. Code Ann. §56-5-2950(E).

3.

The court erred in admitting testimony regarding Appellant's blood alcohol level from a blood sample obtained by law enforcement at the hospital because it was not video recorded and therefore violated S.C. Code Ann. § 56-5-2950 (B).

Relevant Facts

When the state asked its forensic toxicologist, Stacy Matthew, what Appellant's blood alcohol concentration was, defense counsel objected. R. 408, l. 15 – 18. Counsel argued that S.C. Code Ann. § 56-5-2950 (B) requires that any blood sample that is obtained by a suspect of felony DUI must be obtained on videotape. R. 409, l. 5 – 410, l. 19. Counsel specifically cited to the language in that section which provides that "no test may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure." R. 410, ll. 4 – 8. The court responded that was not its interpretation of the statute and it had never seen a case where the blood draw itself was videotaped. R. 411, l. 23 – 412, l. 1.

The assistant solicitor argued that the language regarding video recording in § 56-5-2950 was actually related back to S.C. Code Ann. § 56-5-2953 which dealt only with video recording at the incident site and at the breath test site. R. 412, ll. 12 – 15. The assistant solicitor then argued that § 56-5-2953 has a number of exceptions to the video requirement including when the defendant needs emergency medical treatment. R. 412, ll. 15 – 20.

The court allowed the testimony about Appellant's blood alcohol concentration over her objection. R. 417, l. 18 – 418, l. 2. Matthew testified that Appellant's blood alcohol concentration was .210. R. 418, ll. 17 – 25.

Discussion

S.C. Code Ann. § 56-5-2950 is South Carolina's "Implied Consent" statute. It provides in relevant part that:

> A person who drives a motor vehicle in this State 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 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. . . . Blood and urine samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility. Blood and urine samples must be obtained and handled in accordance with procedures approved by SLED.

S.C. Code Ann. § 56-5-2950 (A). This statute also mandates:

> 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: . . .

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

The emphasized language above was added to this statute on February 10, 2009. Up until that date, this section simply provided that "[n]o tests may be administered or samples obtained unless the person has been informed in writing that: . . ." S.C. Code Ann. § 56-5-2950 (a) (effective to February 9, 2009). Beginning in 2009, then, the South Carolina General Assembly added language to this section of the statute to provide that no tests or samples could be obtained unless video recording equipment was activated prior to the commencement of the testing procedure.

"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." Davenport v. City of Rock Hill, 315 S.C.

114, 117, 432 S.E.2d 451, 453 (1993). The primary rule of statutory construction is to give affect to the intention of the legislature. State v. Hercheck, 403 S.C. 597, 602, 743 S.E.2d 798, 800 (2013). The text of the statute itself is the best evidence of what the legislature intended. Id.

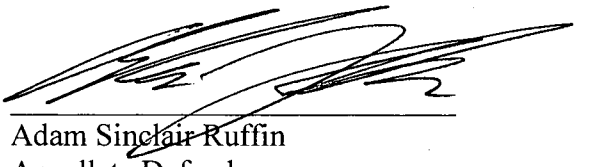
Here, the plain language of the statute requires that tests and samples which are intended to test a person's blood alcohol concentration may not be collected until video recording equipment is activated. This requirement was only added to the statute in 2009 and it is most likely that the South Carolina General Assembly added these words to mean exactly what they say.

Furthermore, the state's argument that the new language added to § 56-5-2950 (B) is meant only to refer to § 56-5-2953 belies the plain reading of the text. Nothing in §56-5-2950 makes a cross reference to § 56-5-2953. In fact, §56-5-2950 (B) which states that "*no tests may be administered or samples obtained*," is referring to all tests and samples taken pursuant to the implied consent law. The language in § 56-5-2953, on the other hand, refers specifically to conduct at the incident site and breath tests only. There is no such limitation in the language of §56-5-2950 (B) and thus the implied consent statute cannot be read to be limited by the exceptions in § 56-5-2953 which deals only with the incident site and breath tests.

The court erred in allowing the state to introduce testimony regarding Appellant's blood alcohol concentration because her blood sample was obtained without the officers activating video recording equipment to capture the collection of the samples. Consequently, Appellant's conviction should be reversed and remanded for a new trial. See S.C. Code Ann. §56-5-2950.

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Clarendon County Court of General Sessions for a new trial.



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This 9th day of January, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 9, 2020

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