STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PAMELA MICHELLE TACKETT,

APPELLANT

APPELLATE CASE NO 2019-001284

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the arresting officer to give an improper lay opinion as to Appellant's impairment where he was not qualified as an expert and Appellant's alleged impairment was not a result of the consumption of alcohol?

STATEMENT OF THE CASE

Appellant was indicted by the Laurens County grand jury for felony DUI resulting in death, felony DUI resulting in great bodily injury, and child endangerment. R. 783-788. Appellant's trial was held before the Honorable Roger L. Couch and a jury from July 15 – 18, 2019. R. 1. Appellant was represented by David Stoddard. R. 1. The state was represented by O. Warren Mowry and R. Knox McMahon. R. 1.

The jury found Appellant guilty as charged. R. 763, ll. 5 – 19. The judge sentenced Appellant to fifteen-years imprisonment for the felony DUI resulting in death and concurrent seven-year sentences for the felony DUI resulting in great bodily injury and child endangerment charges. R. 781, ll. 6 – 25.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

On March 28, 2018, Appellant was driving her car to her psychiatry appointment with her niece in a rear child's seat. R. 558, ll. 9 – 12. Appellant testified that she and her niece were talking and singing and the next thing she remembered was OnStar screaming her name. R. 559, ll. 13 – 25. Appellant had been involved in a car accident where she struck two SCDOT highway workers who were repairing the center cables on the interstate.

Diane Conte recalled that she was driving on I-385 towards Anderson when she saw a silver car "doing variable speeds" and "swerving through lanes." R. 70, l. 9 – 71, l. 8. Conte recalled that "[t]he car swerved into the median, hit one of the DOT workers into the middle of the highway and then crushed the legs of the second DOT worker." R. 74, ll. 1 – 11.

Michael Gabriele, who was a trooper with the South Carolina Highway Patrol, responded to the scene of the car accident. R. 134, l. 4 – 135, l. 21; State's Ex. 45 (Gabriele's body camera video on file with this Court). Gabriele decided to perform field sobriety tests on Appellant even though there was no odor of alcohol because he had concerns about Appellant's "slow responses, her very deliberate movements, [and] possible slurred speech." R. 151, l. 23 – 152, l. 17. Gabriele claimed that he observed indications of Appellant's impairment during the field sobriety tests and placed her under arrest for driving under the influence. R. 164, l. 9 – 166, l. 6. Appellant was then transported to Greenville Memorial Hospital because she was having chest pain. R. 166, ll. 6 – 12.

Appellant consented to law enforcement taking a blood sample from her while she was at the hospital. R. 172, l. 15 – 173, l. 6; R. 179, ll. 7 – 16. While at the hospital, Appellant informed law enforcement officers that she was taking several medications including Wellbutrin, Klonopin, Claritin, Effexor, Geodon, and Tramadol. R. 302, l. 1 – 305, l. 3. Appellant also told

the officers that she smoked marijuana nightly before bed to help with her migraine headaches and pain. R. 305, ll. 4 – 7; R. 308, ll. 11 – 15.

Kelly Bugden with SLED was qualified as an expert by the state in toxicology. R. 347, l. 5 – 350, l. 5. Bugden testified that Appellant's toxicology screen showed that there was no ethanol in her blood. R. 354, ll. 7 – 11. Bugden further testified that Appellant had benzodiazepines (Klonopin), THC (marijuana), and Gabapentin (Effexor) in Appellant's blood. R. 355, l. 11 – 357, l. 11.

Bugden stated: "All of these drugs quantitated or came back with a value that we would expect to see within a therapeutic range." R. 357, ll. 15 – 17. Bugden explained that this meant that the substances in Appellant's blood were at a level typical of a prescription dosage, except for the marijuana because it is not legal for medicinal use in South Carolina presently. R. 357, l. 15 – 358, l. 9. While Bugden stated that these drugs "can be impairing at therapeutic levels," she was unable to state whether Appellant was impaired by the drugs in her blood. R. 358, l. 10 – 359, l. 14.

Demetra Garvin was also qualified as an expert in pharmacology and toxicology by the state. Garvin opined that the substances in Appellant's toxicology blood screen had "the potential to adversely affect and impair an individual for purposes of operating a motor vehicle" even when taken individually. R. 464, l. 18 – 465, l. 5. Garvin further opined, without objection from defense counsel, that Appellant was too impaired to operate a vehicle. R. 474, l. 14 – 477, l. 5.

Appellant testified that she was taking Klonopin, Wellbutrin, Effexor and Gabapentin for manic depression, major depression, night terrors and paranoia. R. 555, ll. 11 – 23. Appellant also testified that she suffered from anxiety and migraines. R. 556, ll. 5 – 8. Appellant smoked a

small amount of marijuana before bed each night to help with her pain and migraines. R. 557, ll. 3 – 6. Appellant maintained that she had never had any problems with driving while taking her prescription medications and that she drove her car on a regular basis without any problems. R. 559, ll. 1 – 9. Appellant further maintained that she did not experience anything unusual on the day of the accident and that she felt great. R. 559, ll. 10 – 12.

ARGUMENT

The trial judge erred in allowing the arresting officer to give an improper lay opinion as to Appellant's impairment because he was not qualified as an expert and Appellant's alleged impairment was not a result of the consumption of alcohol.

Relevant Facts

Michael Gabriele, who was a trooper with the South Carolina Highway Patrol, arrested Appellant after he conducted field sobriety tests on her at the scene of the car accident. R. 183, l. 23 – 184, l. 2. The assistant solicitor asked Gabriele if, "based on [his] experience and . . . training," he was able to "form an opinion" as to Appellant's "condition." R. 184, l. 23 – 185, l. 3.

Defense counsel objected that this was improper opinion because Gabriele had not been qualified as an expert. R. 185, ll. 4 – 6. The judge stated that Gabriele could "testify to his observations, but he's not to draw any kind of medical diagnosis." R. 185, ll. 15 – 17. The assistant solicitor then said that he was only asking Gabriele whether Gabriele believed Appellant was "under the influence." R. 185, ll. 18 – 21. The judge ruled that the solicitor could ask that question. R. 185, ll. 22 – 23.

After the judge's ruling, the assistant solicitor again asked Gabriele whether he believed that Appellant was "under the influence." R. 185, l. 25 – 186, l. 4. Gabriele answered that he did believe Appellant was "under the influence." R. 186, ll. 5 – 20.

Discussion

Pursuant to Rule 701, SCRE:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'

> testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

"[A] lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). "Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge." State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). Finally, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

In Hamrick v. State, 426 S.C. 638, 643, 828 S.E.2d 596, 598 (2019), the defendant was charged with felony DUI resulting in great bodily injury after striking a road construction worker on the highway. The state sought to prove that the defendant stuck the road worker "outside the designated lane of travel" as one way to establish the traffic violation element of felony DUI. Id. at 646, 828 S.E.2d at 600. The state did this by having the arresting officer testify that, based on his "investigation and documentation of the scene," he was able to opine that "the impact did not occur in the designated lane of travel, but occurred behind the cones in the construction zone." Id. 646-648, 828 S.E.2d at 600-601.

The Hamrick Court found that the trial judge erred in concluding that the officer's testimony was "lay opinion" because the officer was testifying about accident reconstruction which "requires expertise." Id. at 648, 828 S.E.2d at 601. The Hamrick Court further found that the arresting officer did not have the requisite training or experience to give an opinion on accident reconstruction. Id. at 649, 828 S.E.2d at 602.

Here, the arresting officer's testimony that Appellant was "under the influence" was inadmissible lay opinion testimony. Gabriele was not qualified as an expert in anything, let alone forensic toxicology or pharmacology. While Gabriele could testify to his personal observations, he should not have been permitted to opine that Appellant was "under the influence." This is especially true since Appellant was not alleged to be under the influence of alcohol, a far more common substance that a lay witness would likely have more experience with. Instead, Appellant was alleged to be impaired by prescription medications which she was taking as prescribed to her at the time of the car accident. Any opinion regarding Appellant's level of impairment would have at a minimum required an expert witness in toxicology or pharmacology.

In Kranchick v. State, 418 S.C. 435, 438-439, 793 S.E.2d 314, 316-317 (Ct. App. 2016), this Court held that defense counsel was deficient in failing to object to a forensic toxicologist's testimony regarding "the mental or physical effects of drugs on a person." In Kranchick, the witness whose testimony was in question had been qualified as an expert in forensic toxicology but had not testified regarding his "education, experience, or knowledge relating to the physical or mental effects of drugs on the human body." Id. at 439, 793 S.E.2d at 317. Therefore, this Court found that trial counsel's failure to object to the toxicologist's testimony regarding the effects of marijuana, cough suppressant, and antihistamine found in the defendant's system fell below an objective standard of reasonableness. Id. at 439-440, 793 S.E.2d at 317.

Finally, this Court considered whether a coroner could opine that the manner of death in a murder trial was a "homicide" in State v. Westmoreland, 421 S.C. 410, 418, 807 S.E.2d 701, 705 (Ct. App. 2017). The defendant in Westmoreland was accused of intentionally running over the victim with his car and then leaving the scene where the victim died. Id. at 413-414, 807 S.E.2d

at 703. The defense was that the defendant struck the victim by accident. Id. at 415, 807 S.E.2d at 704.

The county coroner, who was not qualified as an expert, testified over defense counsel's objection that the manner of death was homicide which meant the killing was intentional. Id. at 415-416, 807 S.E.2d at 704. This Court held that the coroner's testimony was improper lay opinion because the coroner's opinion was not based on his own perceptions but rather the perceptions of others. Id. at 419-420, 807 S.E.2d at 706. This Court further held that, because the main issue at trial was whether the defendant had stuck the victim intentionally or accidentally, the defendant was prejudiced by the improper lay opinion claiming the death was a homicide which the lay witness had defined as an intentional act. Id. at 421-422, 807 S.E.2d at 707-708.

Here, Appellant was prejudiced by the officer's improper opinion testimony regarding her impairment as that was the only point of contention at Appellant's trial. Like in Westmoreland, here there was no dispute that Appellant caused the victim's death in a car accident. However, Appellant was not impaired from alcohol or drugs and the arresting officer should not have been permitted to opine that Appellant was "under the influence." Appellant's convictions should be reversed. See Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019); State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017).

CONCLUSION

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

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of October, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Oct 21 2020
SC Court of Appeals

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Pamela Michelle Tackett states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Roger L. Couch, which was held on July 15-18, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Pamela Michelle Tackett.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment(s);
(2) Entire trial transcript;
(3) State's exhibit 45 (Officer Gabriele's body camera).

I certify that this designation contains no matter which is irrelevant to this appeal.

October 21, 2020

Adam Sinclair Ruffin
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

October 21, 2020.

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