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State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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March 26, 2012

Via Facsimile and U.S. Mail Delivery

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RE: *State v. Hilton*
Case Nos.: 2008-GS-26-4056
2008-GS-26-4057

Dear Ms. Weiss and Mr. Harpootlian:

Please find enclosed a copy of the order dated 3/26/2012 granting the defendant's Motion to Suppress in the above referenced case. As you can see, I decided to prepare my own order regarding the defendant's motion.

By copy of this letter and enclosure to the Horry County Clerk of Court, I am forwarding the original order to the clerk for filing.

With kindest regards, I remain

Very truly yours,

A handwritten signature in cursive script that reads "Benjamin H. Culbertson".

Benjamin H. Culbertson

BHC/bhc
pc: Horry County Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)

IN THE COURT OF GENERAL SESSIONS
FIFTEENTH JUDICIAL CIRCUIT
INDICTMENT NUMBERS: 2008-GS-26-04056
2008-GS-26-04057

State of South Carolina)
vs.)
Michael J. Hilton,)
Defendant.)

ORDER SUPPRESSING
BREATHALYZER TEST RESULTS

HEARING DATE¹.....October 25, 2011
PRESIDING JUDGE.....Benjamin H. Culbertson
ATTORNEY FOR THE STATE OF SOUTH CAROLINA.....Heather W. Weiss
ATTORNEY FOR THE DEFENDANT.....Richard A. Harpootlian
COURT REPORTER.....Grace Hurley

In this case, the defendant is charged with Felony Driving Under the Influence Involving Death and Felony Driving Under the Influence Involving Serious Bodily Injury. Before the court is the defendant's Motion to Suppress the results of the breathalyzer test administered to the defendant at the time of his arrest.

The defendant first argues that the breathalyzer test results should be suppressed because the DataMaster machine used in administering the test was not properly functioning. The defendant introduced evidence that the DataMaster machine used in this case failed to accurately report the alcohol level of the simulator solutions approximately 28 times out of 480 tests conducted in the year preceding the defendant's arrest. Further, the machine failed to accurately report the alcohol level of the simulator solution three times immediately prior to the defendant's breath test in this case. However, the machine tested within the acceptable range in this case when the simulator solution was changed, thus indicating that any errors in the initial three

¹ In addition to the arguments presented by counsel at the motion hearing, the attorneys also submitted briefs for the court's consideration in this motion.

simulator tests were due to the simulator solution and not the DataMaster machine. Therefore, the defendant's motion to suppress the breathalyzer test results because the DataMaster machine was not functioning properly should be denied.

Next, the defendant argues that the breathalyzer test results should be suppressed because the test was not administered within two hours of the defendant's arrest.

A month prior to the defendant's arrest, Code of Laws for South Carolina 1976 §56-5-2950(A) was amended to require that the breath sample taken from a person for testing must be collected within two hours of the person's arrest. However, the amendment did not take effect until nine months after the defendant's arrest. At the time of the defendant's arrest, the two hour time limit for collecting a breath sample was not the law.

Statutes that are remedial or procedural in nature are generally held to operate retrospectively. *South Carolina Department of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416 (2000). Further, amendments relating to the admissibility of evidence are procedural in nature and apply retroactively. See *State v. Frey*, 362 S.C. 511, 608 S.E.2d 416 (S.C.App.2004). This court finds as a matter of law that the amendment to Code §56-5-2950(A) is procedural in nature and, thus, is to be applied retroactively. Therefore, the amendment to Code §56-5-2950(A) requiring that a person's breath sample be taken within two hours of the person's arrest is applicable in this case.

Pursuant to Code §56-5-2950(I), "[a] person required to submit to tests by the arresting law enforcement officer must be provided with a written report including the time of arrest, the time of the tests, and the results of the tests before any trial or other proceeding in which the results of the tests are used as evidence." The purpose of the statute is to provide for reciprocal discovery between the State and defendant as to the time and results of alcohol and drug tests.

State v. Bull, 350 S.C. 58, 564 S.E.2d 351 (S.C.App. 2002). The timing of the administration of breathalyzer tests is crucial because of the ephemeral nature of blood intoxication levels. See *State v. Bull*, *ibid*.

In this case, the "Breath Alcohol Analysis Test Report" (BA report) issued to the defendant pursuant to Code §56-5-2950(I) indicates that the defendant was arrested on May 10, 2008 at 10:15 p.m. and that his breath sample was taken on May 11, 2008 at 12:32 a.m., more than 2 hours after the defendant's arrest. By letter dated October 3, 2011, the prosecutor in this case notified the defendant that the State was changing the time of arrest in this case to 10:40 p.m. on May 10, 2008, less than two hours prior to the taking of the defendant's breath sample.² This change in the time of arrest is based upon the prosecutor's review of the video of the defendant's breathalyzer test. However, the prosecutor was not present for the defendant's arrest, breathalyzer testing or the videoing of the defendant's testing. When the prosecutor first issued the defendant the letter that purportedly amends the BA report, she was relying upon the date and time on the recorded video without verification of its accuracy from the arresting officer or breathalyzer operator.³ The prosecutor's letter dated October 3, 2011, does not include the time of testing or the test results in this case as mandated by Code §56-5-2950(I). Therefore, the prosecutor's letter dated October 3, 2011 does not constitute a "written report" as required by Code §56-5-2950(I).

² The defendant's Motion to Suppress was originally scheduled for hearing on October 3, 2011. The prosecutor presented this letter to the defendant immediately prior to the motion hearing. Therefore, at the defendant's request, the court continued the motion hearing until October 25, 2011.

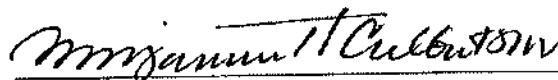
³ At the motion hearing, the breathalyzer operator testified that the prosecutor's letter dated October 3, 2011, accurately reflected the date and time of arrest and that the date and time of arrest on the BA report was not correct. However, the state has never issued an amended written report. Instead, the State argues that the original BA report combined with the prosecutor's letter amending the date and time of arrest satisfies the requirements of Code §56-5-2950(I).

Because the BA report issued to the defendant pursuant to Code §56-5-2950(I) indicates that the defendant was arrested on May 10, 2008 at 10:15 p.m. and his breath sample was taken on May 11, 2008 at 12:32 a.m., more than 2 hours after the defendant's arrest, the State failed to take the defendant's breath sample for testing within two hours of his arrest as mandated by Code §56-5-2950(A). On the other hand, if the breath sample was taken within two hours of the defendant's arrest as argued by the State, then the State has failed to provide the defendant with a correct written report that includes the defendant's time of arrest, time of testing and test results as mandated by Code §56-5-2950(I). Therefore, the defendant's breathalyzer test results in this case should be suppressed and the defendant's motion granted.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the defendant's Motion to Suppress the breathalyzer test results in this case is GRANTED.

AND IT IS SO ORDERED.



Benjamin H. Culbertson
Presiding Judge

March 26, 2012

Georgetown, SC