STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2002CP4602614

South Carolina State Of *vs.* Elaine P Belviso

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

ORDER

Dated at York, South Carolina, this 23rd day of October, 2007.

Court Reporter:

s/John C. Hayes, III

PRESIDING JUDGE - John C. Hayes, III

This judgment was entered on the 24th day of October, 2007, and a copy mailed first class this 24th day of October, 2007, to attorneys of record or to parties (when appearing pro se) as follows:

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SCRCP APP-24/FORM 4

CPFORM4M

STATE OF SOUTH CAROLINA COUNTY OF YORK State of South Carolina, Appellant, v. Elaine P. Belviso, Defendant.	)	IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT Ticket No.: Z777711; Z777712 02-CP46-2614 ORDER

This is an appeal from the Magistrate Court's pre-trial rulings dismissing the open container charge against Respondent and suppressing other evidence critical to the State's case against Respondent. The Court makes the following findings as to the issues on appeal:

1. Dismissal of the open container charge.

Appellant claims the Magistrate Court abused its discretion by granting Respondent's motion to dismiss the charge of open container in a vehicle. See S.C. Code Ann. § 61-6-4020. Respondent argues that her due process rights were violated when the arresting officer poured out the contents of a Styrofoam cup, which was confiscated from the interior of the vehicle and filled with a liquid the officer believed to contain alcohol. Respondent contends that the officer impermissibly destroyed potentially exculpatory evidence.

The Supreme Court has recognized that "the Due Process Clause is implicated when a state intentionally destroys evidence that may have proved favorable to a criminal defendant." California v. Trombetta, 467 U.S. 479, 484, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, n.5 (1984) (citing People v. Hitch, 12 Cal.3d 641, 117 Cal.Rptr. 9, 527 P.2d 361 (1974)). To comport with prevailing notions of fundamental fairness under the Fifth Amendment, "criminal defendants must be afforded a meaningful opportunity to present a complete defense." Trombetta, 467 U.S.

at 485. Accordingly, "the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" Id. (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3447, 73 L.Ed.2d 1193 (1982)).

"[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 88, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). In Trombetta, the Supreme Court acknowledged that there is a danger in allowing the State to circumvent the disclosure requirements set forth in Brady by intentionally destroying evidence of the guilt or innocence of the accused. Trombetta, 467 U.S. at 488.

The Supreme Court analyzed the due process implications of the State's failure to preserve evidence in Trombetta and in Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). In Trombetta, the Court held that there was no due process violation where the State failed to preserve breath samples that were given for the purpose of determining the defendants' blood alcohol concentration. Trombetta, 467 U.S. at 491.

The Court characterized the breath samples as "raw data," noting that the evidence to be presented at trial was not the breath itself, but the Intoxilyzer test results based upon the breath samples. Id. at 487-488. The Court concluded that where such evidence is obtained for purposes of extracting raw data, and is subsequently destroyed in good faith and in accord with normal practices, there is no due process violation. Trombetta, 467 U.S. at 488, (citing Killian v. United States, 368 U.S. 231, 242, 82 S.Ct. 302, 308, 7 L.Ed.2d 256 (1961)).

"Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's

defense." Trombetta, 467 U.S. at 488. In accord with this principle, Trombetta set forth the requirement that the evidence be "material" to the defense. Id. To meet the materiality standard, the evidence must: (1) possess an exculpatory value that was apparent before the evidence was destroyed; and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by any other reasonably available means. Id.

The Court held that the breath samples at issue in Trombetta were not material to the defense. First, in light of the procedures used, there was a minimal chance that the evidence would have proven to be exculpatory. Id. at 489. Further, even if the test results were shown to be inaccurate, the defendants had "alternative means of demonstrating their innocence," because they could have established that the Intoxilyzer malfunctioned without resorting to the breath samples themselves. Id. at 490.

In Youngblood, the Supreme Court held that the police's failure to preserve and test potentially exculpatory semen samples was not a denial of due process of law. Youngblood, 488 U.S. at 58-59. In doing so, the Court modified the materiality test set forth in Trombetta, holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute denial of due process of law." Id. at 58.

The reasoning underlying the bad faith requirement is as follows:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. "The presence or absence of bad faith . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Id. at n. p. 56.

The Court asserted that although the police may have been negligent in failing to refrigerate and preserve the samples, the possibility that the semen could have exculpated the defendant if preserved or tested did not meet the "materiality" standard in the absence of any evidence of bad faith. Id. at 58. The Court further found that "the police do not have a constitutional duty to perform any particular tests." Id. at 59.

The South Carolina Supreme Court embraced and applied the holdings in Trombetta and Youngblood in State v. Jackson, 302 S.C. 313, 396 S.E.2d 101 (1990). In Jackson, the Court held that prosecuting the defendant for driving under the influence violated due process where: (1) the charge was dismissed after the assistant solicitor viewed a videotape of the defendant performing field sobriety tests; and (2) the videotape was subsequently erased. Jackson, 396 S.E.2d at 102.

Applying the materiality test, the Court found that the exculpatory value of the tape was "apparent" because the assistant solicitor in that case was prepared to drop the charges based upon his viewing of the tape. Id. Additionally, the defendant "had no other evidence and could not obtain evidence of comparable value." Id. Further, the tape was not erased in good faith and in accord with normal practice. Id.

Based on the above, it does not appear that the Magistrate properly applied the law applicable to the instant case. Therefore, the Magistrate's dismissal of the open container charge is reversed.

2. Suppression of all evidence, including Trooper's McCloud's lay opinion testimony, of the open container in the vehicle.

The Magistrate Court suppressed all evidence of the open container, including Trooper McCloud's lay opinion as to the contents of the Styrofoam cup. The Magistrate Court reasoned that all evidence of the open container should be suppressed in light of its decision to dismiss the

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open container charge based on the cases cited above. As set forth above, the Magistrate Court erred in dismissing the open container charge, and its decision to suppress the officer's testimony as to the contents of the container likewise constitutes an abuse of discretion.

The South Carolina Rules of Evidence permit opinion testimony by lay witnesses. SCRE, Rule 701. Lay witness testimony 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." Id.

The requirement that the opinion be "based on the perception of the witness" means that it must be based upon the witness' own personal knowledge, and that it must be reasonably related to that knowledge. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973). As to whether or not the opinion is "helpful," this requirement is roughly equivalent to the prior common law rule that lay opinions are inadmissible "only when they are superfluous in the sense that they will be of no value to the jury." Notes to SCRE, Rule 701 (citing State v. McClinton, 265 S.C. 171, 177, 217 S.E.2d 584, 586 (1975)). Subsection (c) limits lay opinion testimony to those subjects where expert testimony is not required. In South Carolina, expert testimony "is essential where the topic is not a matter within the common knowledge and experience of most lay persons." Notes to SCRE, Rule 701 (citing Spartanburg Regional Med. Center v. Bulsa, 308 S.C. 322, 417 S.E.2d 648 (Ct. App. 1992)).

At the very least, evidence in the form of the officer's opinion testimony as to the contents of the cup is circumstantial evidence relevant to the charge of driving with an unlawful alcohol concentration. The Court finds the trooper's testimony as to the contents of the cup is a valid lay opinion for the following reasons: (1) the trooper's testimony is based upon his

personal knowledge of the contents of the cup; (2) the trooper's testimony is of some value to the jury; and (3) the smell of alcohol is a matter within the common knowledge and experience of most lay persons. The credibility of lay opinion testimony is a matter for the jury, and, pursuant to the above, the Magistrate Court erred in suppressing evidence in the form of Trooper McCloud's opinion as to the contents of the cup.

3. Suppression of Respondent's pre-Miranda statements.

Appellant contends that the Magistrate Court abused its discretion in suppressing statements made by Respondent as to whether and how much she had been drinking. Said statements were made to Trooper McCloud prior to and during the administration of the field sobriety tests. The lower court granted Respondent's motion to suppress based upon Respondent's argument that the statements were made while she was in custody and under interrogation in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694 (1966).

Miranda held that "the prosecution may not use statements, whether inculpatory or exculpatory, stemming from custodial interrogation of [a] defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444. "Custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. "[T]he safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984) (citing California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.E.2d 1275 (1983)).

In Berkemer, the United States Supreme Court held that although a routine traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment, it does not rise to the level of "custody" under Miranda. Berkemer, 468 U.S. at 440. In Pennsylvania v. Bruder, 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988), the Court applied the holding in Berkemer to statements made to an officer during field sobriety tests.

South Carolina follows the holdings in Berkemer and Bruder. In State v. Peele, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989), the South Carolina Supreme Court held that "the performance of field sobriety tests at the request of a police officer following a routine traffic stop does not trigger Fifth Amendment rights." The restrictions associated with the administration of field sobriety tests do not curtail a suspect's "freedom of action to a degree associated with formal arrest." Peele, 378 S.E.2d at 256. Therefore, officers are not required to give Miranda warnings prior to the performance of field sobriety tests.

Likewise, in State v. Clute, 324 S.C. 584, 590, 480 S.E.2d 85, 88 (1996) (overruled on other grounds), our state Supreme Court held that motorists are not in custody during field sobriety tests, and are not entitled to a recitation of constitutional rights prior to the tests. The Court implied that it might require recitation of Miranda warnings if it found "extraordinary . . . circumstances surrounding the administration of the . . . field sobriety tests . . .." Id. Absent "extraordinary circumstances," it is clear that South Carolina does not require law enforcement officers to recite Miranda warnings prior to field sobriety tests. Id.

The record is void of any evidence of "extraordinary circumstances" surrounding the administration of the field sobriety tests in this case. Accordingly, the Magistrate Court erred in suppressing the statements Respondent made during the administration of the field sobriety tests and prior to the Trooper's recitation of Respondent's Miranda rights.

4. Suppression of the breath analysis results.

The lower court granted Respondent's motion to suppress the results of the breath analysis test because Miranda was not recited to Respondent at the breath test site. S.C. Code Ann. § 56-5-2953 requires Miranda warnings to be given on videotape "*if* required by State or Federal law." (emphasis added).

As set forth above, Miranda warnings are required where there is: (1) custody; and (2) an interrogation. Miranda, 384 U.S. at 444. "[T]he special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. Rhode Island v. Innis, 446 U.S. 291, 300, 100 S.Ct. 1682, 1689 (1980). The Court defined interrogation as follows:

> Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. at 300-301 (emphasis added).

In Pennsylvania v. Muniz, 496 U.S. 582, 601, 110 S.Ct. 2638, 2650, 110 L.Ed.2d 528 (1990), the United States Supreme Court held that booking questions fall within the definition of "custodial interrogation" under Innis. However, the Court recognized that there is a "'routine booking exception' which exempts from Miranda's coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" Muniz, 496 U.S. at 601. Accordingly, Miranda warnings are not required prior to questions of that nature.

The record shows that Trooper McCloud recited Respondent's Miranda warnings to her when he placed her under arrest prior to transporting her to the breath test facility. The Court finds that Trooper McCloud complied with Miranda by informing Respondent of her rights when

she was taken into custody. Further, it appears that any "interrogation" at the breath test site consisted of routine booking questions and the recitation of boilerplate information regarding the implied consent law. Neither Miranda nor any State or Federal law required law enforcement officials to re-administer Miranda warnings under the circumstances at the time of Respondent's arrest.

As to Respondent's argument that the results of the breath test itself constituted interrogation designed to elicit an incriminating response, the Supreme Court has held that the Fifth Amendment protects only against self-incriminating evidence that is "testimonial" in nature. "[T]he privilege does not protect a suspect from being compelled by the State to produce 'real or physical evidence.'" Muniz, 496 U.S. at 589 (citing Schmerber v. California, 384 U.S. 757, 764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966)).

In Schmerber, the Court held that a person suspected of driving under the influence could be forced to provide a blood sample, because blood samples are "real or physical evidence" outside the scope of the protections under the Fifth Amendment. Schmerber, 384 U.S. at 765. Accordingly, the Court finds that Intoxilyzer results are not "testimonial evidence" within the ambit of the Fifth Amendment.

As to Respondent's argument that she was entitled to speak with an attorney prior to the administration of the breath test, the South Carolina Supreme Court has held that "[a]n accused is entitled to assistance of counsel only at critical stages of the proceedings." State v. Degnan, 305 S.C. 369, 370, 409 S.E.2d 346, 347 (1991) (citing State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974)). The Court noted that in most jurisdictions, the administration of a breath test is not a critical stage. Degnan, 409 S.E.2d at 347. The basis for the rule is as follows: "(1) a defendant has no constitutional right to refuse to submit to chemical analysis under Schmerber v.

California; and (2) under implied consent laws, driving upon state highways implies consent to the use of chemical analysis." Id.

The Court found the foregoing reasoning persuasive and held that "administration of a breathalyzer test is not a critical stage at which an accused is entitled to counsel." Id. at 348. The Court cited the Fourth Circuit Court of Appeals for the proposition that "no Sixth Amendment right to counsel is violated when an arrested person is not allowed to consult an attorney before deciding to submit to a breathalyzer." Degnan, 409 S.E.2d at 347-348 (citing Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981)).

Pursuant to the above, the Court finds that Respondent was not entitled to consult counsel prior to the administration of the breathalyzer test. Accordingly, the lower court abused its discretion in suppressing the results of the test; therefore, this case is remanded to the lower court for further proceedings in light of the findings herein.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

October 23rd, 2007
York, South Carolina

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