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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP WAYNE LOWERY,

APPELLANT

APPELLATE CASE NO. 2022-000806

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED

Petitioner's Issues Presented on Certiorari

I. Whether the Court of Appeals erred in holding that the trial court abused its discretion in admitting statements made by Lowery on the dash cam video.

II. Whether the Court of Appeals erred in holding that the State failed to comply with the DUI statute.

Respondent's Question Presented

I. Did the Court of Appeals correctly hold that a Miranda violation occurred, where a law enforcement officer testified unambiguously that Respondent was not free to leave, make a telephone call, or use the restroom, where the same officer engaged in questioning designed to elicit an incriminating response?

II. Did the Court of Appeals correctly determine that a statutory violation occurred, where the state failed to prove compliance with S.C. Code Ann. § 56-5-2953 by making the video part of the record before the lower court?

STATEMENT OF THE CASE

Appellant was indicted by a Greenville County grand jury on June 5, 2018 for driving under the influence. R. 152. He proceeded to trial before the Honorable Robin B. Stilwell and a jury on December 12, 2018. J. Max Gravlee represented Appellant; Brann Fowler appeared on behalf of the state. R. 1. After a two-day trial, the jury found Appellant guilty. R. 144, ll. 1 – 8. Judge Stilwell sentenced Appellant to two years' incarceration.

The Court of Appeals reversed by way of a published opinion earlier this year. State v. Lowery, 436 S.C. 349, 872 S.E.2d 197 (Ct. App. 2022). The state sought rehearing which was denied on May 18, 2022. The state filed its Petition for Writ of Certiorari on June 10, 2022.

This Return follows.

ARGUMENT

I. The Court of Appeals correctly held that a Miranda violation occurred, where a law enforcement officer testified unambiguously that Respondent was not free to leave, make a telephone call, or use the restroom, where the same officer engaged in questioning designed to elicit an incriminating response.

Relevant facts and procedural history

In this DUI case, the state called two witnesses—both police officers—in an attempt to satisfy its burden of proving Respondent's guilt beyond a reasonable doubt. Because neither officer witnessed Respondent driving a vehicle, the state relied on Respondent's statement taken through custodial interrogation, in order to convict him.

As discussed at the oral argument at the Court of Appeals, this case presents a rare occasion wherein an officer outright admitted the suspect was not free to leave. During the Jackson v. Denno[1] hearing, David Vallin, an officer with the South Carolina Highway Patrol, conceded Respondent was not free to leave the scene at the Spinx gas station in Greenville County. R. 10, ll. 23 – 25. Later during cross-examination, Vallin reiterated that Respondent was confined to the gas station parking lot:

Q: So - - and your testimony earlier that he was not free to leave?

A: Correct.

Q: So, if he had taken off running, y'all would have attacked him?

A: We would have stopped him, yes.

Q: Some sort of force to restrain him?

A: Yes, sir.

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1 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Q: Because he was not allowed to leave?

A: Correct.

R. 14, l. 24 – R. 15, l. 8.

Vallin never told Respondent he could leave the scene or that he had a right to terminate the interrogation. R. 15, ll. 16 – 18. When pressed on other details, he encountered difficulty in recalling specific facts. R. 102, l. 6 – R. 104, l. 21. During direct examination in front of the jury, he could not recall whether Appellant was inside or around his daughter's car, a red SUV, in a gas station parking lot when law enforcement arrived. Id. He was likewise unsure whether Appellant even had keys to the car at the time. Id. Vallin, who had been a trooper for approximately three years at the time of Appellant's trial, did not prepare an incident report. R. 110, l. 22 – R. 112, l. 15. Additionally, he did not take any photographs or write down any notes. Id.

Brandon McNeely was the state's only other witness. At the time of trial, he had been with the South Carolina Highway Patrol for almost two years. R. 115, ll. 1 – 16. Like Vallin, he arrived at the gas station parking lot on January 26, 2018. Id. McNeely remarked that the gas station had outdoor cameras and that he neglected to even consider obtaining that footage. R. 123, ll. 15 – 24. McNeely indicated that Appellant showed signs of impairment. R. 121, ll. 8 – 20. Appellant also urinated on himself. R. 122, ll. 18 – 24. McNeely arrested Appellant and then read him his Miranda rights. R. 123, l. 25 – R. 124, l. 8.

The state admitted the dashcam video from Vallin's car as state's Exhibit 1; McNeely's footage became state's Exhibit 2. After offering the testimony of Vallin and McNeely, the state rested. R. 79, ll. 8 – 10. Appellant moved for a directed verdict on the grounds that the state failed to prove the *corpus delicti* in the case. R. 83, l. 4 – R. 85, l. 20. He argued that neither

trooper witnessed Appellant or anyone else driving the red SUV, that there was no testimony regarding scrape marks or the temperature of the car, and that there was no proof Appellant had been driving.

The assistant solicitor opined in response, that Appellant's statement from the dashcam videos was "excellent evidence and certainly enough for a jury question as to whether or not he was driving." R. 85, l. 23 – R. 86, l. 20. The trial judge denied Appellant's motion for a directed verdict. R. 87, l. 16 – R. 88, l. 11.

Respondent testified in his defense. R. 92. As part of his defense, he also called Kim Pryor. R. 104. The defense then rested and renewed all prior objections. R. 116. Respondent was found guilty as indicted. R. 114, ll. 1 – 8. Judge Stilwell sentenced him to two years' incarceration. R. 150, ll. 6 – 10.

At the Court of Appeals, the undersigned raised the two issues presently before this Court. As to the first issue, the Miranda violation, the state took the position that this was a routine traffic stop that did not require such warnings. Final Brief of Respondent p. 9. The state relied on Berkemer v. McCarty for the notion that traffic stops are not unduly coercive. 468 U.S. 420 (1984). Alternatively, the state sought to rely on the public safety exception. FBOR p. 12. This exception was not argued by the solicitor at trial.

The Court of Appeals opinion reversed on both issues. As to the statement and the failure to give Miranda warnings, the Court held Respondent's situation "was more than a routine traffic stop." 436 S.C. 349, 356, 872 S.E.2d 197, 201. The Court determined Vallin's questioning was interrogational. Id. at 357, 872 S.E.2d at 201. Further, the Court held Respondent was in custody. Id.

As to the second issue, compliance with S.C. Code Ann. § 56-5-2953, the Court held the recording utilized by the state at trial "did not comply with the statute." Id. at 361, 872 S.E.2d at 203. The video admitted into evidence, viewed by the jury, and reviewed by the Court of Appeals did not contain all of the sobriety tests and the issuance of Miranda warnings. Because this Court modified the remedy for a violation under this section in the weeks leading up to the oral argument in Respondent's case, the Court of Appeals held the remedy for the failure to meet the statutory requirements was no longer dismissal. State v. Taylor, 426 S.C. 28, 870 S.E.2d 168 (2022).[2]

Discussion

In Jackson v. Denno 378 U.S. 368, 376 (1964), the United States Supreme Court indicated "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376–77. "In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

The state may not use statements stemming from custodial interrogations of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-

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2 The state mistakenly cited a different case by the same name in its Petition before this Court. Petition p. 16 n. 3 (citing State v. Taylor, 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014)).

incrimination. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, (1966). Custodial interrogation entails 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. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.' " State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). A person is "in custody" when a person's freedom has been restricted. State v. Caulder, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct.App.1986).

The Miranda warnings are not required if the defendant is not in custody or significantly deprived of his freedom. State v. Neely, 271 S.C. 33, 40, 244 SlE.2d 522, 526 (1978). To determine whether a suspect was in custody for the purposes of Miranda, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Maryland v. Shatzer, 559 U.S. 98, 112, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).

Multiple United States Supreme Court justices inquired during the oral argument in Berkemer v. McCarty why officers do not give Miranda warnings at the outset of a custodial interrogation. 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). In that case, an officer saw a car "weaving in and out of a lane" and therefore pulled over the car. 468 U.S. at 423. When the officer noticed the driver had difficulty standing, he concluded the driver "would be charged with a traffic offense and therefore, his freedom to leave the scene was terminated." Id. The driver was not told that he would be taken into custody, however. Id. Similar to the case at bar, the officer asked incriminating questions to the driver: "[Officer] asked respondent whether he had been using intoxicants. Respondent replied that 'he had consumed two beers and had smoked several joints of marijuana a short time before.' " Id.

The Supreme Court described the purposes of the Miranda safeguards: "to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the 'inherently compelling pressures' generated by the custodial setting itself, 'which work to undermine the individual's will to resist, and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." 468 U.S. at 434. The Court chose not to distinguish between felonies and misdemeanors, instead reiterating that "a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." Id.

The clarification useful to the matter *sub judice* came later in the opinion. Regarding traffic stops, the state surmises that this case provides *carte blanche* for officers to avoid giving Miranda warnings. Petition p. 12. That is neither the holding of the Berkemer Court nor the law in South Carolina. "If a motorist who has been detained pursuant to a traffic stop thereafter is

subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed in Miranda." Berkemer, 468 U.S. at 440 (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

The oral argument in Berkemer, held on April 18, 1984 is illustrative.[3] Regarding an "alcohol influence report form," counsel for McCarty, R. William Meeks, opined that it is "a document that is designed by law enforcement officers to elicit information that will be used to prosecute the suspect at trial. There is no other way to explain it." Oral argument at 33:25 – 34:10. The purpose of the form was to allow the officer "while engaging in the custodial interrogation ... to find out where that person was, how long he had been there, how much he had to drink." Id. Rather presciently, counsel envisioned a situation similar to Respondent's:

> We are saying that when a person is deprived of his freedom, as a motorist is when they are stopped on the freeway, and when that officer then has probable cause ... the type of probable cause, frankly, that this Court required be utilized in taking somebody to the station house in Dunaway... that at this point in time, the officer must give that driver his Miranda rights.
>
> The reason is simple, Your Honor, as far as we're concerned. The general on-the-scene questioning is permitted, but it's no longer general on-the-scene questioning when that officer has probable cause to believe that the driver has committed the crime.

Oral argument at 40:56 – 41:30.

Counsel distinguished the facts in his case, as would also be applicable in the matter at bar, that if the officer "merely wants to inquire on basic background information of [the] driver ... he doesn't have to give Miranda warnings. But if that officer wants to approach the driver of that car who he has stopped, and say I want to know where you've been, what time is it, how much have you had to drink, then those answers are reasonably likely to incriminate the person

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3 The audio can be heard here: https://www.oyez.org/cases/1983/83-710 (last accessed July 11, 2022).

... that's interrogation" Oral argument at 45:53 – 46:13. As noted above, the Supreme Court adopted a similar holding in its opinion. If an individual is in custody, even at a traffic stop, he or she should be afforded Miranda safeguards. South Carolina jurisprudence supports this position.

The purpose of Miranda warnings is to apprise a defendant of the constitutional privilege not to incriminate oneself while in the custody of law enforcement. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights." State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007). "Miranda warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996) (quoting Miranda, 384 U.S. at 444, 86 S.Ct. 1602).

Lowery's freedom of action was curtailed to a "degree associated with formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983). Even if a motorist who has been detained pursuant to a traffic stop is thereafter subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

"Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning." State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841. "The custodial determination is an objective analysis based on whether a reasonable person

would have concluded that he was in police custody." Evans, 354 S.C. at 583, 582 S.E.2d at 410.

In State v. Medley, law enforcement officers witnessed Medley run a stop sign and speed away from a checkpoint while driving a motorcycle. 417 S.C. 18, 22, 787 S.E.2d 847, 849 (Ct. App. 2016). Naturally, they gave chase. Id. Medley drove to his parents' house, where an officer "apprehended him and 'put him on the ground.' " Id. The officer then asked Medley two incriminating questions: whether he had a license and how much he had been drinking. Id. After Medley responded with incriminating answers, the officers arrested him and read him his Miranda rights.

Clearly, Medley was in custody. He was restrained and therefore deprived of his freedom of action. Id. at 26, 787 S.E.2d at 851. The officer also asked incriminating questions:

> Further, given that the most important factual question in any DUI case is how much alcohol the suspect consumed prior to getting behind the wheel, we find Lt. Mullinax should have known his question was reasonably likely to elicit an incriminating response form Medley.

Id.

The Court of Appeals held the circuit court erred in failing to suppress Medley's response. Id. at 27, 787 S.E.2d 847, 852. The Court also rejected the state's argument regarding public safety exception. Id. at n. 5.

In State v. Ledford, a Buick crashed into a victim; the driver left the accident scene. 351 S.C. 83, 85, 567 S.E.2d 904, 905 (Ct. App. 2002). The license plate number was given to officers, who located the driver, Ledford, at his mother's house, passed out. Id. After he was awoken by an officer, Ledford answered in the negative when asked if he had consumed any alcohol since the accident. Id. at 86, 567 S.E.2d at 906. The Court of Appeals rejected the state's contention that officers were "merely conducting an investigation of the accident, not a

custodial interrogation." Id. at 88, 567 S.E.2d at 907. Distinguishing the facts in that case from an accident investigation, the Court of Appeals held Ledford was entitled to Miranda warnings:

> Because Ledford could not walk, Officer Craig literally carried him from the house to his patrol car. Officer Craig questioned Ledford as he was propping him up on the hood of his patrol car and preparing to handcuff him and place him inside the car. Thereafter, the officer drove him to the scene of the accident to be identified by the victims. We find it difficult to conceive of another set of circumstances which would create a more unequivocal custodial posture than when a person is physically carried from a residence to a patrol car where he is handcuffed. Furthermore, we find that Officer Craig embarked on a custodial interrogation when he began questioning Ledford after exigent the house, in an effort to obtain incriminating information.

Id. at 88-89, 567 S.E.2d at 907.

In State v. Easler, a motor vehicle accident occurred around 2:15 in the afternoon. 327 S.C. 121, 125, 489 S.E.2d 617, 620 (1997), overruled on other grounds by State v. Greene, 423, 263, 283, 814 S.E.2d 496, 507 (2018). A man matching the given description of the driver was seen using a pay phone at a nearby convenience store. Id. at 126, 489 S.E.2d at 620. Officers asked him if he had been involved in an accident; Easler answered yes and confessed that he did not have a driver's license. Id. The officer located a six-pack of beer at the pay phone and also asked Easler when he had consumed his last drink. Id. The Court of Appeals, citing Berkemer v. McCarty, supra, held the questions were the result of a routine investigation of a traffic accident and therefore did not constitute custodial interrogation. Id.

This Court wrote that the Court of Appeals "placed undue emphasis on Berkemer v. [McCarty]." Id. This Court noted the differences between traditional traffic stops and the facts giving rise to Easler's detainment:

> The present case, however, does not involve a routine traffic stop. On the contrary, the officers, having been advised there had been an accident and that someone had left the scene, went looking for that individual based upon a description given by two eyewitnesses. Accordingly, to the extent the Court of Appeals relied on 'routine traffic stop' cases, its opinion is modified.

Easler at 127, 489 S.E.2d at 620.

This Court took it one step further and revised from the Court of Appeals findings, concluding "[t]his was clearly interrogation." Id. at 127, 489 S.E.2d at 621. As a result, the only remaining inquiry was custody:

> Easler was not in custody at the time of the interrogation. At the time officers approached Easler at the convenience store, they had not yet been to the scene of the accident, nor were they aware of the severity or extent of the accident. The only information they had received on the police scanner was that there had been an accident on Lockhart Lane and that one of the individuals had left the scene. Upon finding Easler, officers confirmed that he was, in fact, the individuals involved in the accident. **At this point, however, the officers had no basis to suspect Easler of DUI** or to know the extent of the injuries of the accident. Accordingly, they requested him to return to the scene of the accident, where, upon seeing the injuries and realizing Easler's intoxicated state, they arrested him and issued Miranda warnings. Given the totality of the circumstances, we find Easler was not 'in custody' for purposes of Miranda.

Id. at 128-29, 489 S.E.2d at 621 (emphasis added).

Although not a DUI case, State v. Caulder is also instructive. 287 S.C. 507, 339 S.E.2d 876 (Ct. App. 1986). In Caulder, law enforcement obtained a search warrant for a medical examination. Id. at 514, 339 S.E.2d at 880. The doctor who performed the medical examination asked Caulder how he received a particular scratch. Id. The purpose of the search was to discover any "evidence of a physical struggle." Id. at 515, 339 S.E.2d at 881. The Court of Appeals therefore held that the purpose of the medical examination was "to gather evidence, not provide medical treatment." Id. The Court of Appeals reversed and remanded.

Turning to the instant case, Lowery was flanked by a substantial number of police officers from at least three different agencies. The officers were in uniform and armed. Lowery was told he could not make a telephone call, he was not allowed to use the restroom, and he was subjected to custodial interrogation beyond the scope of a routine investigation. His statement should have been suppressed due to the failure to give Miranda warnings.

During the Jackson v. Denno hearing, Vallin—an officer with the South Carolina Department of Public Safety—testified about a car accident on Piedmont Highway on January 26, 2018. R. 8, ll. 2 – 7. Vallin received a call from the Greenville County Sheriff's Office, speculating that the vehicle, ostensibly the at-fault one, was located in the Spinx parking lot. R. 8, ll. 8 – 15. Having not witnessed the accident or learned firsthand that Lowery was in any way involved in the accident, Vallin nonetheless drove to the Spinx. R. 9, ll. 7 – 9. Flanked by either three or four other officers,[4] Vallin questioned Lowery. R. 9, l. 19 – R. 10, l. 2.

Vallin plainly and candidly testified that Lowery's freedom was curtailed **immediately** when Vallin first walked up to him. R. 10, ll. 23 – 25; R. 14, l. 24 – R. 15, l. 8. Although not dispositive by any means, Vallin did not tell Lowery that he could leave the scene or that he was free to terminate the interrogation. R. 15, ll. 16 – 21.

Vallin's dashcam footage, later made state's Exhibit 1, was played for the judge during the pre-trial hearing. Some of the questions Vallin asked Lowery were:

- What happened?
- You don't remember anything?
- How'd you get all the way down here?
- You came all the way here?
- You didn't know your tire was like that?
- How much have you had to drink?
- How big were the beers?
- Were you the only one in your car?

State's Exhibit 1.

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4 The trial judge took judicial notice that "there was a substantial number of law enforcement officers there and blue lights were flashing." R. 14, ll. 18 – 20.

The footage showed Lowery asking if he could make a telephone call; Vallin would not let him. R. 16, ll. 2 – 6. Vallin radioed that Lowery was "10-55" meaning "intoxicated driver."[5] State's Exhibit 1 at 1:35 – 1:40. As recently pointed out by this Court, officers in uniform constitute a level one use of force.[6] Defense counsel argued this was "a plain, clear custodial interrogation." R. 18, l. 11 – R. 21, l. 4. In response, the state cited State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984), a case easily distinguished from the matter at bar. R. 21, l. 6 – R. 22, l. 6.

The trial judge found "objectively that [Lowery] was not in custody at the time." R. 22, ll. 13 – 14. Seemingly limiting the analysis to physical impairment, the ruling on custody continued:

> It's clear that there was a lot of law enforcement around. However, they were standing in the middle of a parking lot, he was not being physically impeded in any way. Either through contact from the officers or by handcuffs. Nor was he within the confines of a patrol car. He was simply standing there.
>
> And I do find that Morgan is persuasive in that he wasn't investigating a DUI, he was investigating a traffic accident and asked fairly innocuous questions regarding the traffic accident. To which the Defendant offered very voluntarily and openly answers to the questions that were posed. So, I find that by - - that he was not in custody and that Miranda Warnings were not required. I also find that it was in furtherance of a routing traffic violation that's contemplated in the Morgan case. I further find the statement was freely and voluntarily given. And I find that by a preponderance of the evidence.

R. 22, l. 14 – R. 23, l. 7.

In Morgan, a Mustang and Camaro were racing; the Mustang lost control and wrecked.

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5 "Radio Communications" p. 11, https://columbiapd.net/wp-content/uploads/2018/03/07.01-Radio-Communications-1.pdf ; see also https://wiki.radioreference.com/index.php/SC_Highway_Patrol/Department_of_Public_Safety_(SC) (last accessed July 11, 2022).

6 Oral argument of State v. Michael Frasier, Jr., 33:42 – 34:24, Appellate Case No. 2020-001405, held March 15, 2022 (https://media.sccourts.org/videos/2020-001405.mp4) (last accessed July 11, 2022).

282 S.C. 409, 410, 319 S.E.2d 335, 336 (1984). The Camaro returned to the scene, driven by a man named Dotson. Id. Morgan told officers he had been using alcohol and marijuana and that he had been driving the Camaro before the wreck. Id. No Miranda warnings were given prior to the discussion. Morgan's statements were the only evidence he had been driving the Camaro. Id. at 411, 319 S.E.2d at 336.

Regarding custody, this Court held Morgan was not in custody:

> Defendant's view that he was deprived of his freedom is not sustained by the record. A traffic accident had just occurred. Dotson volunteered the information that he and the Defendant had seen the accident. What followed was a routine investigation into the cause. The statements by Defendant were made during the course of this routine investigation. Miranda warnings were not required.

282 S.C. 411-12, 319 S.E.2d at 336-37.

In Morgan, officers were trying to determine the at-fault driver of the Camaro. Morgan and Dotson voluntarily returned to the scene of the crash. By contrast, Vallin believed Lowery was the driver of the at-fault vehicle. R. 8, ll. 8 – 15. Lowery was not free to leave as soon as Vallin first walked up to him, perhaps sooner. R. 10, ll. 23 – 25. Officers approached him; he did not return to the scene of the wreck as in Morgan. Vallin was investigating who caused the collision. R. 11, ll. 1 – 4. The questions Vallin asked, particularly about whether Lowery had been drinking, had no bearing on the identity of the at-fault driver.

The Court of Appeals opinion took guidance from Easler, supra, concluding "[w]e likewise find Lowery's questioning was more than a routine traffic stop." Lowery at 356, 872 S.E.2d 197, 357. The Court of Appeals correctly concluded the questioning was both accusatory and interrogational. Upon information and belief, Lowery was never indicted on any sort of hit-and-run offense. The officers were investigating a DUI—hence the questions about how much he had to drink. They needed his statements to prove all of the elements of DUI, including

whether he had been driving.

Regarding custody, the Court of Appeals correctly concluded Lowery was in custody. Vallin's stark admission sets the scene for Lowery, a man cornered by numerous officers at a gas station. They found him; he was involuntarily detained and not free to make a telephone call, use the restroom, or leave the Spinx.

Analyzing the facts in Lowery's case in concert with the factors outlined in State v. Williams, 405 S.C. 263, 273, 747 S.E.2d 194, 199 (Ct. App. 2013), the Court of Appeals concluded Lowery was in custody and declined to apply the public safety exception. Id. at 357, 436 S.E.2d at 201. The Williams case listed the following thirteen factors as helpful in the custody determination:

> (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation.

Williams, 405 S.C. at 276-77, 747 S.E.2d at 201.

The state's creative contentions regarding these factors are without merit and unsupported by the Record. For example, the first factor, whether the contact with law enforcement was initiated by the police or the person interrogated. In its Petition, the state submits the Court of Appeals "neglected to address the fact that Lowery voluntarily pulled in to

the gas station, Officer Vallin did not conduct a traffic stop of Lowery, he merely arrived at the same gas station as Lowery." Petition p. 11. Candidly, the analysis regarding this factor revolves around who initiated the contact. The facts indicate Vallin walked up to Lowery. R. 9, ll. 7 – 22. The state failed to offer any evidence as to whether Lowery voluntarily agreed to interview. To the contrary, Vallin unambiguously testified he never advised Lowery that he was free to leave or terminate the interrogation. R. 15, ll. 2 – 21. Morgan can be distinguished Lowery's case based on this factor alone.

Secondly, the express purpose of the interview was to question Lowery. The officers were seeking information. Vallin radioed that Lowery was "10-55," or an intoxicated driver. The officers would end up, for whatever reason, not getting any footage from the gas station security cameras. Therefore, they needed information as to whether he had been driving. Those were the questions Vallin asked, and he admitted he was investigating who caused the collision. R. 10, l. 14 – R. 11, l. 4. The state suggests "Lowery was not being questioned as a suspect for DUI," but the state's own exhibit belies that assertion. Vallin asked Lowery how much he had to drink and how large the beers were. State's Exhibit 1. Based on the radio contact, he believed Lowery was intoxicated. In accordance with that theory, law enforcement had Lowery submit to sobriety tests.

The third factor—where the interview took place—weighs in favor of a custody determination. The state disingenuously likens the interaction to a traffic stop, where the two features of an ordinary traffic stop under Berkemer v. McCarty are not present:

> Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely.' First, a detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering

> questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he will most likely be allowed to continue on his way.
>
> ...
>
> Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passerby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will, be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in Miranda itself and in the subsequent cases in which we have applied Miranda.

Berkemer v. McCarty, 468 U.S. 420, 437-38.

The stop was neither roadside nor was it a brief detainment. Lowery was accosted by officers at a gas station, private property presumably owned by Spinx. Further, as will be discussed below, there were not just one or two officers. As such, this factor weighs in favor of a custody determination.

Fourth: whether the police informed the person he or she was under arrest of in custody. This is likely a neutral factor—although Vallin would have obstructed Lowery had he attempted to leave, the police did not verbally inform Lowery he was under arrest or custody, at least until later. The fact remains, a person in Lowery's position would have not felt free to leave.

The fifth factor is whether officers informed the suspect that he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom. As discussed above, Vallin never informed Lowery of this, because **Lowery was not**

free to leave.

The sixth factor is whether there were restrictions on the person's freedom of movement during the interview. The officers talking with Lowery used body language and social cues to continually engage Lowery. As such, he knew he was not free to leave. The state argues that because Lowery's request to use the restroom occurred later, it should not be a part of the analysis. Petition p. 13. This is incorrect, as the calculation entails a totality of the circumstances. Further, Lowery undoubtedly thought he was not free to leave, as he requested to use the telephone in order to have someone bail him out of jail. State's Exhibit 1 at 4:15.

The next factor is how long the interrogation lasted. The trial judge did not address this factor in its ruling. R. 22, l. 7 – R. 23, l. 10. The state seeks to limit the custody period to six minutes based on Vallin's interrogation, but the entirety of Lowery's interactions with police were much longer. He performed sobriety tests not seen in Exhibit 1. Thus, the duration was longer than six minutes.

The eighth factor is how many police officers participated. The trial judge took judicial notice "that there was a substantial number of law enforcement officers there and blue lights were flashing." R. 14, ll. 18 – 20. The state claims "the Court of Appeals embellishes its analysis of this factor and states 'he was surrounded by numerous officers' yet failed to address that only one officer is asking questions and actually participating in the interview." Petition p. 14. This position contradicts the clear language of the Williams test. Frankly, the inquiry is not "how many police officers asked questions," but "how many police officers participated." The Record indicates a "substantial number of law enforcement officers" were on the scene, according to the uncontested judicial notice. This factor paves the way for a custody determination.

Next is whether the officers dominated and controlled the course of the interrogation. As noted above, Vallin was after information. Contrary to the state's assertion that "Vallin was not peppering Lowery with questions," the state's Exhibit reflects Vallin's hunt for incriminating responses. Although the questioning may have subsided after Vallin perceived to have received incriminating responses, this was an officer-dominated exchange from the outset.

The tenth factor to consider is whether officers manifested a belief that the person was culpable and they had evidence to prove it. Vallin was told, by a different agency, that they had located who they believed was responsible for the accident: "We got a call a little while later from the Greenville County Sheriff's Office saying that they believe that they had located the vehicle in a, I believe it was a Spinx parking lot, and they responded to that scene." R. 8, ll. 10 – 15. According to the solicitor, there was a lot of discussion between Lowery and the officers about the wreck. R. 23, ll. 13 – 18.

The eleventh factor is whether the police were aggressive, confrontational, or accusatory. Vallin seemed incredulous that Lowery could have driven the vehicle with a tire flat. He repeatedly asked Lowery how he got to the gas station. Although not as aggressive or confrontational as police officers have been in other cases, Vallin was downright accusatory. He firmly believed Lowery had driven to the gas station after causing the accident, and he was accusatory as a result. In its Petition, the state opines "Vallin's demeanor and tone in his questioning is the exact opposite of aggressive, confrontational, and accusatory, and is extremely understanding and conversational." Petition p. 15. This assertion is disproven by Vallin's own testimony from the Jackson v. Denno hearing wherein Vallin admitted he became accusatory. R. 16, ll. 10 – 14. The Court of Appeals correctly adopted this admission into its opinion. Lowery at 348, 872 S.E.2d at 202 ("Vallin admitted his interrogation was accusatory").

The twelfth factor is whether the police used interrogation techniques to pressure the suspect. For a questioning at a gas station, this factor is likely irrelevant and inapplicable. As to the thirteenth and final factor—whether the person was arrested at the end of the interrogation—Lowery was arrested. The answers elicited through the custodial interrogation provided officers with enough information, in their minds, to arrest Lowery:

> Q: But if the investigation did ultimately prove that if the answers that you got, that ultimately led to his arrest; correct?
>
> A: The answers along with the tests and the information that he gave us, yes.

R. 16, ll. 18 – 22.

Based on the above, Lowery was in custody at the time Vallin was asking questions designed to elicit a response. As discussed in the Berkemer oral argument, Vallin should have just read Lowery his Miranda rights at the beginning. But because he failed to do so, the statement should be suppressed. The Court of Appeals should be affirmed as to this issue.

II. The Court of Appeals correctly determined that a statutory violation occurred, where the state failed to prove compliance with S.C. Code Ann. § 56-5-2953 by making the video part of the record before the lower court.

Lowery moved for dismissal of the charges "for failure to meet the requirements as required under the DUI law" because the state failed to include in the dashcam video the field sobriety tests and the administering of Appellant's Miranda rights. R. 116, l. 22 – R. 117, l. 14. The trial judge found that the state "substantially complied with the requirements under the law." R. 117, ll. 22 – 24. The court ruled that "the video itself was introduced into evidence and ... that is the requirement." R. 117, l. 22 – R. 118, l. 3.

Appellant was alleged to have driven under the influence, in violation of S.C. Code Ann.

§ 56-5-2930. R. 152. "A person who violates Section 56-5-2930... must have his conduct at the incident site and the breath side video recorded." S.C. Code Ann. § 56-5-2953. The video recording at the incident site must include any field sobriety tests administered and include the arrest of a person for driving under the influence and show the person being advised of his Miranda rights. Id. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge ... **"if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest ... was in an inoperable condition."** S.C. Code Ann. § 56-5-2953(i). (emphasis added). No affidavits were offered by law enforcement in this case.

The state was unable to play the entirety of McNeely's dashcam footage at trial. R. 75, ll. 2 – 3. The trial judge, the jury, and the Court of Appeals was unable to observe the entirety of McNeely's video, State's Exhibit 2. Therefore, the state failed to comply with the above statute; it did not prove that the video from the incident site contained all of the field sobriety tests as well as the person being advised of his Miranda rights.

At the time of Lowery's trial, a violation of this section may have resulted in dismissal of the DUI charges. S.C. Code Ann. § 56–5–2953(B); see also City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of DUI charge is an appropriate remedy if the officer fails to produce a satisfactory video recording unless an exception applies). However, soon before the oral argument in Lowery's case at the Court of Appeals, this Court issued State v. Taylor, which modified the remedy. 436 S.C. 28, 870 S.E.2d 168 (2022).

It is not possible to determine if Appellant actually heard and understood his Miranda rights. The officers failed to capture the arrest and Miranda warnings on the videotape. The trial court in the matter *sub judice* abused its discretion in finding that the video complied with the

statutory requirements.

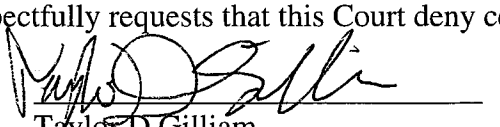
The Court of Appeals held "the video failed to comply with the DUI statute." Lowery at 359, 872 S.E.2d at 202. "The statute requires a video recording of all of the sobriety tests and the issuance of Miranda warnings. The recording at trial did not comply with the statute." Id. at 360, 872 S.E.2d at 203. The Court of Appeals correctly cites to State v. Kinard, an opinion from 2019 that resulted in a certiorari dismissal as improvidently granted by this Court. 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019). In Kinard, the Court of Appeals reiterated the two primary purposes of the DUI statute: "to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered" and "to protect the rights of the defendant by 'requiring video recordings of the person's arrest and of the officer issuing Miranda warnings." Id. at 372, 831 S.E.2d at 140-41. This reduced the number of trials as swearing contests. The officer in that case failed to capture the arrest and Miranda warnings on the videotape.

The Court of Appeals further stated "[g]iven our understanding of the legislative intent in section 56-5-2953(A), the requirement that the arrest and Miranda reading be videotaped serves **to protect the rights of the defendant.**" Id. at 373, 831 S.E.2d at 141 (emphasis added).

The state misapprehends the Court of Appeals holding on this issue. The Court of Appeals simply held the state's exhibit did not comply with the statute. The Court of Appeals did not upend entirely the means by which solicitors can try DUI cases. In this case, the state failed to create a sufficient record to prove that it complied with the statute. At the Kinard oral argument, this Court remarked how the video is useful to the fact finder to get direct evidence. In that case, as in this one, it is impossible to determine if the defendant was properly advised of his rights. The Record as it exists does not conclusively establish that the officer complied with the DUI statute. This Court should deny certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny certiorari.



Taylor D Gilliam
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ATTORNEY FOR RESPONDENT

This 11th day of July, 2022.