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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLAYBON LEWIS ATWATER, JR.

APPELLANT

APPELLATE CASE NO. 2021-001320

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it failed to dismiss Appellant's felony DUI charges pursuant to § 56-5-2953, which requires video recording that visually depicts the defendant's conduct at the incident site, where the video recordings did not visually depict Appellant or the officer during the provision of *Miranda* warnings and did not visually depict additional conduct by Appellant? Assuming *arguendo* that dismissal was not proper, whether the court erred in failing to redact the nonconforming evidence?

STATEMENT OF THE CASE

On June 12, 2019, an Horry County Grand Jury indicted Claybon Atwater, Jr., Appellant, for felony driving under the influence (DUI) with death and felony DUI with great bodily injury. R. 515-516; R. 519-520. Appellant was tried before the Honorable Steven H. John and a jury, from November 1 – 4, 2021. Kirk Truslow represented Appellant. George DeBusk and Rachel Harte prosecuted the case. R. 1.

Appellant was convicted as indicted. R. 497, l. 16 – 498, l. 9. The court sentenced Appellant to serve concurrent terms of imprisonment of 22 years for felony DUI with death and 15 years for felony DUI with great bodily injury. R. 514, ll. 1-9; R. 517-518; R. 521-522

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "Therefore, this Court is bound by the trial court's factual findings unless the appellant can demonstrate that the trial court's conclusions either lack evidentiary support or are controlled by an error of law." *State v. Elwell*, 403 S.C. 606, 609, 743 S.E.2d 802, 804 (2013) (citing *State v. Laney*, 367 S.C. 639, 644, 627 S.E.2d 726, 729 (2006)).

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)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The court erred where it failed to dismiss Appellant's felony DUI charges pursuant to § 56-5-2953, which requires video recording that visually depicts the defendant's conduct at the incident site, where the video recordings did not visually depict Appellant or the officer during the provision of *Miranda* warnings and did not visually depict additional conduct by Appellant. Assuming *arguendo* that dismissal was not proper, the court erred in failing to redact the nonconforming evidence.

Relevant facts

At approximately 4:40 p.m. on April 6, 2019, Appellant pulled out of the Circle K convenience store in North Myrtle Beach to make a left turn onto the highway. Appellant needed to cross three lanes of northbound traffic in order to go left into the southbound lanes. There was no traffic signal at that spot. R. 221, l. 24 – 234, l. 17; R. 178, l. 8 – 195, l. 3; R. 141, l. 15 – 148, l. 4; *see* State's Exhibit #21.

David Schnell (Complainant) and his wife Donna (Decedent) were driving north on the highway in their Yamaha "street trike" or motorcycle. R. 116, ll. 1-18. Complainant was in the innermost northbound lane, closest to the median. The traffic in the two outermost northbound lanes, closest to the convenience store, slowed. Appellant was able to cross those lanes without a problem. However, Appellant's car crashed into Complainant's motorcycle when it got to the innermost northbound lane. R. 141, l. 15 – 148, l. 4; *see* State's Exhibit #21; R. 155, l. 3 – 159, l. 18; R. 189, l. 13 – 192, l. 18. Decedent was ejected from the motorcycle and she was killed instantly. R. 244, l. 5 – 248, l. 4; R. 228, l. 18. Complainant suffered severe injuries including a compound leg fracture, broken ribs, and a broken jaw. R. 216, l. 13 – 220, l 9. The State alleged

Appellant failed to yield the right of way.[1] R. 147, ll. 8-17. Authorities concluded excessive speed was not a factor. R. 146, ll. 21-23.

Appellant was a plumber in his thirties with a wife and children. R. 507, ll. 17-23; R. 509, l. 18; R. 501, ll. 5-7. His wife and child were in the car with him. R. 229, ll. 18-23; *see* State's Exhibit #28. Police officers responded and Appellant initially told officers that his wife had been driving. However, witnesses claimed Appellant was driving and Appellant admitted he was the driver. R. 229, l. 6 – 234, l. 18. Appellant's license had been suspended. R. 236, l. 22 – 237, l. 5. Officers handcuffed Appellant and detained him in the back of a patrol car while they investigated, in order to separate him from his wife.[2] R. 229, l. 14 – 232, l. 3. Officer Shick detained Appellant but Officer Shick could not smell because of cancer surgery. R. 233, l. 20 – 234, l. 9. Officer Floyd arrived and spoke with Appellant, and, according to Officer Floyd, Appellant smelled like alcohol. R. 255, ll. 5-9. Both officers were equipped with body-worn cameras.

Officer Shick's body-worn camera captured Appellant seated in the passenger side of the car, and it captured his false statement that his wife was driving. Officer Shick's camera showed Appellant being handcuffed and detained. Officer Shick's camera at times captured partial views of Appellant's person but the camera was mostly aimed at the car or the sky. Officer Shick's voice can be heard reading and rereading Appellant his *Miranda* warnings.[3] However, the camera

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[1] S.C. Code Ann. § 56-5-2350 provides that, "The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed."

[2] *In camera*, Officer Schick explained another reason for his decision to detain Appellant was because he believed Appellant was a flight risk. R. 26, ll. 3-20. Officer Floyd testified *in camera* the reason officers decided to do field sobriety tests in the police station's breathalyzer room was because Appellant was a flight risk and so the tests could be recorded. R. 52, l. 20 – 53, l. 2.

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

footage did not visually depict the same. The camera was pointed at the sky during the initial provision of *Miranda* warnings. Officer Shick's arm obscured the camera view during the rereading of *Miranda* warnings. Officer Shick's camera footage was admitted as State's Exhibit #28 and is on file with this Court. *See* State's Exhibit #28; R. 234, l. 19 – 235, l. 15.

Officer Floyd's body-worn camera footage captured Appellant admitting that he had been drinking alcohol. Officer Floyd's camera footage was admitted as State's Exhibit #1 and is on file with this Court. Officer Floyd can be heard telling Appellant to sit up, which he does at times. Officer Floyd can be heard telling Appellant that he is being arrested for driving under suspension. Officer Floyd can be heard reading Appellant his *Miranda* warnings, but, as with Officer Shick, once again the footage did not visually depict the same. The video showed Appellant lying down in the back of the police car, at which point Appellant's person was off-camera except for his foot and lower leg. Neither Appellant nor Officer Floyd were visible during Officer Floyd's *Miranda* provision. Instead, Appellant's foot and the patrol car are visible during Officer Floyd's *Miranda* provision. Appellant can be heard on this recording admitting to Officer Floyd that he drank a 24-ounce "Icehouse" and a "couple of shots." However, Appellant said that occurred "way earlier." *See* State's Exhibit #1; R. 255, l. 15 – 259, l. 12. Officer Floyd took Appellant from one patrol car to another. However, the visual depiction of Appellant's conduct walking to the next patrol car is incomplete in that it only partially and at times visually depicts Appellant's person. And, as seen, much of Appellant's conduct in the police car was also off-camera. State's Exhibit #1.

Officers arrested Appellant for driving under suspension at the scene and took him to the police station's breathalyzer room where they told him he was under arrest for felony DUI. R. 51, l. 18 – 52, l. 9. Additional evidence admitted against Appellant included video footage from the breathalyzer room in which Appellant can be heard saying he had been drinking—a 16-ounce and

a 24-ounce beer, as well as shots the prior night.[4] Appellant's voice was also recorded on the way to the police station, and he can be heard stating that he had had "some drinks."[5] An insurance claims adjuster alleged Appellant told her he had a couple of beers and a "taste" of a strawberry daiquiri earlier in the day. R. 201, ll. 2-18; R. 210, l. 11 – 213, l. 1. A breathalyzer test showed Appellant had a 0.11 blood alcohol concentration. R. 310, ll. 15-19. However, cross-examination and SLED calibration records revealed the breathalyzer machine had had some "errors." R. 427, l. 25 – 442, l. 15. A blood test showed Appellant had a blood alcohol concentration of 0.105. R. 358, ll. 20-24. The State's expert witness claimed that using retrograde extrapolation, Appellant had a 0.135 – 0.165 blood alcohol concentration at the time of the crash. R. 361, l. 4 – 362, l. 8. Field sobriety tests indicated Appellant was intoxicated according to Officer Hoard. However, Officer Hoard only performed two out of the three standard field sobriety tests. R. 299, l. 24 – 306, l. 14. And, Appellant was able to give coherent plumbing advice to Officer Hoard in response to Officer Hoard's attempted small talk during the breathalyzer video. *See* State's Exhibit #36.

Pretrial, defense counsel sought a dismissal of the case based on the State's failure to produce incident site recording under S.C. Code Ann. § 56-5-2963. R. 37, l. 24 – 43, l. 12. Defense counsel noted that incident site video must begin as soon as practicable and must show the person being advised of *Miranda* warnings. R. 61, ll. 2-7. Defense counsel argued that since it was practicable to record incident site video, a statutorily compliant incident site video was required. R. 40, ll. 15-18. Defense counsel argued the video footage was noncompliant because although Appellant was *Mirandized*, he was "not on video . . . they didn't video record any of his conduct,

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[4] The video footage from the breathalyzer room was admitted as State's Exhibit #36 and is on file with this Court.

[5] The video footage from the dashboard camera was admitted as State's Exhibit #37 and is on file with this Court.

and you cannot see him walking to the car properly to assess his conduct, and you cannot see him receiving *Miranda*, nor the officer. You can hear it." R. 41, ll. 16-24. Defense counsel argued none of the subsection (B) exceptions such as traffic accident and totality of circumstances applied. R. 41, l. 5 – 43, l. 5. Defense counsel moved the charges should therefore be dismissed under *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). R. 42, l. 4 – 43, l. 12. Finally, defense counsel argued that if the court did not dismiss the case, it should redact the video footage in keeping with *State v. Gordon*, 414 S.C. 94, 777 S.E.2d 376 (2015), as a "backup remedy." R. 61, l. 8 – 62, l. 9.

Officer Floyd testified during the motion, and he stated that Appellant was off-camera during Miranda because "he continued to lay down and like lean over in the seat. You'll hear me say to him several times, hey, you need to sit up . . . Plus, where my body camera sits on my person, the older cameras we had kind of angled up a little bit more." R. 49, l. 17 – 50, l. 3.

The court denied the motion and ruled the video footage complied with the statute. The court stated that it found, "This was a traffic accident investigation. This was not a stop of the defendant for driving under the influence violation . . . the proper video was attempted and taken, even though it's not the best quality, it does show the defendant clearly; he is given *Miranda* warnings . . ." R. 65, ll. 6-19. The court found the officers had "valid concerns about Appellant's flight risk, that it was a "busy scene," with a "deceased person" and "EMS working on another victim with great bodily injury." R. 66, ll. 1-8. "[T]he motion to dismiss based upon Section 56-5-2953(A) regarding the video recording at the incident site is denied for the reasons stated . . ." R. 66, ll. 14-17. Appellant renewed his objections when the videos were introduced. R. 235, ll. 14-20; R. 259, ll. 2-12. Appellant was convicted as indicted, and he was sentenced to concurrent terms of imprisonment of 22 years and 15 years. R. 517-518; R. 521-522.

Discussion

S.C. Code Ann. § 56-5-2953(A) provides that a person who violates § 56-5-2945 (the felony DUI statute) must have his "conduct at the incident site" video recorded. S.C. Code Ann. § 56-5-2953(A)(1)(a)(iii) requires that the video recording at the incident site must, among other things, "show the person being advised of his *Miranda* rights."

"[T]he primary intention behind section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." *State v. Elwell*, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011), *aff'd*, 403 S.C. 606, 743 S.E.2d 802 (2013). It also protects the defendant's rights. *Id.*, 396 S.C. at 336, 721 S.E.2d at 454, n. 9. "Section 56-5-2953 commands the arresting officer to videotape the individual during a DUI arrest." *City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007). "*Suchenski* indisputably established that the videotaping provisions of section 56-5-2953 are mandatory and not optional[.]" *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (citing *Suchenski*, 374 S.C. at 16, 646 S.E.2d at 881).

Here, the video footage captured was insufficient to show Appellant's "conduct." "[T]he plain language of the statute does not require the video to encompass every action of the defendant, but requires video of each event listed in the statute." *State v. Taylor*, 411 S.C. 294, 305, 768 S.E.2d 71, 77 (Ct. App. 2014). "The plain language of the statute demonstrates the legislature intended video recording of the majority of an officer's encounter with a potential DUI suspect." *Id.*, 411 S.C. at 306, 768 S.E.2d at 77. "[S]ection 56–5–2953 does not require dismissal of a DUI charge when the video recording of the incident briefly omits the suspect but that omission does not occur during any of those events that either create direct evidence of a DUI or serve important rights of the defendant." *Id.*

In *State v. Taylor*, 436 S.C. 28, 31, 870 S.E.2d 168, 170 (2022), the South Carolina Supreme Court addressed "the meaning of the word 'show' as it is used in subsection 56-5-2953(A)." There, although both the officer and the DUI defendant were audibly captured during the provision of *Miranda* warnings, neither person could be visually seen on video. *Id.* The Supreme Court rejected the State's argument that the statutory "language requires the video to simply 'demonstrate' or 'make apparent' that *Miranda* warnings are administered to the defendant." *Id.*, 436 S.C. at 35, 870 S.E.2d at 171. The Supreme Court noted that the General Assembly "intentionally amended the statute to add a visual requirement." *Id.*

"We hold that in order for a DUI recording to 'show' a defendant being advised of his *Miranda* rights, the defendant and arresting officer must be visually seen and audibly heard." *Taylor*, 436 S.C. at 35, 870 S.E.2d at 172. *See also State v. Kinard*, 427 S.C. 367, 372, 831 S.E.2d 138, 141 (Ct. App. 2019) (under a plain reading of 56-5-2953(A), a person's conduct during *Miranda* warnings cannot be captured from a video in which he cannot be seen); *State v. Gordon*, 414 S.C. 94, 777 S.E.2d 376 (2015) (§ 56-5-2953 requires motorist's head to be included in the video). In this case, neither Appellant's conduct nor the officer's conduct were visually shown during the provision of *Miranda* warnings, as is required by statute. Nor was Appellant's conduct at the incident site shown in other regards. In particular, Appellant's conduct walking from patrol car to patrol car was incomplete since the video footage only provided glimpses of some of Appellant's body. Much of Appellant's conduct in the police car was also not captured on video.

At the time of Appellant's trial, caselaw held that the proper remedy for a violation of § 56-5-2953 was a severe remedy—dismissal of the charges. *See Suchenski*, 374 S.C. at 16, 646 S.E.2d at 881 (dismissal of charges is the proper remedy when 56-5-2953 is inexcusably violated); *Town of Mt. Pleasant v. Roberts*, 393 S.C. at 348, 713 S.E.2d at 286 (legislature clearly intended

per se dismissal when law enforcement agency violates mandatory provisions of 56-5-2953); *State v. Johnson*, 396 S.C. 182, 192, 720 S.E.2d 516, 521–22 (Ct. App. 2011) (magistrate's remedy of suppression constitutes reversible error; "dismissal is the appropriate sanction for the officer's unexcused violation of section 56–5–2953"); *State v. Elwell*, 403 S.C. 606, 614, 743 S.E.2d 802, 807 (2013) (the proper remedy for failure to comply with the statutory requirements elucidated in section 56–5–2953 would be dismissal).

However, caselaw suggested that suppression or redaction might be proper. *See State v. Sawyer*, 409 S.C. 475, 481-82, 763 S.E.2d 183, 186 (2014) (§ 56-5-2953 governs the admissibility of certain evidence and failure to comply with the statute's terms renders the evidence inadmissible); *State v. Gordon*, 414 S.C. at 100, 777 S.E.2d at 379 ("Even if we assume that the video of a field sobriety test is of such poor quality that its admission is more prejudicial than probative, the remedy would not be to dismiss the DUI charge. Instead, the remedy would be to redact the field sobriety test from the video and exclude testimony about the test").

The South Carolina Supreme Court recently clarified in *State v. Taylor*, 436 S.C. at 36, 870 S.E.2d at 172, that the proper remedy for failure to comply with the statute's requirement to record a defendant's *Miranda* warnings is suppression of the tainted evidence, not dismissal. "[W]e take this opportunity to clarify that moving forward, when a DUI suspect is not *Mirandized* in accordance with the statute, statements made by the suspect during custodial interrogation are to be considered given under the cloud of a *Miranda violation*." "[W]e hold that from this point forward, suppression of tainted evidence flowing from the failure to administer *Miranda* warnings in accordance with subsection 56-5-2953(A)—not *per se* dismissal of the DUI charge—is the proper remedy." *Id.*, 436 S.C. at 39, 870 S.E.2d at 174.

Appellant's case was tried in 2019, which was prior to the Court's clarification in *Taylor* of the proper remedy regarding videotaping failures and *Miranda*. Appellant moved that the charges be dismissed in keeping with the *Suchenski* line of cases and failing that, the tainted evidence be redacted as suggested in *Gordon*, *supra*. R. 42, l. 4 – 43, l. 12; R. 61, l. 8 – 62, l. 9. Appellant was entitled to a ruling in keeping with the current law at the time of his trial. Under *Suchenki*, dismissal was the proper remedy for failure to video record Appellant's conduct at the incident site. In *Taylor*, 436 S.C. at 36, 870 S.E.2d at 172, the Supreme Court explained that the suppression remedy should be applied for noncompliance with the statutory requirements to video record *Miranda* warnings "moving forward." Appellant's case had already been tried when *Taylor* was decided. Therefore, the new rule should not be applied retroactively to Appellant's case. Instead, the dismissal remedy should apply here.

However, if this Court determines the trial judge did not err in failing to dismiss the charges, the trial court's failure to grant the defense's alternative remedy by redacting the tainted evidence was error, as explained by the Supreme Court in *State v. Taylor*, 436 S.C. at 36, 870 S.E.2d at 172 and *State v. Gordon*, 414 S.C. at 100, 777 S.E.2d at 379. Absent dismissal, the trial court should have redacted the audible and partial visual depictions of Appellant from the contested videos.

The error was not excusable. Subsection (B) of § 56-5-2953 outlines several statutory exceptions that excuse noncompliance with the mandatory videotaping requirements.

> Noncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and

> citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

Town of Mt. Pleasant v. Roberts, 393 S.C. at 346, 713 S.E.2d at 285.

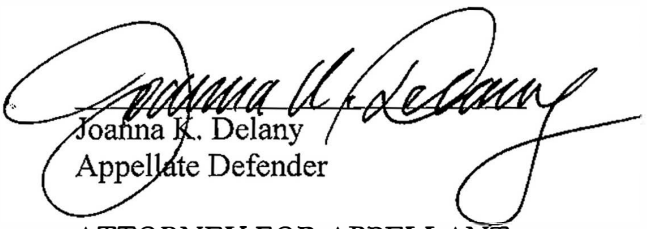
The State argued the nonconforming video footage should be excused by two of the exceptions: traffic accident investigation and totality of the circumstances. R. 63, l. 5-9. However, the subsection (B) exception of traffic accident did not apply here since there was video footage recorded and the failure to properly record was not caused by the fact that there was a traffic accident. Officers were able to audibly record Appellant at the scene. They could have also visually recorded him. Importantly, subsection (B) requires that, "as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section." S.C. Code Ann. § 56-5-2953(B). "[W]hen an individual's conduct is videotaped during a situation provided for in subsection (B), compliance with subsection (A) must begin at the time videotaping becomes practicable and continue until the arrest is complete." *State v. Henkel*, 413 S.C. 9, 15–16, 774 S.E.2d 458, 462 (2015). "We construe the exception to require compliance with subsection (A) when it becomes practicable to begin videotaping." *Id.*, 413 S.C. at 14, 774 S.E.2d at 461. *See Teamer v. State*, 416 S.C. 171, 178, 786 S.E.2d 109, 112 (2016) ("This Court has recently interpreted the third exception, regarding traffic accidents, to excuse the videotaping only up to the point where videotaping becomes practicable").

Nor should the failure to produce statutorily compliant video be excused by the subsection (B) exception of totality of circumstances for the same reasons—it was practicable to record under these circumstances. Here, the video was recorded when it became practicable, and it audibly captured Appellant being provided with *Miranda* warnings, but it did not conform with the statutory requirement to visually depict Appellant being provided with *Miranda* warnings. It also failed to fully capture Appellant's incident site conduct.

Finally, the fact that Appellant was initially arrested for driving under suspension does not excuse the noncompliance. Appellant was accused violating the felony DUI statute. § 56-5-2953 applies to persons who violate the felony DUI law. Officers smelled alcohol on his breath, learned that he was driving, and suspected he committed a traffic violation while they were at the incident site. *See* S.C. Code Ann. § 56-5-2953(A) ("A person who violates Section . . . 56-5-2945 must have his conduct at the incident site and the breath site video recorded). *See also State v. Manning*, 400 S.C. 257, 265, 734 S.E.2d 314, 318 (2012) (although defendant had already been transported to hospital before officers arrived, § 56-5-2953 requires defendant's conduct at incident site must be recorded unless exception applies). Therefore, the provisions of § 56-5-2953 applied.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court remand the case for entry of an order of dismissal. If this Court finds dismissal is not the proper remedy, Appellant respectfully requests this Court remand for a new trial.



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This 15th day of February, 2023.

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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."

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This 15th day of February, 2023.